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836591 ONTARIO LTD. OPERATING AS MARY HOMES

APPEAL TO THE LICENCE'S TERMS AND CONDITIONS
PRESCRIBED BY THE DIRECTOR FOR PHONEIX RESIDENCE,
JOSEPHINE RESIDENCE, MAJOR ROAD RESIDENCE, ST.
JOSEPH GROUP HOME AND KINGFISHER RESIDENCE UNDER
SECTION 198 OF THE *CHILD AND FAMILY SERVICES ACT*

TRIBUNAL: JANE WEARY, Vice-Chair
KEITH PENNER, Member
JIM KENNELLY, Member

APPEARANCES: KATHARINE RENISON, Counsel, representing the Director
under the *Child and Family Services Act*

EMILIO S. BINAVINCE, Counsel, representing 836591 Ontario Ltd.
operating as Mary Homes

DATES OF JANUARY 6 and 7, 2005
HEARING:

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

Under Part IX of the *Child and Family Services Act*, RSO 1990, c.11, and Regulations (the "Act"), a Director issues licences for the operation of children's residences. The Applicant is such a licensed operator of ten residences. Renewal of licences for the residences under appeal have been issued by the Director subject to a term and condition requiring the licensee submit to the Director audited financial statements for the previous year of operation. The Applicant appeals this term and condition.

An earlier appeal of the same term and condition attaching to other licensed residences operated by this Applicant was heard by this Tribunal in August of 2004. The decision upholding the Director has been appealed to the Divisional Court. Prior to hearing evidence in this matter, the Parties were advised by this Tribunal that this case would be

subject to independent analysis of the evidence brought before it in the making of its separate decision in accordance with section 201(7) of the Act.

During the evidence an issue was raised concerning the authority of the Community Program Manager to sign the licence renewals in question. The Tribunal is satisfied such authority is provided by virtue of the Minister's appointment signed September 25th, 2001 under section 5(1) of the Act.

EVIDENCE:

The Applicant's witnesses consisted of Ms. Mary Descoeurs, Director of MARY Homes, as well as Mr. William Wilson, owner of a foster care agency and Director of the Foster Care Association of Ontario. Testimony presented by the Director included the evidence of Ms. Katherine Neff, Program Supervisor, Eastern Region, Ministry of Children and Youth Services, as well as Ms. Kathy Hryshko-Renaud, Manager of Compliance and Program Review, also with the Ministry of Children and Youth Services.

The evidence established that the annual provincial costs of child welfare are escalating. It is currently in excess of one billion dollars, forty per cent of which is used for residential care supplied to children in need (Exhibit 3, Tab 6). Despite increased funding, three quarters of Children Aid Societies, themselves directly funded by the Ministry, were operating at a deficit in 2002-3 (Exhibit 1, Tab N).

The evidence outlined the administrative process undertaken by applicants for licences under the Act. An operator applicant is required to attend a "rate-setting" meeting with Ministry staff. A primary purpose of the meeting is to set the maximum per diem rate the operator, once licensed, can charge provincial Children's Aid Societies (CAS) for placing a child in the residence. In making this assessment, the operators' financial budgets are reviewed. Mr. Wilson testified to his experience that, although the Ministry makes the final decision, it was his experience that this rate setting is in fact "*negotiated*" during the meeting. An equally important purpose for the meeting is to determine the service programs, facilities, and supports the operator intends to provide under the licence. Consequently, a CAS representative also attends the meeting for input into what needs are required in the locality. The nature and extent of programs offered by the Operator will, naturally, have a bearing on the amount of per diem fee approved.

There is no Ministry input into what a licensee can charge a private or out of province placement agency for residential care.

Hence, while the placement and care of children in the homes of licensed operators are subject to contractual arrangements made between placement agencies, including the

CAS, and independent licensees; the licence itself determines the services the operator will provide and the maximum per diem rate it can charge the CAS, its primary client.

Once licensed by the Ministry, an operator is only able to request a per diem rate review should it alter program service substantially. No operator can successfully seek rate changes simply for escalating business costs. Equally, the evidence demonstrated that the Ministry has never sought a rate review to lower a per diem based on decreases in the cost of providing residential service. Indeed, according to uncontradicted witness testimony of Ministry employees responsible for program delivery, corroborated by the 2000 Policies and Procedures Manual (Exhibit 1, Tab R) setting out Rate Review procedure, there is no process for a Ministry initiated rate review.

The evidence established that the process of both rate setting as well as rate review result from policy and is not stipulated in the legislation.

The Applicant testified that, despite increases over the years in the cost of living resulting in higher costs to her for food, clothing and other services she provides in her programs, she has never sought a rate review from the Ministry as she has never met the criteria of substantial altering her program services. She did receive a Notice in October 2000 of a rate adjustment due to human resources pressure, which consisted of 0.8% increase to her per diem maximum (Exhibit 3, Tab 8). Other than this one change, she has received the same per diem rate as when her various licences were first granted.

The evidence demonstrated that, although she has been licenced to operate since 1989, the Applicant has never been required to submit financial statements to the Ministry until October 2003 when she received a letter requesting she complete an attached document for each residential service she operated (Exhibit 3, Tab 2). This document sought information on profile characteristics of programs each residence offered, as well as administration, staffing and program expenses. All the information was to be taken from the most recently completed financial year. The letter advised that the first part of the document concerning program profile characteristics would be *"...made available to children's aid societies through regional offices and will support ongoing CAS efforts to identify the most appropriate residential services for children in care."* The letter advised that the second part of the document covering financial information *"...will be useful to the regional office when establishing or reviewing approved per diem rates."*

The Applicant testified that she understood from this letter that the Ministry could take the information she provided and use it to unilaterally change her per diem rate or to establish new rates for other licensees seeking licences. A series of written communications then transpired between the Applicant's Counsel and the Eastern Region Program Supervisor whereby the Ministry advised that the information had been sought from others of the Ministry's nine provincial regions in the past, but was now being sought consistently from

all and would be used “... *in comparing costs across programs and contribute to the ministry’s analysis of new rates and requests for rate reviews. The financial data reported to us will be for ministry use only. As this expenditure information will contribute to the analysis for rate reviews, children’s aid societies that are participating in these reviews may have access to this information.*” (Exhibit 3, Tab 5) The Applicant refused to supply the information as she believed it was not sought in relation to her compliance with the law as a licensee, but rather was sought for a non legislated purpose, that being future unilateral Ministry rate setting.

In the summer of 2004 the Applicant received a letter from the Program Supervisor of her Region attaching an Agreement for Service template which the evidence established was an initiative by the Ministry to create consistency and best practice in the varying contracts entered into by CAS and licensees throughout the Province. There was no demand that such a template ever be adopted and, in fact, the evidence demonstrated that the Ottawa Region had not done so.

Finally the Applicant testified that the number of children being placed in her residences had dropped over the last year such that she currently has no children in the Phoenix, St Joseph and Kingfisher residences. While there appeared initially to be some suggestion that the Applicant felt this was caused by CAS and Ministry decision not to support her residences, her own witness, Mr. Wilson, testified to similar experience by foster homes across the Region. He further stated that the CAS had advised him that its reasons for the decreasing number of children needing residential care in Ottawa were twofold: (1) the total number of children coming into care was down by close to 30%; and (2) the CAS had been told to use their own residences over per diem operators. He had further received information from an unclear source that the requirement for financial records, as requested in the Director’s October, 2003 letter, was not being consistently applied as Newmarket operators had not been required to produce them.

There was uncontradicted testimony from the Program Supervisor of the Eastern Region that historically regional policy has required production by the licensee of audited financial statements at any rate review. She also noted that each licensee is required under the Regulations to keep current financial records on hand that can be produced on request by the Director. The Policy and Procedures Manual of 2000 specifically notes that such operators “... *should report all revenues and expenditures annually so that Regional offices can ensure that per diem income is being applied to the services it was intended for.*” (Exhibit 3, Tab 6, page 9, para 11). The reason for the Applicant’s licence condition in issue was the fact that she had refused to produce such financial records when requested to do so by the Ministry in October 2003. The witness testified that between 65 and 75 per cent of the Region’s licensees had complied with the written request; of those not in compliance, all had the condition placed on their licence renewal.

Evidence showed that the cost of producing the accounts is recoverable since it can be included by licensees in both the rate setting and rate review discussions with the Ministry. Thus, recovery of these costs is the current practice.

The Manager of Compliance and Program Review for the Eastern Region testified she had twenty years of accounting experience in both the public and the private sector. It was her evidence that she had worked as a financial analyst for both the Ministry of Children and Youth Services as well as the Ministry of Health. It was her experience that governments typically base future benefit determination on past financial information. The example she provided concerned long-term health care benefits based on past year's income statements of the applicant beneficiary. As well she testified that numerous government agencies will request audited statements from the previous year to determine if payments to agencies funded by government are being spent in accordance with service expectations. It was she who had recommended to the Director that the condition in issue be attached to the Applicant's licence.

The witness noted that the Applicant's initial rate setting was almost ten years old and may, as a consequence, be lower than those of operators more recently licensed. However, per diem rates alone were not critical in the CAS choice to utilize one licensee over another. The more pivotal question for the CAS was: which local residence offered the program/service a particular child required.

SUBMISSIONS:

The Applicant argued the imposition of such a condition on her licence interfered with her freedom to negotiate a competitive rate contract with the CAS. This, she submits, is beyond the authority of the regulator unless expressly authorized in the legislation. Moreover, the unilateral nature of this imposed condition excludes safeguards present in truly regulated industries where open and comprehensive hearings ensure operator risks and profit margins are considered. The Applicant argued that the same reasoning might apply to the Ministry setting her per diem rates in the first rate setting process, save for the fact that an applicant can walk away. Once licensed and operational, however, a Ministry imposed rate would find the licensee caught in a web of predetermined and unilaterally imposed price restrictions.

The Applicant agreed that the initial rate setting imposed on a licensee is acceptable since the Act gives the Director authority over who can enter the business of children residential care. She submitted, however, that this did not include authority to dictate the operator's charges at rate review. Such action is no longer one of licensing concern, but rather fiscal control. If valid, such control should be directed at the recipient of the funding (the CAS) and not a third party with whom the CAS contracts, regardless of the fact that such a third

party is also licensed. This will lead to eventual bankruptcy of these services which is not in the interests of the children the legislation seeks to protect.

Counsel for the Applicant further argued the Ministry's action was invalid because it was retroactive in application, as it sought financial records from the business' previous operating year. It was finally submitted that it was discriminatory based on the evidence that the requirement had not been applied consistently throughout the province.

Counsel for the Director submitted that rules of construction lead to the conclusion that the correct interpretation of legislation is to ensure the goals of the legislature are capable of being met. She noted that the purpose of the Act is the well being of children. She noted the Ministry indirectly funds the payment received by licensees through its direct funding of the CAS. In order to meet its obligation of prudent fiscal management, the accounting of such funds is required. In order to meet its goal of child protection, the programs and services contracted for, including their public cost, should be subject to regulatory review. Moreover, if the Applicant's position is accepted, the legislated licensing authority cannot assess whether the licensee is in fact meeting the program services upon which its licence is predicated. Finally she argues that the reason for the request and subsequent licence condition on the Applicant, is to better meet the Applicant's concern of like-information being used to assess appropriate per diem rates.

The Ministry submitted that the rate setting process did not amount to the common law concept of restraint of trade in that regulated businesses can and do realize profits. There is no effort by the Ministry staff to declare where a licensee's income should be allocated; only that the service is adequately funded to meet its licensed programming. The Applicant herself had expanded from one to ten residences over the ten years she had been licenced.

THE LAW:

Section 1 of the *Child and Family Services Act*, stipulates:

The paramount purpose of this Act is to promote the best interests, protection and well-being of children

In section 3 of the Act, "Service Provider" is defined as including a licensee as well as a children's aid society.

Sub section 5(5) of the Act mandates a service provider to

- (a) make the prescribed reports and furnish the prescribed information to the Minister, in the prescribed form and at the prescribed intervals; and
- (b) make a report to the Minister whenever the Minister requests it, in the form and containing the information specified by the Minister.

Sections 15 to 20 set out the functions of, and funding provisions to, Children's Aid Societies.

Part IX of the Act deals with licensing, the relevant sections being as follows:

Section 192:

In this Part "children's residence" means

- (c) a staff model residence where three or more children not of common parentage, live and receive residential care, and includes a foster home or other home or institution that is supervised or operated by a society, but does not include....
 "staff model residence" means a building, group of buildings or part of a building where adult persons are employed to provide care for children on the basis of scheduled periods of duty.

Section 193(1) No person shall,

- (a) establish, operate or maintain a children's residence; or
- (b) provide directly, or indirectly, residential care for three or more children not of common parentage in places that are not children's residences, except under the authority of a licence issued by a Director under this Part.

Section 193(5)

Subject to section 196, a licensee who applies for renewal of the licence in accordance with this Part and the regulations, and pays the prescribed fee, is entitled to have the licence renewed by the Director, subject to any terms and conditions imposed by the Director.

Section 198(1)

A licensee who is dissatisfied with the terms and conditions prescribed by a Director under subsection 193(3), (5) or (6) is entitled to a hearing by the Tribunal if the licensee mails or delivers to the Director and to the Tribunal, within fifteen days after receiving the licence, a written request for a hearing.

Section 198(2)

Where a licensee requires a hearing under subsection (1), the Tribunal shall appoint a time for and hold a hearing and may, on hearing the matter,

- (a) confirm any or all of the terms and conditions;
- (b) strike out any or all of the terms and conditions; or
- (c) impose such other terms and conditions as the Tribunal considers appropriate.

Regulation 70, section 78 (1)

Every licensee shall in respect of each residence maintained and operated by the licensee

- (a) keep a complete record of revenues and expenses made in connection with the operation of each residence; and
- (b) prepare and submit financial reports to a Director when required by a Director including reports by a public accountant licensed under the Public Accountancy Act.

Section 105 (1)

Every person who applies for a licence to establish, operate and maintain a residence shall prepare and keep on file and provide to a Director when required by the Director,

- (1) a plan for securing funds to establish, equip and operate the residence.

ANALYSIS:

The onus of establishing the illegitimacy of the condition is on the Applicant. This Tribunal finds she has not met the onus. To uphold her view the Tribunal would have to find that the scope of the Director's authority over both (1) the financial information required of licensees, and (2) the licensing conditions available to the Director is highly restricted contrary the broad language of the legislation itself. The Tribunal has reviewed the arguments and the law and does not agree with this position.

The legislation clearly enables the Director to demand audited financial records from licensees when required as stipulated in Regulation 70, Section 78(1) (b). There is no limitation on the unfettered language in the subsection limiting the requirement to a specific set of circumstances. Nonetheless the Applicant refused to comply with the Director's initial production request in October 2003. As a consequence of her non-compliance, the Director added the demand as a condition of her licence renewal. She argues that such a condition is beyond the authority conferred upon the Director by law despite section 193(5) which authorizes a Director under the Act to impose "*any terms and conditions*" on a licence renewal.

The Applicant argues that such limitations on the Director's authority arise by operation of legal standards in statutory construction as well as rules of interpretation both at common law and in legislation. The fact that the Act does not speak to the rate setting/reviewing authority of the Director means, the Applicant argues, that to set/review rates the Director is extending authority given to him under the legislation for invalid purposes. In this regard reference was made to the 1976 Divisional Court decision of *Re Doctors Hospital and Minister of Health et al* 68 DLR (3d) 220 where the Court considered provincial hospital legislation in issue and found it regulatory in nature as "primarily concerned with staffing, management and operation of public hospitals." The authority being challenged was the decision to revoke approval of a hospital based on budgetary considerations. The authority to take such action was allegedly found in section 4(5) of the enabling legislation which provided:

Any approval given or deemed to be given under this Act in respect of a hospital may be suspended...or revoked...

Cory, J. reviewed the fact that the legislation was unchanged from 1937 when the provincial government had no authority over expenditure of public funds on hospitals. He thus concluded that the wording of the section could “...*never have been used as a means of exercising financial control over hospitals; that is to say, to revoke the hospital's approval not for inefficiency say, but for lack of funds*”. By so-doing, the Court concluded that the decision maker in this case had considered extraneous matters that were beyond the objects and policy of the legislation in question and had thus acted outside its authority.

This case is clearly distinguishable on the facts. Here the Tribunal finds the evidence demonstrates the Act provides for funding to the CAS for the provision of the services provided by licensees such as the Applicant. Consequently, the Tribunal finds that the broad language in the *Child and Family Services Act* is entirely compatible with the Ministry's request for financial records for the purpose of exercising fiscal management and accountability over its regulated licensees to the limited extent they are recipients of Ministry funds. It is of some significance that no evidence was presented to establish any limitation by the Ministry on prices a licensee can charge an outside agency not in receipt of Ministry funding.

Both Parties urged the Tribunal to review the Supreme Court of Canada decision of *Rizzo and Rizzo Shoes Ltd. (Re)* (1981) 1 RCS 27, being the leading case on statutory interpretation. Iacobucci, J. reviewed the literature of statutory interpretation and, in so-doing, quoted Dreidger, 2nd ed., page 87 where he writes:

Today there is only one principal or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.
And further;

I also rely upon section 10 of the Interpretation Act, RSO 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act “shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.

The Court found the legislation, being the *Employment Standards Act*, was benefits orientated, intended to protect all dismissed employees such that to discriminate on the basis of the bankruptcy of the employer would frustrate its the true intent and spirit:

In my opinion, the consequences or effects (of not extending the protection to the Applicant) are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principal of statutory

interpretation that the legislature does not intend to produce absurd consequences...an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable; if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment.. or would defeat the purpose of a statute or render some aspect of it pointless or futile. (page 43)

The legislative scheme pertinent to the *Child and Family Service Act* establishes a procedure for children who, as a result of their need for public protection, are removed from their homes and placed into residences. The legislation details a regulatory system covering both the process of removal of the children by the CAS and the operation of such residences. Where a private operator such as the Applicant is licensed under this system to provide the residential service, it can enter into a contract with the CAS, also licensed, who will pay a per diem amount for each child placed in the residence. The payment is derived from CAS funding provided by the Ministry from public funds, all of which is set out in the Act. The policy and object of this legislation is, therefore to ensure children are well protected, including being provided with publicly funded residential services when required.

Counsel for the Director urged the Tribunal to consider the Federal Court of Appeal decision of 2002 *Villani v. Canada (AG)* (C.A) 2001 FCA 248 which concerned interpretation of the *Canada Pension Plan*. The Court found the legislation was benefit conferring and hence should be given a liberal construction. It determined that “employability” should thus be read into what appeared an exhaustive list of prerequisites for conferring of the benefit. Likewise, this Tribunal finds that the *Child and Family Services Act*, as legislation, which aims to protect some of the most vulnerable in our society, must be liberally construed. Consequently it is entirely reasonable that the Director who is expressly empowered to oversee a licensee’s plans with regard to staffing, clothing, food, dental requirements of children in residence, must be able to review the licensee’s financial records.

The evidence was that costs were increasing to such an extent that most CAS agencies were in fact operationally in the red. The evidence was also clear that, since first licensed ten years ago, the Applicant had not been requested to provide any financial information to the Ministry, despite it being a power available to the Director through legislation, and reiterated in the Policy Manual of 2000. Continuation of the regulatory scheme set out in the legislation, including licensed residential programming for funded children in need, can be reasonably inferred to be an intent and object of the Act. Effective expenditure of public funds requires accountability. It is logical that the accountability be by licensees who, entirely as a consequence of licence, have a monopoly on services available to a publicly funded agency such as the CAS.

As to the Applicant’s position that requiring financial records for the purpose of a rate review is outside the authority of the Director, the Tribunal cannot agree. If the Applicant

were correct, it would frustrate the Ministry in its efforts to ensure consistency and currency in its database for use of rate setting and review, characteristics the Applicant argued were sadly non-existent under current rate review standards. Further, it would defeat the very purpose of the legislation to provide residential protection of children in need if the Ministry responsible for the payment for service was unable to review efficacy of operation by programs both when such programs are seeking original licence as well as program changes.

The Applicant submitted that the more recent Supreme Court judgment of *Morguard et al v. The City of Winnipeg* (1983) 2 SCR 493 be reviewed for the proposition that legislation aiming to constrict a private right, must do so expressly. She argued that restricting her right to contract for CAS payment for her services was a private contractual right not to be interfered with by the Director unless expressly authorized in the legislation. The Court's decision concerned an independent private taxpayer's right to appeal a city property assessment under city legislation which the Court concluded was not compromised by a later Act that made no direct or indirect reference to the earlier legislation. At pages 508-9 the Court quotes the 877 decision of *Nicolls and Robinson v. Cummin* as follows:

When a statute derogates from a common law right and divests a person of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has often been held, that acts which impose a charge or duty upon the subject must be construed strictly and ... it is equally clear that no provisions for the benefit or protection of the subject can be ignored.

In keeping with the *Moreguard*, Counsel for the Applicant also directed the Tribunal to the 1981 Supreme Court decision of *Colet* (1981) 1 SCR 2, which concerned the authority to seize private property under the guise of a search warrant. The court held that invasion of a private right must be expressly granted by legislation.

Both decisions are distinguishable from the situation here as both concern the rights of private citizens. Here, the Applicant is rather a licensed operator of a regulated business who, as a consequence of that licence, has the privilege of contracting with the CAS for publicly funded services. The evidence demonstrated that the CAS can only contract with licensed operators under the Act. Unlicensed businesses have no such right.

If the requirement can be said to infringe on the licensee's freedom to contract, and here there is some doubt, the Tribunal finds that it does so within reason, based on her status as a licensed service provider and based on the logical and reasonable needs of the Director to establish prudent management of the Ministry's significant public expenditures.

Nor is the Tribunal persuaded from the evidence that the Ministry intends to use the information to impede her right to set prices for her services by unilaterally imposing price

caps on licensees. Such a claim is simply not supported by the evidence. It isn't the reason given for the requirement of the information in the October letter. Nor is it the testimony of the Applicant's own witness who found the process of the rate setting for his foster home to be one of negotiation. While the Ministry apparently had the final decision, even the Applicant testified that the initial rate setting was determined by all three Parties at a meeting for that purpose and predicated on her own projected budget figures provided. As concerns the rate review, the evidence was that this, too, is a matter of discussion and consideration on the licensee's making of a case; that there is no history of, nor process for, Ministry initiated rate review.

The Tribunal accepts the Ministry's position regarding the fair practice of utilizing past financial records to determine eligibility of future licensing and rejects the Applicant's arguments that the exercise of the Director's authority is invalid as it is retroactive.

The Tribunal also rejects the Applicant's position that the authority is invalidly exercised as implemented inconsistently across the jurisdiction. The evidence established that the requirement for financial records is based on Ministry policy across the province. The evidence also established that the condition had been placed on all licensees under the jurisdiction of the Ottawa Region who had not complied with the letter asking for the voluntary submission of the records last October. One witness stated he had been advised that one location, Newmarket, had not been required to provide the information. The Tribunal is satisfied from the evidence that the requirement is province-wide and, does not find that the evidence as to its implementation is sufficiently convincing to conclude it is unfair or discriminatory.

ORDER

For all these reasons the Tribunal upholds the Director's terms and conditions of licensing the Applicant and consequently denies her Claim.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

Keith Penner
Member

Jim Kennelly
Member

RELEASED: February 15, 2005

File : 2303-4.2478-80.cfsa.maryhomes.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



SHARON LATHAM, operating a children's residence 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 THE LICENCE

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

APPEARANCES: SHARON LATHAM, the Applicant

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

DATES OF HEARING: February 9, 10, 11, 12, 13, 2004,
March 8, 17, 26, 29, 30, 2004,
April 16, 2004, May 17, 19, 2004
June 1, 2, 3, 7, 10, 11, 17, 2004,
August 16, 17, 23, 24, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant is the operator of a Children's Residence licensed by the Ministry of Community, Family and Children's Services under the *Child and Family Services Act* R.S.O. 1990, c. C. 11 ("the Act") under the name Reista's Place. The home was a residence located in Brampton licensed to accommodate six teenaged girls placed into care by various area Children's Aid Societies. These residential licences are subject to annual renewal. The Ministry through a Director appointed for the purpose is authorized under Section 196 of the Act to both grant licences and initiate proceedings to refuse to renew a license on grounds stipulated in the Act. The refusal process takes form of a Notice of Intention which is served upon the licensee stating the Director's grounds for the

intended refusal to renew. Preceding the issuance of the Notice an investigation is carried out and the results given to the Director. The operator is granted a right of appeal to the Tribunal against the Director's decision pursuant to Section 197 of the Act. That right is exercised through the filing with the Tribunal of a Notice of Appeal.

As the matter deals with children an Order was sought seeking anonymity for those involved. Unopposed, the Order was granted.

There have been no children placed into the care of Reista's since the spring of 2003.

ISSUES:

It is the position of the Ministry through the Director that the Applicant was in breach of numerous provisions of the regulations promulgated under the Act to which Reista's Place was subject. Close to 100 particulars were set out. For ease of explanation they have been divided into categories.

Record Keeping:

It was the position of the Director that the various logs required to be kept by operators of children's residences under the regulations were either improperly maintained or not kept at all.

Plans of Care:

It was the position of the Director that the regulations requiring plans of care for each child placed in the home and their review were not carried out.

Medical Care:

It was the position of the Director that proper records of medications were not kept indicating either unacceptable log keeping or non administration of prescribed medications, some of a psychotropic kind.

Safety:

It was the position that through non observance of regulatory requirements the physical safety of the children in care was put at risk; these included lax or non existent fire drill procedures, fighting between the girls, inattention to absences without leave (AWOLs) from the residence, and not filing reports of serious occurrences.

Physical Needs:

It was the position of the Director that breaches of the regulations led to unsanitary conditions. Lack of recreational activities led to "hanging out". There was also overcrowding in the residence. At times there were eight as opposed to the six children in residence for which Reista's was licensed.

Nutrition:

It was the position of the Director that the evidence available to her through the Ministry's investigation is more consistent than not with the licensee not expending the required amount out of the per diem allotment for proper food.

Schooling:

The Director contends that attendance at school was not properly monitored.

Staff Qualifications and Fitness:

The qualifications listed in the proposals submitted for license approval proved not to be accurate. The staff hired to look after six teenage girls with emotional and developmental problems was inadequate to the task.

Emotional Needs:

The Director contends that the evidence supports a finding that troubled girls such as the ones in the care of Reista's Place did not receive the support required. This was due inter alia by the ministrations of unqualified staff and inappropriate disciplinary procedures.

EVIDENCE:

To put into some context the complaints levied against the Applicant evidence was led which described the administrative apparatus established to ensure the proper care of children, such as those here involved, who for a variety of reasons find themselves in need of governmental support.

The Ministry establishes and licenses residences where children in need of care can be placed. The various Children's Aid Societies (CAS) throughout the province receive children into care and place the children in the residences. It is the task of the placing CAS to review the available facilities and try to find a "fit" to the particular child. Obvious considerations would be the sex of the child, threats if any to the child, medical needs, cultural needs and the like.

Children come into the care of the CAS through various routes including the courts and the police. The reasons they come into care range from abuse to abandonment to criminality and beyond. For persons up to 16 years of age (children) the court can order the child into care or a care agreement can be reached between the CAS and the parent or guardian.

The first task of the CAS is to assess the child's needs and seek the appropriate placement; typically this would be a foster home. However there are gradations of required care ranging upwards from foster care to custodial. There were five area CASs placing children at Reista's.

The girls placed at Reista's were assessed as being in need of the type of care for which Reista's was licensed, namely an around the clock supervised setting in a "homelike" atmosphere. Many of the girls had pronounced psychological problems requiring

medication. Many had difficulty with school but all of the cases presented revealed lives unstructured by the normal supports one equates with stable families and which lead to enhanced situations for abuse, criminality, truancy and the doleful litany of societal pitfalls. The number of children requiring processing and the needs manifested makes it apparent that descriptions of available licensed area facilities be both accurate and carefully monitored. The placing CAS does not have the resources to do so frequently and it must make a decision regarding the child's placement quickly based largely upon the descriptions provided by the operator.

Once a placement decision is arrived at the CAS, the licensee enters a service agreement outlining what is expected in return for the per diem amount set by the Ministry and payable on behalf of each child placed in the licensee's home. For Reista's the per diem was in the vicinity of \$196.00 per child per day of care. Times six this represents the amount for running expenses available. If extra clothing or other additions are deemed necessary there can be a supplementary allotment. Per Diems take into account fixed costs such as mortgage payments and salaries. The Ministry for the type of license granted to Reista's wanted to see round the clock staffing with qualifications to match the type of child in care. It was expected that structured recreational activities, life skills, first aid, restraint training and anger management programs be available.

The essential philosophy behind residences such as Reista's was the creation of a home like atmosphere; "milieu therapy" as it was described. Under the constant supervision of professionals the girls would hopefully melt unobtrusively into the community, by attending the local school, interacting with the surrounding peer group and indulging in the normal activities of young teenaged girls.

The objective of this approach is to prepare the girls to develop into "independent" adults.

It was recognized that the scheme is fraught with difficulties not the least of which is the reluctance of neighbors to have these residences in their area. As well a concentration of vulnerable young girls can become a focal point to unsavory characters of one kind and another. All these factors were brought out in evidence to stress the need for professional vigilance.

An overall view of the stresses playing upon such girls was put forth by Dr. Meen, a practicing psychiatrist with broad experience in teen behavior. He described for the Tribunal what behavioral signals are given off by teens and the importance of there being appropriate responses. It is their behavior that is being used as a method of communication. He also described the importance and the effects of the prescription drug regimen that many of the girls were on. He stressed the importance of timely and accurate dosages, as these behavioral modification pharmaceuticals were very powerful with adverse consequences to their inappropriate administration. His testimony was most useful in giving the Tribunal a frame of reference through which to view the appropriateness of the regulatory framework and the Applicant's response to it.

There was considerable documentation submitted by the Applicant by way of proposals prior to the licensing adjudication and inspection. These documents form part of the information package relied upon by placing agencies. One witness, Mr. John Freedman from Toronto CAS, testified that the Reista's package was available to him and other placing agencies as a reference by which children could be matched to the appropriate facility. For example an agency that feels a group home situation is required for a particular child will scan the available facilities to see if that type of resource is available in the area. The Tribunal after hearing testimony as to the workload on each agency became aware that reliance must be placed on the material provided as there would not be the time available to individually research each facility to any great depth beyond the material.

The licensing material available on Reista's gave the impression for one thing that an "in house" psychiatrist was available. The material listed programs of anger management, social skills, cooking, budgeting skills, recreation, and house interaction meetings, all with the assistance of professional, qualified staff.

The physical plant was described as 1,600 square feet with four bedrooms and two and one half bathrooms. There were eight beds.

The staff were presented as each having a Child and Youth Worker Diploma or 5 years related experience. The supervision was to be 24 hour. Detailed descriptions of the program structures, staff responsibilities and record keeping were also set out in the Reista's material.

The security of the residence was described in full and included representation made as to the types of fire alarms in site and that monthly fire drills would be carried out. The timing and regularity of these would be important as some of the residents were in the home for short periods only.

All serious occurrences (AWOLs, fighting etc.) were to be logged and appropriate authorities informed.

The Canada Food Guide was to be followed in the planning of meals.

It was indicated in Reista's program that the local YWCA and other area facilities would be used for physical fitness. As well there were to be nature walks and handicraft programs along with museum and library visits. For vacations there was to be camping trips available. In house there was to be vocational training, resume preparation and interview skills programs.

Family visits and overnight stays were to be carefully monitored including proper advance permission of the CAS.

All medications would be accurately dispensed and recorded.

The material indicates that to a placing agency the description sent to them by Reista's would fit the bill for disturbed teenaged girls who required constant supervision, psychiatric care, professional counselling, and medication. These seemed to be reasonable conclusions to the placing CASs from a scan of the Reista's material.

The Tribunal is aware that between representations and actuality in all fields of contractual and licensing arrangements there can be divergence. However that divergence must be narrow depending upon its consequences. In the case of arrangements for children in need of care representations should carefully match reality.

Reista's History:

The history of Reista's from conception to license was introduced through Mathew Hurd, a Ministry Program Advisor. Mr. Hurd was the principle witness for the Ministry. He did the investigation of complaints surrounding Reista's commencing in the fall of 2002 and submitted his findings to his superior, the Director Ms. Bonnie Corey. Ms. Corey previously had approved the granting of Reista's licence. Mr. Hurd set out his credentials which show long and varied experience in the field of child care in general and children's welfare work in particular.

Reista's Place was first thought of by its present Director Ms. Sharon Latham. Originally proposals for a license to operate a children's residence were submitted in conjunction with a partner. That relationship ended and Ms. Latham proceeded on her own.

In August 2000 an application was received by the Ministry of Community and Social Services for the operation of a children's residence from Merline (Sharon) Latham. The residence was to accommodate six girls aged 12 to 16 years. A Ministry Program Advisor Mary Ballantyne carried out a review in November 2000 and submitted a "Group Home Licensing Review Report" with a recommendation that a six month provisional license be issued. Her recommendations were based upon a finding that the physical site met all requirements and that all policies and procedures were in place with no outstanding non-compliance items.

Following this recommendation a six month provisional license was issued, signed by Bonnie Corey, Program Review and Compliance Manager (as she then was), with an expiry date of May 14, 2001. Remaining items to be completed were staff interviews, residence interviews and case record reviews. There was also a reference to the displeasure of the neighbors regarding the establishment of the home. The home was to be for six children under 24 hour supervision in a structured program. The girls required supervision over and above that available through foster care given their behavioral problems.

On May 18, 2001 Ms. Ballantyne, in her capacity of Program Advisor, conducted another licensing review as a prelude to the issuance of a permanent license. She reviewed four open files and two that were closed and interviewed four residents. She found the required

documentation provided and the Program was in compliance subject to a few minor changes to be made. Ms. Ballantyne also noted that the neighborhood opposition while present had not manifested itself in complaints. All safety requirements had been fulfilled and the children interviewed stated they liked the home. She filed her completed checklist and recommended a regular license be issued.

On May 31, 2001 Ms. Latham replied by letter to Ms. Ballantyne indicating recommended changes including name sheets for fire drill completion and clarity about who can administer medications.

By letter dated June 27, 2001 again over the signature of Bonnie Corey, a regular (as opposed to provisional) license was granted for a 12 month period. Other than a stipulation that the maximum number of children in the home was to be six there were no terms and conditions attached to the license.

On August 10, 2001 Ms. Nancy Anderson, Program Manager Central West Region, wrote to Ms. Latham outlining the per diem arrangement. The rate was set at \$196.00 on the presumption that there would be seven full time front line staff for the six residents. The Ministry to allow some flexibility in the per diem allocation informed Reista's as follows:

the Ministry is not directing you to spend on a line by line basis according to the budget you submitted. Provided licensing standards are met you may chose to allocate expenditures within the funds generated by your approved rate. It is the Ministry's expectation that the direct service costs, such as front line staffing and programming, will not be negatively affected.

The first complaint about Reista's came from the neighbors. On September 18, 2002 a call was received by the Ministry outlining what the caller described as unacceptable behavior by some of the girls in residence. This included foul language, smoking pot, begging for cigarettes, and drinking. The complainant assumed the girls were unsupervised. The matter was referred to Mathew Hurd for investigation. He attended at Reista's and while compiling his follow up subsequent complaints were received on the 20th and 22nd. These included visiting neighborhood boys, sex in parked cars, harassing people and unsupervised "hanging out" at all hours. Ms. Latham was advised to hold a neighborhood meeting and report the complaints to the placing CASs. Mr. Hurd stated that supervisory staff should be adequately trained to deal with these types of behavior. He added that there are no regulated minimum standards for staff.

On November 18, 2002 another series of complaints came in this time from some of the residents. Mr. Hurd's follow up included interviews. Some of the residents liked Reista's, others were not at all happy. There was obvious friction between two of the girls and the structure and staff. This resulted in absences from the home known as AWOLs. Previously, according to Ms. Latham, girls could earn two hours of unsupervised community time for good behavior. Discipline from other complaints was being bucked. The log indicates Mr. Hurd's announced visit of November 20th. It showed the removal of troublesome girls. As explained, a placing agency cannot refuse to take back a girl; conversely a home cannot be forced to keep a girl. There is, for these purposes a 7 day

notice period.

The log also noted in August staff problems and warnings from Ms. Latham about adhering to schedules. This was accompanied with threats of dismissal. As well, there were threats of non-payment of wages if shifts were worked without the approval of Ms. Latham. She went so far as to log for the attention of staff that she was willing to “clear house” without notice if they did not improve. In mid August 2002, log entries indicate a falling out between Ms. Latham as Director and Ms. Lewis as Supervisor. The entry indicates that Ms. Latham was unhappy with Ms. Lewis altering the schedule to meet other or personal needs. The relationship between staff and Ms. Latham as being testy was borne out by staff testimony. The source of the animus was never fully brought out but it was unmistakable. In fact some log pages were removed due to inappropriate comments by staff even though this was contrary to regulations. The Applicant stated that some of the other missing logs could be explained by the fact that subsequent to the beginning of the hearing, a fire occurred in her car where the log books were kept.

Mr. Hurd made an unannounced visit on February 25, 2003. He made out six pages of non-compliance which Ms. Latham signed. These included improper daily and medical logs, no batteries in smoke detectors, non submission and lack of signatures on serious incident reports, poor laundry facilities, lack of records on medical intakes, and generally poor and incomplete records, for example, Plans Of Care not signed. His interviews resulted in accusations against Ms. Latham that were consistent over several sessions. The more serious included more than the permitted six children in the home at any one time, accusations about staff stealing files, doctoring of logs and other information, withholding of allowances, unapproved visits, name calling, children told to extend home visits if weekend emergency placements did not leave by Monday, staff being advised to say kids refused medications if prescriptions not filled, virtually no structured recreational time rather children shuffled to the Mall to get them out of the residence and lack of staff training.

These were followed up by contacts with the placing CASs which in turn resulted in withdrawal of children from this placement.

Lydia Bogle, a staff member wrote to Mr. Hurd on March 17, 2003 stating her grounds for leaving Reista's. She was employed from November 2000 to March 2002. She stated in the letter that she left on account of the inappropriate treatment of the children in care. This included inadequate food, poor laundry conditions, false accusations against the children to CAS regarding theft by the children which did not in fact occur, and compensation for items that should not have occurred.

On March 18 2003 Mr. Hurd, as part of his inquiry, contacted Sandra Jenkins, a former Reista's staff member. She informed him of what she considered to be shortcomings at Reista's Place. Mr. Hurd committed the conversation to writing. She told Mr. Hurd several things that caused him concern. For example, Missing Persons Reports (MPRs) were sometimes not filed in order to prevent deduction of per diem. As with other interviews

inadequate food was mentioned. The activity board was for “show” and did not form the basis of any real activity. She was alone at night but was told by Ms. Latham to say that there were two staff on duty if asked. She stated in the letter and viva voce that there were more than eight children there most of the time. She reported seeing cheques that were supposedly payroll amounts made out to persons not employed. In her case she was being recorded as staff for longer than she actually was. She was upset at the language directed toward the children. Her impression was that Ms. Latham was operating solely for the money.

A telephone conversation with Ms. Lewis, the supervisor, revealed information similar to that of other staff members. She followed up with a signed fax setting down her concerns. She reiterated staff being told to “doctor” files to reflect well on Reista’s. She complained about the lack and quality of food as had the others. She told Mr. Hurd about visits without CAS approval.

In contrast, staff members who were relatives of Ms. Latham to a person told Mr. Hurd that there were essentially no problems such as inadequate food and laundry facilities.

The culmination of the investigation after the completion of Mr. Hurd’s investigation and advisories to the Applicant was a Director’s meeting on April 1, 2003. Minutes of the meeting were taken and produced. The license issuing Director Ms. Corey presided. The purpose of the meeting was to review with Ms. Latham the results of the investigation into the operation of Reista’s. There was an admission that there were too many children in the house periodically. The explanation was that she had been given permission by a CAS person. That person was not called. The regulations state that capacity cannot be exceeded without the permission of the Ministry and only for a specified time. It was noted that the staff members who were related to Ms. Latham had quite different answers than those who were unrelated.

Other elements of the meeting included a review of the staff qualifications in relation to the types of girls being placed. There was a distinct gap between educational qualifications and the types of problems that would be encountered.

Ms. Latham stated that when she was in the residence things went smoothly, however when her back was turned, as she put it things would fall through.

When queried about file tampering she revealed that three people had access to the file cabinet, herself, her cousin and Leisa Lewis, the Supervisor.

When told that six staff members and four children reported that residence food was inadequate and that a visiting CAS worker confirmed this, Ms. Latham’s response was a general denial. She maintained that there was always plenty of varied foods in the home and that the pantry was kept full.

Other concerns of the Director were that, from the files, of the 10 staff only four had

diplomas, seven had resumes on file, and only five had restraint training (the Ministry requires all staff to have it).

Further of the ten staff only one had fire extinguisher training, four were familiar with serious reporting procedure, and none had first aid training. All of these represent shortcomings from *Child and Family Services Act* requirements. Ms. Latham's response to these concerns was that the files had been tampered with and that she is going to bring in a locked filing cabinet.

Ms. Latham stated that the washing machine in fact broke down but that her attempts to get repairmen failed. The result was that Laundromat visits were necessary. The child that stated she didn't want to go to school because of dirty clothes in fact resented her own clothes.

On the issue of calling the children names which came from a number of sources. Ms. Latham denied ever having used inappropriate language to any of the girls. She told at the meeting that she would not allow such behavior.

The home had eight beds and a licensed capacity of six. The minutes show that Ms. Latham stated that the two beds were used for emergency placements. She accepted responsibility for this usage.

Ms. Latham stated she was aware of the errors in the medical logs and undertook to take corrective action.

In general, Ms. Latham stated that the complaints were overblown and that she was the victim of harassment and a scheme to undermine her.

The meeting concluded with Ms. Latham being informed that a decision would be forthcoming from the Ministry with regard to the future of Reista's.

The decision of the Ministry involved input from not only the investigators but the legal department as well. By the time of the meeting Reista's was not receiving children as the various CASs had backed off. When the Reista's application came it was refused.

Ms. Corey stated that the bottom line in her decision was that there was not sufficient indication that Ms. Latham could or would hire qualified staff or that CASs would place children at Reista's in any event. Without the per diem inflow the residence would not be a viable enterprise.

There was great concern expressed about the shortcomings as brought forth in Mr. Hurd's investigation and whether Ms. Latham had the judgmental wherewithal to deal with them.

The Children:

Evidence was tendered as to the background of several of the girls placed into residence at Reista's. Apparent from even a brief scansion of their young biographies is the degree and type of care that would be required to give them half a chance at an upbringing that could, by any measure be considered "normal".

AG:

This young teenager spent several months at Reista's during the summer months of 2002. She did not attend the fall session of school and was discharged from Reista's following an AWOL and detainment by police. She had psychiatric problems which required the administration of psychotropic drugs including Paxil and Risperidol. Dr. Meen had stressed the importance of administering these drugs with accuracy and timeliness. If the dosage is one in the evening it means just that, not one per day. Certainly missing a day would be totally unacceptable as a level of dosage must be maintained in the recipient's system.

It became abundantly clear from the log records and testimony of staff that the maintenance of the drug records was spotty at best. These logs represent the only corroboration of the appropriate administration of drugs available to the Tribunal. Log entries stating "out of Risperidol" were very disturbing to Dr. Meen.

In 2001 she was found by court order to be a child in need of protection and was made a Society Ward for a period of six months. She had been apprehended from her father's care in May. She had been diagnosed as learning disabled and was found in dangerous situations with men. Her father had become emotionally unwell attempting to look after her. Her grandparents also tried to care for her but failed due to her uncontrolled behavior. She had been charged with assault at a previous residence which had refused to take her back. Prior to that she was constantly running away from home. An ongoing concern was her inability or refusal to maintain a level of personal hygiene.

Her 30-day assessment after placement at Reista's reported her to be making "tremendous gains" while still having trouble interacting. She had to be disciplined or "consequenced" regularly. The report went on to state that she was having conversations with imaginary friends.

Her 60-day assessment again centered around her unwillingness to maintain an acceptable level of personal hygiene. There were log entries to this effect. She went to great lengths to avoid washing at times pretending to have done so by running water and wearing perfume to disguise body odour. For twelve straight days she refused to shower during July. She continued to visualize herself as African or Caribbean instead of Caucasian. She was attending her Baptist church regularly. Her mother while visiting regularly refused to actively participate in the established behavior modification programs. Her relationship was friendly but not nurturing. She continued to exhibit signs of past abuse. The assessing officer coupled these remarks with the finding that she made "remarkable improvement" and "great gains" while at Reista's. It was posited that the biggest threat to her stability was the mother's inability to help with corrective behavior.

Despite signs of improvement the assessor found that she was nearing a breaking point indicated by self-talking and other behaviors.

There was a recorded incident which involved a verbal tirade and property damage coming after the insistence that she attend a scheduled resident's meeting. Police were notified and a psychological assessment requested.

On August 13 she was apprehended prior to a MPR being issued. She was taken into custody and released back to Reista's the next day.

There were numerous entries regarding emotional instability, one for example during a visit from her father (divorced) resulting in a shortened meeting.

On September 15 an Incident Report was made out by Ms. Latham regarding the child's behavior. She had returned from a visit with her father and launched into verbal tirades and property damage. The log indicates her resentment regarding questions about her involvement with a "48 year old black man" The police and her social worker were advised. She was detained in custody.

Even though she was discharged from Reista's in early September, the October medication sheet showed her as receiving drugs.

B:

Ms. Natasha Budzarov was B's CAS worker after August 23, 2002. Prior to that date the worker was a Ms. MacMillan. Ms. Budzarov was called to give the story of B.

B is a child of African descent who was placed into care at Reista's in July 2002 after discharge from St Joseph's mental health facility. She remained at Reista's until February 12, 2003. On that date she was arrested on a charge of threatening. Produced into evidence was the Peel Police arrest report for the incident. The report reads that she was "routinely defiant to staff" and has had ongoing problems with the staff. The arrest was the occasion of her discharge from Reista's.

Her parents were believed to be deceased and she lived with an uncle. She showed signs of sexual abuse from a family member which led to family discord and divorce for which she was blamed. She showed signs of fear that the family member would find her. She had bed-wetting problems which did not abate; this was taken as a symptom of the abuse. Other symptoms included the wearing of several layers of clothing described as a sign of body detachment. She also shaved her head (to ward off headaches, and flash backs). She had difficulty dealing with stress. She was prescribed psychotropic drugs but was refusing them. Her social worker reported that she attended school but was disorganized. She struggled academically and did not keep track of test dates.

The CAS worker expressed concerns about the relationship between Ms. Latham and B,

finding Latham vindictive in response to B's complaints. B reported to her CAS worker that there was only stale food, no laundry facilities, withholding of allowances (there is an entry to this effect for two weeks allowance by Latham on October 31), bribery of residents who "rat" on others and tirades by Latham. The worker's visit to the home on February 10 coincided with the complaint lodged on February 11 to Ministry. The worker witnessed the lack of food and the disconnection between the menu and actual fare served as well as the lack of laundry facilities. Workers are professionally trained to recognize the manipulation of adults attempted by teenaged girls. In this case however the worker believed the girl's story.

The worker kept very close tabs on B. From her notations there are constant reminders of behavioral problems, despite rather optimistic 60 and 90-day assessments. For example there were incidents of self-harming, indecent exposure, foul language and altercations. It would be a dubious conclusion to state that the evidence is consistent with finding that B's problems would have been cured in another home. The most one can say is that some of the techniques employed at Reista's fell short of the standards put forth in the materials and in the observed practices.

P:

P was a girl of South East Asian extraction who was born in Saudi Arabia. She is a big girl looking older than her age. She was raised by her maternal grandparents till the age of 8 when her mother took her to Texas to live with her. Her mother is a nurse who works two jobs. P hated Texas and evinced a desire to return to Canada to live with her grandma. She had not seen her father since she was a baby. She was described by her worker Ms. Alba as a loud, friendly, mature and intelligent teenager.

This was a very difficult to handle child and Reista's represented her second time in care. She came to be beyond the ability of grandparents to handle given her mood swings. However she visited them on weekends. In fact the primary objective of her Plan Of Care was to get her emotional state in balance. She was on medication for asthma.

P was first placed into care in April 2002. She was assessed as having done well and was released to her grandparents in June. However because of self-harming behavior and truancy she was placed back into care on November 1, 2002, this time at Reista's. She remained there until February 11, 2003. She was placed on suicide watch. On January 14, 2003 she again cut her forearms and was again placed on suicide watch.

On December 20 2002 she was picked up by police in a stolen car with an adult male. She was visiting her grandparents at the time. Her grandparents did not want her back.

She was AWOL on January 13 and was returned home in a cab. The log entry for the day states that the residence was informed that she was in Toronto without permission. The log states that a MPR was filed and that a serious incident report was faxed. Again on January 15 she was technically AWOL but as she was at her grandparents' police did not file MPR.

An incident report of February 4 indicated a refusal to go to school due to sore throat and refusal to go to doctor. On February 4 an incident report filed due to offensive language. Her placement was terminated on February 11. There is a log entry showing her departure from Reista's in the company of her worker.

Mr. Hurd's examination of P's file disclosed that: there was no cumulative health record maintained, there was no agreement for service as required, the Plan of Care was not reviewed as required and there were no school records.

Self-harming behavior was described by Dr. Meen as of a different order than suicidal. Children exhibiting self-mutilation are stuck somewhere between wanting to live and wanting to die. The pressures built up between these two existential poles are to a degree relieved by the behavior. As such it can become addictive. The overarching fear of course is that the behavior can accidentally result in death.

T:

T came into care due to parental teen conflict at age 15. Her mother reported that since her father had left two years ago, T was out of her control and that her negative influence on the younger children could not be tolerated. She had smoked pot, shop lifted and was aggressive towards her two sisters and mother. She is reported as being very attractive with an affinity for tight fitting clothes. She was described as having emotional rather than psychiatric problems. The primary source of her anger was the infidelity of her mother, which resulted in family separation. She was placed at Reista's October 2002.

On November 17 she AWOLed with three other residents. She was the leader. They went to her mother's home which led the mother to call Reista's for help.

Her assessment for January 2003 was not positive. She had AWOLed four times and was answering a theft under charge. She could not abandon the group of friends who were decidedly deleterious to her improvement. She remained defiant and tried to divide the residents along racial lines.

On February 9, T called the Ministry complaining about the food at Reista's. Other residents had also complained.

A report generated on February 12 stated that she had attacked a resident at Reista's and was taken into custody. Reista's asked for her removal pursuant to the right of a licensee conferred by the governing legislation.

K:

According to the records admitted into evidence, K, 15, first came into care in November 2001 under a Temporary Care Agreement. She came from William Osler Hospital. She had engaged in self-harming behavior. Dr. Meen informed the Tribunal that self-harming

behavior is of a different order than suicidal behavior. (see above under P)

According to the Discharge Report dated February 25, 2003 and signed by both K's CAS worker Ms. Budzarov and Ms. Latham, K was admitted to Reista's on February 6 and discharged February 25. She came from William Olser Hospital. There were concerns around self-harming behavior and she was prescribed a regime of medications. That regime consisted of: tricycle birth control, Paxil 20mg daily, and Risperidol 0.5 mg daily. The drugs were prescribed for evening as if taken in the morning there followed the effect of drowsiness.

Produced was an invoice from Reista's in the amount of \$5,514.04 for the period February 1 to 28, 2003 @ 196.93 per diem.

Mr. Hurd went through the medication and daily logs on K for her stay and showed the Tribunal errors that either indicated bad log keeping or inappropriate administration of powerful medications. Included were suggestions that drugs had been refused. To Dr. Meen this would be completely unacceptable without follow up to the attending physician. Mr. Hurd's interview notes also indicate K getting medications if she asked for them and that upon her arrival, there were eight kids in the house.

On February 21, K AWOLed and a MPR report was filed. According to the notes of her worker the AWOL, behavior was chronic to the point of Peel Police becoming frustrated. K was one of the girls who complained to Mr. Hurd about the lack of food.

V:

Her CAS Family Services worker was Mr. Freedman who testified as to her situation. V was admitted into Reista's on early November 2002 until early March 2003. She was 15. According to the file notes, she had not seen her mother for four years and her father was in jail. She did not want to live with her father as he was abusive. The notes indicate that she wanted to come into care as her only support member, her grandmother, was ill.

She had Asberger's syndrome. She was prescribed Paxil for her anxiety. Mr. Freedman had concluded that Reista's was an appropriate placement based upon his review of the Reista's material. She AWOLed February 20 and a MPR filed.

Mr. Freedman's main concern was that V had had contact with her father over a two-week period without his specific authorization for two weeks.

She was interviewed by Mr. Hurd after November 2002 complaints from Reista's to Ministry.

Mr. Hurd took notes of his perusal of V's records. He found: there was no cumulative health record, there were only medical sheets for January and February, there were notations on the medical logs of V refusing drugs yet entries showing they were administered, contradictions between medical logs and daily's and a cancellation of a

psychiatric appointment due to a failure to do chores.

When Mr. Hurd interviewed V his notes indicated that the menu was “never followed”, that Ms. Latham paid some girls to “rat” on others, no toilet paper some days, she had gone to YWCA maybe once in weeks, there were seven girls in the house for several months, sometimes eight, allowances were not given out, the posted recreational schedule is “a joke”.

D:

Mr. Melanson was the CAS worker who testified as to D’s story. Her child protection worker was Ruby Shrivastava. D is a child of West Indian background. She was taken into care after having run from what she described as physical punishment at home.

Her mother was a strict disciplinarian and appears from the reports to have given up on D. She warned the CAS that D will “take advantage of the system.” There was a mention in the material of a chance encounter between D and her father in a mall that was without incident but no mention of any real paternal relationship. She reportedly refused to give his whereabouts.

D was described as a “fully developed 14 year old very aware of her appearance” in thrall to the fantasy world of rap artists and designer labels. She definitely resented authority figures and she became in the parlance of social work a “runner.” D had been arrested on a charge of theft under in early 2002 and was picked up pursuant to a warrant for failure to appear. The recognizance subsequent to her bail was also breached resulting in custody. She was found upon reporting to her probation officer living with “friends” in conditions of squalor. The “friends” included men with weapons and criminal records. She was described as being sexually aware beyond her age.

D was very upset about being returned to the care of CAS much preferring to live with her “friends”. According to Mr. Melanson she stated that she would live “anywhere that wasn’t CAS”. An option that was explored was living with a 24 year old sister. This could not be taken seriously at the time given her brushes with the law. However one day visit per month was allowed.

On March 1, 2002 she was placed at Reista’s with a pending court appearance on March 10. Her curfew was 5:30. She had the required medical examination and was found to be in good health.

The initial indication that things were not going well was evidenced by an incident report dated March 3. D missed her curfew arriving at Reista’s at 11:00. On March 10 she was discovered with a boy in her room. There were subsequent AWOLs on June 3 and June 10. The Case Note created by R Shrivastava on March 11 notes that D was in custody for breach of recognizance. The report states that Ms. Latham said she was willing to give D another chance but that having boys in the residence was unacceptable and that further

breaches would result in a seven day notice for D's removal.

Her mandatory 30-day assessment stated that she remained in good health and was under no medication. She was reported to be eating well and nutritiously. She was culturally comfortable at Reista's and could relate to the staff. Mr. Melanson noted a continued antipathy towards himself.

By June 28 Mr. Melanson, in the absence of Ms. Shrivastava, had become concerned to the point of righting an entirely new contractual agreement between the CAS and D with her sister Tracy as a party. He was concerned with the lack of notification to authorities regarding AWOLs, particularly the non-filing of MPR's. Each AWOL also represented a breach of the terms of her probation. As there were multiple breaches by D of the original terms and constant failures by Reista's to adequately notify authorities of these breaches, Mr. Melanson decided that beginning in mid July, D could commence week long visits to her sister's with a reassessment in the fall as to the appropriateness of her sister assuming permanent care.

On August 8, D was arrested on a charge of fraud at Home Depot and detained. Both D and her sister said that D had been "set up" by D's boyfriend.

On August 28, the CAS decided to place D in her sister's care and that Reista's could close her bed.

Mr. Melanson's conclusion was that the program of Reista's was the wrong type for D and that in any event he would probably not place another child with Reista's.

MEDICATIONS:

Mr. Hurd explained the log keeping requirements involving medications. A monthly log entitled "Prescription Sheet" records the daily administration of medications as to dosages and times. For each day there is a space for the initials of the staff member noting the drug, the dosage and the time. As pointed out by Dr. Meen, this notation is particularly important in the case of psychotropic drugs. At the bottom of the sheet there is a section which allows for the logging of drugs not taken, discontinued, absent girls or girls out of the home with their prescriptions. This sheet allows the regulator to track the administration of prescription medications for each child in care.

Along with the daily medication log is the requirement for each medical appointment to be recorded in the daily residence log.

As stated, Dr. Meen testified that the drugs in question need to be administered accurately and on time. The maintenance of a level of medication in the child's system is very important. He described some of the psychotropic drugs in question. Respiradol: is a new anti psychotic drug which allows people with anxiety issues to function, it is very powerful; Ritalin: again allows people to function but must be administered in the morning to take

affect during the day, the effect would be wasted with an evening dose. Paxil: is a drug useful in panic attacks, it can have adverse effects if not administered as prescribed. Epival: is a mood stabilizer which must be administered at precise times three or four times daily. Both over and under dosages can have side effects. To ensure accurate dosages is the primary reason for accurate logs. As Dr. Meen put it, if the dosage is three times daily it means three times daily and not when the child asks. The adults in charge must also explain why the drugs are important and to be seen as trustworthy in their administration. A non-administration through refusal or otherwise must be treated seriously and reported to the attending physician.

The allegations regarding these issues centre on A, V and K. Mr. Hurd went through his notes and showed logs to reveal the following:

The investigation of Mr. Hurd into this area included complaints from residents and a review of relevant logs. His investigation revealed obvious shortcomings in the administration of medications:

Section 82 of Regulation 70 requires a licensee to secure all necessary emergency medical treatment for each child.

The Ministry set out a number of breaches of Regulation 70 Subsection 92 (1) (a) and (b). All of these allegations were admitted. They included:

A complete absence of the 17th day of the month from the medical logs of five of the girls. The drugs prescribed for these girls were in part psychotropic, requiring the diligence in administration outlined by Dr. Meen.

With regard to K, she had overdosed and was prescribed Essexor for depression. As well Risperidol and Paxil.

For A contradictions between the daily and the medical log on two occasions,

An indication from the records available that requested medication was not given,

A medical record showing a medical record being kept after the child A had been discharged.

A record showing the incorrect date as to when A's medication even began.

With regard to child V there were:

Contradictions between the daily logs and the medical logs as to whether her prescribed medications were taken or not. Her medications were psychiatric medications.

Contradictions between Daily logs and Medical logs between V's refusal to take her

medications and entries indicating her drugs were taken recorded refusal to take a drug and an entry showing its administration on several occasions in January and February 2003. The logs were introduced through Mr. Hurd.

With regard to child K there were:

Similar contradictions between drugs being administered or not. As with A and V, the medications in question were psychotropic, requiring accuracy as to dosage and time of administration. The testimony indicated that the whole point of proper record keeping is to enable medical providers and subsequent care givers an accurate portrayal of the child's background. Only in this way can proper diagnoses be available on an ongoing basis.

In K's case, given her questionable stability (self harming), it was extremely important that medications were properly administered. Missed or over dosage could lead to a worsening not a betterment of her ability to cope. Accurate records are essential to ensure these problems do not arise. In cases of refusals to take medications, the doctor in charge should be alerted. There was no logged indication that this occurred in K's case or in others.

With regard to child S, there were similar indications as with A, V and K including a log sheet with white out indicating an entry not contemporaneous with the event.

Paula Rampersad as staff member stated she remembers giving meds but not recording them.

OVERCROWDING:

The importance of the allegation regarding excess capacity over that for which the residence was licensed was stated by Dr. Meen. The whole notion of placing a child in care is to give the feeling that they are getting a "better deal" than that to which they were exposed. Any notion that they were being "warehoused" would naturally lead to a feeling that they did not count for much, and would add to their already heightened sense of insecurity. It is this feeling that they are somehow the lesser dust under the chariot wheels that care should be designed to overcome. This requires a degree of personal space. It is obvious also that overcrowding can lead to friction. He stressed the importance of the fact that these girls are teenagers and must be accommodated as such. Their central nervous systems are developing and cannot be compared to those present in adulthood. Overcrowding doesn't only impact the children, it is deleterious to staff as well. There is a correlation between a staff put under stress and their ability to properly carry out their function.

FOOD:

Under this heading Dr. Meen in his evidence stressed the obvious importance of balanced nutrition, particularly with teenagers. Many children brought into care come from backgrounds of very poor eating habits and require a regime of diet that allows them to develop a sense of proper nutrition. Again with other aspects of care, it is important for the children to see that proper food is being provided to prevent the feeling of being a cipher in a system for which any kind of food is good enough. Poor self-esteem is a theme that runs through all of these children. Any arrangement whereby food is used as a disciplinary tool is unacceptable with children in care. Where one child breaches the rules, for example stealing food, deprivation of food imposed upon the others represents collective punishment which can only isolate the child further. It was disturbing to see log entries stating that "food is for the residents only". Children would have a difficult time trusting staff that was literally taking food from them.

CLEAN CLOTHES:

Dr. Meen testified that having clean clothes to wear was important not simply for the obvious reasons of cleanliness but for the girls' self-esteem. Integral to an "effective" program was the inculcation of good habits of personal hygiene and clean clothes would form part of such practices.

The main problem in this area was the unreliability of the home's washing machine. It would break down forcing trips to the Laundromat.

Another problem relayed to the investigators was access to soap. Mr. Hurd introduced a form issued by the home which required a child to sign for laundry soap. Within the form is the admonition that the bag of soap received is sufficient to do four loads of laundry and that it will not be replaced until the next scheduled time for allotment. Also if the soap was stolen or given away, it would not be replaced. The implied accusatory tone was seen as adding to the girls' lack of self esteem.

Dr. Meen stated that if teens do not have clean clothes there can be stigmatizing reactions from peers.

The position of the Ministry was that the evidence was more consistent with this practice being detrimental to the children's sense of well being than with appropriate disciplinary practice.

AWOLs:

Peel police reported an inordinate number of AWOLs from Reista's compared to other group homes. Dr. Meen stressed that behavior is a form of communication. Disturbed children will run from circumstances which they believe are harmful to them. If they don't feel nurtured they will flee. Children will develop a sense that going it alone is preferable to their circumstances.

COLLECTIVE PUNISHMENT:

On several occasions, according to the testimony of Mr. Hurd supported by log entries, there were instances of all of the residents being docked allowance or deprived of free time as a result of the default of one of the girls.

RECORD KEEPING:

The evidence surrounding this item was hampered somewhat by a lack of timely production of the documents. During the first stages of the appeal, Ms. Latham stated that a fire in her car resulted in the partial destruction of some of the logs. Charred remains were brought to the hearing.

PLANS OF CARE AND SERVICE AGREEMENTS:

Section 81 of Regulation 70 requires that service agreements be completed as soon as possible after a child is placed. Mr. Hurd did not find agreements.

PV's plan of care was not reviewed every 30 days during her six-month stay as required by Section 86(6).

SAFETY:

Section 109 of Regulation 70 requires that fire drills are carried out regularly and that records be kept of attendees. As the residents changed frequently this was a particularly important routine to keep.

Mr. Hurd introduced log entries to demonstrate this deficiency. On one occasion in April 2002, the fire drill sheet which is supposed to be a record of participating residents showed the presence of a girl who should not have been there. On another occasion a girl was listed on the sheet but was AWOL at the time according to the reports.

Paula Rampersad, a Reista's staff member, stated that she signed the fire drill sheets as having been completed because she was asked to do so by Ms. Latham even though she was not present.

Another item of concern to Mr. Hurd during his inspection was the discovery of toxic substance on the premises, namely rat poison.

As well he found cold medication packets in the back yard. Photographs of these two breaches were entered. An empty beer bottle was also found on site.

VISITS:

Of concern to the regulator from the investigation of Mr. Hurd was the failure to properly record visitations and in some cases allow inappropriate visits.

All visits must be authorized by the child's CAS worker. And it is the responsibility of the operator to seek the approval. V was permitted to visit her father for an extended period despite a history of abuse without her worker's permission. He only found out about the visit through an unrelated conversation.

Ms. Alba, P's worker, testified to a similar situation with her charge. She had not been asked to approve P's weekend visits.

COMPLAINT PROCESS:

Section 109 of the Act requires that the children to have an independent source of complaint. Mr. Hurd testified that he could find no evidence that such processes were in place. He introduced a log entry noting that B had lodged a formal complaint with regard to her having been called an inappropriate name. The log entry went on to describe the complaint as "nonsense" and that mediation would settle it. The worker, Ms. Budzarov, had no case note indicating the report of the complaint. The printed complaint procedure for Reista's is as follows:

Sometimes when living in a group environment problems may arise. If you have a problem with the way you are being treated by a staff member with the rules or anything else, you need to first try and talk with the essential staff member involved. If this is hard for you can talk to another and ask for her help. If you feel that you have not been listened to, or have been treated unfairly then you may talk to the residential supervisor. If you still do not feel that the problem has been solved you may speak to the Director."

Ms. Latham maintained her position that B was a liar to B's worker.

There is a log entry for May 24, 2003 indicating that the Peel Regional workers had informed Ms. Latham that the staff was mocking residents when they had valid complaints.

OVERCROWDING:

Occupancy records compiled by the Ministry from placement data of the CASs indicated that more than the allotted six residents were in house. This may have been explained by the acceptance of unapproved and unauthorized emergency placements over weekends. Paula Rampersad stated that there were eight children while she was at Reista's from March 2002.

As outlined, several of the girls and the records of placements from CAS data show more than eight girls in residence on many occasions. There were eight beds.

Ms. Latham stated that she had been given permission by CAS. That worker was not called.

CAS workers stated that even when a child is on a visit, her bed must remain unoccupied even in her short-term absence and the bed is continued to be paid for until discharge.

INCIDENT REPORTING:

Daily logs are to record the happenings around the residence. Serious incidents are to be recorded on the girl's case file and reported to the authorities. As well Missing Persons Reports (MPRs) are to be given to police in a timely manner. The police must have knowledge of a child not in residence if they are to be capable of acting.

Regarding child D, her worker testified that D had breached the terms of her probation and or parole some 50 times. He reported to his superiors that Reista's, where D had been since March 2002, had not followed the correct reporting procedures for serious incidents.

STAFF:

The staff at Reista's Place was organized with Ms. Latham as the director and Ms. Lewis as the supervisor.

Paula Rampersad:

Ms. Rampersad began work at Reista's in March 2002. She continued for one year until for all intents and purposes Reista's was a non-operating facility. She worked both weekends and the three to eleven shift. She previously worked in a clothing store and was approached by Ms. Latham about employment at Reista's. The hours worked at Reista's could go towards a Youth Worker diploma. She complained that at times there was an expectation of work for no pay.

Ms. Rampersad testified that while she was there, there were eight children in residence most of the time. This does not coincide with log entries to the point that there may be some lay offs if all six licensed allotted places were not filled. She testified that she had been instructed to wipe off the bottom two names on the resident's roster board to ensure only six names showed. She testified as to the lack of food. She testified as to the alteration of a fire drill log by white out.

Ms. Rampersad testified that some of the logs indicating fire drills had been carried out had not in fact been. Furthermore, she testified that some log pages purportedly initialled by her had not in fact been done so. She stated that the initials that appeared on the pages were not hers.

She believed the food to be below par. The food was kept under lock and key and was in any event insufficient. She recalls the visit from Mr. Hurd in the fall of 2002.

Also there was inappropriate language used to children. She testified as to male presence on site.

She stated that Ms. Latham castigated the staff on the pages of the daily log.

Lydia Bogle:

Ms. Bogle knew Ms. Latham for some period prior to coming to Reista's. She stated she had Probation Work Certificate. She testified as to having 5 years experience. She was at Reista's for two years, from opening till March 2002.

She was asked about the various aims and stated goals of Reista's. She stated that the recreational and community interaction outlined in the materials such as Red Cross and Girl Guides never materialized. She complained that she was never left to make decisions on her own but constantly had to get authority from Ms. Latham. She did not witness any anger management training. Sometimes she was alone on night shift. Sometimes there

were more than six children in residence. The kids were in for supper then after chores they hung out at the Mall. She stated that Ms. Latham's favorites got regular allowance others did not. This playing of favourites extended to not filing MPRs if a favourite went past curfew of 8:30. She implied that Ms. Latham would not spend all of the allotted money on the children. She verified other testimony regarding the broken down washing machine and food was not fresh at all times. She agreed also that log books were not accurately kept and that entries that would reflect badly upon Reista's were discouraged. She had been a friend of Ms. Latham for some six years prior to employment at Reista's but the friendship soured during the term in Ms. Latham's employ.

Essentially she was of the opinion that Reista's got off to a good start but after a time it deteriorated.

Sandra Jenkins:

Ms. Jenkins had an Early Childhood Certificate. Reista's was her first employment in the field. She was on weekends eleven to seven shift. When it came to management of staff Ms. Jenkins stated that the methods weren't conducive to harmony and that unqualified staff were hired. The standards were low. She testified as to the rat poison. She also testified as to the lack of activities and kids hanging in the Mall. She used the term warehousing. She never saw a tutor on the premises. The activity board was "just for show". There was no life skill training or psychiatric availability. Her CPR was not current while at Reista's. She was never offered training or given police check. She did receive her pay while employed. She never filled out a medical log. She could not remember a check of the fire alarms. She too testified as to stale food and the broken washing machine. Curfews were not enforced. Mr. Hurd called her first. She stated that Ms. Latham called the girls inappropriate names.

Leisa Lewis:

Ms. Lewis was the Supervisor of Reista's Place. In terms of the day to day operation she was directly under Ms. Latham. It was her task to institute the policies and directives established for the home.

She had previous experience in the field at another residence. She testified as to her experience in meal planning, log keeping, medications, counselling and the other tasks involved in running residences.

She began helping Ms. Latham in November 2000 and remained at Reista's till March 2003. They had met at a place of previous employment. Her background included an education at Sheridan College in human resources. Her experience also included crisis intervention, CPR, brain injury care and associated tasks. The evidence revealed a background which appeared to suit the position of supervisor at the new Reista's facility. From the outset of the testimony it was clear that whatever band of trust that may have existed between Ms. Lewis and Ms. Latham had been irretrievably broken. Part of the

problem, at least from the perspective of Ms. Lewis was the fact that Ms. Latham was holding over her information about a previous conviction albeit one from which she had been pardoned. Ms. Lewis also evinced a desire to open her own facility.

In any event as time progressed after the licensing of Reista's friction arose between the owner and supervisor to the detriment of the operation and concomitantly the girls entrusted to Reista's care.

Ms. Lewis corroborated a number of points raised in evidence. There was for example CPR training for the original staff then a lapse, there were more than the allowed six girl's in residence at various times, staff members signed logs for one another, girls had to sign for food, menus drawn up did not correspond to food actually served, it was commonplace not to have enough food, food was not fresh and at times beyond expiration date, logs were signed without having been read, the washing machine had periods of disrepair, there was collective punishment meted out following misdeeds by one resident, Ms. Latham would favor some children over others, reluctance to file missing persons reports in order to prevent Reista's from looking bad to the regulator, finally she verified the indifferent attitude to the correct administration of medications.

Sandra Boca:

Ms. Boca began her employ at Reista's in June of 2001. She remained there until there were no remaining children. She worked mainly the eleven to seven shift.

Prior to her employ at Reista's she had no experience in group homes nor any educational qualifications. She was in fact working in a nearby mall when asked by Ms. Latham about employment at Reista's. This lack of qualifications was not taken by the Tribunal as a slight against Ms. Boca as in fact she came across as a straightforward witness.

As with Ms. Lewis her testimony corroborated the documentary evidence produced by the Ministry. She stated that she should ensure the regulator believed there to be two staff on at all pertinent times, she witnessed there being more than the allowed number of residents, she had signed logs which she had not authored, she confirmed the lack of proper laundry facilities from time to time, she witnessed Ms. Latham favour some children, the recreational activities were more fantasy than reality, and she was not trained in the administration of medications.

THE LAW:

Child and Family Services Act:

S. 27 (2) A service provider may provide a residential service to a child who is less than sixteen years of age only with the consent of the child's parents or, where the child is in a society's lawful custody, the society's consent, except where this Act provides otherwise.

S.109 (1) A service provider who provides residential services to children or places children in residential placements shall establish a written procedure, in accordance with the regulations, for hearing and dealing with complaints regarding alleged violations of the rights under this Part of Children in care.

(2) A service provider shall conduct a review or ensure that a review is conducted, in accordance with the procedure established under subsection (1), on the complaint of,

- (a) a child in care
- (b) the child's parents; or
- (c) another person representing the child,

and shall seek to resolve the complaint

S. 196 A Director may refuse to renew or may revoke a license where, in the Director's opinion,

- (c) the activity for which the licence is required is carried on in a manner that is prejudicial to the children's' health safety or welfare.

Regulation 70:

S. 66(3) A licensee shall not admit to a residence more children than the maximum number of children permitted in the license unless the admission is approved by a Director for a specified period of time.

S. 74(1) Every licensee shall ensure that a daily log is maintained in each residence operated by the licensee.

(2) Each incident that affects or in the opinion of the licensee may affect the health, safety or well being of a staff person in the residence or a resident shall be included in the daily log.

S. 81 (1) Every licensee shall ensure that a written agreement for the provision of service to a child is entered into with respect to each child that is admitted to a residence operated by the licensee.

(2) A written agreement shall be entered into at the time of admission of the child to the residence or as soon as possible in the circumstances.

S. 82 Where an agreement for the provision of service to a child is not entered into under section 81, the licensee shall ensure that before a child is admitted to a residence operated by the licensee a consent for admission of the child in accordance with section 27 of the Act

S. 84(1) Every licensee shall ensure that each child admitted to a residence operated by a licensee has had a general medical examination by a physician within thirty days prior to admission or has such an examination within seventy-two hours after admission.

S. 86 (1) Every licensee shall develop or participate in the development of a written plan of care for each resident admitted to a residence operated by the licensee within thirty days of admission of the resident.

(6) Every licensee shall ensure that the development of each resident in each residence operated by the licensee in relation to the plan of care developed for the resident is reviewed at least every thirty days during the first six months that the resident is in the residence and at least every six months thereafter.

S. 91(4) Every licensee shall, with respect to each resident in a residence operated by the licensee, maintain a cumulative record of each resident's medical and dental examinations and treatment while the resident is in the residence.

S. 92 (1) Every licensee shall ensure that with respect to each resident in each residence operated by the licensee,

- (a) prescription medicines are administered to a resident only under the general supervision of the program staff of the residence and only when prescribed by a physician; and
- (b) a record is kept of all medication given to each resident, including the type of medication, the period for which it is prescribed, when each dose is to be given and is given and by whom each dose is given.

S. 96 No licensee shall:

- (a) use or permit the use of deliberate harsh or degrading measures to humiliate a resident or undermine a resident's self respect; or
- (b) deprive or permit a person to deprive a resident of basic needs including food, shelter, clothing or bedding.

S. 99 (1) Every licensee shall maintain a written case record for each resident in a residence operated by the licensee that includes,

- (h) school records and reports concerning the resident ,where applicable;
- (j) reports of any serious occurrence involving the resident.

S. 102 (1) Where,

- (a) a resident dies;
 - (b) a resident is seriously injured;
 - (c) a resident is injured by a staff person or by the licensee;
 - (d) a resident is abused or mistreated;
 - (d.1) a resident is physically restrained by a staff person or by the licensee;
 - (e) a complaint is made by or about a resident that is considered by the licensee to be of a serious nature;
 - (f) a resident resides in a residence operated by the licensee in which a fire or other disaster occurs; or
 - (g) in addition to the matters set out in clauses (a) to (f), any other serious occurrence takes place concerning a resident,
- the licensee shall within twenty-four hours of the occurrence report the occurrence to,
- (h) a parent of the resident;
 - (i) where applicable, the person who placed the resident and who has been involved in the plan of care for the resident;
 - (j) where applicable, the society that placed the resident; and
 - (k) a Director. R.R.O. 1990, Reg. 70, s. 102 (1); O. Reg. 77/02, s. 5.

S. 102 (2) Where,

- (a) a resident is absent from a residence operated by the licensee without permission for twenty-four hours or more; or
 - (b) a resident is absent from a residence operated by the licensee without permission for a period of less than twenty-four hours and the absence is considered by the licensee to be a serious matter,
- the licensee shall forthwith report the absence to,
- (c) a parent of the resident;
 - (d) where applicable, the person who placed the resident and who has been involved in the plan of care for the resident;
 - (e) where applicable, the society that placed the resident; and
 - (f) the local police having jurisdiction in the area where the residence is located. R.R.O. 1990, Reg. 70, s. 102 (2).

S. 106 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

- S. 109 (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 in the procedures to be followed when a fire alarm is activated;
 - (b) the procedures referred to in clause (a) are,
 - (i) posted in conspicuous places in the residence, and
 - (ii) practiced at least once a month and a record is kept of each practice

- S. 109 (2) Every licensee shall ensure that in each residence operated by the licensee,
- (h) harmful substances and objects not essential to the operation of the residence are not allowed in the residence

APPLICATION OF LAW TO FACT:

A Director appointed by the Ministry to oversee the operation of licensed facilities has made a decision by way of Notice of Intention that Reista's Place should not be granted licence renewal. That administrative decision was taken on the basis of an investigation initiated by the Director.

The Act grants to the licensee an appeal from that administrative decision in the form of a "hearing". The granting of a hearing allows a full examination de novo of the factual basis underlying the Director's decision.

As the issuer of the initiating Notice it is the task of the Ministry to demonstrate to the Tribunal that the evidence before it is more consistent than not with a finding that Reista's Place should not be granted a renewal of its licence.

Such a finding must be premised upon an independent evaluation by the Tribunal as to whether the ends of the governing legislation are best served by such a finding.

The Tribunal is mindful of the fact that the matter before it dealt with the welfare of children. Some children, such as those whose lives were revealed in the evidence, have found themselves in circumstances from which they must be extricated to salvage their physical and emotional well-being. These are children "in need of care". Our society has long recognized its responsibility towards these vulnerable young people and in order to discharge this onus the legislature has enacted a regulatory framework of intervention and care designed to deal with their needs. The primary agency charged with ensuring the maintenance of a proper interface between the child and this framework are the Children's Aid Societies established throughout the province.

It is the task, inter alia, of the designated CAS to ascertain the most appropriate level of care required for each child, to find a residence and to assign a case worker to monitor the child's progress. Integral to achieving the appropriate level of care is the availability of residences within which the particular child's needs can be accommodated. It is the task of the Ministry to license and regulate such facilities and it was the Applicant's alleged failure to adhere to those regulations that resulted in the Director's decision and subsequently to this appeal.

Reista's Place was evaluated and licensed by the Ministry as a facility, which could accommodate young teenaged girls who required, supervised and structured care. Such a homelike yet structured environment falls under the rubric "milieu therapy."

The Tribunal heard evidence as to what regulations were in force and what breaches occurred.

The primary and most lasting impression imparted through the evidence was the lack of staff qualifications. If one begins with the explanation of these children's needs from their biographies as set forth by Dr. Meen and the social workers involved, it becomes obvious that caring for these children is not a job for amateurs however dedicated they may be. There was a clear disconnect between the regulatory requirements with regard to the type of regimen for the care of these children imposed by the Ministry and the capacity of the staff in place at Reista's to do so. There are courses of study available at community colleges but they do not appear to be mandatory as prerequisites to the care of children in Ministry licensed homes. There is not the evidence however before the Tribunal such that a direct cause and effect relationship can be drawn between level of care and level of professional training in each case. In fact it is a reasonable conclusion that there may not be such a relationship as there are many licensed homes operating under the same regulatory regime and the evidence from Director Corey is that very few wind up under threat of closure.

It would appear that Reista's failure to live up to the obligations under the Act as evidenced by the various breaches have been based more upon personality conflict and lack of management skills than anything else. The Tribunal heard evidence of improper use of resources provided, lack of pay to staff, and the general inability of Ms. Latham to engender any kind of loyalty or focus upon the job at hand. However, it has to be assumed that professional training would have been helpful in preventing the failure of Reista's to achieve its ends, for example, some professional training would surely have prevented the lack of proper administration of medications, evidence of which the Tribunal found particularly disturbing.

It is of course not the task of the Tribunal to dissect the inner workings of a particular facility other than for the purpose of deciding whether that facility is capable of fulfilling the terms of its license. Ms. Latham struck the Tribunal as earnest but there was no affirmative evidence from past experience or otherwise as to her capabilities to manage properly a children's residence. The hearing in any event is not nor should it be about Ms. Latham. Again, the sole task of the Tribunal is to decide whether on the evidence children can be properly cared for at Reista's. If not then Reista's should not be licensed.

The best evidence of whether proper care can be given by a licensee is to be found primarily in the observance of the regulations. There was no evidence or indeed argument that any of the regulations were improperly drafted, inappropriate to the care of children or in any other way not worthy of consideration as a measure of what proper care should be.

For example log keeping. It became obvious that fundamental to the proper care of children in need of care is a proper record of their progress or lack thereof. Accurate log keeping is the primary method through which such a record is kept. The worker who for instance succeeds another must be able to review material on the child in his or her charge. If that material is either inaccurate or indeed missing altogether the analysis surrounding future care will be obviously adversely affected.

There was equally a disconnect between the purported support systems available at Reista's as set out in the descriptive materials and the reality of those provided in fact. The CASs placing children at Reista's were doing so on the basis of quite frankly bogus information. The evidence showed Ministry approval documentation outlining the availability of psychiatric help, counselling, recreational outings and other capabilities which, if reviewed by a CAS worker, could convince him or her to enter into a placement agreement with Reista's for the care of child in need of the supervised care outlined.

The evidence of the girls' backgrounds outlined above revealed anti-social behavior with extremely complex and varied causes. It was manifest to the Tribunal that Reista's was ill equipped to deal with let alone assuage such problems. It was also clear that some of the children's' mandatory periodic assessments were out of sorts with the ably presented and extensive viva voce and other documentary evidence set forth. Given this, it was incumbent upon the Tribunal in this circumstance to attempt to arrive at some overarching deficiencies to explain what was obviously a dysfunctional situation.

The evidence makes clear that two primary causes led to the demise of Reista's as a functioning residence. First, there was not the staff with the requisite qualifications to even approach the degree of care these children required. Secondly, there was a near complete breakdown between Ms. Latham as owner and the staff that she in fact hired. The complaints from staff members to Mr. Hurd at the time of his investigations both written and verbal were taken individually and independently in writing and over the telephone. They were not transcribed so as to allow interview techniques to be assessed nor did the Tribunal have that expectation. They did nevertheless show a similarity in subject matter and in emphasis. On the stand, these original observations held up and the Tribunal did not see any significant divergence between the investigation results and the hearing's witness-excluded testimony. Ms. Latham, when faced with these complaints at the Director's meeting following the investigation, took the position that some of the shortcomings pointed out to her could be explained by staff tampering with files. She maintained this position at the hearing. Assessing these sources of evidence the Tribunal is faced with accepting the staff's version of conditions at Reista's or the position of Ms. Latham that her employees were somehow out to get her. Conspiracies usually have an underlying rationale or motive and more often than not founder through inconsistencies. The Tribunal could discern neither inconsistencies nor rationale. One item that did stand out to the Tribunal was that when the staff members were interviewed those that were relatives of Ms. Latham stated in their interviews that in essence everything was fine. These apologists were not called. In the absence of corroborative evidence of a plot the

version of conditions at Reista's as presented through staff members and Mr. Hurd's testimony must stand.

It was clear to the Tribunal on the evidence that even if regulatory shortcomings could have been overcome, which is problematic, there remained no redeeming case that Reista's, given its personnel and management, could have operated a residence such as to satisfy the aims of the governing legislation or to correct the Director's concerns.

Neither Ms. Latham nor the staff members called struck the Tribunal as inherently nasty or vindictive people and the cause of the animus between them was never completely made clear; but it was certainly palpable during the hearing. And it certainly went beyond the staff's complaints brought forth in testimony. The Tribunal however is not tasked to delve into the basis of this bad feeling. The Tribunal's mandate is to assess the ability of the Applicant to fulfill the requirements of the license granted to it pursuant to the Act. In the opinion of the Tribunal that ability does not exist.

ORDER:

The Tribunal pursuant to the authority vested in it by the Act orders that the Director carry out the refusal to renew the license of the Applicant.

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH,
Vice-Chair

CECILIA TAYLOR,
Member

MALCOLM FEALING,
Member

File name: 1892.cfsa.reista.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.

EVAMOORE RESIDENTIAL SERVICES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: GARY S. KAY, Counsel, representing Evamoore Residential Services

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

DATE OF
MOTION: November 15, 2004

Toronto

ORDER

Upon application of the Respondent herein, and upon hearing Counsel for the Applicant and Counsel for the Respondent, and upon reading the Affidavit of <name of witness removed>;

This Tribunal orders that:

1. Without prejudice to the Parties hereto to bring such further and other motions as they may deem appropriate, 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 the expert witnesses.
2. The oral hearing is not open to the public during the testimony of the employees of the Children's Aid Societies.
3. Copies of all documentary evidence provided by the Children's Aid Societies and distributed at the hearing to the Parties hereto and to the expert witnesses be returned to the Tribunal for shredding no later than 31 days following the date of the release of the decision of the Tribunal.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

RELEASED: November 23, 2004

FILE NAME: 2522.cfsa.Evamoore Residential Services.order on public access.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



EVAMOORE RESIDENTIAL SERVICES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: GARY S. KAY, Counsel, representing Evamoore Residential Services

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

DATE OF
MOTION: November 15, 2004

Toronto

ORDER

Upon application of the Respondent herein, and upon hearing Counsel for the Applicant and Counsel for the Respondent;

This Tribunal orders that:

1. Without prejudice, the Children's Aid Society of Toronto produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore (a.k.a. Safenest) Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
 - (a) Name;
 - (b) Date of birth;
 - (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.

2. The Children's Aid Society of Toronto produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
 - (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;
 - (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;
 - (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.
3. The Children's Aid Society of the County of Simcoe produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore (a.k.a. Safenest) Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
 - (a) Name;
 - (b) Date of birth;
 - (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.
4. The Children's Aid Society of the County of Simcoe produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
 - (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;
 - (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;

- (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.
5. The Children's Aid Society of the Regional Municipality of York produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
- (a) Name;
 - (b) Date of birth;
 - (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.
6. The Children's Aid Society of the Regional Municipality of York produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
- (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;
 - (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;
 - (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.
7. The Children's Aid Society of the County of Oxford produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
- (a) Name;
 - (b) Date of birth;

- (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.
8. The Children's Aid Society of the County of Oxford produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
- (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;
 - (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;
 - (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.
9. The Children's Aid Society of the County of Huron produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
- (a) Name;
 - (b) Date of birth;
 - (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.
10. The Children's Aid Society of the County of Huron produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
- (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;

- (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;
 - (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.
11. The Durham Children's Aid Society produce forthwith the following records and documents related to each child in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004, inclusive:
- (a) Name;
 - (b) Date of birth;
 - (c) Status;
 - (d) Date of Admission to Evamoore and/or Safenest Children's Residence;
 - (e) Date of discharge from Evamoore and/or Safenest Children's Residence;
 - (f) Name of worker.
12. The Durham Children's Aid Society produce forthwith the following records and documents related to the children set out in Schedule "A" hereto in the care of the Society who were placed at Evamoore and/or Safenest Children's Residence during the period of January 10, 2001 to July 16, 2004 inclusive:
- (a) Child's File Face Sheet or History indicating name of child, date of admission to Evamoore and/or Safenest Children's Residence, date of birth of child, date of discharge from Evamoore and/or Safenest Children's Residence;
 - (b) Caseworker Notes;
 - (c) After hours or Night logs, indicating reports of AWOLS, injuries and other serious occurrences;
 - (d) Incident Reports from Evamoore and/or Safenest Children's Residence;
 - (e) Serious Occurrence Reports;
 - (f) All correspondence and reports from Evamoore and/or Safenest Children's Residence;
 - (g) Medical Reports done on admission to Evamoore and/or Safenest Children's Residence;
 - (h) Assessment documents including Plans of Care; and
 - (i) Where medication was prescribed for a child during that period, a diagnostic report.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

RELEASED: November 23, 2004

FILE NAME: 2522.cfsa.Evamoore Residential Services.order on production of documents.doc

EVAMOORE RESIDENTIAL SERVICES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: GARY S. KAY, Counsel, representing Evamoore Residential Services

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

DATE OF
MOTION: November 15, 2004 Toronto

ORDER

Upon having submissions made by Counsel for the Respondent and upon hearing Counsel for the Applicant and Counsel for the Respondent, and reading the motion materials;

Without prejudice, this Tribunal orders that:

The persons named below disclose and produce forthwith the York Regional Police Department records of incidents at <address removed>, from the period January 10, 2001 to July 16, 2004, inclusive.

- Chief of Police and/or Designate
York Regional Police
Newmarket, Ontario L3Y 4W5

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

RELEASED: November 23, 2004

**Licence
Appeal
Tribunal**

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



836591 ONTARIO LTD. OPERATING AS MARY HOMES

APPEAL TO THE TERMS AND CONDITIONS PRESCRIBED BY
THE DIRECTOR UNDER SECTION 198 OF THE *CHILD AND
FAMILY SERVICES ACT*

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: KATHARINE RENISON, Counsel, representing the Director
under the *Child and Family Services Act*

EMILIO S. BINA VINCE, Counsel, representing 836591 Ontario Ltd.
operating as Mary Homes

DATE OF PRE-HEARING: AUGUST 19, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicants are operators of several approved facilities for the care of children under the *Child and Family Services Act* RSO 1990 C. 11 ("the Act"). The various residences operate with different names although under the umbrella organization of "Mary Homes". Under Section 193 of the Act the Ministry through appointed Directors issues and renews licenses for such facilities. The issuing Director is also entitled to attach terms and conditions to such licenses and renewals. Two of the homes under the "Mary" umbrella "Mary and Andre" and "Lacroix" were issued licences on February 5 and April 25, 2004 respectively. Both facilities had attached as terms and conditions to their licences the requirement to submit audited statements. Section 198 of the Act allows an appeal to the Tribunal from any such imposed terms. The present appeal arises in response to the imposed terms and conditions.

An annual renewal of license is a requirement under the governing legislation. The Ministry for the renewal period relevant to this appeal sent out a questionnaire to be filled in by license holders such as the Applicants as part of the renewal process. It consisted of seven pages of data the last few of which covered financial information. The Applicants returned

the questionnaire without the financial information requested. Because of this failure the Ministry imposed the requirement to forward audited statements of the operation as a condition precedent to the renewal of the operating license.

EVIDENCE:

Leading up to the present set of circumstances was a series of exchanges between the Ministry and the Applicant. These took the form of correspondence copies of which were introduced into evidence.

The license under which the Applicant is currently operating one of their residences expires on November 16, 2004. It contains two conditions neither of which are concerned with the question of financial statements. The renewals for the two residences under the Applicants licence in question Mary & Andre and Lacroix were issued February 5 and April 23 2004 respectively for one year. Each contains the following Advisory:

This license is subject to the following terms and conditions:

- (1) the most recent audited financial statements for your agency are to be submitted to Kathy Neff, Program Supervisor, by March 12 2004.

(The submission date for the statements for Lacroix is May 28.)

The first of the letters exchanged is dated October 27, 2003 and addressed to M.A.R.Y. homes. In it "MARY's director M. Descoeurs was asked to complete a questionnaire through which the Ministry could gather..."pertinent and consistent information from Per Diem Residential Care and Treatment Programs". The information sought was divided for present purposes between financial and non financial. The non financial information was to be ... "made available to children's aid societies through regional offices and will support ongoing CAS efforts to identify the most appropriate residential resources for children in care". The financial data was said to be ..."useful to the regional office when establishing or reviewing approved per diem rates."

Counsel retained by the Applicant responded by letter of November 13, 2003. In it he voiced his concerns about the purpose of the survey being conducted and the use to which the Ministry would put the information provided.

By letter of December 3, 2003 Katherine Neff, Program Supervisor Eastern region (Ottawa) wrote back to clarify the Ministry's position. In addressing the primary concerns of the Applicant she wrote... "Per Diem operators have been asked to complete financial information for their most recently completed fiscal year. Operator expenditure information will be managed in the regional offices and will be useful in comparing costs across programs and contribute to the Ministry's analysis of new rates and requests for rate

reviews.” It was brought out that the rate review is internal to the Ministry and not subject to independent oversight. Ms. Neff went on to state that the financial information... “will be for Ministry use only. As this expenditure information will contribute to the analysis of requests for rate reviews, children’s aid societies that are participating in these reviews may have access to this information.”

Despite this explanation the Applicant demurred on the issue of financial statements. This resulted in the issuance of the licenses with the condition of the provision of financial statements. She stated her objection as being her belief that financial information was being sought in order to be used as bargaining tool come rate increase time.

There was evidence to the effect that the Ministry as regulator of childrens’ residences had initiated a process of forming a template for future contractual negotiations between Children’s Aid Societies as placement authorities and residence operators. A Ministry letter to the Applicant stated in April 2004:

As you are aware, these agreements are negotiated and signed by the CAS and individual operators at the time of first placement and annually thereafter. At this time there is considerable variation on these arrangements and feedback from a number of sources identified the value in reducing the number and range of roles, responsibilities and costs that need to be negotiated agency by agency.

SUBMISSIONS:

In his submissions counsel for the Applicant argued that the imposition of this particular term was offensive to the appropriate construction of the legislation. He began by positing that the whole purpose of getting private operators (indirectly funded operations) into the delivery of this particular service was that the old system of directly funded Children’s Aid Societies had become too costly. In the present system the Ministry is the source of funding and each operator in turn establish arrangements with the placing agencies (Children’s Aid).

His principal objection is that having the private operators submit audited statements is inappropriate in that it is obvious the information can be used to set ongoing per diem rates. He has no argument with the necessity to have an initial per diem set as in that instance there remains freedom of contract, that is the operator can walk away. Once established however there becomes a relationship of one paymaster and a per diem operator subject only to an internal appeal process in the Ministry, with no hearing in the legal sense. This would offend the tenet that a person’s livelihood must be protected from administrative fiat or caprice. In this case there must be a system of freely negotiated contractual relations available.

Counsel for the Applicant pointed to the Ministry’s scope of contractual rights and

obligations, sec 7 and 7(b). His position was that it should be read as being limited to agreements negotiated (agreements should be read as contractual agreements arrived through contractual negotiations not imposed). The imposition of the present terms and conditions amounts to price setting without legislative authority. There is no objection to the use of financials for policing but not for annual per diem rate setting.

The Ministry position is that annual per diem rates have to be set appropriately for the good of children and best use of scarce public resources. The effort to provide a contract template to standardize rate setting falls within the purview of the Ministry as regulator. The request for and use of the information sought falls within the duties of the Director appointed under the Act to issue and renew licenses for children's residences.

Alternatively the financial statements of the operator would show whether a facility had the wherewithal to maintain the bargained for placement arrangement.

Counsel urged the broadest interpretation of the Act in order to accommodate the position of the Ministry as regulator. The Tribunal need only look to section 1 of the Act to inform itself as to the guiding premise in determining the intent of the governing legislation. The Tribunal should defer to the expertise of the regulator in pursuit of the Act's stated goal before intervening to limit that authority unless it can be shown that the exercise of that authority conflicts with a demonstrated higher purpose. If the evidence produces the result that there exists a balance to be weighed between a common law right and a regulatory action taken in pursuance of the object of the legislation then, certainly as here in the case of children's welfare, the latter must prevail.

As the moving party the Applicants must demonstrate that the imposed term would not lead to a better administration of the Act and by implication the betterment of the welfare of children. It is well within the mandate of the Director to ensure the financial soundness of the residences in her area as a condition of a license.

CASES:

Re Doctors hospital and Minister of health et al.68 DLR (3d) 220

In this case applications were brought on behalf of a number of Ontario hospitals seeking declaratory relief from the effect of a decision of the Minister of Health through Order in Council relating to their closure. From the evidence produced it was clear that the action by the Minister was being taken for financial or "cost efficiency" reasons. There was no suggestions that the closures were for any reasons relating to the soundness of their respective operations. In short not for any "regulatory" purpose.

The authority under which the Minister was acting was stated as being section 4 (5) of the

Public Hospitals Act R.S.O. 1970 c. 378:

any approval given or deemed to have been given under this Act in respect of a hospital *may* be suspended by the Minister or revoked by the Lieutenant Governor in Council (italics added)

The issue before the Court was whether the royal prerogative of the Lieutenant Governor had been appropriately exercised. It was conceded by the Attorney General that Orders in Council could be reviewed by the courts.

Counsel for the applicants in the case argued that the royal prerogative had been improperly used in that it was exercised for a purpose extraneous to the Act. As the Act was regulatory in nature financial considerations were an invalid basis for the Minister's decision and therefore they should be set aside.

Counsel for the respondent argued that the Courts should only look behind Orders in Council in specified circumstances and that any right to a hearing flowing from the exercise of the Royal Prerogative must be expressly granted.

Cory J as he then was, dealt with the question of whether the Order in Council revoking the approvals of the hospitals was based upon considerations extraneous to the purpose of the Act. He found from a review of the Act and its history that its primary concern is.... "the staffing, management and operation of public hospitals". Further the authority for the subject revocations comes from the quoted section 4(5). That section could never have been intended to exercise financial control over hospitals, that is to revoke a hospital's approval on the basis of lack of funds as opposed to some deficiency in the hospital's ongoing operation.

By this reasoning the learned Judge decided that once the statute in question is determined to be regulatory in nature it follows that the Royal Prerogative could only be used in furtherance of its policies and objectives. It follows further that any such exercise is subject to review in the absence of clear words to the contrary.

Since the Orders in Council were founded upon considerations extraneous to the purpose of the Act his Lordship issued a declaration that they were invalid.

Morguard Properties et al and the City of Winnipeg [1983] 2 R.S.C. 493:

The respondents appealed to the Manitoba Court of Queen's Bench for an Order prohibiting the Board of Revision of the City of Winnipeg from considering an application pursuant to section 159(3) of the *City of Winnipeg Act* to lower an assessment of their properties. The issue was whether the Board was estopped from re-assessing the applicant's properties per section 4(1) of a Statute entitled "an Act respecting the Assessment of Property for Taxation in Municipalities". The section read:

the same level of values as were used in assessing lands....for the years 1980 shall apply when making assessments for 1981 and 1982.

The court of Queen's Bench concluded that the effect of the section was to freeze the assessment of property for 1981 and 1982. The Manitoba Court of Appeal confirmed holding that the provision superseded the provisions of the *City of Winnipeg Act*.

The issue before the Supreme Court was whether the legislation could alter the rights of taxpayers without expressly doing so. In allowing the appeal the court held that the newer statute was merely superimposed upon the assessment provisions of the *City of Winnipeg Act*. No rights available to taxpayers under that Act were derogated and the taxpayer's appeals to the Board of Revision could proceed. Estey J in his reasons reviewed the section in question and the basis of statutory interpretation upon which he relied. On the subject of the actual section he stated:

Section 4 does not of course, deal directly with the assessment produced under the city of Winnipeg Act. It simply provides that...“the same level of values as were used in assessing lands” for the year 1980 shall apply when making assessments for the years 1981 and 1982. Nothing is mentioned about applying and using the assessments of 1980 for the years 1981 and 1982, and nothing is said of the continuance or otherwise of other proceedings or elements in the assessment process such as sec 159 (of the City of Winnipeg Act)

The *City of Winnipeg Act* he stated, at page 506 had been for years the governing basis for assessment. Any amending legislation would have to expressly redefine the rights granted thereunder. His Lordship referred to the judgement of Lord Cairns in *Partington v Attorney General, 1869 L.R. 4 H.L. 100* to emphasize the point that the Courts have always insisted that for there to be an imposition of a tax such imposition has to be clear in the wording of the statute. Any ambiguity should be read in favour of the taxpayer; the courts should not in such circumstances assume the intention of the legislature. Such principles apply where the rights of the citizen are involved. He quotes from Ritchie J in *Nicholls Robinson v Cumming (1877) 1 S.C.R. 395 @ 422*:

When a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed....

The sole qualifier to this principle is stated by Estey J on page 510:

The only qualification on this approach lies in the principle that the statute must be read as a whole.

His Lordship continues with a quote from Viscount Haldane in *Lumsden v Commissioners of Inland revenue [1914] A.C. 877* at pp 896:

My lords, I said at the beginning that the duty of judges in construing statutes is to adhere to

the literal construction unless the context renders it plain that such a construction cannot be put on the words.

Rizzo and Rizzo Shoes Ltd (Re) [1998] 1 R. S. C.

The Rizzo case dealt with the issue whether severance and termination monies were owing to former employees from a company petitioned into bankruptcy. The rights to the monies depended upon competing interpretations of the *Employment Standards Act* R.S.O. 1980 c137 ("the Act"). One interpretation of the section in question led to the conclusion that the monies were owing to workers who were in fact terminated former employees, that is, those whose employment had ceased prior to the petition. The other interpretation led to the employees who were now former due to the bankruptcy being subsumed into the category. The question was whether bankruptcy could be the equivalent of employer termination within the meaning of the Act. Section 40 of the Act deals with notice requirements of employers to employees upon termination and the consequences to the employer in terms of monies owing if the notice provisions are breached:

40(1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives:

- (a) one week notice in writing to the employee if his or her employment is less than one year;
- (b) (the Act goes on to list pay owing for varying lengths of service)

40(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non overtime work week for the period of notice prescribed by subsection (1)

Section 40a 1(a) dealt with the severance obligations in cases where "terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment"

the employer shall pay severance to each employee whose employment has been terminated and who has been employed by the employer for five years or more

At the Court of Appeal Austin J stated:

The plain language of sec 40 and 40a does not give rise to any liability to pay termination or severance except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989 following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

Iacobucci J reviewed Austin J's opinion that as the employment was not terminated by an act of the employer but by an order of bankruptcy no liability under the Act arose. The opposing party on appeal took the position that the Act was designed to distinguish between voluntary and involuntary termination. The Act would protect employers from

liability towards employees who ceased employment voluntarily. Where employment ceases through an action by the employer the termination provisions of the Act are triggered. The plain words of the statute do not allow for that triggering when employment ceases through circumstances not involving an act of the employer.

His Lordship felt the Court of Appeal's analysis to be incomplete. He preferred the more expansive approach to statutory interpretation as expressed by professor Driedger in *Construction of Statutes* (2nd ed.1983).

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

His Lordship also referred to the *Interpretations Act* R.S.O. 1980 c 219 s 10:

Every Act shall be deemed to be remedial and that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Iacobucci J found that the scheme of the *Employment Standard Act* (ESA) was to establish a mechanism to provide for standards to protect the interests of employees. It therefore could be characterized as “benefits-conferring” legislation

His Lordship states on page 48 is approach to the sections under scrutiny:

As I see the matter, when the express words of ss 40 and 40a of the ESA are examined in their entire context there is ample support for the conclusion that the words “terminated by the employer” must be interpreted to include termination resulting from bankruptcy of the employer

The Act as benefits-conferring legislation must be given the generous interpretation called forth by that characterization. A finding that employees who no longer have employment due to bankruptcy are not entitled to the same severance as those terminated under the “plain wording” analysis of the Court of Appeal would be counter to the overall intent of the Act.

LAW:

The Child and Family Services Act:

Section 1

The purposes of this Act are,

- (a) as a paramount objective, to promote the best interests, protection and well being of children

Section 7

The Minister may,

- (a) provide services and establish, operate and maintain facilities for the provision of services; and
- (b) make agreements with persons, persons and agencies for the provision of services and may make payment for those services and facilities out of legislative appropriations.

Section 198(1)

A licensee who is dissatisfied with the terms and conditions prescribed by a Director under subsection 193(3),(5) or(6) is entitled to a hearing by the Tribunal if the licensee mails or delivers to the Director and the Tribunal within 15 days after receiving the license a written request for a hearing.

Section 193(1)

No person shall,

- (a) establish, operate or maintain a children's residence

except under the authority of a license issued by a Director under this Part

- (5) subject to section 196, a licensee who applies for renewal of the license in accordance with this Part and the regulations and pays the prescribed fee is entitled to have the license renewed by a Director, subject to any terms and conditions imposed by the Director.

Regulation 70

Section 78(1)

Every licensee shall in respect of each residence maintained and operated by the licensee

- (a) keep a complete record of revenues and expenses made in connection with the operation of each residence; and
- (b) prepare and submit financial reports to a Director when required by a Director including reports by a public accountant licensed under the Public Accountancy Act.

Section 105(1)

Every person who applies for a license to establish, operate and maintain a residence shall prepare and keep on file and provide to a Director when required by the Director,

- (i) a plan for securing funds to establish, equip and operate the residence.

APPLICATION OF LAW TO FACT:

By operation of section 193(5) there is an entitlement to a license renewal upon payment of the prescribed fee and that entitlement may be made subject to terms and conditions imposed by the Director. If a licensee is dissatisfied with the imposed terms and conditions an appeal lies to the Tribunal.

For the Tribunal to rule upon such an appeal an understanding of the legislative intent underlying the scope of the Director's power to impose terms and conditions is required. Such a determination gives the Tribunal a basis for determining whether the appeal is properly grounded. The path to the understanding of legislative intent has been recently lighted by the decision of Iacobucci J in *Rizzo* quoted above. Lower courts are advised of the usual caveat against overly deconstructing statutes to the point of finding themselves, intentionally or otherwise, on the road to result oriented adjudication.

His Lordship uses as his point of analytical departure Professor Driedger's "Modern Principle" of statutory interpretation quoted above. Accordingly, the first task is to read the words of the Act, "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". In *Rizzo* case the court went on to "characterize" the Act under scrutiny and determined that characterization to be "benefits conferring" legislation. By that determination benefits were found owing to a class of employees through the operation of a set of circumstances not in fact explicitly set out in the legislation. Implicit in this analysis is the fundamental assumption that all words are put into an Act for a reason and that reason can only be, by implication, the furtherance of the intent of the Act determined in turn by applying the modern interpretative analysis. If as in the present case an administrative official, the Director, is granted the mandate to impose terms and conditions upon licenses there is the assumption that such impositions can only be made within the intent of the legislation. And if the Act can be fairly characterized as "child welfare" legislation then the imposed terms should be read as being within that principle context unless shown otherwise by the moving party. That is, an appeal must be grounded in an objection that the impositions were not so made.

The Tribunal agrees with counsel for the Ministry that to discern the legislative intent of the *Child and Family Services Act* one need look no further than Section 1.

The Applicant contends that the Director was performing an administrative function beyond what the Act had granted. The terms imposed in the licenses were not contemplated by the Act in that they infringed a common law right of the Applicant. Applying the test in the *Morguard* case, which predates *Rizzo*, the Applicant contends that any such derogation of rights would have to expressly set forth in the legislation. It was established that the terms were imposed as a result of the failure of the Applicant to provide the information

voluntarily. It was also established on the preponderance of the evidence that the financial information could be provided to Children's Aid Societies to form part of a contract negotiation template to establish a per diem rate with operators in whose care children were placed.

The Applicant further contends that the right to demand financial information granted in Reg 70 section 78 does not translate into the use of that information for rate setting. The words, "make agreements" in Section 7 of the Act must be read to mean freely negotiated contracts not the imposition of rates. The parties at the beginning of their relationship is one of freely contracting parties (The Ministry sets a rate and the operator accepts or walks away). Contract renewals should not be trammelled by one side, The Ministry, having the financial position of the other in hand. The exposure of how efficiently the contractor operated the childrens' home should not be an ingredient in negotiations. This assertion if valid would mean that the authority granted in Section 78 should be read as meaning the use of financial information solely in the oversight function of the Ministry. The principle complaint about the imposed necessity to provide financial statements, in short, is the use to which they could be put. As the Tribunal understood the argument it is the provision of the information by the Ministry to the Childrens' Aid Societies that is objectionable. In essence the operator's ability to carry on business in an unfettered manner is being thwarted by administrative fiat without a proper recourse. The right to an internal review of per diem rates does not meet this test. The Ministry's position that the operator could become a private institution if it finds the terms onerous is a bit thin on the evidence particularly having carried on business for some time under government control. The fact that financials were for the prior year and that this retroactivity adds to the undesirability of their production could not be woven logically into the argument by the Tribunal.

The Ministry, as stated, contended that applying Iacobucci's analysis in *Rizzo* to Regulation 70 sections 78 and 105 along with sections 1, 7 and 193 of the Act the Tribunal should conclude that imposing the requirement to produce financial information from licensees is within the mandate of the Director. The Ministry is the party responsible for the regulation and administration of these homes and as such is required to husband the public resources within its budgetary constraints. The Ministry provides the funding but it is the CAS that enters into the contracts with the operators of the residences for the placement of children. Children can come into CAS care with some immediacy and through a variety of circumstances requiring placement decisions that must be made with some alacrity. In these circumstances the Ministry as the dispenser of funds, wants some consistency in these placements and it was decided that a form of contractual template between operator and placing CAS would serve that end. The contracting CAS and the Ministry could be reasonably assured of the financial soundness of the operator and the types of care its financial resources would allow.

In summary the Ministry takes the position that if it has the right to require financial information then its use of that information should not be abridged unless and until that use

is shown to be outside of the scope of the Director's administrative domain as determined by an appropriate reading of the legislation. If such a reading leads the Tribunal to the conclusion that the Act is "child welfare" legislation then the concerns of the Applicant must yield in favour of the Director's imposed terms and conditions. And in any event it has not been demonstrated that the financial information will be either widely distributed or used solely for contract negotiations. Still further it has been not demonstrated that the use of the information in templating contracts so distorts the negotiation process as to amount to a reversible administrative decision.

The Tribunal having considered the positions of the parties decides in favour of that put forth by the Ministry and so rules.

ORDER

It is the decision of the Tribunal in accordance with the jurisdiction granted by the Act that the appeal of the Applicant fails.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

RELEASED: October 19, 2004

File name: 2301.2365.cfsa.maryhomes.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.

PRE-HEARING

EVAMOORE RESIDENTIAL SERVICES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GARY S. KAY, Counsel, representing Evamoore Residential Services

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

DATE OF
PRE-HEARING: October 6, 2004

Toronto

ORDER

Following attendances on October 6, 2004 at a pre-hearing before this Tribunal of Gary S. Kay, Counsel on behalf of Evamoore Residential Services (the "Applicant") and Katharine Renison, Counsel, on behalf of the Director under the *Child and Family Services Act* (the "Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, December 15, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, at 9:30 a.m. on Thursday, December 16, 2004 at the Tribunal's above address:

- 1) The Parties to the hearing shall be the Applicant and the Director.
- 2) The Parties recorded that there was no resolution at the pre-hearing of any of the issues in this matter. The Parties undertook to attempt to resolve issues in dispute when the Parties Counsel meet further prior to the hearing.

- 3) Counsel for the Director, with the consent of Counsel for the Applicant, moved that certain aspects of the Director's Proposal dated July 16, 2004 be amended namely:
 - a) the deletion of the letter "B" at the commencement of the second paragraph on page 26 of the Proposal and the substitution thereof of the letter "C".
 - b) the deletion in paragraph A.20 (a) and (b) of the words "probation officer" and the substitution thereof of the word "parent" in both subparagraphs (a) and (b) of paragraph A.20.
- 4) The motion referred to in paragraph three (3) above, having been consented to by the Applicant's Counsel, is hereby granted subject to the right of the Applicant, if necessary, to amend its Response to the Director's Proposal, as amended.
- 5) The Director's Counsel undertook to make Disclosure to the Applicant's Counsel in terms of Rule 6 of the Tribunal's Rules of Practice, at the termination of this pre-hearing.
- 6) The Applicant shall make full disclosure in terms of Rule 6 of the Tribunal's Rules of Practice (November 3, 2003).
- 7) The Parties, not less than fourteen (14) days prior to the hearing, shall provide each other with the full names of all witnesses that they intend to call to testify on their behalf at the hearing and shall further provide the other Party with a brief written summary of the intended evidence to which such witnesses shall testify.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 13, 2004

FILE NAME: 2522.cfsa.Evamoore Residential Services.prehrg.order.doc

PREHEARING

836591 ONTARIO LTD. OPERATING AS MARY HOMES

APPEAL TO THE TERMS AND CONDITIONS PRESCRIBED BY
THE DIRECTOR UNDER SECTION 198 OF THE *CHILD AND
FAMILY SERVICES ACT*

TRIBUNAL: IRVIN H. SHERMAN, Q.C., Vice Chair

APPEARANCES: KATHARINE RENISON, Counsel, appearing on behalf of the Director
under the *Child and Family Services Act*

JACK WARREN, Counsel, appearing on behalf of 836591 Ontario Ltd.
operating as Mary Homes

DATE OF PRE-HEARING: September 27, 2004 *by teleconference*

ORDER

Following attendances on September 27, 2004 at a prehearing by teleconference before this Tribunal of Katharine Renison, Counsel, who appeared on behalf of the Director under the *Child and Family Services Act* (the "Respondent" and the "Act" respectively) and Jack Warren, Counsel, who appeared on behalf of 836591 Ontario Ltd. operating as Mary Homes (the "Applicant");

1. IT IS ORDERED THAT the hearings of the five appeals herein be consolidated because they all relate to the same issue.
2. IT IS FURTHER ORDERED THAT these hearings be scheduled to a date to be fixed by the Registrar following the release of the decision of Vice Chair McIntosh on two appeals brought by the Applicant on a similar issue.

3. The parties hereto are advised to disclose all evidence and the books of authority with the time frame for disclosure as set out in section 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C.
Vice Chair

RELEASED: September 29, 2004

File name: 2403-4.2478-80.cfsa.maryhomes.prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER OF
836591 ONTARIO LTD. O/A MARY HOMES

AND IN THE MATTER OF the terms and conditions prescribed by the Director under section 198 of the *Child and Family services Act* to operate a children's residence under the name of Major Road Residence, St. Joseph Group Home and Kingfisher Residence
- Date of Issue of Licences: June 21, 2004

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

836591 ONTARIO LTD. O/A MARY HOMES

Applicant

- and -

DIRECTOR, UNDER THE *CHILD AND FAMILY SERVICES ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing by teleconference in the above matter on Thursday, September 9, 2004;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-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 Monday, September 27, 2004 by teleconference.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: August 23, 2004

file name: 2478.2479.2480.Mary Homes.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



836591 ONTARIO LIMITED o/a MARY HOMES

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSIONS OF TIME

TRIBUNAL: G. MAURICE POWER, Presiding Member

APPEARANCES: EMILIO S. BINA VINCE, Counsel, representing 836591 Ontario Limited
o/a Mary Homes (the "Applicant")

KATHERINE RENISON, Counsel, representing the
Director under the *Child and Family Services Act* (the "Respondent")

DATE OF
HEARING: July 15, 2004

Via Teleconference

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal to extend the time for the Applicant, 836591 Ontario Limited o/a Mary Homes, to file an appeal with respect to the terms of two licenses issued to it by the Director under the *Child and Family Services Act*.

The hearing of this motion proceeded as an electronic hearing. The Applicant filed two Notices of Motion with the Tribunal, both dated June 18, 2004, together with supporting documentation. The reasons for the Applicant's motion to extend the time for filing its appeals are set forth in the documentation filed with the Tribunal. The Applicant contends that due to inadvertence, and press of court engagements in the offices of its solicitors, the time within which the Applicant was required to appeal the terms of the two licenses to the Tribunal under Section 198 of the *Child and Family Services Act* expired before the appeals were filed. The Applicant's solicitors requested the Director's consent to an extension of time for the filing of an appeal but such request was refused, hence the Applicant's motions to the Tribunal. The Director filed no materials, but the Director's counsel participated in the hearing of the motion to oppose the Applicant's motion.

FACTS FOUND PROVEN:

Having heard Counsels' submissions and having considered the documentation filed by the Applicant and the Registrar, the Tribunal finds the following facts to have been proven.

1. The Applicant operates 9 children's homes under the authority of licenses issued by the Respondent, and to the date of the Affidavit filed had received renewals of the licenses for four of these homes.
2. All four licenses contained a similar term, to which the Applicant objects. Upon receipt of the first two licences, the Applicant filed appeals in respect of the term in this Tribunal. These appeals were filed late, but as the Respondent's counsel consented to the late filing, no motion was necessary in those cases. Those two appeals are proceeding to a hearing.
3. The renewal licences for the other two homes arrived at the offices of the Applicant on May 12, 2004, while the Director, and operating mind, of the Applicant was away from the office. In the absence of evidence to the contrary, the Tribunal finds that the Applicant therefore had until close of business on May 27, 2004, the fifteenth day after receipt of the licenses, to file notices of appeal to the Tribunal with respect to the term it objected to in the licenses, under Section 198 of the *Child and Family Services Act*.
4. Upon her return to the office on May 17, 2004, the Applicant's Director transmitted copies of the licences by facsimile to the officers of the Applicant's solicitors, with instructions to commence appeals of the term in each license, similar to the appeals in respect of the two licenses previously received and appealed.
5. Due to what are termed in the Affidavit of the Applicant's Director "pressing demands and court engagements" within the office of the Applicant's solicitors, appeals in respect of the two licenses were not delivered to the Director and the Tribunal until June 2, 2004.
6. The Respondent's counsel refused to consent to the notices of appeal being filed late in these two cases.

THE LAW:

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

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.

Section 198 of the Child and Family Services Act states:

A licensee who is dissatisfied with the terms and conditions prescribed by a Director under subsection 193 (3), (5) or (6) is entitled to a hearing by the Tribunal if the licensee mails or delivers to the Director and to the Tribunal, within fifteen days after receiving the licence, a written request for a hearing.

APPLICATION OF LAW TO FACTS:

In his Reasons for Decision in the *Scanlon and Sterling* appeals to this Tribunal, Vice-Chair Israel considered similar requests for extension of time. He reviewed the basis for granting such extensions, as follows.

The test for determining whether there are reasonable grounds for applying for an extension of time to file an appeal and for the granting of relief are dealt with in *Re Bilodeau and ONHWP (1994) 25 CRAT 930*. In order to be successful in a motion to extend the time for filing an appeal, an Applicant must show:

1. That there was an intention to appeal within the time limit;
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if he did so as soon as the true situation was apprehended;
3. That there is not some overriding prejudice to the Respondent in allowing the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

The Tribunal, when considering whether or not to grant an extension of time for the filing of an appeal must be cognizant of the fundamental principle that justice must be done.

In applying the tests as reviewed by Vice-Chair Israel to the facts in this case, the Tribunal finds that the Applicant did have the intention to appeal within the time limit. The Applicant's Director instructed its solicitors to commence the appeals as soon as she became aware that new licenses had arrived containing the term objected to, on May 17, 2004. This was well within the 15 days permitted by Section 198 of the *Child and Family Services Act*. The fact that the notices of appeal were delivered six days beyond the time provided for appeal was due to a problem in the offices of the solicitor, not to any lack of diligence on the part of the Applicant or its Director.

There is no overriding prejudice to the Respondent in allowing the extension of time. No evidence was presented to the Tribunal by the Respondent that they would suffer prejudice

if an extension was granted and the Tribunal finds there to be no prejudice caused by the delay in the Applicant's filing of his Notice of Appeal. There are appeals of two similar matters involving the same parties already in progress before the Tribunal. The Respondent's counsel argued that this should be a reason to refuse the extension. Her argument, in effect, was that the Applicant would not be prejudiced by refusing the extensions. Since the wording of the term and the principal at stake is exactly the same in respect of all four licenses, she argued, the Respondent could be relied upon to apply the same principal applied by the Tribunal in its Decision on the two present appeals.

The Tribunal rejects this argument. Should the Tribunal order deletion or modification of the term objected to in the two existing appeals, it could lead to a very unfair situation. Despite counsel's assertion, the Respondent may not be bound to change the similar term in other licenses already issued to the Applicant. Should the Respondent choose not to amend the two licenses which are the subject of this motion, this would also tend to bring the fairness of the process and the legislation into question in the minds of the public. At the very least, the Applicant would be faced with an application to the Courts to correct the situation.

However, the Tribunal sees no reason why the four appeals cannot be heard together in these circumstances.

Finally, the Tribunal has to consider whether the Applicant has a reasonable chance of successfully appealing the term in its licenses. As noted by Vice-Chair Israel, "The bar is not set high for an Applicant to show a reasonable chance of success before the Tribunal". Section 198 of the *Child and Family Services Act* specifically provides that the Tribunal may consider and if appropriate change terms in licenses such as these. The Applicant in its notices of appeal has stated that the term in question is effectively retroactive and this is certainly a ground upon which the Tribunal would consider rescinding or changing such a term.

ORDER:

Accordingly, pursuant to the authority vested in it by Section 7 of the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders:

That the application to extend the time for the filing of the Applicant's appeal regarding the term in the licences of April 14 and 29, 2004 be and is hereby granted.

LICENCE APPEAL TRIBUNAL

G. Maurice Power,
Presiding Member

RELEASED: August 4, 2004

FILE NAME: 2403.2404.mary homes.motion.doc

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.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



SHARON LATHAM, operating a children's residence 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 THE LICENCE

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

APPEARANCES: SHARON LATHAM, the Applicant (via telephone)

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

DATE OF
HEARING: May 19, 2004

Toronto

ORDER

BACKGROUND:

This matter was scheduled to proceed peremptorily on Monday May 17, 2004. At approximately 6:30 that morning, the Applicant telephoned the Tribunal and left a message that she would not be attending for medical reasons. The Tribunal instructed the staff to contact Ms. Latham and inform her that a Doctor's certificate would be required to explain her absence. This was explained to the Respondent. A certificate did arrive stating that Ms. Latham would not be available for a number of days. On a previous occasion, March 8, 2004 there was an identical situation requiring the adjournment of an already sitting panel.

The Respondent sought leave to bring a Motion pursuant to Rule 11.1 of the Tribunal's Rules of Practice for Wednesday May 19. This was granted and the Motion was conducted by teleconference between the parties.

ISSUES:

The Respondent's Notice of Motion with Affidavit in support seeks an order from the Tribunal requiring:

- that the Applicant be required to submit a medical report sufficient for the Tribunal to make a determination as to reasonableness of her non-attendances and for all future adjournment requests, failing which the matter proceed ex parte;
- that the Applicant submit a final list of witnesses and that she be cautioned that no documents will be admitted that do not relate to persons on the witness list.

GROUND:

The Affidavit of Lucia Spampinato outlines the chain of events:

- On March 8, 2004 on no more than a few hours notice a similar justification for an adjournment was raised and granted.
- There have been late arrivals of the Applicant to hearings.
- The Respondent has never consented to these adjournments.
- The Respondent asked for and was granted preemptory status for the hearings.
- There has been a great deal of wasted time of Children's Aid (CAS) workers scheduled as witnesses.
- The Applicant has yet to subpoena witnesses or provide a witness list.
- There has not been adequate disclosure of documents pursuant to the Rules of the Tribunal.

On the issue of adjournments, the Respondent takes the position that the delays amount to an abuse of process and that the *Statutory Powers Procedure Act*

R.S.O. 1990, c. s. 22, s.3 provides that tribunals are able to make rulings that would prevent an abuse of their process.

On the issue of the failure to deliver both documents and a witness list, the Respondent takes the position that such breaches of procedure and directives prejudice the Respondent's right to know the case it has to meet.

The Respondent takes the position that as the Notice of Intention to Refuse to Renew the Applicant's licence was filed August 4, 2003 and the Notice of Appeal by the end of August, there should, by the Tribunal's own Practice Directive, be an anticipated decision date by August of 2004.

The Applicant takes the position that she is unrepresented by counsel and is thereby deserving some leeway in the enforcement of the Rule, and in any event she has no control over her absences.

DECISION:

The primary consideration for the Tribunal is the balance between fairness to the parties before it and the requirement of the Tribunal to control its process. The Tribunal is established as an oversight body to ensure that regulatory action taken by those charged with the administration of the various Acts under its purview is carried out with due regard to the public interest deemed in need of protection by the legislature and fairness to the individuals made subject to the regulations.

Part of its oversight function is the responsibility to grant a hearing to those who believe themselves to have been unfairly or inappropriately dealt with by the regulator. Such hearings to be countenanced as "fair" must serve both of the above ends. Patently neither of these ends can be considered served unless the Tribunal's deliberations are conducted in a timely manner. It is the history of most tribunals that adjournments are the largest impediment to timeliness.

In the present case a three-person panel has been established to conduct the hearing. The difficulty of re-scheduling such a panel requires no further comment. As well, it has been established that the witness lists are very long and involve professional people with multiple commitments. Same day requests for adjournments when all the resources of the Tribunal have been allotted must be dealt with.

The Tribunal's practice directions regarding adjournments outline the appropriate considerations. These reflect the findings of the Supreme Court of Canada in *Prassad v. Canada (Minister of Employment and Immigration)* 1989 36 *Administrative L.R.* 72 at p 84.

As a general rule,... tribunals are considered to be masters in their own house. In the absence of specific rules laid down by the statute or regulation, they control their own procedures, subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournments of proceedings is very much in their discretion.

In addition the Practice Directive states that when dealing with adjournments the Tribunal shall consider:

the public interest in the delivery of the Tribunal's services in an optimum, timely and cost effective manner; and, in particular the direction of the Report of the Special Review Committee on the Review of Regulatory and Adjudicative Agencies Draft Performance Measures (March 1999) that 'timeliness is critical in the administration of justice' and that 'hearings be completed within one year of the date of filing'.

The Respondent has asked for there to be an order requiring a medical report and prognosis from the Applicant, failing which the hearing to proceed *ex parte*. Any such order would be extraordinary relief as it would necessarily offend one of the fundamental tenets of "fair hearing", namely *audi alterem partes*. Before contemplating such a finding, it is incumbent upon the Tribunal to weigh the consequences to the Applicant against the public interest the Tribunal is bound to oversee.

On two occasions to date, the Applicant has been granted same day adjournments resulting in a stand down of an already assembled panel and witnesses. There have also been late appearances. To date the Tribunal has been accommodating.

The unavoidable facts however are that professional child care witnesses called by the Respondent are being uselessly kept from their manifold duties. As well it was urged by the Respondent that as long as there is no decision by the Tribunal there remains open for business a children's home deemed unfit by the Regulator. This latter point deals with the issue of the degree of deference owed by the Tribunal to decisions of regulators.

It is necessary that there be public confidence in a regulatory scheme established to monitor businesses licensed to operate in areas deemed by the Legislature to be in need of public interest protection. The licencing of Children's Homes without question falls within this domain. To this end there is a body of expertise and experience established over time within the regulatory body upon which decisions are rendered.

Nevertheless these decisions are of necessity largely based upon the findings of investigators and are perforce not subject to the rules of natural justice. It is the Tribunal's function to oversee the operation of such regulatory schemes to ensure that they are carried out without favour or caprice. In addition it has been long established that the right to carry on one's livelihood once granted cannot

be taken away without some form of due process, usually subsumed under the rubric of “rules of natural justice”. The courts have given some insight to this balance.

In *Muscillo Transport Ltd. v. Ontario Registrar of Motor Vehicles R.S.O. 1990, c. H.8* the Court of Appeal Brooke and Moldaver JJA Borins JA (dissenting in part) stated that:

We all agree that deference must be accorded the expertise of the Registrar and the Board. But that having been said, my brother Moldaver and I agree that the evidence supports the conclusion reached by the Registrar and the Board. The appeal was brought on an issue of apprehended bias on the part of the Registrar and the court ruled that the de novo aspect of that allegation any suggestion of unfairness.

In a later decision released February 11, 2003: *Registrar, Motor Vehicle Dealers Act and Shine Car Sales*, the Divisional Court, Lane J dealt with the issue of the degree of deference owed by a quasi-judicial tribunal to the decision of a regulator. Per Lane J:

It should be clearly understood that the Tribunal owes no deference to the Registrar's opinion. The Registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference.

These cases while useful on the issue of counsel's point of the continuation of the Applicant's license do not directly address the dilemma facing a Tribunal bound to conduct a hearing in accordance with the rules of natural justice yet deterred from doing so by continued same day adjournments by one of the parties. If the delays were clearly inexcusable the Tribunal would be perfectly justified to continue ex parte. Where intermittent illness is the cause the problem is not so easily dealt with.

The Tribunal must strike a balance between the competing interests outlined. That balance in the present case should, on the facts presented come down in favour of the matter proceeding even in the absence of the Applicant unless satisfactory evidence is presented to the Tribunal which would convince it to rule to the contrary.

ORDER:

The Tribunal orders the following:

1. The Applicant will by May 26, 2004 forward or have forwarded to the offices of the Tribunal a medical report explaining her past absences and containing a prognosis sufficient to allow the Tribunal to make determinations as to her future availability. Failure to do so will result in the hearing continuing ex parte.
2. In addition, prior to the next hearing date of June 1, 2004, the Applicant is ordered to produce a witness list and a list of documents she wishes to

rely upon at the hearing.

3. The hearing shall continue to take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Tuesday, Wednesday, Thursday, June 1, 2 and 3, 2004, and be continued on Monday, Thursday, Friday, June 7, 10 and 11, 2004 and Monday, Tuesday, August 16, 17, 23 and 24, 2004.

LICENCE APPEAL TRIBUNAL

WILLIAM McINTOSH
Vice-Chair

CECILA TAYLOR
Member

MALCOLM FEALING
Member

Released: May 21, 2003

File name: 1892.cfsa.reista.motion.doc



PREHEARING

836591 ONTARIO LTD. OPERATING AS MARY HOMES

APPEAL TO THE TERMS AND CONDITIONS PRESCRIBED BY
THE DIRECTOR UNDER SECTION 198 OF THE *CHILD AND
FAMILY SERVICES ACT*

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES: KATHARINE RENISON, Counsel, representing the Director
under the *Child and Family Services Act*

EMILIO S. BINAVINCE, Counsel, appearing on behalf of 836591
Ontario Ltd. operating as Mary Homes

DATE OF PRE-HEARING: May 25, 2004

Ottawa

ORDER

Following attendances on May 25, 2004 at a prehearing before this Tribunal of Katharine Renison, Counsel, who appeared on behalf of the Director under the *Child and Family Services Act* (the "Respondent" and the "Act" respectively) and Emilio Binavince, Counsel, who appeared on behalf of 836591 Ontario Ltd. operating as Mary Homes (the "Applicant");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, August 19, 2004 and to continue, if necessary, on Friday August 20, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant and Respondent.
2. The hearing shall relate to two children's residences in the City of Ottawa operating under the names of Mary Homes Emergency Residence (Mary and Andre) and Mary Homes Lacroix Residence.
3. The hearing shall relate to the sole issue of the terms and conditions attached to the renewals of registration under the Act issued to the above named two children's homes on February 5, 2004 and April 23, 2004 respectively.
4. There was no settlement of any or all of the issues as Counsel for the Applicant

advised the Tribunal that he required to obtain instructions from his clients, including the Applicant, in regards to the "Residential Care Report" found at Tab 2 of the Respondent's Book of Documents. The Applicant's Counsel did acknowledge that the contents of pages marked 2 of 7 and 3 of 7 of such report were acceptable to the Applicant.

5. Counsel for the Applicant undertook to communicate with both the Applicant's Board of Directors and his various other clients in order to obtain their detailed position regarding the report, what aspect or aspects of the report they consider are not acceptable to them and the reason and/or reasons why such aspects are unacceptable.
6. Counsel for the Applicant advised the Tribunal that by no later than June 25, 2004 he would advise the Respondent's Counsel in writing as to the Applicant's and his other clients' position in regards to the report.
7. The Applicant's and Respondent's Counsel informed the Tribunal that subsequent to the Applicant's Counsel's written communication addressed to Respondent's Counsel as above, they would again confer in person or by teleconference in order to ascertain whether all or any issues are capable of resolution. Failing resolution this matter shall proceed to hearing on the dates set above in this Order.
8. Both Parties shall fully comply with all the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice.
9. Both Parties shall not less than 10 days prior to the hearing serve on the other Party and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: June 1, 2004

File name: 2301.cfsa.maryhomes.prehrg.doc



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SHIVRAM CHADEE

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

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: PHILIP ULRICH, Counsel, representing Shivram Chadee, the
Applicant

JACOB BAKAN, Counsel, representing the Registrar, *Collections
Agencies Act*

DATES OF
HEARING:

October 5, 6 and 28, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Shivram Chadee to the Licence Appeal Tribunal from a Proposal of the Registrar under the *Collection Agencies Act* R.S.O. 1990, Chapter c. 14 as amended ("the Act") to revoke his registration as a collector. The Proposal is contained in a Notice of Proposal ("the Notice") dated May 27, 2004 duly served upon the Applicant. Mr. Chadee has been a registrant since October 1990.

The Registrar bases his Proposal to revoke on sections 6(1)(b) of the Act and section 20(d) of Regulation 74. He states in the proposal:

The past conduct of Shivram Chadee affords reasonable grounds for the Registrar to believe that he will not carry on business with integrity and honesty for the following reasons:

- a) In or about the months of December 2003 and, January and February 2004 Chadee made repeated calls to the debtor company identified as Baun Construction Inc. and spoke to employees in an attempt to contact Jeff Baun (hereafter also "Baun"), the company's President. Chadee directed insulting, degrading and lewd remarks, and used profanities in speaking with Baun and his employees. The nature of these calls constituted harassment of the company's principal Baun, contrary to the provisions of section 20(d) of the Regulations;
- b) In or about the month of October 2003 Chadee made telephone calls to the residence of a consumer identified as Elizabeth Wyse (hereafter also "E. Wyse"). E. Wyse is the mother of the alleged debtor Lloyd Wyse. In speaking with E. Wyse Chadee made reference to L. Wyse in a manner that was degrading and insulting and made inappropriate remarks concerning domestic violence between L. Wyse and his spouse. During another conversation with E. Wyse Chadee spoke to her in a manner that was insulting. In a conversation with L. Wyse Chadee made reference to him in a manner that was insulting. The nature of these calls constituted harassment of a member of the debtor's family, contrary to the provisions of section 20(d) of the Regulations;
- c) In or about the month of July 2003 Chadee made telephone calls to the residence of a consumer identified as Stanley Blair (hereafter also "S. Blair"). During one of these telephone calls Chadee spoke to S. Blair in an insulting and demeaning manner. During more than one of these telephone calls Chadee contacted Katharine Blair (hereafter also "K. Blair"), spouse of S. Blair, and spoke to her in a manner that was insulting and demeaning and used profanities. In speaking with K. Blair and on a voicemail message, Chadee made reference to S. Blair and described S. Blair in an insulting and a demeaning manner. The nature of these calls constituted harassment of S. Blair, contrary to the provisions of section 20(d) of the Regulations.

EVIDENCE:

The Registrar Mr. Brian Pitkin was called to give the position of his office and an explanation of the complaints process. He described the Registrar's role as providing a level playing field between debtors and collection agencies. This is done by using the provisions of the Act to regulate and oversee the methods used by collectors to acquire payment of outstanding debts. It is recognized that the relationship between debtors and those hired to collect debts will more often than not be acrimonious. Complaints come to another office within the Ministry and the services of that office are used by the Registrar.

It was his appraisal of the present matter that Mr. Chadee had gone beyond the bounds of acceptable behavior with regard to the attempted collection of the Baun, Wyse and Blair accounts listed in the Proposal. The extent to which the behavior exceeded acceptable bounds led him to the conclusion that the appropriate remedy under the Act was outright revocation. Mr. Pitkin stressed that the behavior involved by its nature must

have been known to Mr. Chadee to have been a breach of his registration. There were for this reason no intermediate steps taken such as counseling or letters of caution.

He receives about 3,000 complaints per year of which 80 to 90 involve allegations of harassment. There were calls in the three present cases to persons not the debtor which went beyond the permissible bounds of such calls. What really sealed the matter in terms of the appropriate sanction was the use of demeaning and sexually explicit language. There was not the requirement to unpack the operative word "harassment" contained in regulation 74 section 20, as the most cursory review of the statements reportedly used by the Applicant would fall within the term. The guidelines call for no more than three calls in one day to an individual debtor. It was the content not the frequency of calls that became the issue. There are no published guidelines as to what constitutes permissible language. The Tribunal was not provided with details of other complaints against Mr. Chadee.

Mr. James Masters was called to explain the actual processing of the complaints lodged by the three complainants. It was his analysis that the nature of the three complaints constituted a pattern worthy of sanction.

He was the author of the letters sent to Excel in response to the complaints asking for both the electronic records and an explanation of Chadee's behaviors. He went on to explain that the delay in response until the spring of 2004 regarding the Blair complaint was caused by the belated renewal of his contract with the Ministry.

Mr. Ashton Harripaul was called to offer a description of the collection process at Excel. He has known Mr. Chadee for 10 years and in fact Mr. Chadee is now his superior. He has worked with Mr. Chadee but not during the period in which the three complaints took place. If the complaints are true he stated they would be out of character for Mr. Chadee. A typical collector will receive complaints, some 3 to 5 per year. He described Mr. Chadee's day as one of constant phone calls, perhaps over 70 per day covering over five hundred files. Words such as "bitch" and "slut" are unacceptable in the industry and although the collection activity as described appears somewhat Dickensian it is expected that collectors keep a cool head. The driving force appears to be the fact that a collector's remuneration is contingent upon successful retrieval of monies owing. Debts referred to agencies such as Excel usually would not be worth pursuit through litigation.

Blair:

Mr. Blair testified that he had rented a Lexus automobile and due to financial difficulties found that he was unable to make the monthly payments of some \$1,000.00 as scheduled. Originally a \$65,000.00 vehicle there remained some \$46,000.00 outstanding. He was unable to rearrange the payment schedule and his leasing company was unwilling to fetch what he considered to be the appropriate retail price. As

a result the account was turned over to Excel for collection. Mr. Chadee was the collector put in charge of closing the loan and in due course began calling the Blair household commencing in the spring of 2003. He probably spoke to Mr. Chadee some six times. At first according to the testimony of Mr. Blair the calls were business like and professional but rapidly descended into acrimony. Mr. Chadee was made aware that Mr. Blair, due to a two year old bankruptcy. and other difficulties had insufficient assets or credit to cover the shortfall.

He stated that Mr. Chadee also called his wife and his daughter. The language used to Mrs. Blair was upsetting to the point of reducing her to tears.

Mrs. Blair testified as to the calls she received from Mr. Chadee. Mrs. Blair was not responsible for any part of the debt and Mr. Chadee did not suggest that she was.

Mr. Blair through his solicitor Mr. Brown reported the substance of Mr. Chadee's calls to Chadee's employer Excel with a copy to the Ministry of Consumer and Business Services by letter of July 24, 2003. The letter stated that that Mr. Chadee had said to Mr. Blair that he drove a Lexus to "pick up young broads because his bitch wife wouldn't service him"; also Mrs. Blair was referred to as "bitch, whore, cunt and prostitute." Further the letter states that Mr. Blair was a "bastard deadbeat husband, lazy son of a bitch who couldn't service his wife". When speaking directly to Mrs Blair Mr. Chadee reportedly told her that Mr. Blair was a "deadbeat husband, lazy son of a bitch who couldn't service his wife."

Mrs. Blair in her testimony confirmed the statements in the solicitor's letter as correct information. She stated that she found the language highly offensive and that it caused her anxiety when answering the phone for two months. She stated that there were messages with vulgarities on them but they were erased.

The complaint was apparently referred to Mr. Masters but there was not a notification to Excel regarding the complaint until March 15, 2004. As stated Mr. Masters was on contract and was de-activated in the interim. Mr. Pitkin stated that he took the allegations in the Blair letter seriously but as the matter had been referred to Mr. Masters and his contract regarding investigations was not renewed until January 2004, there was a 10 month hiatus between the Brown complaint letter and the Ministry's action letter of March 15, 2004. The point here raised by Counsel for the Applicant is that if timely action had been taken upon receipt of the July 2003 solicitor's letter, such as the standard letter of caution, the Baum and Wyse complaints of late 2003 and early 2004 would in all likelihood not have occurred.

Upon receipt of the Ministry's letter, Excel replied through Mr. Bryan, President, Mr. Chadee directly and an employee Mr. Hamdan; all letters are dated March 22, 2004. Mr. Hamdan informed the Registrar that he had spoken to Mr. Blair's solicitor Mr. Brown in February and was informed that he no longer represented Mr. Blair. He spoke to Mr.

Blair with no success. Mr. Chadee informed the Registrar that he did not use the offensive language towards Mrs. Blair as alleged. He stated that Mr. Blair had no intention of addressing the debt and simply had a solicitor's letter sent to the Ministry in order to avoid further contact with Excel. Mr. Bryan informed the Ministry that there were no violations of the Act and that the Mr. Blair's account would be referred for legal action as he refuses to deal with the matter.

Mr. Chadee was called to give his side of the story. On the subject of his individual workload he generally confirmed other evidence. He tries to contact 20 debtors per day requiring between 80 to 100 calls. Monthly he may get through to 400 debtors requiring perhaps 2,000 calls to sometimes 1,000 debtors.

Mr. Chadee testified that he made the comment about the use of the Lexus but to Mr. Blair not to Mrs. Blair. He explained that he used profanity after Mr. Blair swore at him after the more professional approach did not work. He denies using the highly offensive words to Mrs. Blair. He recognizes that they would be over the line to either gender but particularly to women. He did use the "deadbeat husband" phrase to Mrs. Blair and if the word "bitch" was used it was in the phrase "son of a bitch" to describe Mr. Blair not in reference to her personally.

Mr. Chadee admits that he crossed the line when he used the profanity. He says he did but it was in the heat of the moment and unintentional. He has been a collector for 14 years and has heretofore been under no sanction from the regulatory authority. He has no criminal record.

Baun Construction:

By letter of December 19, 2003 Baun was advised by Excel that an outstanding account of behalf of Ryder Truck Rentals had been placed with them for collection.

Mr. Baun is the owner of the debtor company and testified to the fact that complaints from his staff came to him about Mr. Chadee's tactics. He wrote a letter to Excel dated January 20, 2004 informing them of his displeasure and alerted Excel to the fact that a complaint would be lodged with the Ministry. In his letter to the Ministry Mr. Baun stated that he was aware of the delinquent account with Ryder trucks but was offended by the methods of the collection agency Excel.

Mr. Baun stated that he was aware of the outstanding account and that he would settle it. He further stated that he attempted to contact Chadee to be assured that Mr. Chadee in fact represented the creditor Ryder Trucks. He says that he and Mr. Chadee kept missing each others calls. He then made reference to Mr. Chadee calling his female staff "bitches", "sluts" and "dumb receptionists". The letter refers to an occasion when Mr. Chadee asked whether a female staff member preferred to be called a "bitch or a slut". On February Mr. Baun sent copies of telephone message slips relevant to the

Chadee calls. Finally produced was an account balance sheet between his company and Ryder from 1996. There is an entry indicating of a cheque returned NSF in mid 2002.

The Ministry responded to the complaint by letter to Excel of February 13, 2003. Along with the debtors complaint letter was a reference to further investigation indicating Mr. Baun being called a "prick". A response was required within 5 days. The response in fact came, after a prompt, on February 20.

It was Mr. Chadee's testimony that Baun was avoiding contact and had no intention of making good on the NSF cheque. His belief was that Baun was making assertions about honoring the account and asking questions about the authenticity of Excel as stalling tactics. He flatly denied the use of profanities and of calling Mr. Baun a "prick". He stated that Mr. Baun called him a Paki and that he had said to Baun "where's my fucking money" after several unsuccessful attempts to get him to forward the cheque he had said was going to be sent.

David Pinsent is a foreman at Baun Construction. He testified that he talked to Mr. Chadee on the telephone and recalls him saying: "I don't want to talk to those bitches anymore they keep putting me on hold".

Claudia Rojas is the receptionist at Baum Construction. She confirmed that the calls began prior to Christmas 2003 and at first were polite. She recalls four calls over two weeks. On one occasion she reported him saying: "get him out of the fucking meeting" and I want to speak to the prick". On another she recalls him saying: "I want my fucking money, I don't care if you lose your fucking job". She further recalls the use of the words "bitch" and "slut". She also noted a message on a telephone chit the following: "Mr. Chadee called asking for the prick".

Virginia Alfino, the Bookkeeper and Office Manager of Baun Construction also testified. She confirmed the outstanding account with Ryder as the source of Mr. Chadee's calls. As with other witnesses she confirmed an initial politeness followed by abusive language. She recalls Mr. Chadee saying: "what would you prefer bitch or slut".

Wyse:

Mrs. Wyse was called to describe the circumstances surrounding her communication with Mr. Chadee beginning in October 2003 relating to a debt owing by her son. As a result of this contact she phoned the police who put her in contact with the Ministry, following which she filed a complaint form which was received by the Ministry December 3, 2003.

The Ministry responded by letter of April 26, 2004 to Excel. In the letter Excel was asked to provide electronic records regarding the Wyse matter and for an explanation as to

why a non-debtor was being contacted. The inappropriate comments listed in the complaint were also put to Excel for an explanation.

Excel responded by letter dated April 30 signed by the President enclosing the requested data. Mr. Chadee also responded by letter of same date stating that a letter to the address was sent October 1, 2003 followed by telephone calls of October 23 and 24. He denied the use of the offensive language. Mr. Chadee affirmed the two calls in testimony. He did acknowledge the reference to “crack” though not in his letter, stating that it was untoward and made out of frustration. On the issue of contacting her on a debt for which she was not responsible he stated that Mrs. Wyse’s address was listed as a last known place and on the second occasion of calling the debtor came on the line.

Mrs. Wyse told Excel that she had nothing to do with the debt and that her son did not reside with her. She, like the other two complainants before the Tribunal, stated that the initial calls from Mr. Chadee were respectful but soon degenerated into nastiness. She specifically noted the use of the word “bitch” and that her son was a “low life on crack”. Mrs. Wyse was a pleasant lady of 56 years who testified calmly despite being visibly nervous. She stated in her complaint and in testimony that Excel was informed that the debt was her son’s and that he did not reside with her. She stated that on one occasion her son came on the phone while Chadee was calling

Llyod Wyse, Mrs. Wyse’s son testified that he was being called upon to pay arrears owing to his former co-operative. He stated that he had been ordered out of his residence by court order following a complaint from his former wife. His membership in the co-op had been cancelled and he disputed his obligation to pay. He said under cross examination that he had acted as a collector for six months and that he told Chadee that he could have his license lifted. He went on to say that Chadee had called him a “fucking deadbeat”.

SUMMARY:

From the viva voce and documentary evidence the Tribunal is satisfied that Mr. Chadee went beyond what he knew must have been the bounds of his registration as a debt collector however described. Mr. Chadee’s collection technique appears to have been the mailed fist in the velvet glove. His initial contact with debtors is professional and calm but escalates over time as results are not forthcoming. How far he went beyond the bounds is the grist for the mill of sanction. The Tribunal was not given much guidance as to hard and fast-proscribed behavior. It is the very language said to have been used that became the graveman of the matter. Mr. Chadee acknowledged he exceeded the bounds of behavior.

On the use of the word “prick” as it applied to Mr. Baun we have a denial from the Applicant and testimony from the Baun employees that the word was used. There was produced a copy of a telephone message slip jotted by a female employee dated February 12, 2004 containing the line “Mr. Chadee called asking for the prick”.

The use of the word “bitch” was testified to by the female witnesses as being directed towards them. Mr. Chadee stated that he did not use the term as a slight to women rather as it was included in the term “son of a bitch” relating to a debtor.

The use of the word “cunt” stated to have been spoken to Mrs. Blair was particularly troubling to the Tribunal. The Tribunal granted itself judicial notice of the fact that the term is immensely offensive in general but particularly so to women. There is no context, situational circumstance or etymological nuance that could possibly render the use of this word in any way benign. It is in the class of words that are per se offensive. Mr. Chadee flatly denies its use. He stated that he would never use such language to a woman. However he is a person who uses rough language and who makes literally thousands of calls per month in the course of his business. While there is no taped or written verification of the word’s use it is difficult for the Tribunal to believe a lady such as Mrs. Blair to forget being called such a term. It was difficult enough for her to acknowledge its use while on the stand.

LAW:

The *Collection Agencies Act* states as follows:

6(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.

7(2) Subject to section 8, 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 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

8(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 therefore on the applicant or registrant.

(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 a hearing and, on the application of the Registrar at the hearing may by order direct the Registrar to carry out the proposal or refrain from carrying it out and to take such action as the Tribunal 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.

9. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Regulation 74 under the Act states:

20. No collection agency or collector shall,
(d) make telephone calls or personal calls of such nature or with such frequency as to constitute harassment of a debtor, his or her spouse or any member of his or her family or household.

APPLICATION OF FACT AND LAW:

The determination of whether a breach of section 20(d) of Regulation 74 had occurred would, in some instances, call for a definition of “harassment” applicable to the circumstances of a complaint. Webster’s defines harass as “continuous, vexatious attacks, questions, demands or other unpleasantness”. In the present case the alleged and admitted language usage speaks for itself. There can be no possible explanation in the present circumstances for its use other than for harassment.

There can be no doubt that if the evidence is more consistent than not with the inappropriate words having been employed by the Applicant in his collection efforts then on the burden of proof required the section was breached. If breach is established the remaining question is whether on the totality of the evidence the sanction of revocation is warranted.

Counsel for the Registrar referred the Tribunal to the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers Act)* [1983] O.J. No. 1017 to inform the Tribunal of its role in deciding matters before it. The Tribunal in Brenner had made a determination that the evidence given by the applicant regarding his declaration of corrected behavior outweighed the evidence relied upon by the Registrar in determining an applicant’s worthiness for registration. The Divisional Court held that the proper test for the Tribunal in weighing evidence before it was:

Whether the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business according to law and with honesty and integrity. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In the matter of *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. the court held:

In our view the test in the Divisional Case of Brenner v. Ontario remains the proper test for this purpose. Brenner must be read carefully. It does not establish a rule that the registrar must be shown to be wrong in having concluded that there was reason to doubt that the registrant would carry on business appropriately. The Tribunal approaches the matter uninhibited in any way by the registrar’s view.

The court went on to describe the difference between an administrative finding based upon an investigation and that of a Tribunal after a hearing. The applicant is entitled to a “hearing” with all that the use of that term imports. The Tribunal cannot defer to the findings of the Registrar for the simple reason that it is commanded by the Act to arrive at its decision through a different process than that employed by the Registrar. The main difference of course being that the evidence before the Registrar is not tested in cross examination.

With no disrespect to the Registrar the Tribunal must proceed unimpeded by deference to his opinion for the reason that the Act in effect tells it to do so by granting the applicant a “hearing”.

Counsel for the Registrar submits that even on this basis there is sufficient evidence before the Tribunal to come to the same conclusion as the Registrar that the circumstances demand the sanction of complete revocation. There was no need for intermediate steps to have been taken such as a warning on the basis that the Applicant knew or ought to have known that his behavior was beyond that permitted by the regulations under which he is licensed.

Counsel for the Applicant states that a revocation is tantamount to denying the Applicant the right to make a living within his chosen occupation. This should not be done without due attention to all of the surrounding facts and without the Tribunal first satisfying itself that a less drastic sanction would serve the public interest. In that vein counsel argues that there is a heretofore clean record and that the three present complaints represent a tiny fraction of an otherwise uncomplained of course of conduct. As well the complaints may have been prevented had the complaints process of the Ministry not have been interrupted by the non renewal of Mr. Master’s contract. Finally, Mr. Chadee while admitting to the use of some of the bad language, for which he apologizes, he denies using all of the words attributed to him. The Tribunal was asked to factor in the evidence of Mr. Chadee’s co-worker Mr. Hauripal who stated that use of the described language would be out of character. It was noted that Mr. Chadee was that witness’s superior.

Counsel for the Registrar pointed to the fact of at least on one occasion in the Baun Construction matter there was corroborative written evidence of the use of foul language in the form of a telephone message pad notation. This should elevate the testimony in that instance at least beyond a “he said she said” situation.

He referred the Tribunal to the matter of *Lana Trina Rose LAT April 15, 2004*. The matter involved the use of profanity and threats of litigation. The “F” word and “bitch” were liberally employed. Ms. Rose denied the use of profanity but conceded she may have threatened legal action. The Tribunal in Rose could not decide which of the parties was truthful regarding the nature of the language. As well it decided that a single call could not represent harassment. Accordingly the Tribunal decided that the

Registrar had not satisfied the onus upon him of demonstrating that the Applicant had breached the regulations and ordered the Registrar to refrain from carrying out the 21 day suspension he had proposed.

Here as stated the Tribunal after observing the witnesses and taking into account both possible memory lapses on the one hand and exclusion of witnesses on the other that on a number of occasions Mr. Chadee breached the regulations.

It is the finding of this Tribunal that the Registrar has satisfied the onus of showing that Mr. Chadee has been in breach of Sec 20(d) Reg. 74.

Taking into account both Mr. Chadde's otherwise good record and the lapse in time in responding to the original complaint, the Tribunal is of the opinion that a licence suspension of six months is the more appropriate sanction.

ORDER:

Therefore by the powers vested in the Tribunal by the Act it is ordered that the Registrar suspend the registration of Mr. Chadee under the Act for a period of 6 months commencing from the issuance date of this decision.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: November 16, 2004

FILE NAME: 2424.caa.Chadee

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



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

JEAN FAYE FOWLER

IN THE MATTER OF the REGISTRATION of
JEAN FAYE FOWLER
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*

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

JEAN FAYE FOWLER

Applicant

- and -

REGISTRAR, *COLLECTION AGENCIES ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Collection Agencies Act*, R.S.O. 1990, Chapter C.14 as amended (the "Act"), Jean Faye Fowler (the "Applicant") initiated an appeal under section 8(4) of the proposal of the Registrar under the Act, dated September 20, 2004 in terms of which the Registrar proposed to refuse to register the Applicant as a collector;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 9 of the *Licence Appeal Tribunal Act*, 1999;

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 8 of the *Collection Agencies Act*, this Tribunal directs the Registrar, *Collection Agencies Act* to carry out his proposal dated September 20, 2004 to refuse to register Jean Faye Fowler as a collector.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: November 10, 2004

FILE NAME: 2628.caa.Fowler.dismissal.doc

LEVORN MOSES

MOTION TO CONSIDER AN APPLICATION FOR
EXTENSION OF TIME TO APPEAL A REFUSAL OF
REGISTRATION UNDER THE *Collection Agencies Act*

TRIBUNAL: KENNETH S. JEPSON, Vice-Chair

APPEARANCES: LEVORN MOSES (the "Applicant")

JACOB BAKAN, Counsel, representing the Registrar, *Collection Agencies Act* (the "Respondent")

DATE OF
HEARING: September 27, 2004 *by teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND

This is an application to the Licence Appeal Tribunal to extend the time for the Applicant, Levorn Moses, to file an appeal of a Notice of Proposal to refuse the registration of Mr. Moses as a collector ("the Proposal") pursuant to the *Collection Agencies Act* ("the Act"). The motion is brought under section 7 of the *Licence Appeal Tribunal Act* and the Tribunal's own Rules of Practice.

The hearing of this motion proceeded electronically, by teleconference. Mr. Moses originally filed a Notice of Motion dated August 3, 2004 which indicated that an extension of time to appeal was sought but included no grounds for the motion. Subsequently, following prompting in correspondence from the Tribunal, Mr. Moses filed a further Notice of Motion dated August 24, 2004 setting out three grounds for the motion. The motion proceeded on the basis of the second of these Notices of Motion, although Mr. Moses ultimately relied upon different grounds than those stated in the Notice of Motion; these are described below. The Registrar under the *Collection Agencies Act* ("the Registrar") opposed the extension of time to appeal.

The Applicant Mr. Moses appeared on his own behalf on the motion. The Registrar was represented by its counsel Mr. Jacob Bakan.

The Applicant did not file any documentary evidence on the motion. The evidence filed by the Registrar consisted of the Proposal, together with a letter from the Registrar to the Tribunal dated July 22, 2004 and a Notice of Refusal dated June 2, 2004. I allowed Mr. Moses to give evidence under oath at the hearing of motion, although such evidence was confined to the issue of his reasons for the late filing of the appeal. Mr. Bakan was permitted an opportunity to raise any additional facts on behalf of the Registrar, and to question Mr. Moses. Both Mr. Moses and Mr. Bakan also made submissions.

FACTS

The basic facts concerning the timing of the Registrar's Proposal and the steps the Applicant took are not in dispute. The Registrar's Proposal, dated May 3, 2004 was served upon the Applicant on May 4, 2004. Mr. Moses agreed in his evidence that he was served on that date. The *Collection Agencies Act* provides for a fifteen-day period within which an Applicant may notify both the Registrar and this Tribunal that he or she requires a hearing to dispute the Proposal. Accordingly, the deadline for filing a Notice of Appeal expired on or about May 19, 2004.

The Proposal included, as required by s.8(3) of the Act, a statement that the Applicant could require a hearing if the Registrar and Tribunal are given notice within the fifteen days.

Mr. Moses did not file his appeal with the Tribunal until July 21, 2004. Thus, the appeal was brought nine weeks late.

EVIDENCE AND SUBMISSIONS

Mr. Moses explained that the sole reason he did not appeal in time was that on April 29, 2004, his mother passed away. He testified that he decided to prioritize family matters over all else, and was occupied with funeral arrangements and related matters. He left for Jamaica May 10, 2004 and the funeral was held there on May 13, 2004. He returned from Jamaica June 4, 2004.

When asked by the Vice-Chair to describe what he was engaged in between his return from Jamaica June 10 and the filing of the appeal July 21, Mr. Moses indicated that he was "back and forth" to New York, dealing with various "insurance matters." He did not elaborate.

Mr. Moses submitted that he had concerns about the impartiality of the Registrar's decision. In his Notice of Motion, Mr. Moses indicated that allegations made against him in the Proposal are inaccurate and untrue. He argued on the motion that if given a chance for a hearing, he could bring forward evidence of which the Registrar was not

previously aware and that he would be able to satisfy the Registrar that his registration as a collector should be reinstated.

Mr. Bakan argued that the requirements of the Act were fulfilled and Mr. Moses received due notice of the time limit for requiring a hearing. Mr. Bakan also argued that, even if the time extension were allowed, the Tribunal would have no jurisdiction on the appeal itself because s.8(4) of the Act only allows the Tribunal to either order the Registrar to carry out a Proposal or refrain from carrying it out. In this case, since the Applicant did not register an appeal within the fifteen days, the Proposal had been carried out. Mr. Bakan argued that the more appropriate course for Mr. Moses was to reapply for registration with new evidence, under s.9 of the Act.

THE LAW

The relevant subsections of the *Collection Agencies Act* provide:

Notice of proposal to refuse or revoke

8.(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.

Notice requiring hearing

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may require such a hearing.

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.

Numerous cases of this Tribunal have referred to the decision in *Re Bilodeau and ONHWP* (1994), 25 CRAT 930 for the factors to be considered in exercising the discretion to extend time to appeal. That case suggested that to be successful on a motion to extend time an applicant must show:

1. That there was an intention to appeal within the time limit;

2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if he did so as soon as the true situation was apprehended;
3. That there is not some overriding prejudice to the Respondent in allowing the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

Two of the four points mentioned in *Bilodeau* combine more than one consideration and may be broken down further. The second part of the test can be said to require the consideration of:

- (a) the nature of the reason for the delay; and
- (b) whether the Applicant acted diligently once aware that there may be a time limitation issue

Similarly, the fourth point can be said to encompass the following two considerations:

- (a) whether the issue under appeal is substantial and significant;
- (b) whether there is a reasonable chance of success in the appeal.

Consideration of the chance of success of the appeal has received further comment. Vice-Chair Israel has noted that in assessing this factor “the bar is not high for the Applicant to show a reasonable chance of success” (*Scanlon v. Registrar, Motor Vehicles Dealers Act*, LAT, August 1, 2002). I agree. A motion for time extension cannot and should not become a hearing on the merits of the appeal. That being so, given the absence of a full hearing of all evidence, any consideration of the merits of the appeal on a time extension motion should only be a factor where, on the face of the record, the appeal has a very low probability of success. Even where this may be so, such a consideration should still only be one of the several factors to be considered on a time extension motion.

Another factor not expressly mentioned in *Bilodeau* but which must always be considered is the length of the delay itself (*Re Ferreira*, LAT, June 29, 2004).

Finally, it has also been noted that in exercising the discretion to extend time the Tribunal must be cognizant of the fundamental principle that justice must be done (*Scanlon v. Registrar, Motor Vehicles Dealers Act*, LAT, August 1, 2002).

In summary, the factors to consider in determining whether to exercise the discretion to extend time include:

- whether there was an intention to appeal within the time limit
- the length of the delay
- the nature of the reason for the delay

- whether the applicant acted diligently once aware that there may be a time limitation issue
- whether there is overriding prejudice to the respondent
- whether the issue under appeal is substantial and significant
- whether it is apparent that the appeal has a very low probability of success

As is often noted, each case must be considered on its own facts; there can be no strict formula for the exercise of the discretion. No one of the above factors will necessarily be determinative, and the relative weight each will vary depending upon the individual case.

FINDINGS AND CONCLUSIONS

The Tribunal accepts the evidence of the Applicant regarding his mother's death and the necessity of his trip to Jamaica to attend the funeral. It is also reasonable to accept that the death of a parent would cause considerable emotional upheaval as well as the necessity to attend to various funeral and other arrangements. The death occurred April 29, 2004, and the Proposal was served May 4, 2004. These circumstances certainly suggest some leniency should be afforded the Applicant. However, the Tribunal must also consider the undisputed fact that the appeal was filed nine weeks late in this case, a considerable delay in the circumstances. In addition, it is necessary to consider in more detail the circumstances following the service of the Proposal.

The Registrar did not file any evidence of prejudice caused by the delay, and Mr. Bakan did not suggest there was any. The Tribunal finds there is none in this case. It must be noted, however, that it is not necessary to show actual prejudice in each case; this one factor is not determinative.

The issue is a substantial one for Mr. Moses; he is currently not registered and wishes to regain registration in order to carry on the employment as a collector. Absent registration he cannot do so. However, while this factor weighs in the Applicant's favour, it must also be noted that nearly all professional registration appeals involve the substantial issue of ability to work in the industry. If this factor were to be given excessive weight, time extensions under industry regulation statutes would be granted as a matter of course and the time limit given no effect.

This is also not a case where it can be said that on its face the appeal has a very low probability of success. While the allegations against Mr. Moses are significant, he disputes many of them and it would not be possible to say in advance of a full hearing that he could not potentially rebut or explain those allegations.

Thus, there are factors which weigh in favour of granting the time extension. However, there remain serious difficulties as to why the appeal was filed as late as it was. Significantly, there is no clear evidence that Mr. Moses formed an intention to appeal within the time limit. Indeed, his evidence was that while he was fully aware of the

Proposal served upon him, he had “decided” at that time to prioritize family matters above all else. What happened, then, is that Mr. Moses formed no intention because he consciously chose not to deal with the Proposal at that time. However, until the appeal was actually filed, there is no evidence any other steps or actions from which a continuing intent to appeal could be inferred.

Further, notwithstanding that Mr. Moses has raised a genuinely sympathetic circumstance to explain some of the delay, there are elements of the explanation that are less than adequate. A failure to deal with the Proposal immediate aftermath of the family death might be excused. The delay between the service of the Proposal on May 4, 2004 and Mr. Moses’ return from Jamaica one month later would not, in itself, be fatal to the Applicant. However, one would expect that once the most pressing family matters had been dealt with Mr. Moses would turn his attention to the Proposal and at that time, if he intended to appeal, act promptly. This did not happen. Mr. Moses was previously aware of the Proposal, and, even if he had not read it carefully or absorbed its import when first served (including the statement of the time limit to appeal), he could have done so at that later time. However, between Mr. Moses’ return from Jamaica and the filing of the appeal, there was a further six and one-half weeks delay. Indeed, this period constituted over two-thirds of the total delay. Mr. Moses’ explanation for his activities during this period was vague — that he was travelling back and forth to New York, dealing with “insurance matters.” This explanation not only lacks detail, it does not explain why, even with some travel in and out of the city, the Applicant took no steps, even a phone call, with respect to the Proposal and his non-registration. Mr. Moses did not testify that he was in New York during this whole period, but rather that he was “back and forth.” It may be noted that since Mr. Moses’ registration had previously lapsed, the Proposal to refuse registration was in response to an application to re-register. As such Mr. Moses was not registered to work as a collector during this period. He had not in fact been registered since October of 2003 when his registration had lapsed. It would be expected that if Mr. Moses had at that time formulated the intent to dispute the refusal of registration it would have been an obvious priority for him. However, he took no steps.

The Tribunal is not unsympathetic to the family loss that befell the Applicant. However, the relatively short fifteen day time limit in the legislation creates an expectation that applicants or registrants will act reasonably promptly to signal their intention to appeal. The time limit must be given some substance. While the death of Mr. Moses’ mother might excuse delay until June 4, 2004, when he returned from Jamaica, or even for some period after that, it cannot excuse the nearly seven weeks further delay until July 21, particularly when no persuasive explanation was offered for not taking steps during that time.

Ultimately, the failure to satisfactorily explain the inordinate delay, even when considerable time is allowed for dealing with the family affairs, outweighs those factors in favour of granting the extension. There is insufficient evidence that Mr. Moses formed any intent to appeal within the time limit, or even in the weeks after it had

expired, and he failed to act with sufficient diligence on an issue which should have been an obvious priority.

For the above reasons, the motion to extend time to appeal is dismissed. Given this ruling, it is unnecessary to address Mr. Bakan's argument regarding the Tribunal's jurisdiction on an appeal where a Proposal to refuse registration has already been carried out.

I note that Mr. Moses indicated that there was evidence of which the Registrar was not aware which would convince the Registrar that his registration should be reinstated. If this is so, Mr. Moses is free to make a further application for registration based on this new evidence, pursuant to s.9 of the Act.

ORDER

The motion to extend time to appeal is dismissed.

LICENCE APPEAL TRIBUNAL

Kenneth S. Jepson, Vice-Chair

RELEASED: October 6, 2004

FILE NAME: 2503.caa.Moses.motion.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

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PREHEARING

JOHN JAMES BRYAN

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

TRIBUNAL: KENNETH S. JEPSON, VICE-CHAIR

APPEARANCES: JOHN JAMES BRYAN, Applicant
JOHN MONGER and CRAIG R. COLLINS-WILLIAMS, Counsel for
Applicant

BRIAN PITKIN, Registrar, *Collection Agencies Act*
JACOB BAKAN, Counsel for the Registrar

DATE OF
PRE-HEARING: October 12, 2004 Toronto

ORDER

Following attendances on October 12, 2004, 2004 at a pre-hearing before this Tribunal by the parties listed above, the Tribunal makes the following Order:

1. The previously scheduled hearing dates of November 25 and 26, 2004 are hereby rescinded. The pre-hearing conference in this appeal is adjourned and to continue on November 26, 2004, commencing at 9:30 a.m.
2. The hearing in this appeal is scheduled for five days, from January 31, 2004 to February 4, 2004 inclusive.
3. The Applicant is to serve upon the Tribunal forthwith written notice of change of counsel.
4. By no later than October 26, 2004, the Applicant shall deliver to the Registrar a specific, itemized list of any further items of evidence or particulars which the Applicant requests be disclosed by the Registrar.

5. By no later than November 2, 2004, the Registrar shall respond to the Applicant's request for disclosure in #4 above by providing all evidence and particulars that it agrees to disclose, and by providing an itemized list of any evidence which the Registrar objects to disclosing.
6. By no later than November 2, 2004, the Registrar shall also provide to the Applicant the list of witnesses it intends to call at the hearing of this matter, together with brief will-says for each witness.
7. By no later than November 9, 2004, the Applicant shall provide to the Registrar his position and submissions regarding any disclosure items which remain in dispute.
8. By no later than November 16, 2004, the Registrar shall provide to the Applicant its responding position and submissions regarding any disclosure items remaining in dispute.
9. By no later than November 16, 2004, the Applicant shall provide to the Registrar a list of witnesses he intends to call at the hearing of this matter, together with brief will-says for each witness.
10. By no later than November 24, 2004, the parties shall file with the Tribunal a Statement of Agreed Facts, setting out all relevant facts which the parties agree are not in dispute. The parties shall also by this date file with the Tribunal their respective submissions on any remaining disputed items of disclosure.

LICENCE APPEAL TRIBUNAL

KENNETH S. JEPSON
Vice-Chair

Released: October 20, 2004

File name: 2519.caa.Bryan.pre.doc

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LANA TRINA ROSE

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

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JOEL MISKIN, Counsel, representing Lana Trina Rose

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

DATES OF
HEARING: January 8, 2004, April 1 and April 2, 2004 Toronto

REASONS FOR DECISION AND ORDER

Background

This is an appeal by Lana Trina Rose ("Rose") to the Licence Appeal Tribunal (the "Tribunal") pursuant to a written Notice of Proposal (the "Proposal") issued by the Registrar under the *Collection Agencies Act* (the "Registrar" and the "Act" respectively) to suspend the registration of Rose as a collector under the Act for a period of twenty-one days.

The Registrar basis his Proposal to suspend the registration of Rose as a collector under the Act, under section 6(1)(b) of the Act as read with section 7(2) of the Act. The Registrar has caused the Proposal to be served upon Rose in terms of section 8(1) of the Act and Rose has delivered a written notice requiring a hearing before the Tribunal. This hearing is accordingly held pursuant to section 8(4) of the Act.

In support of his proposal the Registrar has furnished the following reasons:

The past conduct of Lana Trina Rose affords reasonable grounds for the Registrar to believe that she will not carry on business in accordance with law and with integrity and honesty for the following reasons:

- a) On or about the 3rd day of December, 2002 she contacted _____ (hereafter "Debtor #1") by telephone. The nature of these calls constituted harassment of Debtor #1, contrary to the provisions of subsection 21 of the Regulations;
- b) On or about the 3rd day of December, 2002 she directly or indirectly threatened to proceed with an action against Debtor #1 for which the collection agency or collector did not have lawful authority, contrary to the provisions of subsection 20(c) of the Regulations;
- c) On or about the 3rd day of December, 2002 contacted Debtor #1's residence and made a demand for payment of a debt without indicating her identity, contrary to the provisions of subsection 20(g) of the Regulations;
- d) On or about the 17th day of December, 2002 she contacted _____ (hereafter "Debtor #2") by telephone. The nature of these calls constituted harassment of Debtor #2, contrary to the provisions of subsection 20(d) of the Regulations;
- e) On or about the 17th day of December, 2002 she directly or indirectly threatened to proceed with an action against Debtor #2 for which the collection agency or collector did not have lawful authority, contrary to the provisions of subsection 20(c) of the Regulations;
- f) In or about the month of December, 2002 she failed to carry on business in accordance with the law, pursuant to section 6(1)(b) of the Act;
- g) In or about the month of December, 2002 she failed to carry on business with integrity, pursuant to section 6(1)(b) of the Act;
- h) In or about the month of December, 2002 she failed to carry on business with honesty, pursuant to section 6(1)(b) of the Act.

The Registrar's Proposal also gives the following particulars in amplification of the reasons above:

- 1. Lana Trina Rose was registered as a collector under the Act on August 21, 1996 and during the month of December 2002 was an employee of Nor-Don Collection Network Inc.
- 2. On or about the 3rd day of December, 2002 Lana Trina Rose contacted the debtor identified as Debtor #1 and in a screaming manner spoke to this individual in an insulting and degrading manner and used a profanity.
- 3. On or about the 3rd day in December, 2002 Lana Trina Rose contacted the debtor and stated that she would take Debtor #1 to court and sue her for non-payment of the debt. The collection agency and the collector did not have lawful authority to proceed with such an action.
- 4. On or about the 3rd day of December, 2002 Lana Trina Rose contacted the debtor and made a demand for payment without identifying herself;
- 5. On or about the 17th day of December, 2002 Lana Trina Rose contacted a debtor identified as Debtor #2 and in a yelling hysterical voice spoke to this individual in an insulting manner and used a profanity in speaking to her;

6. On or about the 17th day of December, 2002 Lana Trina Rose contacted the debtor and threatened to close the business of Debtor #2 for non-payment of her debt. The collection agency and the collector did not have lawful authority to proceed with such an action.

THE EVIDENCE

The evidence presented by the Registrar consisted of the testimony of:

Debtor #1
Debtor #2
Jim Masters
Brian Pitkin

The evidence presented by Rose consisted of the testimony of:

Dennis Hickey
John Henry Wonnacott
Natalie Owens-Murphy
Kerri McVicar
Janis Cranny
Lana Trina Rose

In addition to the testimony of the above persons there was documentary evidence introduced by the parties, which were marked as exhibits. A summary of the various person's relevant testimonies follows.

DEBTOR #1

Debtor #1 testified that she had become indebted to Zellers and Nor-Don was handling that account for collection. Initially, in December 2002, Debtor #1 had dealt with a Sam Joshi ("Joshi").

The relationship that evolved between Debtor #1 and Joshi was poor from the beginning. Debtor #1 stated that Joshi used "quite a bit of swear words" when speaking with her and screamed, shouted and harassed her. The swear words used were profane. Debtor #1 called Nor-Don and requested to speak to Joshi's supervisor. She was put through to "a lady". Debtor #1 informed this "lady" with whom she was then speaking that she was calling regarding Joshi. At that point in time Debtor #1 became aware of Joshi's voice in the background saying to the "lady" "that's her, that's her". The "lady" who Debtor #1 was speaking with then said "why don't you pay your f..... bills" and also said "why don't you get off your fat f..... ass, quit living off other peoples money and get yourself a job and pay your own bills". This "lady" then said she was "going to take my ass to court – have yourself a merry f.....Christmas" and then hung up.

This was the only conversation Debtor #1 had with “the lady” who when she asked the receptionist at Nor-Don to put through to Joshi’s supervisor had been connected with “the lady”. Debtor #1 then filed a written complaint with the Ministry (Exhibit 3, tab 11, pages 2 and 3) which form was completed by Debtor #1 and signed by her on December 9, 2002. Debtor #1 went on to state that in her statement to the Ministry she complained of Joshi’s harassment of her.

On February 23, 2003 Debtor #1 on the advice of her lawyer wrote a further letter to the Ministry regarding Joshi’s conduct and also complained of the conduct of “his unnamed supervisor” (Exhibit 3, tab 11, pages 5 through 9). Debtor #1 referred the Tribunal to pages 2 and 3 of the February 23, 2003 statement which she confirmed set out what had occurred when she spoke Joshi’s supervisor who did not identify herself by name.

DEBTOR #2

Debtor #2 testified that she became indebted to Zellers and she was, in May 2001, contacted by NCN Financial Recovery Specialists (“Nor-Don”) who advised that Nor-don was acting for Zellers in the recovery of Debtor #2’s debt with Zellers. Debtor #2 stated that she initially dealt with Mr. Goodwin of Nor-Don and when he left Nor-Don’s employment she dealt with a Ms. Owens. Debtor #2’s dealings with Goodwin commenced in May 2001 and were conducted without unpleasantness. Arrangements she made with him regarding payments were complied with by Debtor #2. In August 2002 Goodwin left the employment of Nor-Don and a Ms. Owens took over Debtor #2’s. Friction and unpleasantness in their relationship took place immediately, with Owens with demanding larger payments by Debtor #2 in reduction of her indebtedness to Zellers. The relationship with Owens continued to be fractious and unpleasant with the relationship degenerating into what Debtor #2 described as harassment. In October 2002 Debtor #2 complained to Owens’ supervisor at Nor-Don but this did not result in a change in the relationship between Debtor #2 and Owens. Eventually on October 29, 2002 Debtor #2 sent a complaint to the Ministry of Consumer and Business Services (Exhibit 3, tab 10). A Mr. Masters at that Ministry spoke with Debtor #2 shortly after her letter was sent to the Ministry and thereafter she had no further contact with Owens. Debtor #2 further stated that during the time Owens had handled her account with Zellers, she had increased her payments in reduction of her indebtedness to such an extent that her bank account became depleted.

Debtor #2 went on to state that on December 17, 2002 at about 8 a.m. she received a telephone call from Rose who had then taken over Debtor #2’s account from Owens. In that conversation there was an apparent misunderstanding that took place between Debtor #2 and Rose as a result whereof Rose’s tone, which had been pleasant until the misunderstanding occurred, became threatening and abusive with Rose yelling and using profane language including referring to Debtor #2 as a “bitch” and using the “F” word liberally (Exhibit 3, tab 10, page 5). Debtor #2 called Masters at the Ministry to report what happened during her conversation with Rose as a result of which Debtor #2, at Masters’ request, sent him a written statement of what had occurred (Exhibit 3, tab

10, page 5). Debtor #2 stated that she was upset and angry by the December 17, 2002 conversation with Rose. Rose had indicated in her telephone call to Debtor #2 that she knew the whereabouts of Debtor #2 and the store where Debtor #2 worked and was going to close it down before Christmas.

This was the last time she spoke with Rose and she had no further dealings with Nor-Don. During her dealings with Nor-Don Debtor #2 had on many occasions requested a statement of the balance owing by her to Zellers. She stated that she was never able to obtain such statement.

JAMES MASTERS

Masters testified that he was an analyst/investigator with the Ministry and dealt with consumer's complaints against collection agencies. The complaints of Debtor #1 and Debtor #2 were assigned to him.

Masters further stated that he authored a letter dated July 25, 2003 to Nor-Don (Exhibit 3, tab 13, page 2). This letter referred to the Debtor #1 complaint and in that letter he enquired whether Nor-Don had lawful authorization from Zellers to proceed with legal action pursuant to section 20(c) of Regulation 74 to the Act. He further stated that in response to that enquiry Nor-Don had written the Ministry acknowledging the Ministry's letter of July 25, 2003 and stated as follows:

In regards to your question of lawful authorization, Nordon Collection Networks Inc. does not have authority unless we receive written authorization from Hudson's Bay Company.

(Exhibit 3, tab 13, page 3)

Masters also stated that he received a letter from Nor-don dated January 2, 2003 in which Rose, who signed that letter, stated as follows in regard to his letter to Nor-Don asking it to deal with Debtor #2's complaint:

I have reviewed your complaint from Debtor #2 and although my name is mentioned on your cover letter, there is no mention of my name in the complaint. Too the best of my knowledge I never had any dealings with the aforementioned consumer and the electronic notelines will confirm this.

(Exhibit 3, tab 4, page 1)

Subsequently, Masters received a further letter from Nor-don dated February 26, 2003 also signed by Rose in which letter Rose corrected what she had stated in her letter of January 2, 2003 and stated as follows:

Upon further review of our electronic note lines, I recall the consumer contacting me on September 23, 2002 stating that she would be willing to make payment arrangements of \$750.00 through the Bank of Montreal. On September 30, 2002 the consumer left me a voice mail stating that she would pay the account in full in October. On September 30, 2002 I returned the consumer's call and gave her the account balance and re-affirmed that the account would be paid in full in October. On October 28, 2002 I called the consumer at her place of employment and requested payment in full. The consumer

stated that she was in the process of purchasing a building. I in turn advised her that in order to get a mortgage she would need to pay the account in full. The consumer advised that she would pay at least \$800.00 on November 7, 2002. On December 17, 2003 I called the consumer and she advised me that she received our letter and also stated that she received the mortgage on the property, again she stated that she would pay the account in full, however we never received money.

(Exhibit 3, tab 4, page 2)

Masters went on to testify that the Ministry had received a letter dated March 19, 2003 from Nor-Don signed by Rose relating to Debtor #1's complaint. That letter reads as follows and identifies Rose as "the lady" or supervisor of Joshi with whom Debtor #1 had spoken:

I have reviewed the complaint from Debtor #1 and wish to respond to her allegations.

I had cause to speak with the complainant, Debtor #1, when Mr. Joshi requested that I do so. Prior to speaking with her, Mr. Joshi explained that she was very hostile, with him, shouting and being verbally abusive. In speaking with Debtor #1, I further confirmed the status of her file, and once again reiterated that payment was due in full. She was still very hostile, shouting that she was behind with her rent and credit cards due to being on strike. I advised Debtor #1 that her file was delinquent prior to the time of the strike period that she was describing, which she then responded to by saying that her boyfriend was also on strike for 6 months prior. At that point I advised her that she was making up too many excuses and that I felt that she was not being completely truthful with the information provided. I once again stressed that the balance of her debt was still due in full. Further, I advised Debtor #1 that failure to comply would lead to legal action against her. At no point in time, during our conversation, was any profanity used as described in Debtor #1's allegation.

(Exhibit 3, tab 6, page 1)

Masters went on to state that he requested from Nor-don its electronic notes that had been entered into the computer. These, when received, were reviewed by the Ministry (Exhibit 3, tab 6, page 2 and Exhibit 3, tab 4, pages 2 and 3). Masters also stated that when serving the Proposal on Rose on August 14, 2003, Rose told him she had already received a "caution" from the Ministry in relation to the Debtor #2 matter.

BRIAN PITKIN

Pitkin testified that he is the Registrar under the Act and he described the role of the Registrar and the complaints process including investigations handled by the Ministry.

Pitkin confirmed that he signed the Proposal in this matter and had familiarized himself with the allegations against Rose before he signed the Proposal for the suspension of Rose as a collector for 21 days. He stated that in coming to the decision to propose Rose's suspension he took into consideration that the nature of the business of collections is an aggressive one; that he looked at the nature of the allegations against Rose in this matter and whether Rose exceeded what is normally acceptable; the profanities allegedly used by Rose and the allegedly demeaning and offensive comments made. When forming an opinion he had all the necessary documents before

him and he reviewed such documents and gave them consideration. He did not, he said, speak with Debtor #1 or Debtor #2.

Pitkin conceded under cross-examination that the address of Rose in the Ministry's caution letter addressed to her dated March 18, 2003 (Exhibit 3, tab 5, page 1) was not the correct address of Rose but he could not explain how this incorrect address was used by the Ministry.

DENNIS HICKEY

Hickey testified that he is Director and President of Common Collection Agency with which agency Rose is presently employed as a senior collector. He testified that the business of collections necessitates aggressive tactics. Collectors, he stated, have to endure insults and slurs from debtors.

Rose was originally hired by Common Collection Agency in January 1998 and worked there for 2 ½ years at which time she went to Nor-Don. She returned to Common Collection Agency about 2 months ago and presently works for that Agency. Her style is "loud", according to Hickey, while she is "a bright and good worker". He has never heard her use a profanity and he is, at times, on the "collection floor" which he explained is an open area from where a large number of collectors operate.

In cross-examination Hickey stated that collectors are paid a monthly salary and a monthly bonus based upon certain targets, set by the Agency, being met. If the targets are not met there will be no bonus. Exceeding the set targets means a bonus will be paid which is between 20% and 30% of monthly salary. A "forceful collector" according to Hickey is at an advantage over a laid back collector.

JOHN HENRY WONNACOTT

Wonnacott stated in his testimony that he has worked for Common Collection Agency since March 2004 prior to which he was with Nor-Don for about 6 ½ years where he was in charge of legal files. Nor-Don handled Zellers and The Bay accounts and those two businesses did not require that Nor-Don had to obtain authority to sue from them as they had been given a blanket authority by Zellers and The Bay. Wonnacott would determine before taking legal action on a Zellers or The Bay account, whether the file of the debtor would be profitable to Nor-Don. All Nor-Don required of Zellers or The Bay was a final statement of the debtor's account and the credit application the debtor had signed and given to Zellers or The Bay. These two documents would assist Nor-Don and nothing else was required from them to authorize or enable Nor-Don to sue. In the time he was with Nor-Don he had never sought authority from Zellers or The Bay in order to sue. Nor-Don had to bear all legal costs regarding the process of suing a debtor for Zellers or The Bay. Nor-Don earned a commission on the amounts recovered from a debtor and a determination had to be made by Nor-Don whether or not it could make a profit if it sued the debtor.

NATALIE OWENS-MURPHY

Owens-Murphy testified she is and has for the past 5 years been employed by Common Collection Agency. She is the manager of collections and has known Rose and seen her at work. She had observed how she conducts herself at work and she has noted that Rose is direct and to the point when dealing with debtors. She has a louder tone to her voice than do other collectors. Owens-Murphy has never heard Rose utter a profanity.

SHERRI McVICAR

McVicar stated that she is a collections officer with Nor-Don and has been with Nor-Don for the past 3 ½ years. She has known Rose for the last 2 ½ years and has worked in close proximity with Rose. She is a friend of Rose and never heard Rose use a profanity.

McVicar stated that The Bay and Zellers are the exceptions to Nor-Don having to obtain authorization to sue. Nor-Don does not have to obtain either's authority before suing.

JANIS CRANNY

Cranny testified that she is a collector with Total Credit Recovery and was with Nor-Don from July 2002 to October 2003 where she worked on a particular portfolio of clients. She observed Rose's style of dealings at Nor-Don. Rose, she observed, used both a loud and soft voice when dealing with debtors. She noted that Rose's style was a "no nonsense" style. She is firm with debtors and has a loud style with her voice carrying, but she has never heard Rose use profane language.

LANA TRINA ROSE

Rose testified that she has been a licensed collector under the Act since 1996 and is presently employed with Common Collection Agency as a collector.

Rose stated she was with Nor-Don from November 2000 until the end of July 2003. She then joined Common Collection Agency until February 27, 2004 when she took maternity leave.

She confirmed she signed Nor-Don's letter of January 2, 2003 to the Ministry. This letter was drafted by Mr. Rossi. The letter was not accurate. The Ministry's original letter of complaint to Nor-Don did not identify her as the collector involved and therefore Rose did not realize she was the collector involved in the complaint. The complaint only identified Owens-Murphy as the collector (Exhibit 3, tab 10, pages 1 and 2). She realized she was the collector involved in the Harris investigation after having reviewed

her electronic notes (Exhibit 3, tab 4, pages 1 and 2). She at that stage corrected herself and wrote the letter to the Ministry of February 26, 2003 (Exhibit 3, tab 4, page 1).

In dealing with her December 17, 2002 conversation with Debtor #2, Rose testified that that conversation was a short one and she was not able to recollect it in detail. However, she denied using profanities, denied threatening to close Debtor #2's store but conceded she may have threatened legal action as Nor-Don did not require Zellers' authority to institute legal action.

Rose further stated, in regard to the caution letter of March 18, 2003 from the Ministry, that she did not receive that letter as she was not at the address to which the letter was addressed having moved from that address in 2000/2001.

In dealing with the December 3, 2002 conversation with Debtor #1, Rose stated that she remembers that call and when the strike was mentioned by Debtor #1 as a reason for her not being able to pay what was owing to Zellers. Rose denied that yelling and screaming took place and denied saying what Debtor #1 said she said to Debtor #1. Rose further denied that she refused to give her name to Debtor #1 as it was always her method when answering a telephone to give her name. Rose stated further that the electronic entry of December 3, 2002 (Exhibit 3, tab 6, page 2) was made by her. This was the only conversation she had with Debtor #1. Rose stated that at December 3, 2002 she was not handling the Zellers portfolio but was handling a bank's portfolio.

In cross-examination Rose stated that in 2002 she took holidays after Christmas. She stated further that if holidays were taken, monthly minimum targets still remained in place and had to be attained so as to earn a bonus. She has never had difficulty in obtaining payments from debtors in the month of December. However, in the matter concerning Debtor #1, as she was not handling the Zellers portfolio as at December 3, 2002 she did not stand to earn a bonus if Debtor #1 paid during December 2002.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal.

1. Rose spoke with Debtor #1 by telephone on December 3, 2002 in connection with Debtor #1's outstanding account with Zellers.
2. Rose spoke with Debtor #2 by telephone on December 17, 2002 in connection with Debtor #2's outstanding account with Zellers.
3. In or about August 2002 until September/October 2002 one, Ms. Owens-Murphy at Nor-Don was handling the recovery of the amount due to Zellers by Debtor #2.

4. In or about November 2002 and through the month of December 2002 the one, Sam Joshi at Nor-Don was handling the recovery of the amount due to Zellers by Debtor #1.

THE LAW

The *Collection Agency Act* 1990 R.S.O. Chapter C.14 states as follows.

6. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;
1. (2) Subject to section 8, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle registrant to registration under section 6 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.
2. (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 therefore, on the applicant or registrant.
 - (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 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.

Regulation 74 to the foregoing Act states as follows:

20. No collection agency or collector shall,
 - (b) directly or indirectly threaten or state an intention to proceed with any action for which the collection agency or the collector does not have lawful authority;
 - (c) make telephone calls or personal calls of such nature or with such frequency as to constitute harassment of the debtor, his or her spouse or any member of his or her family or household;
 - (d) make a demand by telephone, by personal call or by writing for payment of a debt without indicating the name of the creditor, the balance of moneys owing and the identity and authority of the person making the demand.

DECISION AND REASONS

There are a number of issues that arise from the Registrar's Proposal. Those issues are:

- (i) That on or about December 3, 2002 while employed by Nor-Don Rose harassed Debtor #1 by telephone, in contravention of subsection 20(d) of Regulation 74 to the Act.
- (ii) That on or about December 3, 2002 Rose while employed by Nor-Don directly or indirectly threatened to proceed with an action against Debtor #1 for which neither the collection agency nor Rose had lawful authority and thereby Rose contravened subsection 20(c) of the aforesaid Regulation.
- (iii) That on or about December 3, 2002 Rose while employed by Nor-Don contacted Debtor #1's residence and made demands for payment without indicating her identity and in so doing contravened subsection 20(g) of the aforesaid Regulation.
- (iv) That on or about December 17, 2002, Rose while employed by Nor-Don contacted Debtor #2 by telephone and harassed Debtor #2 by the nature of the telephone calls and in so doing contravened subsection 20(d) of the aforesaid Regulation.
- (v) That on or about December 2002 Rose, during her employment with Nor-Don, failed to carry on business in accordance with law and with integrity and honesty and thereby contravened section 6(1)(b) of the Act.

The onus of proof rests upon the Registrar to establish on a balance of probabilities that Rose contravened the Act and the Regulations as stated above.

The Tribunal has considered the issues above and its findings and conclusions are set out hereunder relative to each issue.

FIRST ISSUE – HARASSMENT OF DEBTOR #1 BY TELEPHONE

The Registrar, in dealing with this allegation at the hearing, introduced a great deal of testimony revolving around collectors, other than Rose, who had dealt with Debtor #1 prior to Rose coming into contact with Debtor #1. All such evidence involving other Nor-Don collectors are irrelevant insofar as Rose's situation is concerned save and except that it gave the Tribunal an insight into the nature or culture in the collection industry and the brittle and often fractious relationship between debtor and collector.

However, insofar as this allegation against Rose is concerned, the Tribunal was faced with the conflicting testimonies of Debtor #1 and of Rose in which the latter rejected that she had harassed Debtor #1. The Tribunal had the opportunity of observing both the above persons when they testified. Having observed both, the Tribunal is not able to conclude who was the more credible. Much was made by Counsel for Rose as to discrepancies in Debtor #1's written statements and her testimony. While there may have been inconsistencies the Tribunal finds such inconsistencies to be of a minor nature that did not impinge on Debtor #1's overall credibility. On the other hand, while the Tribunal felt aspects of Rose's testimony fell short of absolute credibility she was

supported by others that worked with her and that she was not observed nor heard to harass debtors or use profane language.

The incident that did occur on December 3, 2002 was the only telephone call that took place between Rose and Debtor #1. One such incident (even if such allegation as alleged may have been found to have taken place) cannot be considered to be harassment. The very meaning of harassment implies repeated or continuing attacks upon another person and done to wear out, exhaust or harry such other person.

Accordingly, in regard to this issue the Tribunal finds that this one incident, which was not proven to the Tribunal's satisfaction, did not constitute harassment of Debtor #1 by Rose nor was there a contravention of subsection 20(d) of Regulation 74 of the Act.

SECOND ISSUE – THREATENING ACTION WHEN ROSE DID NOT HAVE LAWFUL AUTHORITY

This allegation relates to the statement which Debtor #1 contended was made by Rose on December 3, 2002 when a telephone discussion took place between Debtor #1 and Rose and in which discussion the latter threatened to take Debtor #1 to court while Rose lacked the lawful authority to do so. The Registrar in this regard relies upon Nor-Don's letter to the Ministry that "Nor-Don Collection Networks Inc. does not have authority unless we receive written authorization from The Hudson's Bay Company" (Exhibit 3, tab 13, page 3).

This letter does not say that Nor-Don "does not have authority" but only says that Nor-Don "does not have authority unless we receive written authorization from The Hudson's Bay Company".

The Registrar did not adduce evidence to show that Nor-Don did not have the authority of The Bay. Had The Bay been subpoenaed to give this evidence the Registrar may have been successful in the proof of this particular allegation. As matters stand, and without the necessary confirmation from The Bay that Nor-Don lacked authority, the Registrar must fail.

Quite apart from and in addition to what is stated above there has been evidence of Wonnacott who was in charge of the legal files, as he put it, at Nor-Don. Wonnacott testified that from his experience at Nor-Don the latter did not require written authority from either The Bay or Zellers in regard to taking legal action against debtors of those firms. The evidence of Rose and others who testified on her behalf was that when they worked at Nor-Don it was accepted practice that The Bay and Zellers were the two exceptions to the rule that written authority was required before taking legal action against debtors. If there was a failure to comply with subsection 20(c) of Regulation 74 by Nor-Don such failure cannot be placed at the doorstep of Nor-Don's collectors, including Rose, who merely carried out what they had been told was established practice.

Accordingly, in regard to this issue the Tribunal finds there was no contravention of subsection 20(c) of Regulation 74 to the Act.

THIRD ISSUE – FAILURE BY ROSE TO IDENTIFY HERSELF WHEN SPEAKING WITH DEBTOR #1

Here again the Tribunal is faced with the testimony of Debtor #1 to the effect that Rose refused to identify herself and the contrary testimony of Rose who said she did not refuse to give her name to Debtor #1. What the Tribunal stated as to not being able, one way or another, to make a finding on credibility in relation to the first issue equally applies to this particular issue. Regard being had that the onus of proof is upon the Registrar and the lack of sufficiently convincing testimony on the part of Debtor #1, the Tribunal finds that the Registrar has not met the onus regarding this issue.

Accordingly, the Tribunal finds that it has not been proven that Rose failed to identify herself to Debtor #1 or that there has been a contravention of subsection 20(g) of Regulation 74 of the Act.

FOURTH ISSUE – HARASSMENT OF DEBTOR #2 BY ROSE

Much of the evidence introduced by the Registrar regarding Debtor #2's complaint dealt with two of Nor-Don's employees dealings with Debtor #2 prior to Rose coming into contact with Debtor #2. The evidence relating to what transpired between Debtor #2 and these two other employees is irrelevant to the allegations made by Debtor #2 against Rose. It does however highlight the particular culture that appears to be common in the collection industry and that is, that aggressive pursuit of debtors is encouraged by agencies as this attitude is productive in attaining the goals of a collection agency in the recovery of monies from debtors. It also illustrates the fine line that must be adhered to by agencies and collectors so as not to fall foul of the Act and Regulation 74 thereunder and at the same time be successful in the recovery of monies from debtors. Clearly, as gleaned from the various testimonies in this matter, confrontations between collectors and debtors are common and the relationship that develops between them is not only adversarial but also at times bitterly fractious. In this culture and atmosphere it is understandable why allegations and counter allegations are made of the nature that surfaced in this hearing. Exaggerations may or may not occur and be testified to at a hearing.

Again the evidence introduced in regard to this issue was to a large extent contradictory. This is not to say that the Tribunal found either Rose or Debtor #2 to have deliberately mislead the Tribunal. However, the testimony of both was not so compelling as to negate or discredit the testimony of others, with the result that the Tribunal is not able to decide as to which of the testimonies was more acceptable. That being the finding of the Tribunal, the Registrar must fail in regard to this particular issue as he has failed to discharge the onus.

Quite apart from what is stated above, and in addition thereto, the Tribunal again notes that the December 17, 2002 incident that occurred between Rose and Debtor #2 was a single incident and as such it cannot be termed harassment for the same reasons as stated in the first issue.

Accordingly, the Tribunal finds there was no harassment of Debtor #2 by Rose nor was there a contravention of section 20(d) of Regulation 74 to the Act.

FIFTH ISSUE – ROSE BREACHED SECTION 6(1)(b) OF THE ACT

This issue relates to the past conduct of Rose which the Registrar contends does afford reasonable grounds for belief that Rose will not carry on business in accordance with law and with integrity and honesty.

The evidence that was placed before the Tribunal does not, for the reasons already stated, support the Registrar's Proposal that Rose will not in the future carry on business in accordance with law. The Tribunal has not found that Rose has violated the Act or Regulation 74 to the Act and therefore there can be no basis for making a finding that Rose will not carry on business in the future in accordance with law.

No evidence has been adduced by the Registrar reflecting on the honesty of Rose in carrying on business. Indeed, no such direct allegation was made by the Registrar in his Proposal. Likewise there has been no evidence relating to the integrity of Rose that would support a finding of lack of integrity on the part of Rose in carrying on business.

The Tribunal is cognizant of the *Brenner decision 1983 O.J. No. 1017* and the reasons therein of Southey J. The thrust of Southey's judgment was:

The Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

In referring the matter back for rehearing to the Tribunal the learned Judge stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In the matter of *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales*, a decision of Lane J. sitting in the Divisional Court with Then J. and J. Wright J. on February 11, 2003 and who concurred with Lane J. it was stated that while *Brenner*, supra "remains the proper test" it "does not establish a rule that the Registrar must shown to be wrong".

The *Shine* decision goes on to state that the Tribunal approaches the matter uninhibited in any way by the Registrar's views and that it must be clearly understood that the

Tribunal owes no deference to the Registrar's opinion. The Registrar is the investigator and is not the trier of fact whose opinion is based upon a hearing and so entitled to deference. The decision went on:

While this court might have arrived at a different decision than that of the Tribunal, it is not for us to put ourselves in the shoes of the Tribunal. As a reviewing Court, it is for us to determine whether the Tribunal identified the proper test and whether it applied correctly. Clearly, the Tribunal has discretionary power under the *Motor Vehicle Dealers Act*. Their function is not simply to rubberstamp the Registrar's proposals. It is for the Tribunal to consider the reasonableness of the Registrar's decision and act accordingly.

The Tribunal accordingly finds that Section 6(1)(b) of the Act has not been contravened.

ORDER

Accordingly, by virtue of the authority vested in it under the *Collection Agencies Act*, the Tribunal directs the Registrar to refrain from carrying out the Proposal to suspend the registration of Lana Trina Rose.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 15, 2004

FILE NAME: 1931.caa.Rose



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PREHEARING

M & M LEARNING CENTRE INC. o/a MALTRE-Z EARLY LEARNING CENTRE

APPEAL FROM A PROPOSAL OF THE DIRECTOR UNDER THE
DAY NURSERIES ACT

TO REFUSE TO RENEW A LICENCE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MARILYN A. MARSHALL, Agent, appearing on behalf of M & M
Learning Centre Inc. (the "Applicant")

KATHARINE RENISON, Counsel, appearing on behalf of the
Director, under the *Day Nurseries Act* (the "Director")

DATE OF
PRE-HEARING: June 7, 2004

Toronto

ORDER

Following attendances on June 7, 2004, at a prehearing before this Tribunal of Marilyn A. Marshall who appeared as Agent on behalf of M & M Learning Centre Inc. operating as Maltre-Z Early Learning Centre (the "Applicant") and Katharine Renison, Counsel, on behalf of the Director under the *Day Nurseries Act* (the "Director");

The Tribunal makes the following Order respecting both the adjourned prehearing and the subsequent hearing scheduled to commence at 9:30 a.m. on June 29, 2004 and 9:30 a.m. on October 4, 2004 and October 5, 2004 respectively 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 Director.
2. The Parties recorded that there was no resolution of any of the issues in this matter due to the fact that the Applicant was unrepresented and indicated to the Tribunal that it wished to be represented in this matter by Counsel.

3. The Parties agreed that the prehearing would accordingly be adjourned to 9:30 a.m. on June 29, 2004 at the Tribunal's above Chambers.
4. The Applicant undertook to forthwith seek to retain and to retain the services of Counsel to represent it at the adjourned prehearing on June 29, 2004 and at the hearing on October 4, 2004 and October 5, 2004.
5. The Agent for the Applicant was ordered to bring to the attention of Counsel whom the Applicant retains to represent it, that in terms of the Tribunal's Rules of Practice and the Tribunal's Practice Direction on Adjournments, the Tribunal will not consider the convenience of Counsel to be sufficient reason for an adjournment and including a conflict with a previously scheduled court or Tribunal hearing date. Counsel for the Applicant should therefore only accept the retainer if Counsel is available on the date set for the prehearing or the dates set for the hearing, and has sufficient time to prepare the Applicant's case.
6. Both Parties shall fully comply with all of the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice.
7. Both Parties shall not less than 10 days prior to the hearing serve on the other Party and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-chair

Released: June 10, 2003

File name: 2360.dna.Maltrie-Z Early Learning Centre.prehearing



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Decisions under Funeral Directors And Establishments Act

Fiscal Year 2004 - 2005

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

TINA M. COONEY-THOMPSON

IN THE MATTER of an APPEAL of a DECISION of the
COMPLAINTS COMMITTEE OF THE BOARD OF FUNERAL
SERVICES

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

TINA M. COONEY-THOMPSON

Applicant

-and-

BOARD OF FUNERAL SERVICES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Funeral Directors and Establishments Act*, R.S.O. 1990, Chapter F.36 as amended (the "Act"), Tina M. Cooney-Thompson (the "Applicant") initiated an appeal under section 14(8) of a Decision of the Complaints Committee of the Board of Funeral Services;

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

AND WHEREAS the Applicant has failed to commence an appeal within the 15 day period prescribed by section 14(6) of the *Funeral Directors and Establishments Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee and for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 14 of the *Funeral Directors and Establishments Act*, this Tribunal confirms the Decision of the Complaints Committee of the Board of Funeral Services.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: March 31, 2005

File name: Cooney.fdea.dism.

Licence
Appeal
Tribunal

Tribunal
d'appel en
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FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
Revised Statutes of Ontario, 1990, Chapter F.36

L. EVANS

IN THE MATTER of an APPEAL of a DECISION of the
COMPLAINTS COMMITTEE OF THE BOARD OF FUNERAL
SERVICES

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

L. EVANS

Applicant

-and-

BOARD OF FUNERAL SERVICES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Funeral Directors And Establishments Act*, R.S.O. 1990, Chapter F.36 as amended (the "Act"), L. Evans (the "Applicant") initiated an appeal under section 14(8) of a Decision of the Complaints Committee of the Board of Funeral Services;

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

AND WHEREAS the Applicant has failed to commence an appeal within the 15 day period prescribed by section 14(6) of the *Funeral Directors and Establishments Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee and for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 14 of the *Funeral Directors And Establishments Act*, this Tribunal confirms the Decision of the Complaints Committee of the Board of Funeral Services.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: January 17, 2005

File name: L.Evans.fdea.dism.



DeMARCO FUNERAL HOME (WOODBIDGE CHAPEL) INC. –
ADJ-Adjournment-Revised

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

DeMARCO FUNERAL HOME (WOODBIDGE CHAPEL) INC.

IN THE MATTER OF
DeMARCO FUNERAL HOME (WOODBIDGE 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: October 4, 2004

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

DeMARCO FUNERAL HOME (WOODBIDGE CHAPEL) INC.
Applicant
- and -

REGISTRAR, *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*
Respondent

REVISED ADJOURNMENT ORDER

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on January 26 and 27, 2005;

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, April 25, 2005 and continue at 9:30 a.m. on Tuesday, April 26, 2005, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: January 14, 2005

Licence
Appeal
Tribunal

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COLIN WARTMAN

Appeal from decision of the Discipline Committee of the BOARD
OF FUNERAL SERVICES under the *Funeral Directors and
Establishments Act*

TRIBUNAL: JANE WEARY, Vice Chair

APPEARANCES: WILLIAM J. BURDEN, Counsel, representing the Applicant;
JULIE MACIURA, Counsel, representing the Board of Funeral
Services

DATES OF
HEARING: September 9 and 10, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This Hearing arises from a Notice of Appeal filed with the Tribunal by Colin Wartman (the "Applicant"), on May 17th, 2004 pursuant to the May 1st, 2004 decision of the Discipline Committee of the Board of Funeral Services (the "Board") under the *Funeral Directors and Establishments Act* (the "Act").

In its decision the Discipline Committee found the Applicant guilty of professional misconduct by:

- signing or issuing a certificate, report or other document which he knew or ought to have known was false, misleading or otherwise improper contrary to section 44 (o) of Regulation 470 under the Act, and
- acting in a manner relevant to the practice of funeral directing that, having regard to the circumstances, would reasonably be regarded as unprofessional conduct, contrary to section 44(u) of Regulation 470 under the Act.

The consequent penalty imposed upon the Applicant consisted of:

- a reprimand recorded in the Board's Register,
- a fine of \$3,000.00 and
- restriction of his Funeral Director's licence by a one year moratorium on his ability to supervise an intern or co-op student AND, that he must attend the Board's Professional Development Program either in 2004 or 2005.

The Discipline Committee also chose to recommend to the Board that its Decision be published in the Board's newsletter with the Applicant's name and address included.

The Applicant appeals both findings of the Discipline Committee and all three penalties.

ISSUES:

The issues raised by the Applicant on appeal are as follows:

1. Did the Discipline Committee of the Board err in finding the Applicant guilty of professional misconduct under section 44(o) of Regulation 470 under the Act?
2. Did the Discipline Committee of the Board err in finding the Applicant guilty of professional misconduct under section 44(u) of Regulation 470 under the Act?
3. Did the Discipline Committee of the Board err by imposing overly severe and, consequently, unreasonable penalties on the Applicant?

EVIDENCE:

Colin Wartman, the Applicant, and "the Consumer", consumer complainant, and Mr. Rene Brakel, Board investigator, presented evidence before the Tribunal.

The Applicant testified that the Wartman Funeral Home (the "Home") had been the family business since 1916. It is located in Napanee, a small town in southern Ontario. The Applicant purchased the Home from his own father in 1988, the year after he first received his funeral director's licence .

When he took over the business in 1988, the Applicant inherited a number of prearranged funeral contracts to which the Home was contractually obligated. One of these was for the Consumer's mother. It was signed and dated June 17th, 1982. At the time of signing, the prepaid funds were placed in a trust account in accordance with the legislation.

The Applicant stated that, at the time he purchased the Home, he verified the number of outstanding prearranged services to which the Home was obligated, including the corresponding amounts held in trust, in order to ascertain which would be completed at a profit, which a gain and which a break-even amount. He testified that it was industry practice at the time to use excess funds in one account to offset losses in another. The legislation then in force did not prohibit such practice. In 1990, when the Act was brought into force, all excess funds in trust were required to be returned to the estate at

the completion of the contract. This requirement was not, however, made retroactive by the legislators.

In 2002, the time of the events leading to this complaint, the Applicant employed 23-year-old Derek Maschke. Mr. Maschke had only just received his own licence the year prior, but had worked in the Home under the Applicant's direction since Grade 11 as, first, a Co-op student and, later, an apprentice. The Applicant testified that Mr. Maschke never had any authority over any of the accounting or finances of the Home's funds.

On the morning of March 29th, 2002 the Applicant arrived at the Home to find Mr. Maschke in a meeting with the Consumer, discussing funeral arrangements for the Consumer's mother who had died the previous day. The Applicant testified he was aware that these arrangements concerned a prearranged contract in which there were sufficient funds to cover any of the associated costs. He was busy in his own office at the time, but did take time to assist Mr. Maschke as the deceased's family had used his Home's services for many years. It was the Applicant's evidence that he did not discuss costs or money at any time with the Consumer. He testified that he was taken aback when, in reviewing the arrangements with Mr. Maschke after the Consumer had left, his employee advised he had told the Consumer that he would be entitled to a refund. In his testimony the Applicant noted he had queried his employee twice as to what specific information he had given to the Consumer because he was aware of disclosure requirements, but that Mr. Maschke insisted he had not disclosed any particular amounts.

It is the Home's practice to provide follow-up letters to clients at one month, three month, six month and one year intervals post burial. The first such letter was sent to the Consumer on April 29th, 2002. According to the Applicant's evidence, a phone message from the Consumer was received at the Home some days later enquiring as to his "refund". It was in response to this message that the Applicant sent the following letter dated May 14th, 2002:

Dear <name deleted per FIPPA requirements>:,
 First, my apologies for not getting back to you sooner.
 The bank calculated the interest accrued to Mom's account incorrectly and after I got that straightened out, the attached check (sic) sat on my desk for 2 weeks as we where (sic) busy here at the funeral home with spring burials and getting a new roof put on the building.
 Enclosed is the account for Mom's funeral service and a refund cheque.
 Again, thank-you for your confidence in our firm and if there is anything I can do to be of further assistance now or in the future, please don't hesitate to call.
 Sincerely,
 Colin Wartman.

Enclosed with the letter was a cheque written on the Home's account to *Estate of <name deleted per Freedom of Information and Protection of Privacy Act ("FIPPA") requirements>* dated May 16th, 2002 in the amount of \$1,093.66. Also enclosed was a two page document entitled *Contract 222* stipulating on the left margin: *Purchaser: the Consumer* and on the right margin: *funeral services for <name deleted per FIPPA*

requirements>. The document is written on the Home's letterhead and lists the various services and goods provided by the Home with cash disbursements and concludes with: TOTAL SERVICES, MERCHANDISE, TAX & DISBURSEMENTS \$10,396.21

<u>RECEIVED ON ACCOUNT</u>		\$0.00
ACCOUNT BALANCE IF PAID ON OR BEFORE	29Apr-02	10,396.21
ACCOUNT BALANCE IF PAID ON OR BEFORE	29May-02	10,526.16
ACCOUNT BALANCE IF PAID ON OR BEFORE	28 June-02	10,657.74

On the left hand margin was a line for the signature of the Consumer and the date March 30, 2002. It was not signed. On the right hand margin was a line for the signature of Mr. Colin Wartman per Wartman Funeral Home Inc. It was signed.

The Applicant stated that he had received the funds held in trust for the Consumer's mother's account in two cheques: one in the amount of \$13,116.98, deposited on April 3, 2002, and the other for \$1,093.66, deposited April 11, 2002. The Applicant determined to refund the Consumer the amount of the second cheque because it represented an average of his usual post-1990 client refund amounts of between \$1,000.00 and \$12,000.00. The Applicant stated that, as this situation concerned a pre-1990 contract, he was not obligated to send any money to the Consumer, but had chosen to do so in recognition of Mr. Maschke's admission to him that he had told the Consumer a refund would be forthcoming.

The Applicant described the format of *Contract 222* as simply the form used by the Home for current at-need contracts disclosing current pricelists for goods. This explained why it included signing space, required for post 1990 contracts under the new legislation. It also explained why it included an amount of \$603.40 GST Tax, when in fact no GST Taxes were payable on a 1982 contract for services. Since the document was addressed to the Consumer who had not paid any funds for the services, the Document showed a \$0.00 payment for the services. The Applicant acknowledged that, because in this instance he was operating on a pre 1990 prepaid arrangement, he should have deleted the word "contract" from the document's heading, but since it was sent to the Consumer after the fact, he believed the Consumer would understand its purpose and not be confused.

The Applicant testified that this document was never intended by him to be an accounting or reconciliation of the trust fund. Nor was it the contract under which these services were performed, as that had been signed back in 1982 by the Consumer's mother. It was, rather, simply a breakdown of the costs to the Home for the services provided, inclusive of GST only because he is obligated under post 1990 legislation to maintain updated price lists with GST reflected thereon. The Applicant stated that the Home keeps a copy of this updated price lists in a spreadsheet format in all client files, whether for prepaid services or not. He testified his business has been subjected to Board audits on three occasions since 1991, the year he first introduced this spreadsheet, and has never been advised there were deficiencies or issues with his files and/or accounting practices.

The Applicant testified that, despite sending three further follow-up letters to the Consumer and seeing him at another family funeral arranged by the Home in the summer following his Mother's spring burial, he never heard from him again.

In cross examination the Applicant reiterated that it was not his policy to provide any accounting for prepaid contracts entered into prior to 1990 unless specifically requested to do so. He denied having advised the Consumer to spend freely on his Mother's funeral service as he would be required to pay inheritance taxes on any refunded sums. He specifically denied having ever spoken to the Consumer about a refund or the funds held in trust. Indeed, the Applicant testified that, had he known the Consumer knew how much was actually in the trust account, he would have explained the Home's policy with regard to refunds on pre 1990 contracts. The Applicant described as incorrect his letter to the Board of June, 2003 in which he wrote:

Visitation was held on Good Friday and the funeral service on Saturday. I indicated to Ernie that I would mail a refund to him. (Normally I would not provide a refund on a prearrangement such as this that was made under the previous legislation. But to maintain some goodwill with this family and since we had indicated there would be some refund, we followed through.)

The Applicant however thought he might have written this meaning to imply that he had perhaps advised Mr. Maschke to so inform the Consumer.

Respondent's Evidence

The Consumer testified that he had attended at the Home on the day prior to the funeral and met with Mr. Maschke who had gone over the bulk of the service arrangements with him. The Consumer stated that Mr. Maschke had a pink paper in his hand which he referenced when he advised there was nearly \$16,000.00 in the Consumer's mother's prepaid account. The Consumer was flabbergasted. He testified that the Applicant was in the room from time-to-time and it was he who advised that inheritance taxes would be due on any excess funds in the account such that the Consumer should spend the money freely. At no time was the Consumer ever advised about pre and post 1990 prearranged funeral contracts, nor was he ever told he would only receive a partial refund of the excess trust money.

When he received the first follow-up letter at the end of April, the Consumer was surprised there was no refund included. He testified he waited a few days and then called the Home. He spoke with a woman and explained that he had expected a refund or some sort of accounting, bill or statement of what the funeral actually amounted to. A couple of weeks later when he received the cheque he was surprised it was for a smaller amount than he had been led to expect. Further, the Consumer noted the letter was dated two days prior to the date of the cheque, but the Applicant had written that the cheque had sat on his desk for two weeks. The Consumer concluded that the Home was lying to him. Moreover, at the time he had met with Mr. Maschke, the Consumer

had been advised the funeral services would cost somewhere in the vicinity of \$8,000.00. While he had later approved further costs, he had not expected the cost to rise as dramatically as the figure of \$10,396.21 presented in *Contract 222*. The Consumer felt the total figure had been inflated by the Home. Finally, he thought the documentation showing no monies had been paid and figures illustrating interest charges was improper given that the account was, in fact, prepaid.

The Consumer began to draft a letter of complaint which he did not complete. He attended the funeral of an uncle that summer (2002) in Napanee and felt the Applicant appeared "sheepish" when they met. It was not until he received the last follow-up letter sent by the Home in April, 2003 that he was reminded of his deep dissatisfaction and was motivated to complete his letter of complaint to the Board.

In cross examination the Consumer stressed that it was the Applicant who had spoken to him of the inheritance tax when the arrangements for the burial of his mother were discussed. He testified that, if his testimony at the Discipline Committee was less certain, that might have been due to his recent surgery and medication then, but today he remembered clearly. He further clarified that after receiving the letter in April 2003 he had phoned the Home to request some form of accounting documentation in order to understand what exact money remained owing to him, despite his letter to the Board claiming he had left a message with the Home that he had expected a cheque. When asked by Counsel for the Applicant if he had thought *Contract 222* was a trust accounting, the Consumer responded that it was clear that the Applicant was not telling him what was in really in the trust fund as it appeared from the documentation that \$10,391.31, as per the Contract and \$1,096.00, as per the refund, (totaling some \$11,000.00) was the total sum, whereas the Consumer knew it to be some \$5,000.00 greater.

Rene Brakel testified that he had been an investigator with the Board for the last five and a half years. Before that he had been a Police Detective in Toronto for thirty-five years. Mr. Brakel stated that the Board is responsible for some 200 inspections annually, which he oversees in his position of Manager of Inspections and Investigations to the Board. He advised he was personally involved in the Board's investigation into the Applicant.

In response to the Consumer's letter of complaint, the Applicant submitted relevant Home documentation requested by the Board's Registrar, which was, in turn, reviewed by Mr. Brakel. The Board Investigator testified that, while the document entitled *Contract 222* is commonly seen in the business, the reference to GST is not normally included for pre 1990 contracts. Further, Mr. Brakel testified it was usual to see some reference to the fact that the contract had been paid in any statement concerning prepaid contracts. Mr. Brakel finally testified that it was the Board's position to encourage the return of excess trust funds for all prepaid funeral contracts, including those entered into under the old legislation. It was his experience that the return of such funds was the usual practice.

In cross examination Mr. Brakel acknowledged that the deposit slips, dated April 3rd and April 11th respectively, were dated after the date of the arrangement with the Consumer, being March 29th. He further admitted that the Board had no published policies, manuals or directives concerning the treatment of prepaid funerals under the old legislation.

FACTS FOUND PROVEN:

From the evidence presented the Tribunal finds the following facts:

1. The Consumer was advised by the Home that the amount of funds held in trust for his Mother's prepaid funeral service was approximately \$16,000.00.
2. The Applicant did not know this.
3. The Consumer was advised by the Home that the funeral service for his mother would cost approximately \$8,000.00.
4. Interactions with the Home led the Consumer to conclude that any trust funds in excess of the cost of the funeral services provided would be refunded to him as the estate's beneficiary.
5. The Applicant was aware that the Consumer knew there were excess funds in trust and that the Consumer expected a refund of those trust monies.
6. The Applicant's business practice was to only provide an accounting for pre-1990 prepaid funerals if specifically requested.
7. The Consumer telephoned the Home in the first week of May of 2002 and left a message inquiring after his refund and statement/account.
8. The Applicant's letter to the Consumer of May 14th, 2003 was written in response and refers to *Contract 222* as an "account". In fact, the document is an at-need funeral price list used by the Home as an internal statement of services for pre 1990 prearranged contracts where no funds are to be refunded.
9. The statement that no funds had been received on this account is untrue.
10. The total amount of \$10,396.21 does not reflect the actual amount of the cost of the services provided.
11. The cheque enclosed, referred to as a "refund cheque" represented approximately 25% of the excess trust monies in the fund.
12. This cheque had not sat on the Applicant's desk for two weeks as stated in his letter.

THE LAW:

Section 16(2) of the Act provides:

A funeral director may be found guilty of professional misconduct by the Discipline Committee if,...

(b) the funeral director has been guilty, in the opinion of the Discipline Committee, of professional misconduct as prescribed.

Regulation 44 under the Act provides:

For the purposes of the Act, professional misconduct of a funeral director includes,...

(o) signing or issuing a certificate, report or other document that contains a statement that the licensee knows or ought to know is false, misleading or otherwise improper;

(u) acting in a manner relevant to the practice of funeral directing that, having regard to the circumstances, would reasonably be regarded as unprofessional conduct.

Section 18(5) of the Act provides:

After holding a hearing, the Tribunal may by order direct the Discipline Committee to carry out its decision or refrain from carrying out its decision and to take such action as the Tribunal considers the Discipline Committee ought to take in accordance with this Act and the regulations and, for such purposes, the Tribunal may substitute its opinion for that of the Discipline Committee.

DECISION AND REASONS:

While Section 18(5) of the Act authorizes the Tribunal to substitute its own opinion for that of the Discipline Committee in an appeal to it from that Committee, case law presented by Counsel on the Tribunal's jurisdiction were helpful. In particular the Divisional Court decision in 2002 *College of Physicians and Surgeons of Ontario v. Payne* is relevant. Here the Court considered the authority of the Health Professional Appeal and Review Board over the prior decision of its Registration Committee to exclude Payne from registration. At paragraph 18 the Court found:

In considering the jurisdiction of tribunals, the Supreme Court of Canada has adopted a functional and structural approach by looking at the function which the legislature has asked the tribunal to perform and to the powers and processes it has furnished to it (see *R. v. 974649 Ontario Inc* (2001) SCJ No.79).

In the present case, the legislation establishes two tribunals. Under the Code, a registration committee is established, the majority of which must be physicians. It is authorized to deal with applications for registration to practice medicine. This is the focus of its activities. On the other hand, the Act, which applies to all the self-governing health professions, establishes the board. It is comprised of members of the public and no member can be a member of the health professions. Its authority and focus extends to the review of actions of the self-governing professions, and, in this case, the review of the

Registration Committee. In effect, it is a civilian overlay on the operation of the self-governing health professions.

In our view the deference to be shown by the Board to decisions of the Registration Committee is established in the scheme of the legislation itself. Whether and to what extent deference should be shown to the Registration Committee by the Board is resolved by a consideration of the special qualifications and expertise of the Registration Committee in terms of its composition and the focus of its activities, together with the particular issue which is being considered by the Registration Committee... In that context, the simple categorization of a hearing as “de novo” is not of assistance. Where the board holds a hearing and receives new evidence, the issue may be a straight forward question of fact, such as whether the applicant holds a medical degree. In this example, the Board may well be in as good a position as the Registration Committee to determine that question, particularly where the evidence of the medical degree was not before the Registration Committee. However, where the issue relates to the competence to practice medicine, given the special expertise of the Registration Committee, deference should be shown to the Registration Committee by the Board. In such a case, given the composition of the Registration Committee and its special expertise, it would be inappropriate for the Board to simply substitute its own views for those of the Registration Committee.

The Divisional Court’s 2004 decision of *Flowers v. Health Professions and Appeal Board* (2004) OJ No. 1252, provides further direction as to what standard a reviewing Board should use when considering an appeal from a decision of the, in this case, Complaints Committee, of the College of Physicians and Surgeons. Then J., writing for the majority, held:

In our view the dissenting opinion of Mr. Sherman has substantially captured the issue before the Board and the manner in which the issue ought to be determined when he stated the following in his dissenting reasons:

The issue before the Board is not whether it would arrive at the same decision as did the Committee. The Board, which is composed of members who are not members of any of the regulated health professions, must focus on the reasonableness of the Committee’s decision; In Canada (Director of Investigation and Research) v. Southam Inc. (1977)1 SCR 748 at para. 56, Mr. Justice Iacobucci of the Supreme Court of Canada stated that an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. A tribunal reviewing a decision based on the reasonableness standard must look to see if there are reasons to support such a decision.

Counsel for the Applicant argued that, given the grave consequences to an individual found guilty of professional misconduct, including potential loss of livelihood and reputation, the Discipline Committee erred in failing to strictly construe the legislation in finding the Applicant guilty of misleading the Complainant when in fact the evidence demonstrated that the Consumer was never misled. He knew all along that the funds in trust were greater than that of the refund cheque; and, neither was he misled by the document entitled *Contract 222* as he knew the service had been prepaid.

Counsel further submitted that the Committee had incorrectly applied the civil standard of proof when reviewing the evidence against the Applicant. Authority was presented in the Divisional Court's 1977 decision of *Re Bernstein and College of Physicians and Surgeons of Ontario* wherein testimony presented to the College's Discipline Committee consisted of insufficient credible evidence of the complaint against Bernstein. The Court found that there was no evidence connecting the doctor with the complainant other than the complainant's testimony which testimony the Committee itself, through its counsel, found to be inferior to that of the doctor. In overturning the Committee's decision to suspend the doctor's license, the Court held:

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

And later:

I hold that the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based on cogent evidence which is accepted by the tribunal.

The Tribunal has considered these submissions and arguments in its reasons which follow.

In the present case, the Applicant's Discipline Committee was comprised of three licensed funeral directors. The focus of the Board's Discipline Committee's activities is to determine questions of alleged professional misconduct of members of the profession. Professional misconduct, defined under the legislation, includes subsections 44(0) and (u) of Regulation 470.

The Licence Appeal Tribunal is comprised of members of the public and there is no requirement that a member sitting on an appeal from the Discipline Committee under the Act be familiar with the practice of funeral directing. The Tribunal's focus is on consumer protection. Its authority thus extends to the review of actions of numerous self-governing and publicly regulated businesses, including that of the Board of Funeral Services.

The Tribunal will consider the evidence on the three issues in appeal before it in light of the reasonableness standard of clear, convincing and cogent evidence and with deference to the Discipline Committee's expertise in the profession.

1. *Did the Committee err in finding Colin Wartman guilty of professional misconduct under section 44 (o) of Regulation 470 of the Act?*

In its decision to find the Applicant guilty of professional misconduct under section 44(o) of Regulation 470 under the Act, the Discipline Committee determined the relevant evidence consisted of the Applicant's letter of May 14th to the Consumer and its enclosures, being the "account for Mom's funeral service" and the "refund cheque". The Committee noted the Applicant's testimony that the former was not an account, but an internal pricelist. It considered the false notations on the document, including that of \$603.40 worth of GST, which sum was not in fact due and payable on the funeral service provided for the Consumer's mother. The Committee also found a charge for monument engraving was false, given that it exceeded the invoiced amount. (At the Tribunal the Applicant reasonably explained this discrepancy such that it cannot be said the charge for the monument engraving was false in this instance. This is an example of straight forward fact finding on new evidence as referred to in *Payne*, supra.) The finding by the Committee that the "account" was in fact a false document was based on the clear, cogent and convincing evidence of the false GST charge.

This Tribunal finds the Committee's conclusion reasonable given the circumstances. The Applicant may be obligated to keep price lists under the Act; he may be required to include on those price lists sums chargeable for taxes. Such statements and disclosed charges no doubt are required to be available in Board audits undertaken on licensees from time-to-time. As such, the price list may be perfectly appropriate. The document does not however, reflect any particular agreement or contract or charges arising out of a specific preAct prearranged funeral. To use it for this purpose was, quite simply, false, misleading and inappropriate.

Moreover, the Committee found that, given that the Consumer was provided no other description of his mother's funeral service costs, as well as the reference to it as an "account" within the covering letter, the document in its entirety was intended by the Applicant to be relied upon as the "account" for such charges. This it clearly was not. The Applicant testified he only provided an account when requested. The May 14th letter and its enclosures were only provided to the Consumer after his call to the Home. It is reasonable then that the "account" was an "account" provided under such a request.

Although not referred to by the Committee, the Tribunal notes that the statement on the account that no monies had been received was also false as the account had been prepaid. Even more importantly, although again not relied upon by the Discipline Committee in its reasons, was the false information contained in the covering letter, also signed by the Applicant, which advised that the enclosed cheque, dated two days after the letter date, had sat on his desk for two weeks. It was the Consumer's testimony, which the Tribunal found to be consistent, clear and credible, that it was in fact this statement which actually was the catalyst for his loss of faith with a business which he had found to be professional in all other respects.

The Discipline Committee found that by providing “a refund cheque” with the above referenced “account”, and believing that the Consumer knew the trust monies were, in some vague measure, greater than the funeral cost, the Applicant was in fact misleading the Consumer to believe that the amount of the refund cheque was the total amount of excess funds in trust. The Applicant may not have spoken to the Consumer about an inheritance tax or about any refund due to him from the trust; nonetheless, the evidence is uncontradicted that the Applicant knew immediately following the meeting between the Consumer and Mr. Maschke that the Consumer had been advised he would be receiving a refund of trust money. Despite this, the Applicant did nothing about refunding the money until the Consumer specifically requested such in his May telephone call. Given no explanation otherwise by the Applicant, it would be reasonable for the Consumer to view the consequent refund as the complete amount of excess in trust. The Applicant stated that he knew he was not required to provide the Consumer the full amount under the law. The Committee did not disagree; what it found was that by providing an “account” and “a refund”, the Applicant intended to mislead the Consumer into the false belief that here was a true reflection of his mother’s burial costs and the remaining trust funds.

The Tribunal notes that strict construction of the legislation does not lead to a finding that the Discipline Committee erred in this instance. Whether the Consumer was actually misled is not material to the consideration contained in the Regulation. The wording in subsection 44(o) is clear and unambiguous. That is, that the misconduct is contained in the conduct, including intention, of the licensed sender of the certificate, report or document, not the response of the consumer recipient. As consumer protection legislation the legislation is aimed at the conduct of the licensee or funeral director. In this case the issue is clearly whether the Applicant *knew or ought to have known* that the information was false and misleading. In his testimony the Applicant admitted that he knew he was not in fact enclosing an “account” or trust reconciliation. The Applicant, instead, provided an internal document listing at-need funeral prices which had been re-formatted to read as a contract with the Consumer and was referenced in the covering letter as an “account”. Why did he do this? The Tribunal finds that the Applicant chose to provide these documents to the Consumer because the Consumer had requested an accounting or statement when he telephoned to ask for his refund and the Applicant hoped that this account would suffice. He had similar hopes for the arbitrarily chosen amount of refund he supplied, knowing that the Consumer believed the entire amount of excess was actually due to him.

The evidence clearly supports the finding of the Discipline Committee that the May 14th letter and enclosures were false, misleading or otherwise improper and this Tribunal has no reason to interfere with it.

2. *Did the Committee err in finding Colin Wartman guilty of professional misconduct under section 44(u) of Regulation 470?*

Given that a finding under this section's definition of professional misconduct will depend to a large extent on the professional background and expertise of the Discipline Committee, it is with extreme caution that the Tribunal would interfere with the Committee's conclusions.

The Discipline Committee in its reasons found that the Consumer had been led to believe he was entitled to a complete refund of all excess monies held in trust by the Home on his mother's prepaid account. The Committee determined that once this information was known to the Applicant, he was professionally obliged to make full and honest disclosure of all funds, all costs and all excess to the Consumer. By not doing so, despite the fact that he was not legally obliged to refund excess trust money and despite no professional guidelines on the subject provided by the Board, he was guilty of professional misconduct.

Counsel for the Applicant argued that this was a uncertain standard, depending as it did not on clear and articulated professional requirements, but rather on an *ad hoc* declaration of what is professionally acceptable and what is not. It was submitted that this does not meet the strict construction test for professional disciplinary censure.

The Tribunal finds that there is a clear standard set out in the legislation and that standard is one which depends on circumstances, including seriousness of the facts proved, nature of the impact and gravity of the consequences. It is for this reason that the legislation does not attempt an exhaustive and inclusive list of actions which meet the definition of professional misconduct, but rather leaves that to the discretion of a panel made up of fellow professionals operating in the industry. Here, the Applicant's own evidence was that he too recognized this standard of professionalism when he testified that, where an accounting is requested, then a full accounting is given. In this case the Applicant recognized the need to provide the Consumer with an accounting of the services and monies the Applicant knew the Consumer knew were in excess of those services. The Applicant himself honoured the standard set by the Committee. He failed however, to go the next step which was to provide a "full and honest disclosure" He chose instead to provide a misleading and partial accounting and thereby breached the professional conduct to which his peers would hold him.

The Discipline Committee came to its conclusions based on clear and convincing evidence before it. The Tribunal sees no reason to interfere with its decision under section 44(u) of Regulation 470.

3. Did the Discipline Committee err by imposing an overly severe, and, consequently unreasonable, penalties on the Applicant?

Having found that the Applicant misled a consumer client and having found also that the Applicant was guilty of professional misconduct, the legislature has given the Discipline Committee authority to determine what, in its opinion, is an appropriate penalty. For similar reasons to those given above concerning a finding of professional misconduct, the Tribunal is of the opinion that the Discipline Committee is in a better position than is the Tribunal to determine what is appropriate a penalty and what is not. The question then for this Tribunal is: Is the Committee's penalty is reasonably supported under probing examination? (see *Flowers*, supra)

In its reasons for penalty the Committee referenced the Board's recommendations that an appropriate penalty should protect the public, maintain the reputation of the profession, including its ability to govern itself, act as both general deterrence to other members of the profession, as well as specific deterrence to the Applicant, and provide rehabilitation to the Funeral Director.

The Tribunal concurs with the Committee that the recording of a reprimand on the Board register and the imposition of a fine in the amount of \$3,000.00, to be also recorded, is not excessive and meets the needs outlined above.

The Tribunal also finds that the restrictions imposed by the Tribunal on the licence of the Applicant are reasonable and in keeping with the requirements for public protection and rehabilitation. The evidence illustrated a communication failure by the Applicant and his employee, an employee who had interned with him, over expectations and policies concerning the business' consumer financial disclosure. The Applicant's own testimony revealed his need for improved knowledge of the Board's expectations and standards concerning financial consumer disclosure.

As concerns the Committee's recommendation to publish its decision in the Board's newsletter, this was left by the Committee for the Board's determination, but the Tribunal finds it is not an unreasonable recommendation given the need for a self-regulating profession to ensure its members are provided with the kind of information the Applicant argues was never made available to him in regards to professional standards of conduct. If, as the Applicant maintained, such conduct is prevalent in the profession with regard to pre 1990s prearranged funeral contracts, it is important for funeral directors in the province to be advised as to the expected standards of practice in the industry.

The Tribunal finds that the penalties imposed are in keeping with similar disciplinary action sanctioned by case law. The decisions provided to the Tribunal wherein publication was not imposed are distinguishable in that all concern situations where either guilty pleas were tendered demonstrating acceptance by those charged of

responsibility for their action, or the facts did not include findings of misleading a consumer. In this case the Applicant still does not view his actions were wrong and misleading, and professional misconduct.

The Applicant's appeal is, for all these reasons, dismissed.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

Released: October 7, 2004

Filename:2377.fdea.Wartman

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



PRE-HEARING

DeMARCO FUNERAL HOME (WOODBRIIDGE CHAPEL) INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TO REFUSE THE LICENCE AS A FUNERAL ESTABLISHMENT

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

APPEARANCES: GEORGE LONGO, Agent, representing DeMarco Funeral Home
(Woodbridge Chapel) Inc. (the “Appellant”)

JULIE MACIURA, Counsel, representing the Registrar, *Funeral
Directors and Establishments Act* (the “Respondent”)

DATE OF
PRE-HEARING: June 11, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal comes before the Tribunal at this time as a pre-hearing conference and arises from a Notice of Proposal dated March 5, 2004, (the “Proposal”), issued by the Registrar, *Funeral Directors and Establishments Act* (the “Registrar”), to refuse the application of DeMarco Funeral Home (Woodbridge Chapel) Inc. (the “Appellant”), to operate a funeral establishment at 8003 Weston Road in Woodbridge, Ontario under the provisions of Sections 20(3)(a) and 20(3)(b) of the *Funeral Directors and Establishments Act*, R.S.O. 1990, Chapter F.36 (the “Act”).

The Appellant, by a notice dated March 16, 2004, (the “Appeal”), requested a hearing before the Licence Appeal Tribunal (the “Tribunal”) respecting the Proposal pursuant to the Act.

This conference, upon the consent of all Parties, was conducted pursuant to the Rules of Practice of the Tribunal and no testimony of witnesses was heard at this 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. In addition to those representing the Parties as set forth above, Joseph Richer, the Registrar, and Susan Beck, the Acting Registrar, were present at this conference. Submissions were received from the Parties and heard by the Tribunal as to the issues in dispute and the manner in which these matters should proceed in an orderly and expeditious way.

It became apparent at the conference that the main issue to be dealt with by the Tribunal respecting the registration of the Appellant was the allegation by the Respondent that the past conduct of officers and directors of the Appellant and of the majority holder of the equity shares of the Appellant (the "principals") afforded the Registrar reasonable grounds for belief that the undertaking will not be carried on as required by the Act. It is clear, or at least now alleged by the Respondent, that none of the principals are themselves now in default of the Act (emphasis added).

The Appeal is based upon a full reorganization of the Appellant's business undertaking currently taking place, including the replacement of the principals, thus, in effect, a transition to a new management and ownership of the Appellant where any consideration of the past conduct of the principals is and would be irrelevant. The Appellant therefore appeals the decision of the Respondent in order to maintain whatever value there is in the goodwill and location of the Appellant so as to be transferable as an asset to the new reorganized business undertaking registered under the Act.

The Parties exchanged Pre-Hearing Conference Memorandums and this Tribunal is content with the discovery process, which took place at the conference. The Parties had a full, open discussion of the issue contained in the Proposal and the Appeal and were confident that the hearing could be completed expeditiously. It is also probable that there is no dispute between the Parties as to the facts of this issue.

This Tribunal then made an oral order at the conference as to the continuing of this matter in an orderly and expeditious manner. 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 pre-hearing conference and the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Appellant and the Registrar;
2. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Thursday, August 26, 2004, commencing at 9:30 a.m. and shall be continued, if necessary, on Friday, August 27, 2004; 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, Q.C.
Vice-Chair

RELEASED: August 25, 2004

FILE NAME: 2272.fdea.DeMarco Funeral Home.prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CHON-WAH FUNERAL CHAPEL (INC.)

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
R.S.O. 1990, CHAPTER F.36 AS AMENDED

TO REFUSE TO ISSUE THE LICENCE

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES: EDMUND PETERSON, Counsel, representing the Applicant

BERNARD LEBLANC, Counsel, representing the Registrar,
Funeral Directors and Establishments Act

DATE OF
HEARING:

February 19, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

A Notice of Proposal dated September 25, 2003 was sent to the Applicant. The Registrar, Board of Funeral Services wished to refuse the license for Chon-Wah Funeral Chapel (Inc.) (hereinafter "Chon-Wah") under the authority of subsections 20(3) and (4) of the *Funeral Directors and Establishments Act*, on the basis that Chon-Wah's past and present conduct, including the past and present conduct of the proposed managing funeral director, afforded the Registrar reasonable grounds for belief that the operation will not be operated in accordance with the law and with integrity and honesty

By a Notice of Appeal dated October 14, 2003, Ms. Amy Wong and Chon-Wah requested a hearing before the Tribunal. The hearing was conducted on February 19, 2004. At the onset of the hearing, counsel for both parties submitted, and the Tribunal accepted, an Agreed Statement of Facts, which was entered as Exhibit 3 and a Joint Document Brief, which was entered as Exhibit 4.

ISSUES:

The issue before the Tribunal was whether Chon-Wah's past and present conduct, including the past and present conduct of the proposed managing funeral director, afforded the Registrar reasonable grounds for belief that the operation will not be operated in accordance with the law and with integrity and honesty

EVIDENCE:

Amy Wong

Her counsel asked Ms. Wong if she was able to proceed with the hearing being conducted in English. She responded in the affirmative. The Tribunal notes that language comprehension was not an issue at any time during her evidence.

The witness is currently sixty-seven years of age. She was married to Albert Wong in 1966. He abandoned her in August of 1998 and traveled to China. The couple is still married, although living separate and apart. She has three children who range in age from 32 to 36 years of age. None of her children are presently involved in the funeral business.

Ms. Wong's former matrimonial home was 743 Gerrard Street in Toronto. She now owns that property and Mr. Wong has a residence in Richmond Hill. She has never been to his abode.

The proposed location of the funeral home that is relevant to this matter is 508 Spadina Avenue in Toronto. Ms. Wong and her three children share ownership of the property. The location is now vacant although it is set up as a funeral home. The property is worth about \$1.4 million according to a December 2003 property assessment. She and her children paid the taxes on the land in 2001 and 2002. She alone paid the taxes in 2003. She has never received any money from Albert Wong for the payment of property taxes on the property.

Since the time Mr. Wong left her in 1998, she has not made any *Family Law Act* or other such proceeding to seek support or a division of property. Mr. Wong pays no support either voluntarily or by Court Order. She sees no reason to seek a divorce, as she has done nothing wrong in respect of the marriage. In fact, Ms. Wong has not even sought counsel or advice with respect to such issues since the 1998 separation.

Her sole source of income for the last ten years is a flower shop and monument store located at 743 Gerrard Street East. Her monument operation is called Yorkshire Monuments. The flower shop is not that active. While business was good from 1991-1997, she has faced stiff competition in the interim.

She owns the flower shop and monument store and operates it with the assistance of her daughter. Albert Wong has no interest in either business.

Over the last twelve months she has only seen Albert Wong at family events. She stated that their children are not pleased with their father.

Mr. and Ms. Wong were both bankers when they married. It was a traditional marriage with Mr. Wong being the head of the family. They were not involved in the funeral business at the time of their marriage. This changed when Albert Wong and some ten other directors/partners started off into the funeral business.

Ms. Wong stated that she had no significant role in the funeral business operated by her husband until he owned the business himself. She answered phones at the start because the business did not have a lot of money. There was no office and she only pitched in if it was busy or if there was a funeral in progress. At the outset she did not do the accounting. She did do a little debt collecting for the operation.

She stated that she was not aware that the funeral home had trust accounts. She had a book of cheques from which she would make payments for heating and other such debts. When they had money (sometimes a month would go by without a funeral) she would also make some deposits. She was aware of only one bank account for the business. Albert Wong would receive cheques and payments and she would deposit them in to that account.

A ledger was maintained for funds that passed into and out of the account. This was kept at the funeral home. She maintained this ledger with information provided from Albert Wong. Although she accepted money and payments from clients for monuments, she did not accept payments for funerals.

Ms. Wong stated that she was fairly prominent in the local Chinese community because of her command of the English language. This greatly assisted the older members of the community who did not have a strong command of the language.

The witness was shown the submitted Agreed Statement of Facts (Exhibit 3, Page 2) and questioned in respect of one Ting Kau Choy. In 1988, Mr. Choy had been involved in funeral arrangements with Albert Wong and International Funeral Services (Toronto Chapel) Ltd. The issue revolved around Mr. Wong's refusal to refund certain sums paid by Mr. Choy for a pre-paid funeral. Ms. Wong stated that she did not know Mr. Choy (he was the custodian from their church), and that she did not bring him as a customer to the funeral operation.

She stated that she had no involvement with International Funeral Services and was not a shareholder in the business. This evidence was contrary to the evidence in the Agreed Statement of Facts accepted at the outset by the Tribunal. After hearing submissions from Counsel, it was determined by the Tribunal that the Agreed Statement of Facts prevailed. Ms. Wong was allowed to testify to background and supporting information in respect of those facts.

The witness stated that a Mr. O'Reilly ran Far East Funeral Services. She had no interest in the ownership of Far East. This was a predecessor home to International Funeral Services. Ms. Wong again stated that she was not a shareholder of that company in 1988. Although issuing cheques and making deposits for this company in March 1989, she was not a shareholder. She stated that she had never owned shares in International Funeral Services.

On cross-examination, Ms. Wong confirmed that Far East became International Funeral Services in around 1988. She reiterated her position that she was not ever a shareholder, director or officer of International Funeral Services.

Ms. Wong was asked if she recalled proceedings before the Funeral Service Review Board between November 1988 and March 1989. She responded in the negative. She was shown a transcript (Volume V) of the March 6, 1989 proceedings before that Board (Exhibit 6 of this proceeding). She had no recollection of the proceeding or of testifying at the hearing. She was directed to page 124 of that transcript wherein a Mr. Chumak was examining a Mrs. Wong in direct. She stated that it was not her and must have been another Mrs. Wong.

She had some recollection of Mr. Barry Swadron (counsel for the Registrar of the Board of Funeral Services). However, she stated she was not questioned by him and she did not attend at the hearing. She was directed to the cross-examination at page 128 of the transcript. That section of the transcript reveals testimony that Mrs. Wong and her son Matthew Wong were the owners of International Funeral Services. She testified that she was the Treasurer and her daughter was the secretary.

Later on page 129 of that transcript, Ms. Wong is asked who owns Yan Don Inc. She responds "Yan Don Inc." is my husband's".

She reiterated that she does not recall the March 1989 hearing at all and that she never appeared before it and that it did not happen.

The witness was directed to Tab 27 of the Joint Document Brief at Exhibit 4. This is a transcript of the examination of Albert Wong. These are the Supplementary Decision and Reasons of the Funeral Services Review Board dated March 29, 1989 in the matter of International Funeral Service (Toronto Chapel) Ltd. The Review Board appears to have found that the evidence supported the finding that since inception to the date of that matter, International Funeral Services had been owned equally between Mrs. Wong and her three children. There was also some evidence that the Wong family had owned Far East (the predecessor company of International Funeral Services).

She was asked about these conclusions and she stated they were incorrect and that she had no involvement in Far East and was never a shareholder in either company.

Ms. Wong stated her belief that Albert Wong had never been married to anyone else.

The witness was directed to page 24 to 25 of Exhibit 7, the transcript of the November 23, 1988 hearing day before the Supreme Court of Ontario (Divisional Court) in the matter of International Funeral Service (Toronto Chapel) Ltd. The gist of that section of transcript is testimony by Albert Wong that his wife was in charge of accounts and advertising. She denied any involvement with the advertising of that Funeral Home.

Sheila Nunn

The witness is the Manager of Funeral Plan Canada. She was the administrative inspector with the Funeral Services Board from 1986 to 1996. During that time she conducted most of the Board's investigations and was familiar with Ms. Wong from that period.

She indicated that Ms. Wong was present at the various Funeral Service Board hearings conducted during the November 1988 and the additional proceedings during March 1989. Moreover, she had a specific recollection that Ms. Wong testified at those hearings.

LAW:

The relevant sections of the *Funeral Directors and Establishments Act* are:

20.(3) An applicant is entitled to a licence or a renewal of a licence as a funeral director or to operate a funeral establishment or to operate a transfer service except if,

- (a) the applicant cannot reasonably be expected to be competent or financially responsible in the conduct of the applicant's business;
- (b) the past or present conduct of the persons referred to in subsection (4) affords reasonable grounds for belief that the applicant will not operate in accordance with the law and with integrity and honesty;
- (c) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for a licence;
- (d) the applicant is carrying on activities that are, or will be if the applicant is licensed, in contravention of this Act or the regulations;

...

(4) Clause (3) (b) applies to the following persons:

- 1. The applicant.
- 2. An officer or director of the applicant.
- 3. A person holding more than 10 per cent of the equity shares of the applicant or an officer or director of such person.
- 4. Any person having a beneficial interest in the operation of the business of the applicant or licensee.

...

22.(5) After holding a hearing, the Tribunal may by order direct the Registrar to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

...

43. (1) For the purpose of ensuring compliance with this Act and the regulations, an inspector may,

- (a) enter any place at any reasonable time;
- (b) request the production for inspection of documents or things that may be relevant to the inspection;

...

44. (1) No person shall obstruct an inspector in carrying out an inspection under this Act or withhold, destroy, conceal or refuse to provide any relevant information or thing required for the purpose of the inspection.

(2) It is a condition of each licence issued under this Act that the licensee facilitate an inspection relevant to the licence.

...

Regulation 470 states:

45. It is a condition of a licence to operate a transfer service that the operator,

...

(j) carries out the terms of a contract;

...

(m) does not sign or issue a certificate, report or other document that contains a statement the licensee knows or ought to know is false, misleading or otherwise improper;

...

(p) replies within a reasonable time to a written inquiry received from the Registrar;

...

(r) does not act in a manner relevant to the provision of transfer services that, having regard to the circumstances, would reasonably be regarded as disgraceful or inconsistent with fair business practice.

...

53. (1) An operator of a funeral establishment or transfer service shall not include on any sign on the premises of the funeral establishment or transfer service the name or photograph of any person not licensed under the Act.

(2) An operator of a funeral establishment or transfer service shall not include in any advertisement a reference to price or conditions of sale or price or description of services unless the services and supplies to which the prices apply are clearly set out.

(3) All advertisements shall be filed with the Board before being released to the public.

FINDINGS OF FACT:

The Tribunal finds the following facts to have been established by the evidence:

1. Amy Wong was a shareholder, officer and director, and controlling mind, of International Funeral Services (Toronto Chapel) Ltd., whose licence was revoked

by the Funeral Service Review Board in 1989. This decision was upheld by the Divisional Court in 1991 (Agreed Statement of Facts, Exhibit 3, paragraph 2);

2. Amy Wong testified at the Funeral Services Review Board hearings in 1989;
3. There was insufficient evidence presented to refute the Registrar's concern that Ms. Wong was in fact estranged from her husband, Albert Wong.
4. There was insufficient evidence presented to refute the Registrar's concern that Albert Wong was involved in her proposed business affairs;
5. The Applicant was giving evidence in an untruthful manner at the hearing.

It is the duty and obligation of this Tribunal to ensure that proposed funeral service operators conduct themselves in a competent fashion in accordance with integrity, honesty and the law.

The Registrar's concerns with respect to the application of Ms. Wong were very much based upon her reliability, honesty and integrity. Her husband was convicted of possession of stolen goods in circumstances that were industry related. While there is nothing to suggest Ms. Wong was involved in those egregious transgressions, the Registrar would be rightly concerned if these people were involved in any manner in the operation of a funeral home. In the Agreed Statement of Facts, it is noted that two of Ms. Wong's own personal and business references submitted in support of the current application have no knowledge of her estrangement from Mr. Wong. One even thought he was involved in the operation of her flower shop.

Ms. Wong testified that she was no longer involved with her husband. She stated that, except for family engagements, she has had minimal contact with her husband since he allegedly abandoned her in 1998. This was the only evidence available directly from the Applicant to challenge the Registrar's concerns.

The problem for the Applicant is that it was quite evident that she was not being truthful to the Tribunal in giving her evidence. She denied any ownership in the International Funeral Services operation. However, it was part of the Agreed Statement of Facts that she was an owner, officer and a controlling mind of that operation. She persistently denied several elements contained in the Agreed Statement of Facts including her involvement with the advertising at International Funeral Services.

Even more troubling was her selective memory of the significant hearings in 1989 before the Funeral Services Board. She recalled a Mr. Swardon but did not have any memory of and, in fact, denied testifying at these hearings. She stated it must have been someone else present. Mr. Swadron was counsel for the Board and cross-examined Ms. Wong.

The Registrar's witness, Ms. Nunn, very clearly recalled Ms. Wong being present and giving evidence. Counsel for the Registrar submitted, and the Tribunal accepts, that it is very difficult to accept that such a significant event could be forgotten. The Tribunal finds that Ms. Wong was not being truthful when she gave her evidence on this point at the hearing. It was ridiculous to suggest that someone else must have testified at that hearing in her stead and casts a pall on the reliability of the remainder of her evidence.

Under the circumstances, the Tribunal is unable to place any reliance on the evidence given by Ms. Wong at this hearing. As she was the only witness for the Applicant and her evidence has been found untruthful and unreliable, the Tribunal has no difficulty finding that the Registrar has sufficient grounds to believe that the Applicant, if registered, would not conduct her business honestly and in accordance with the law.

ORDER:

Pursuant to section 22 (6) of the *Funeral Directors and Establishments Act*, the Tribunal directs the Registrar to carry out its proposal to refuse registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney
Presiding Member

RELEASED: March 31, 2004

File: 2000.fdea.ChonWah

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.



PREHEARING

CHON-WAH FUNERAL CHAPEL (INC.)

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT
R.S.O. 1990, CHAPTER F.36 AS AMENDED

TO REFUSE TO ISSUE THE LICENCE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: EDMUND PETERSON, Counsel, representing the Applicant

JULIE MACUIRA, Counsel, representing the Registrar, *Funeral
Directors and Establishments Act*

DATE OF
PREHEARING: January 28, 2004

Toronto

ORDER

Following attendances on January 28, 2004 at a pre-hearing before this Tribunal of Edmund Peterson, Counsel, representing Chon-Wah Funeral Chapel (Inc.) (the "Applicant") and Julie Macuira, Counsel, representing the Registrar, *Funeral Directors and Establishments Act* (the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on February 19, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 20, 2004 at the Tribunal's above Chambers:

1. The Parties to the hearing are the Applicant and the Respondent.
2. The Parties record that there has been no resolution of any of the issues in this matter.

3. The parties shall strictly comply with the disclosure requirements more fully set forth in the Rule 6 of the Rules of Practice of the Tribunal, as amended January 2, 2003.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: January 29, 2004

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



DeMARCO FUNERAL HOME (WOODBIDGE CHAPEL) INC.

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

IN THE MATTER OF
DeMARCO FUNERAL HOME (WOODBIDGE 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: March 5, 2004

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

DeMARCO FUNERAL HOME (WOODBIDGE CHAPEL) INC.
Applicant

- and -

REGISTRAR, *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*
Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on August 9 and 10, 2004;

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 Thursday, August 26, 2004 and continue at 9:30 a.m. on Friday, August 27, 2004, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: May 14, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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

IN THE MATTER OF
COLIN WARTMAN

AND IN THE MATTER of the DECISION by
the Discipline Committee of the Board of Funeral Services
- Decision dated: May 1, 2004

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

COLIN WARTMAN

Applicant

-and-

BOARD OF FUNERAL SERVICES

Respondent

ADJOURNMENT ORDER

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on July 2, 2004.

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against both parties* to commence at the Ontario Rental Housing Tribunal, Toronto South Regional Office, 79 St. Clair Avenue East, 2nd Floor, Large Meeting Room, Toronto, Ontario, at 9:30 a.m. on Thursday, July 8, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: June 30, 2004

FILE NAME: 2377.fdea.Wartman.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

COLIN WARTMAN

APPEAL FROM A DECISION OF THE DISCIPLINE COMMITTEE
OF THE BOARD OF FUNERAL SERVICES

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

APPEARANCES: WILLIAM BURDEN, Counsel, representing the Applicant

JULIE MACUIRA, Counsel, representing the Board of Funeral
Services

DATE OF
PREHEARING: July 8, 2004

Toronto

ORDER

Following attendances before this Tribunal on July 8, 2004 at a pre-hearing of William Burden, Counsel, representing Colin Wartman (the "Applicant") and Julie Macuira, Counsel, representing the Board of Funeral Services (the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, September 9, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on Friday, September 10, 2004 at the Tribunal's above Chambers:

1. The Parties to the hearing are the Applicant and the Respondent.
2. The Parties record that there has been no resolution of any of the issues in this matter.

3. The parties shall strictly comply with the disclosure requirements more fully set forth in the Rule 6 of the Rules of Practice of the Tribunal, as amended November 3, 2003.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Vice-Chair

RELEASED: July 12, 2004

FILE NAME: 2377.fdea.Wartman.pre.doc



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Decisions under Highway Traffic Act

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

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2079-MED-ADJ-ADJOURNMENT

HIGHWAY TRAFFIC ACT

Revised Statutes of Ontario, 1990, Chapter H.8, as amended

IN THE MATTER OF the DRIVER'S LICENCE of
THE APPLICANT

AND IN THE MATTER of the DECISION by
the Registrar of Motor Vehicles pursuant to
Section 32(12)(b)(i) of the *Highway Traffic Act*
TO DOWNGRADE A LICENCE
- Decision effective: November 5, 2003

AND IN THE MATTER of a requirement for a hearing respecting the
said Decision pursuant to Section 50(1)

APPLICANT

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS an electronic hearing in the above matter was scheduled to be held on Friday,
April 16, 2004, by the Tribunal;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the electronic hearing
peremptory against both parties to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 10:30 a.m., on Wednesday, May 26, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: April 19, 2004

FILE NAME: 2079.med-Adj-Adjournment

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2236-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: ROY MELVIN, M.D., Presiding Member

APPEARANCES: K.M. BIEL
Representative for the Registrar of Motor Vehicles
By written submission only

Applicant
Unrepresented
By written submissions only

DATE OF
HEARING: April 15, 2004 Written

DECISION AND REASONS

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

FACTS and CHRONOLOGY OF EVENTS:

The Applicant, now aged 66, had been employed as a transport driver and held a class A licence. In 1968 he suffered a myocardial infarction from which he recovered satisfactorily and has had ongoing medical care. A routine medical report requested by the Ministry of Transportation ("MTO") was submitted by Dr. N. Frank of Brampton, Ontario on October

16, 1998 in which he describes his patient as being stable and symptom free on medication. MTO's representative felt that he no longer met medical standards for a classified licence and advised that the Applicant may apply for a waiver. He submitted a medical consultant's report by Dr. L.L. Hill F.R.C.P. (C) of Brampton, Ontario dated January 18, 1999 regarding his cardiac condition as follows:

Left ventricle moderately enlarged, mild to moderate enlargement of the left atrium, 1+ mitral regurgitation, some thickening of the aortic valve and slight tricuspid insufficiency.

On February 24, 1999 the Medical Advisory Committee requested further cardiac tests. These were reported on April 23, 1999 by L.L. Hill as follows:

Stress test in accordance with Bruce Protocol achieved maximum heart rate of 144 after 5.40 minutes – stopped because of shortness of breath. Myoview was injected at peak exercise showed an ejection fraction of 29% with evidence of extensive anterior septum and inferior infarction with no peri-infarction ischemia.

Conclusion – Adequate stress test with moderate reduction of exercise tolerance, moderate reduction of left ventricular systolic function, extensive infarction in the region of the anterior septal and inferior wall with no ischemia.

May 7, 1999

Dr. L.L. Hill's report to the family doctor Dr. N. Frank states that the Applicant is stable cardiovascularly. He has no pain, shortness of breath, dizziness or syncope. His EKG shows normal sinus rhythm, previous anterior infarction, persistent ST elevation V1 to V3 consistent with aneurysm formation and left atrial overload. Holter monitor was repeated, to be followed every six months or earlier if needed.

October 25, 2000

Dr. L.L. Hill's report to the family doctor that the Applicant remains stable.

EKG findings are the same. Echocardiogram reveals the left ventricle to be mildly enlarged. LV function is grade 3 Ejection fraction approximately 35-38%. There was mild left atrial enlargement and 1+ mitral regurgitation. Conclusion: moderate left ventricle dysfunction.

On March 14, 2001 the Medical Review Section wrote to the Applicant that he still did not meet the medical standards for any class of drivers licence higher than "G" and requested an updated waiver certificate and cardiologist's report confirming that there is no evidence of heart disease without functional limitation to meet functional class I of the Canadian Cardiovascular Society Guidelines.

June 13, 2001

Medical Advisory Committee recommends downgrade to class "G" licence because the Applicant does not meet guidelines stipulated by the N.S.C. #3.1 to hold a commercial

licence.

July 10, 2001

Letter to the Applicant rejecting his application for a waiver of medical standards for class "A" licence. Reconsideration will be made on receipt of up-to-date medical reports. A class "G" licence will be sent.

February 20, 2004

Consultation report by Dr. E.G. Davies, Cardiologist to family doctor Dr. F. Kwan of Whitby, Ontario.

The Applicant has no complaints and is taking the following medications: zocor, aspirin, coreg, vasotec and digoxin. An echogram shows normal LV size and has Grade 3 LV function. Estimated ejection fraction is 25%. Stress test by Bruce Protocol for 10 minutes and 30 seconds achieving workload of 12.8 mets.

Summary – the Applicant is stable – is functional class 1 without any angina or dyspnea. He has moderate LV dysfunction but no signs of heart failure. He has no worries about his ability to drive with a class "A" licence.

March 12, 2004

Letter to the Applicant from the Deputy Registrar of Motor Vehicles advising that a medical waiver for a class "A" licence has not been granted because his medical condition does not comply with C.C.S. standards. He has the option of reapplying by submitting detailed cardiologist's reports to show improvement or appealing to the Licence Appeal Tribunal. Meanwhile a class "G" licence has been issued.

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 state:

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 Respondent has a duty to uphold Section 32(12) of the *Highway Traffic Act* by requesting periodic medical examination reports to justify the class of licence held by the driver. Dr. N. Frank's report of October 16, 1998 triggered the Respondent's downgrading of the Applicant's licence. Over the following several years, the Applicant's medical progress was reported to the Respondent, each resulting in the Respondent's decision to maintain this downgrading for the reason that his medical condition did not comply with accepted standards for the holder of a class "A" licence.

The National Safety Code requires a driver with coronary artery disease (as evidenced by previous myocardial infarction) to meet the following criteria to hold a class "A" licence:

Canadian Cardiovascular Society Class I
Left Ventricular Class I and Holter Class II
Or
Left Ventricular Class II and Holter Class I

The Applicant has significant residual cardiac disease. On the basis of the most recent medical report by Dr. E.G. Davies, Cardiologist, dated February 20, 2004, the echogram shows a Grade 3 L.V. function with ejection fraction of 25% factors which are below the requirements for a class "A" licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 8, 2004 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: April 14, 2004

FILE NAME: 2236.med. CARD

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2255-MED-CARD-Cardiac

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 BIEHN, M.D.
Presiding Member

APPEARANCES: MARC A. DiGIROLAMO, Solicitor for the Applicant
(the "Applicant")

LYNDA DUNBAR, Agent
Representative for the Minister of Transportation
(the "Respondent")

DATE OF
HEARING: April 7, 2004 *by teleconference*

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) (the "HTA").

CHRONOLOGY OF EVENTS:

- 1) In October 2002, the Ministry of Transportation ("MTO") received a medical report from the Applicant's family physician. This report detailed the findings of an echocardiogram, done in March 2002, which indicated "moderate aortic stenosis".

- 2) January 2003 - MTO requested cardiologist's assessment.
- 3) February 2003 - Cardiologist assessed Applicant and outlined a series of "plans and recommendations", one of which stated, "There would be no contraindications to his driving trucks".
- 4) September 2003 - MTO notified the Applicant that he no longer met the medical standards for a Class 'A' licence and indicated he must apply "for a waiver of the medical standards".
- 5) October 2003 - Waiver supplied by cardiologist plus echocardiogram report of October 2003.
- 6) December 2003 - Class 'A' licence withdrawn by MTO, specifically because the estimated aortic valve area of 0.9 cm² fell below the standard of 1 cm².
- 7) March 2004 - Case reviewed and ruling upheld by MTO.

FACTS:

In February 2003, the Applicant's cardiologist indicated that the Applicant is known to have a "heart murmur" five years previously, presumably due to aortic valve stenosis.

In February 2003, the cardiologist noted absence of symptoms related to documented aortic stenosis. He also noted that the Applicant had played racquetball several times per week until one year ago, that he walked a lot at work and loaded up to 85 pounds without diminution in effort capacity.

The cardiologist's note of February 2003 also noted:

- i) Bicuspid aortic valve
- ii) Blood pressure 180/90
- iii) EKG evidence of left ventricular hypertrophy and increased LV mass index by echocardiogram
- iv) Intact left ventricular systolic function

The Applicant continued to do his usual work and held his Class 'A' licence from March 2002 (when evidence of aortic stenosis was first confirmed) until its withdrawal by MTO in December 2003.

At no time has the Applicant's cardiologist, by whom he is followed closely, felt that he was a driving risk.

ISSUE:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 state:

- 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.

TRIBUNAL FINDINGS:

The MTO has withdrawn the Applicant's Class 'A' licence citing Section 32(12)(b)(i) of the *Highway Traffic Act* which, in the case of a person who hold a driver's licence, allows the MTO to:

... change the class of motor vehicle in respect of which the licence is issued in accordance with the results of the examinations.

The Canadian Cardiovascular Society (CCS) has developed "standards" for a cardiac patient's fitness to drive. The MTO cites one of these in withdrawing the Class 'A' licence in that the standard recommends that the "estimated valve area" be equal to or exceed 1cm². The Applicant's estimated valve area is 0.9 cm².

The preamble in Section 3.6 Valvular Heart Disease is quoted here, "Determination of fitness to drive in individuals with unoperated valvular heart disease must be based on the degree of functional impairment, presence or absence of cerebral ischemia and, for commercial drivers, a favourable detailed cardiologic assessment".

Putting this together with the estimated valve area measurement, the Tribunal concludes that a decision to withdraw the Applicant's Class 'A' licence should not solely depend on the estimated valve area measurement. In other words, is there any evidence of functional impairment, cerebral ischemia or lack of a favourable, detailed cardiologic assessment? The answer to all of these is a definite NO, according to the cardiologist.

The cardiologist's note of October 2003 notes that the Applicant's blood pressure was 140/85 and his resting heart rate 90 compared to 180 and 90 and when assessed in February 2003. He refers to the "calculated aortic valve area of 0.78 cm²" (October 2003 echocardiogram) as possibly being "over estimated", since it is not "consistent with the peak gradient, which falls into the moderate range". The Tribunal concludes that measurements of aortic valve area by echocardiography are indeed estimates and must be correlated with the clinical and functional status of the Applicant.

The Applicant was represented at the hearing by counsel who spoke on his behalf. It was established that the Applicant is an active individual who is free of any symptoms attributable to cardiovascular disease. He had in the past been an active racquetball player and has returned to this activity on a weekly or more basis. He plays with vigour, stating "I like to win".

Since his condition is asymptomatic, there is no indication for surgery at the present time. His physicians have placed no restrictions on his activities. The Tribunal is of the opinion that the aortic valvular condition is unlikely to suddenly become severely symptomatic e.g. a sudden syncopal episode.

In addition, the Applicant now has a normal range blood pressure and, coincidentally or consequently, a documented decrease in left ventricular mass.

The Tribunal again notes that the Applicant continued to drive his tractor-trailer and centre liner, without incident, from the time his condition first came to the Ministry's attention in March 2002 until suspension of his Class 'A' licence in December, 2003.

DECISION:

Upon the application by the Applicant to appeal the decision effective January 8, 2004 of the Minister (the "Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* (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 Act that the decision of the Minister be set aside.

LICENCE APPEAL TRIBUNAL

John Biehn, M.D.
Presiding Member

RELEASED: April 8, 2004

FILE NAME: 2255.med.card.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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2275-MED-DOWN-SEIZ-Downgrade-Seizures

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: ROY MELVIN, M.D., Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER, Respondent
Representative for the Minister

DATE OF
HEARING: April 19, 2004

Toronto

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. Letter regarding Suspension of Driver's Licence effective February 14, 2003, issued by the Registrar of Motor Vehicles.
2. Notice of Appeal form, received at the Tribunal March 23, 2004, filed by the Applicant.

3. Letter regarding reinstatement of Class "G" driver's licence, dated September 8, 2003, issued by the Registrar of Motor Vehicles.
4. Documents Submitted for Disclosure by the Respondent, tabs 1-4.

FACTS:

On January 24, 2003 Dr. J.C. Martin del Campo notified the Ministry of Transportation ("MTO") that his patient, the Applicant, had suffered two generalized seizures and that investigation yielded the presence of a left frontal lesion awaiting clarification by MRI. The Applicant was placed on Dilantin and had no further recurrences.

On February 5, 2003 the MTO suspended the Applicant's driver's licence on the basis of the reported medical condition, which might impair his ability to drive a motor vehicle safely, as stated in Regulation 340/94 Section 14(a). Reconsideration of that decision would be based on up-to-date medical reports.

On May 13, 2003 Dr. del Campo's report of the MRI showed the lesion to be a small infarct, almost entirely resolved with no evidence of neoplasm, and a normal EEG. He feels there is no medical contraindication for his patient to resume driving as long as he remains on medication.

On June 24, 2003 further reports from Dr. del Campo, at the request of the MTO, indicated the Applicant suffered a seizure associated with a small haemorrhage in the left frontal region of the brain, which was felt to be secondary to a vasculitis associated with chronic inflammatory bowel disease. The Applicant at this time has been on Dilantin with no recurrence of seizure, which first occurred early in November of 2002.

On July 28, 2003 the Ministry's Medical Advisory Committee decided that the Applicant's condition does not fulfil the requirements of a Class "A" licence but agrees to a Class "G" licence pending the Applicant's neurologist's reports that he remains seizure free for one year.

On September 8, 2003 a letter of reinstatement went to the Applicant, saying he may apply for a waiver of medical standards to Class "A" by providing up-to-date reports confirming that he is seizure free for five years off medication or ten years on medication, as indicated by the National Safety Code for Motor Carriers in section 6.3.1. of the Medical Standards for Drivers.

On February 19, 2004 a report from Dr. del Campo stated the Applicant has had no further seizures and was allowed to stop his Dilantin after a few months (in May 2003). Dr. del Campo considers the Applicant to be a very low risk of recurrence but cannot guarantee that the Applicant will not have a seizure in the future.

On March 22, 2004 the Applicant appealed to this Tribunal. Additional medical history was obtained from the Applicant's testimony at the hearing, the details of which are somewhat obscure because of a language problem.

The Applicant, now age 40, has had chronic Ulcerative Colitis for about twenty years, during which time he has had at least five severe attacks, has been in hospital several times and has had a variety of medications, including steroids off and on.

The Applicant was in the Humber River Hospital in November 2002, at which time he suffered what was reported to be a seizure. There is some doubt as to the nature of this attack because he was so toxic with his bowel disease. On November 9, 2002 he underwent a partial bowel resection with a temporary colostomy. A more definitive bowel operation was done at Mount Sinai Hospital in December 2003 with a permanent colostomy and he has felt quite well since. His gastroenterologist is a Dr. Patek.

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?

Does the Applicant suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his 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 infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,

- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
- (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

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

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

Section 50 states:

- 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 Ministry was warranted in suspending the Applicant's driver's licence on receipt of a medical report that he had suffered a seizure, that being a condition likely to impair his ability to drive safely, contrary to the *Highway Traffic Act*, section 47(1) and Regulation 340/94, section 14(a).

Subsequent investigation revealed a vague lesion in the brain, which was considered to be a small infarct due to vasculitis, which is a rare immunological response to other conditions, in this case his chronic bowel disease. With the lesion resolved, his MRI was deemed negative and EEG findings were normal. As a result the diagnosis of epilepsy has never been made. After a short course of Dilantin the Applicant has remained seizure free and off medication for one year. The Ministry's Medical Advisory Committee has agreed to reinstatement of a Class "G" licence but rejects the Applicant's application for a Class "A" licence on the basis of guidelines applicable to patients with epilepsy. However, the guideline most applicable to this case may be found in the C.M.A. guide, Determining Medical Fitness to Drive, A Guide for Physicians, section 5.4.1:

If a complete examination by a neurologist, including EEG and CT, does not suggest a diagnosis of epilepsy or some other condition that precludes driving, it is safe to recommend a return to professional driving after the patient has been **seizure free for 12 months**.

(emphasis in original)

Furthermore, the condition underlying the trigger factor (in this case, ulcerative colitis), which was attributed as the cause of the vasculitis, which in turn caused the minor brain infarct, blamed for the seizure is no longer a problem because of the successful outcome of the Applicant's surgery.

DECISION:

Upon the application by the Applicant to appeal the decision effective August 25, 2003 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 modified by reinstating a Class "A" licence to the Applicant, providing that the Applicant first submit to the Ministry an updated medical report of his entire medical problem with special reference to his bowel condition, to include history, treatment and prognosis.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.,
Member

RELEASED: April 23, 2004

FILE NAME: 2275.med.down.seiz

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Section 47(1) (b) - Medical

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2182-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: DR. JOHN BIEHN, M.D., Presiding Member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

APPLICANT
unrepresented

DATE OF
HEARING: March 24, 2004

Electronic

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. Decision Letter of December 6, 2002 issued by MTO.
2. Notice of Appeal Form Received February 4, 2004 filed by the Applicant.
3. Respondent's Submissions (15 items).
4. Applicant's Submissions.

PRELIMINARY MATTERS: None

CHRONOLOGY OF EVENTS:

October 18, 2002, "seizures x 2" seen in hospital ER. Reported to MTO.

December 19, 2002, licence suspended.

February 5, 2003, seen by Dr. Muhunthan, Neurologist. He reported:

1. History of excessive alcohol intake a few days prior to seizure
2. Past history of binge drinking
3. Diagnosis of alcohol hepatitis
4. "Patient claims she is not drinking anymore"
5. "Recent blood tests show elevated liver enzymes and high MCV.

July 2003, reported in subsequent letter from Dr. Greensmith to have been admitted to hospital for "severe hepatitis secondary to alcohol consumption.

September 2003, attended 10 day outpatient addiction day treatment program.

December 2003, seen by Dr. Greensmith, her family physician, who attested to hospital admission in July and reports Applicant "stated that she has not consumed alcohol since July 2003" also reports that GGT level "remains elevated at 237".

FACTS:

1. It is apparent that the Applicant has a well documented difficulty with alcohol dating back to at least 2000 when alcohol hepatitis was diagnosed.
2. The seizures of October 2002 are more than likely related to alcohol withdrawal. Although the Applicant claims these occurred in November, this discrepancy is not material to the case.

3. The Applicant was admitted to hospital in July 2003 for “severe hepatitis secondary to alcohol consumption. This implies that alcohol consumption was occurring at this time despite her stating, in February, 2003, that she had stopped drinking.
4. The GGT level continues to be significantly elevated in December 2003 although the Applicant stated that she has not had a drink since July 2003. The Tribunal does not wish to challenge the Applicant about her statement but, if it is true, another explanation for the elevated GGT should be forthcoming and is not offered by Dr. Greensmith.

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 licence has been suspended under regulation 340/94, section 14 a) seizures related to alcohol and b) alcohol abuse.

TRIBUNAL FINDINGS:

The Applicant did admit on questioning that she was hospitalised in July 2003 as a consequence of alcohol consumption which would have put her at risk for further seizures. She claims to be alcohol free since then.

She has had a falling out with her family physician who has since dismissed her from his practice and, at present, she does not have a personal physician. This is unfortunate because her situation requires monitoring and should the GGT level remain elevated an explanation for this will be required.

At best the Applicant has been alcohol free for seven months and the guidelines require twelve months under the circumstances.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 19, 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

Dr. John Biehn, M.D.
Presiding Member

RELEASED: April 7, 2004

FILE NAME: 2182.med.ALCL

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2251-MED-MDIS-Mental Disorder

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: PATRICK COFFEY, M.D.
Presiding Member

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

Applicant
unrepresented

DATE OF
HEARING: April 7, 2004

Toronto

DECISION AND REASONS

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

EXHIBITS:

1. Notice of Suspension of Driver's Licence effective May 1, 2003, issued by the Registrar of Motor Vehicles.
2. Notice of Appeal Form received at the Tribunal March 8, 2004, filed by the Applicant.

PRELIMINARY MATTERS:

The Respondent explained that the Applicant's licence is now suspended under Section 47(1) of the *Highway Traffic Act*, (effective March 23, 2004). This replaced the suspension under Section 32 (12) (b) (11) of the *Highway Traffic Act*, which had been in effect since May 1, 2003, for failing to file a medical report.

FACTS:

The Applicant, a 33 year old male, lost his driver's licence, effective May 1, 2003, as the result of failing to file a medical report which was requested by the Ministry of Transportation (MTO) in their letter dated February 4, 2003.

On January 22, 2003 Dr. P. Klassen, psychiatrist at the Clarke Institute of Psychiatry, Toronto, wrote to the Ministry of Transportation (MTO) saying the following:

The above-named individual (the Applicant) was assessed by myself. I have concerns regarding this individual's fitness to operate a motor vehicle.

From April 23, 2003 to June 13, 2003, the Applicant was an inpatient in the Clarke Institute of Psychiatry, Toronto and the following are the main points expressed in the Hospital Discharge Summary, signed by Dr. Jorge Soni (Staff Psychiatrist). The admitting diagnosis was:

Schizophrenia, paranoid type
Mixed substance abuse
Antisocial behaviour
Non-compliance with medical treatment.

The Applicant was brought in by the police on a Form 2 on the basis of threatening to kill them, believing himself to be Jesus Christ and his parents and brothers to be demons. He had a legal history of assault to his grandfather, father, mother and two girlfriends and was convicted of the assaults on his two girlfriends and his mother but not on his grandfather or father. He agreed to remain in Hospital on a voluntary basis and to start therapy. He improved but continued to have delusions. Later, he was permitted to have day passes and then weekend passes. On June 13, 2003, he was discharged to his parents' house with a prescription for medications, to be followed up by his outpatient psychiatrist.

The discharge diagnosis was:

Schizophrenia, paranoid type
Mixed substance abuse.

On September 17, 2003, psychiatrist Dr. J. Soni of the Clarke Institute wrote to the MTO stating the following:

I am the attending psychiatrist for the Applicant. His current diagnosis is Schizophrenia with Major Depressive Episode. He has been stabilised, is compliant and is responding well to treatment. As long as he continues to attend his outpatient appointments, take his medication and follow my treatment recommendations, the Applicant will be able to operate a motor vehicle safely.

Also on September 17, 2003, Dr. Soni, in a Release of Medical Information, answered "No" to the following questions concerning the Applicant:

Is there evidence that this condition is not currently well controlled?
Has there been any episodes of sudden loss of consciousness or any other incident, which may affect the ability to operate a motor vehicle?
Is there evidence of non-compliance to treatment that may affect the ability to operate a motor vehicle?

On November 25, 2003, Dr. Soni sent in another medical report to the MTO in which he said, in part, that he had been seeing the Applicant every four weeks and that the Applicant had shown complete remission of psychotic illness. He thought it would be worth tapering down the Applicant's medication after six months. He said that he and the Applicant's parents were in close communication and that the Applicant understood that not following his recommendations could lead to the suspension of his licence and the loss of his job.

On January 12, 2004, the MTO wrote to the Applicant stating that it had been decided that his driving privileges should remain under suspension, but that his case could be reconsidered upon receipt of medical information satisfactory to the ministry, namely a detailed, up-to-date psychiatrist's assessment confirming that he had established a one year of mental and emotional stability, current treatment, show insight into his illness, freedom from psychotic symptoms and compliance with prescribed treatment. Also, it should be confirmed that there was continued abstinence from illicit drugs supported by random drug toxicology screening.

The certified copy of the MTO driver record for the Applicant, dated March 3, 2004, showed that he was convicted of impaired driving on one occasion and convicted of speeding on two occasions and that the current demerit points totalled 3.

Applicant's Evidence

In the Applicant's written "Reasons for Appeal", he wrote that he was by no means or in any way whatsoever mentally ill and did not suffer from any form of schizophrenia and that he was not delusional or in a state of psychosis. But, he said that for a period of two years he used illegal substances but has recovered from that. He said that much of the information in the medical report was a misrepresentation of the true facts.

At the Hearing on April 7, 2004, the Applicant refuted the following statements made in the Hospital discharge summary and stated that they were untrue:

1. That he ever believed that he was Jesus Christ.
2. That he ever assaulted his grandfather, father, mother or his first or second girlfriend.
3. That he ever had a diagnosis of schizophrenia prior to his recent episode.

Also, at the Hearing he explained that when he was taking illicit drugs he was really just experimenting with them and was not addicted to them in a major way.

He said that he does not drink alcohol or smoke.

He said that when he signed the Treatment Agreement before being discharged from Hospital (June 13, 2003) he was manipulated into doing so.

He has no wish to go on seeing psychiatrist Dr. J. Soni and wishes to have as little as possible to do with the Clarke Institute. He is now seeing a new psychiatrist.

He stated that he no longer takes any medication. But later in the Hearing, on being reminded that Dr. Soni had asserted that it was necessary for him to continue to take the recommended medication and to keep regular office appointments before any consideration be given to return to driving, he said that he was taking medications.

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;
- (5) 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 Tribunal is sympathetic to the request of the Applicant to be able to return to driving.

The Tribunal recognizes that the Applicant is strongly averse to taking any illicit drugs, which was a factor in causing his recent hospitalization in a mental institute.

The Tribunal recognizes that psychiatrist Dr. Soni, in his medical report of November 25, 2003 stated that "He (the Applicant) has shown complete remission of psychiatric illness." But, it is aware that, at the time, the Applicant was taking the recommended medication.

The Tribunal is aware of the fact that in the medical report of Dr. Soni of September 17, 2003, this doctor stated, "As long as he (the Applicant) continues to attend his outpatient appointments, take his medication and follow my treatment recommendations, he will be able to operate a motor vehicle safely". But, at the Hearing on April 7, 2004, the Applicant testified that he is no longer seeing his regular psychiatrist, Dr. Soni, but is now seeing a new one. And the Applicant first said that he was not taking any medication and later contradicted this.

The Tribunal, after careful consideration, is of the opinion that it cannot recommend the return of driving privileges for the Applicant in the absence of a full assessment from his current psychiatrist including a report on the Applicant's compliance with prescribed treatment.

DECISION:

Upon the application by the Applicant to appeal the decision effective May 1, 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

Patrick Coffey, M.D.,
Presiding Member

RELEASED: April 15, 2004

FILE NAME: 2251.med. mdis

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.

2277-MED-ADJ-ADJOURNMENT

HIGHWAY TRAFFIC ACT

Revised Statutes of Ontario, 1990, Chapter H.8, as amended

IN THE MATTER OF the DRIVER'S LICENCE of
THE APPLICANT

AND IN THE MATTER of the DECISION by
the Registrar of Motor Vehicles pursuant to
Section 47(1) of the *Highway Traffic Act*
TO SUSPEND A LICENCE
- Decision effective: August 3, 2002

AND IN THE MATTER of a requirement for a hearing respecting the
said Decision pursuant to Section 50(1)

APPLICANT

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS a written hearing in the above matter was scheduled to be held on Friday, April 23, 2004, by the Tribunal;

AND WHEREAS the Applicant and the Respondent requested an adjournment of the hearing in order to allow the Applicant to obtain and file new medical information;

TAKE NOTICE, upon consent of both parties, the Tribunal Orders:

- (1) this matter is adjourned *peremptory against both parties*;
- (2) the Applicant's submissions are due April 26, 2004;
- (3) the Respondent's response is due May 6, 2004;
- (4) the Applicant's reply is due May 17, 2004;
- (5) the written appeal shall be heard on Tuesday May 18, 2004 by this Tribunal.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 7, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2290-MED-SEIZ-Seizure

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: KEVIN FYNN, M.D.
Presiding Member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

Applicant,
Unrepresented

DATE OF
HEARING: April 23, 3004 *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. Notice of Suspension of Driver's Licence issued by the Ministry of Transportation on November 21, 2003, 2003, filed by the Applicant.
2. Notice of Appeal dated March 26, 2004 filed by the Applicant.
3. File Summary prepared by the Registrar of Motor Vehicles, filed by the Respondent.

PRELIMINARY MATTERS:

The Applicant acknowledged receipt of the File Summary submitted by the Respondent, but was unable to locate this document for the teleconferenced Hearing.

FACTS:

The Ministry of Transportation received a letter in compliance with section 203 of the *Highway Traffic Act*, dated September 4, 2003 from Physician A, Family Physician to the Applicant, stating that the Applicant had a grand mal seizure.

The Ministry sent written notification of Suspension to the Applicant on November 11, 2003 and advised her that she must submit an up-to-date report from a physician familiar with her medical history, or a neurologist regarding her seizure. This report must contain results of all investigations, prescribed treatment, and cause of the seizure, prior to consideration of re-instatement of her driving privilege. She was also advised of her right to an Administrative Review and of her right of Appeal.

On January 8, 2004, a letter was submitted to MTO by Physician B, a colleague of Physician A. This described the seizure that occurred on August 23, 2003 as secondary to alcohol withdrawal. An EEG performed on November 27, 2003 by Physician C, a neurologist, was reported normal. A CT scan was also reported normal. The medical report also stated that the Applicant had stated that she had quit drinking and joined Alcoholics Anonymous, that "she was neurologically intact and should not have further seizures unless she resumed abusing alcohol".

The Applicant was advised by MTO on February 5, 2004, that a decision was made to continue the suspension, and that reconsideration would be made upon receipt of medical information satisfactory to the Registrar confirming that she had established a one-year period seizure-free and alcohol-free.

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 Respondent relies on:

Regulation 340/94, Section 14 that 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.

and on the Canadian Medical Association Guidelines “Determining Medical Fitness to Drive: Section 3.3 which states:

*Patients with a diagnosis of alcohol dependence, including those with alcohol withdrawal induced seizures, should not be allowed to drive any type of motor vehicle. These patients **must** complete a recognised rehabilitation program for substance dependence and remain alcohol free and seizure free for **12 months** before recommencing driving.*

In Reasons for Appeal and in her evidence the Applicant stated that she started to drink at age 15 and was now age 53. She acknowledged that she was a binge drinker at least on a monthly basis. She had been advised by her physician in regard to her drinking to “keep it down”, and had no medical complications of her drinking until the seizure in August 2003 which followed three days of binge drinking due to depression. She was on medication for hypertension, lived with her husband and two children. Her husband worked away from home for long periods of time. Since the seizure she last a drink in December 2003 and attended AA three times a week. She has a sponsor whom she phones if she feels like drinking. Suspension of her licence has caused family hardship due to difficulty going to work, grocery shopping and taking her children to appointments.

The Tribunal finds as fact:

1. The Registrar was justified in suspending the Applicant’s licence to drive on receipt of a medical report of seizure.
2. The Registrar was justified in continuing the suspension on receipt of medical evidence that the seizure was secondary to alcohol withdrawal.
3. The Applicant has shown genuine desire to avoid alcohol by joining Alcoholics Anonymous with no evidence of further seizure.
4. The Tribunal congratulates the Applicant for recognising that she must avoid alcohol in the future.
5. The Tribunal agrees with the guidelines of the Canadian Medical Association that stipulate a period of 12 months free of seizure and alcohol before re-commencing to drive.
6. The Tribunal recommends that the Ministry of Transportation adopt the practice of providing suspended drivers with the relevant guidelines of the Canadian Medical Association which might assist the drivers’ physicians to more fully assess their patients’ goal of regaining driving privileges.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 21, 2003 of the Registrar of Motor Vehicles (“Registrar”) to suspend her/his driver’s licence pursuant to Section 47(1) of the *Highway Traffic Act* (“HTA”), and having considered the evidence filed

with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Kevin Flynn, M.D.
Presiding Member

RELEASED: *April 28, 2004*

FILE NAME: 2290.med.seiz.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.



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Chart 1 Number of appeals received in a given fiscal year, compared with the number of appeals received in previous fiscal years, as of the end of each month of each fiscal year. The numbers are broken down by statute and type of appeal.

Chart 2 Number of decisions rendered by the Tribunal in a given fiscal year, as of the end of each month. The chart shows the number of decisions in favour of the Applicant or the Respondent, under each statute and type of appeal.

Chart 3 Number of appeals received in a given fiscal year, as of the end of each month, broken down by statute and type of appeal.

Chart 4 Percentage of number of appeals received in a given fiscal year, broken down by statute and type of appeal, as of the end of each month.

Chart 5 LAT appeal process average turnaround time in a given fiscal year, to date, compared with LAT appeal process average turnaround time in previous fiscal years.

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Decisions under Highway Traffic Act

Section 47(1) (c) or 17(2) - Commercial Vehicle Operator's Registration (CVOR)

Fiscal Year 2004 - 2005

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1371631 ONTARIO INC. o/a ANGEL TRANSPORT

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: SIMON DANN, Presiding Member

APPEARANCES: LAURENCE YOUNG, Agent representing the Applicant,
1371631 Ontario Inc. o/a Angel Transport

MURRAY FORBES, Counsel for the Respondent, the
Deputy Registrar of Motor Vehicles

DATE OF HEARING: March 22, 2005

Toronto

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

The Applicant, 1371631 Ontario Inc. o/a Angel Transport ("Angel Transport") appeals to the Licence Appeal Tribunal from a Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles ("Respondent") dated December 10, 2004 and issued pursuant to Section 47 & 47 (1) of the *Highway Traffic Act*.

On November 2, 2004 the Deputy Registrar issued a Notice of Suspension and Seizure proposing a thirty (30) day suspension of the CVOR certificate issued to 1371631 Ontario Inc., o/a Angel Transport and that the plate portions of permits and number plates be seized.

On December 8, 2004, a Show Cause meeting took place and on December 10, 2004, the Deputy Registrar issued a decision wherein he states that "I have considered your

submissions, action plan, failed MTO Facility Audit, your safety record including your record of accidents, vehicle out-of-service rate and convictions, 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 14 days. This Order had the effect of reducing the original suspension from 30 days to 14 days. It is this Order that is the subject of this Appeal.

A pre-hearing was held on February 17, 2005, and points 4 and 5 of the prehearing Order recorded that:

4. The sole issue relates to the seizure of the plates on the trailers owned by the corporate Applicant and the effect of such seizure on corporate Applicant's business.
5. The corporate Applicant stated that the facts found in its CVOR record dated November 1, 2004 are agreed upon.

Though the Tribunal was provided with and considered evidence regarding Angel Transport's history and business operations, including the Applicant's submissions regarding the potential impact of a suspension on its ability to stay in business, the focus of this decision remains on safety, in accordance with the Act and whether or not the decision of the Deputy Registrar was in error.

John Miller

Mr. Miller was the Respondent's only witness. He has been a carrier safety rating administrator with the Sanctions and Investigation Branch of the Ministry of Transportation for four years and deals with integrity checks of CVOR records. 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 transportation safety officer and a national safety code auditor.

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. 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 referred to Tab 2 of Exhibit 4, which is the Ontario Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline. Page 34 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.

Mr. Miller stated that the latest statistics show that 80% of carriers improve after receiving the initial warning letter.

Mr. Miller referred to the Carrier Record Review (Exhibit 4, Tab 7) which reported the overall threshold standing of Angel Transport as being at 117.4%, compared to the provincial average of 35.3%.

This overall average was drawn from Angel Transport's two year CVOR record (October 2, 2002 through to October 1, 2004 - Exhibit 4, Tab 8) comprised of:

- Accidents: 5 events 174.9% of threshold
- Convictions 6 events 68.5% of threshold
- Inspections 10 events 51.3% of threshold

The record review contained in Exhibit 4, Tab 7 also listed the Ministry's record of interventions as follows:

- January 15, 2000 - safety rating satisfactory unaudited
- December 20, 2000 - warning letter
- August 7, 2001 - safety rating conditional
- February 5, 2002 - failed MTO facility audit
- November 1, 2004 - sanction analysis

In addition, the review record showed unpaid fines (which it was noted had now been paid); a 3 point conviction from April 7, 2004 which is still to be added to the record, as well as 2 cases that had been adjourned to a later date, with one 6 point incident for careless driving.

The Notice of Suspension and Seizure (Exhibit 4, Tab 3), for a proposed period of 30 days, was issued on November 2, 2004 and stated that the Notice was "based on the safety record of 1371631 Ontario Inc. o/a Angel Transport including:

- Accidents
- Convictions
- Inspections

- Failed MTO Facility Audit dated February 5, 2002
- Unpaid fines

Mr. Miller then referred to the Show Cause meeting which was scheduled to provide Angel Transport with the opportunity “to show cause why the Suspension and Seizure Order should not be issued”. This meeting took place on December 8, 2004 and was attended by Mr. Harbhajan Tamber, President of Angel Transport, and Mr. Larry Young, the Applicant’s consultant, as well as Mr. Grieg Beatty, Deputy Registrar, Mr. Mike McKay Program Standards Manager and Mr. Miller.

The meeting notes prepared by Mr. Miller (Exhibit 4, Tab 14) made a number of points about the operator as well as provide details on an action plan intended to improve the company’s safety record.

Points noted about the operator:

- Mr. Tamber had just entered into an agreement with Transport Business Management, a group of loss prevention, safety and compliance specialists, to help bring the operation into compliance;
- in reviewing the CVOR record, Mr. Young stated that “it was a standard case of doing everything himself....and not knowing what is required of him (Mr. Tamber) as a CVOR holder;
- “...if given the opportunity he would quickly get the operation in order.”

Mr. Miller’s notes recorded that at this stage of the Show Cause meeting, Mr. Young introduced an action plan with target dates.

While this ‘Safety and Compliance Action Plan’ (Exhibit 4, Tab 15) noted that the company has “a number of issues that require serious attention [and] Mr. Tamber is prepared to take, with the support and direction of outside professional help, immediate action”, it also committed to a variety of specific steps which would be implemented “Immediately” and completed by several dates up to February 15, 2005. Specifically included were that...

- “The Company will implement a simple drivers policy and safety manual...” (“Completion February 15/2005”) (page 255)
- “Angel Transport will fully document a systematic Preventative Maintenance program. Our written policy statement will clearly spell out what is checked...” - (“Completion February 1/2005”) (page 255)

Mr. Miller’s meeting notes state that the Ministry’s concerns revolved around the fact that “the company had done nothing until the Notice of Suspension and Seizure was received”. In conclusion, Mr. Tamber stated that he was asking “for a chance to come into compliance with using Mr. Young to train him”.

As a result of the information presented by Angel Transport at the Show Cause meeting, Mr. Miller stated that the Suspension and Seizure Order (Exhibit 4, Tab 16) issued on January 17, 2005, was reduced from 30 days to 14 days.

During cross-examination, the Tribunal heard questions about fleet size and whether the fleet size used to determine the Applicant's threshold rating was the correct fleet size. However, as no material evidence was submitted to show that record adjustment requests had been formally sent in by the Applicant to the Ministry, there was nothing to contradict the Ministry's records.

Mr. Miller also confirmed that the Applicant had not been called in for an interview after the failed facility audit of February 2002 and he acknowledged that even though the record was getting progressively worse, the Registrar had not considered an interview to be warranted.

When asked if there hadn't been enough time in the 2½ years between the failed facility audit and the notice to schedule an interview meeting, Mr. Miller said that the interview had not been done because too many things went on and as the record got worse, the situation went past the interview stage.

While it was learned that the 2002 facility audit had been conducted on only one driver, one truck and one trailer, the Facility Audit Notes also showed (Exhibit 4, Tab 12, page 241) that Mr. Tamber advised the inspector "that the company now only has 1 driver".

Harbajan Tamber

Mr. Tamber was the Applicant's only witness. Mr. Tamber stated that while he started the business in 1999 with a partner, he became the sole owner in 2002. The company hauls waste from waste transfer sites to various landfill sites.

The witness stated that the company now has 3 trucks and 7 trailers and that the equipment is specialized to carry waste. Details about the company's financial commitments and on-going costs regarding the acquisition of the truck equipment was also provided.

Mr. Tamber testified that his partner looked after the administrative aspects of the company as long as he was with the business and he did not know if his former partner received a warning letter prior to 2002. Mr. Tamber confirmed that he did receive the notice for the facility audit and at that time there was only 1 truck, 1 trailer and 1 driver.

The witness confirmed the company's maintenance activities, the monthly expenditures for tire maintenance as well as how drivers are hired and trained by himself. There was no material evidence presented in accompaniment to Mr. Tamber's testimony.

When asked what he did upon receiving the Notice of Suspension and Seizure, Mr. Tamber said he knew he needed help.

Mr. Tamber said that was when he went to Transport Business Management to obtain their assistance in preparing an action plan and preparing for the Show Cause Meeting.

The relationship of the Applicant and Transport Business Management is described in the Applicant's Action Plan (Exhibit 4, Tab 15) as well as in the Show Cause Meeting Notes, written by Mr. Miller (Exhibit 4, Tab 14).

Mr. Tamber stated that he has changed the mechanics used by the company and that he now does the daily inspections as well as overlook the repair work.

Through cross-examination, the Tribunal heard that Mr. Tamber had been a driver for the company prior to becoming the sole owner and he had received a number of convictions during that period (Exhibit 4, Tab 8, pages 219, 220, 222).

A review of other incidents during the time when Mr. Tamber was in sole control of the company, from 2004 and back, was also provided (Exhibit 4, Tab 8, pages 209, 210, 211).

The Tribunal asked Mr. Tamber about the Action Plan (Exhibit 4, Tab 15) and whether any of the committed actions had been completed in accordance with the schedule committed to in the Action Plan, specifically the drivers policy and safety manual and the Preventative Maintenance program document.

Mr. Tamber said he did not have the documents with him.

Closing statements:

Mr. Forbes submitted that the Registrar did not err in issuing the Order based upon the Applicant's record of accidents, convictions and inspections and that the Registrar reduced the suspension from 30 days to 14 days due to the fact that the Applicant had been candid and hired a consultant to help the company.

Mr. Forbes further stated that as the Applicant did not show any evidence to confirm that steps had been taken since the submission of the Action Plan at the Show Cause meeting, the Suspension and Seizure Order should be confirmed.

Mr. Young submitted that if the Respondent had called the Applicant in for an interview after the Facility Audit, that might have resolved the matter. However, this did not happen until 2½ years later, when the Notice of Suspension and Seizure was received. even though the Ministry had continued to monitor the Applicant and note its increasing violation rate.

The Applicant submitted that the Respondent's failure to provide an interview should prohibit it from imposing a sanction at this time.

Mr. Young submitted further that the Applicant's position is not to deny the validity of the Ministry's position but to ask the Tribunal to consider the steps the Applicant had taken and proposed.

In the alternative, if the Tribunal determines to confirm the Suspension Order, Mr. Young asked the Tribunal to modify the Order to withhold seizure of the trailer plates so that they may be used by another carrier on the Applicant's behalf.

Mr. Forbes suggested that such a modification would defeat the purpose of the sanction and again submitted that the Deputy Registrar's Order ought to be confirmed.

ISSUES:

There is one issue to consider and that is whether or not the decision of the Respondent was 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.

ANALYSIS:

Based on the evidence presented and that the CVOR record of the Applicant is not in dispute, it is clear that the concerns of the Deputy Registrar regarding the past safety record of Angel Transport are justified.

Specific points noted by the Tribunal are:

- the Applicant's overall safety record
- the Applicant's acknowledgement that he did not know what was "required of him as a CVOR holder" (re Show Cause meeting notes, Exhibit 4, Tab 14)

- the absence of supporting documentary evidence to confirm the schedules and costs of the maintenance actions claimed to have been taken
- the Applicant's failure to produce documentary evidence to confirm that the action commitments made in the Action Plan (Exhibit 4, Tab 15), and to be completed by or before mid-February 2005, had in fact been done

It should also be noted that on the Applicant's behalf, the Respondent recognized the Applicant's candid attitude and positive actions towards improving his operation's safety record, specifically by the hiring of Transport Business Management and the commitment to have that consultant train and support the implementation of appropriate safety programs and training procedures.

It is also noteworthy, as pointed out by Mr. Young, that 2½ years had elapsed from the failed facility audit and that it would not be unreasonable to consider that the Respondent should have considered an interview in the intervening time, particularly as the Applicant's record continued to deteriorate and the Respondent was simultaneously monitoring that record. This is viewed as a short-coming on the Respondent's part.

However, the absence of that interview opportunity does not relieve the Applicant in any way of his obligations and responsibilities, as a CVOR holder, to operate with full knowledge and understanding of how the business must conduct itself in order to be in compliance with the Act. This is viewed as a failure on the Applicant's part.

Regarding the Applicant's submission that a suspension could have a potentially negative effect on the company's financial viability, it is the Tribunal's view that in this particular instance, this potential implication cannot be considered as a mitigating excuse for the Applicant's failure to fully understand his compliance obligations as a CVOR operator.

The evidence regarding the Applicant's CVOR record (Exhibit 4, Tabs 7, 8, 9) and the absence of any countervailing action from either the time of the warning letter (December 20, 2000) or as an outcome of the failed facility audit (February 5, 2002) can be taken to suggest the Applicant failed in the past to make compliance with the Act an operating priority.

At the same time, it is the view of this Tribunal that the steps recently presented by the Applicant are positive and merit recognition, especially as they were not rejected nor contradicted by the Respondent.

Based upon the foregoing, it is this Tribunal's finding that the Deputy Registrar was not in error in concluding that he had reasonable grounds to remain concerned for highway safety and that while a sanction was warranted, the decision of this Tribunal is to modify the Suspension and Seizure to a period of nine (9) days.

ORDER

The Tribunal does hereby order that the Suspension and Seizure Order of the Respondent dated December 10, 2004 suspending CVOR certificate 133-368-103 and plate portion of permits for all commercial vehicles and trailers of 1371631 Inc. be modified to nine (9) days and be carried out for that period of time.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: March 30, 2005

FILE NAME: 2746.cvor.Angel Transport

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 Tribunal
Appeal d'appel en
Tribunal matiere de permis



ROSEWAY CONSTRUCTION LTD.

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED FROM THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR PURSUANT TO SECTION 47(1) OF THE ACT.

TRIBUNAL: ELIZABETH BENNETT-MARTIN, Presiding Member

APPEARANCES: PIETRO MANCUSO, Agent for the Applicant, Roseway Construction Ltd.

MURRAY FORBES, Counsel for the Respondent, the Registrar of Motor Vehicles

HEARING: January 14, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal arises from the Suspension and Seizure Order (the "Suspension Order") dated December 18, 2003, issued by the Deputy Registrar of Motor Vehicles (the "Registrar") under the *Highway Traffic Act* (the "Act") to suspend, until such time as payment is made by Roseway Construction Ltd. to the courts for unpaid fines, CVOR Certificate 022-231-741 and plate portion of permits for all commercial vehicles and trailers issued to Roseway Construction Ltd.

The reason for the Suspension Order is unpaid fines. The Suspension Order states as follows:

AND TAKE NOTICE that this is based on your failure to pay fines imposed by the courts including the attached ICON Reports(s) of Unpaid Fines.

AND TAKE NOTICE that prior to January 9th, 2004 you must provide proof of payment of all unpaid fines or make written submissions to the Deputy Registrar of Motor Vehicles at 301 St. Paul Street 3rd Floor, St. Catharines, ON, L2R 7R4 to show cause why the Suspension and Seizure order should not be effected. If you do not wish to make written

submission and have paid the fines, you must provide proof of payment prior to the effective day of the sanction. Please address your submissions and any questions to Don Gillett at the address below ...

AND FURTHER TAKE NOTICE that should you choose not to make written submissions to the Deputy Registrar of Motor Vehicles, or do not pay all unpaid fines, this suspension and seizure will be effective January 19, 2004 at 9:00 a.m. Eastern Standard time and shall remain in force until payment of all unpaid files are made.

ISSUES:

The issue to be decided on this appeal is whether or not the Registrar made an error in issuing the Suspension Order.

EVIDENCE OF THE MINISTRY OF TRANSPORTION

Evidence of Louis Janetos

Mr. Louis Janetos is a Carrier Safety Rating Administrator at the Ministry of Transportation.

Mr. Janetos testified that Roseway Construction Ltd. has \$8,716.25 in outstanding fines as shown on his ICON (Integrated Court Ontario Network) search located at Tab 7 of Exhibit 3. Mr. Janetos then provided the Tribunal with particulars of these fines as also set out in Tab 7 of Exhibit 3.

Mr. Janetos then went on to testify as to the particulars of Roseway's CVOR abstract, including a summary of safety inspections as set out at page 35 of Tab 9, Exhibit 3. Of 8 inspections, Roseway had 7 out of service inspections, and received a carrier OOS Rate of 87.50% compared to the Standard OOS Rate of 35.30%. Tab 10 of Exhibit 3 provides further particulars of the defects found in the vehicles inspected.

Mr. Janetos testified that Mr. Pietro Mancuso was authorized by Roseway to deal with the Ministry of Transportation (p. 68 of Tab 9, Exhibit 3) and that Mr. Mancuso came to the Ministry of Transportation to speak to the outstanding fines on August 10, 2004, as confirmed in the Ministry's documents at p. 53 & 67 of Tab 9, Exhibit 3. Mr. Mancuso advised the Ministry that he had paid a number of outstanding fines, and as well that he intended to appeal a number of fines as they were not the fines of Roseway. Mr. Mancuso advised that a truck belonging to Roseway was loaned to a third party who accrued a number of fines. Mr. Mancuso was unable to provide the Ministry with a statement of what fines remained outstanding. Tab 9, also indicated that: "Roseway was under sanction analysis for unpaid fines totalling \$8,716.25, and that the fleet size shows 60 units however VRS shows no valid plates on any of there (sic) 18 CMV". Mr. Mancuso was advised by the Ministry that the Suspension Order would remain in effect.

EVIDENCE OF ROSEWAY CONSTRUCTION LIMITED

Evidence of Pietro Mancuso

Mr. Pietro Mancuso testified on behalf of Roseway Construction Limited. He testified that Roseway is a family owned business. Mr. Mancuso testified that he realizes that the fines have to be paid, and that he is prepared to pay the fines, but that he requires more time.

Counsel for the Ministry cross-examined Mr. Mancuso with respect to details concerning how the family business is run, and who is responsible for the day-to-day operations of the business. In the Tribunal's view, this evidence is not helpful to the decision of whether or not an error was made with respect to the issuance of the Suspension Order.

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.

DECISION AND REASON FOR DECISION:

The only issue in this appeal is whether the Deputy Registrar of Motor Vehicles made an error in issuing the Suspension Order.

It is not disputed that a significant number of fines remain unpaid by Roseway Construction Ltd., and that they have been outstanding for some period of time. Mr. Mancuso admitted that the fines have to be paid, but that he requires more time to pay the fines. This is not a sufficient basis upon which to conclude that the Deputy Registrar made an error when it issued the Suspension Order.

The Tribunal finds no reason to therefore interfere with the Suspension and Seizure Order imposed by the Deputy Registrar in the circumstances of this case.

FOR THE REASONS GIVEN ABOVE the decision of the Deputy Registrar is confirmed.

LICENCE APPEAL TRIBUNAL

Elizabeth Bennett-Martin
Presiding Member

Released: March 7, 2005

FILE NAME: 2661.cvor.Roseway.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

1371631 ONTARIO INC. o/a ANGEL TRANSPORT

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: IRVIN H. SHERMAN Q.C., Vice-Chair

APPEARANCES: LAURENCE YOUNG, Agent for the Applicant, 1371631 Ontario Inc.
o/a Angel Transport

PATRICK MOORE, Counsel for the Respondent, the Registrar of Motor Vehicles

DATE OF
PREHEARING: February 17, 2005 Toronto

ORDER AND REPORT

Following participation at a pre-hearing conference before this Tribunal by the parties listed above, the Tribunal makes the following Order:

1. The parties to the appeal are 1371631 Ontario Inc. o/a Angel Transport and the Registrar of Motor Vehicles, Ontario ("the Registrar"). The parties agree that the corporate Applicant is correctly identified and is the holder of the CVOR licence at issue in this appeal.
2. The appeal is scheduled for one day, to be heard March 22nd, 2005
3. The corporate Applicant and the Registrar shall make disclosure of all documentary evidence in accordance with the Rules of the Licence Appeal Tribunal on or before March 12, 2005.

4. The sole issue relates to the seizure of the plates on the trailers owned by the corporate Applicant and the effect of such seizure on corporate Applicant's business.
5. The corporate Applicant stated that the facts found in its CVOR record dated November 1, 2004 are agreed upon.

It is noted that the Registrar and the corporate Applicant each intend to call one witness at the hearing.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: February 18, 2005

File Name: 2746.cvor.Angel Transport.prehrg.doc



UNITED R GRADE CANADA LTD.

IN THE MATTER OF THE REFUSAL BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED SEPTEMBER 24, 2004 TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE AND TO ISSUE AN OPERATING LICENCE.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: RATNAM UTHAYAKUMAR, Agent, representing the Applicant
UNITED R GRADE CANADA LTD.

PATRICK MOORE, Counsel, representing the Respondent,
the Deputy Registrar of Motor Vehicles

DATES OF HEARING: February 1, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Deputy Registrar of Motor Vehicles (the "Registrar") issued a notice of refusal to issue to United R Grade Canada Ltd. (the "Applicant") a Commercial Vehicle Operator's Registration certificate ("CVOR") as well as a notice of refusal to issue to the Applicant an Operating Licence, both such notices dated September 24, 2004. The notice of refusal to issue a Commercial Vehicle Operator's Registration certificate was issued pursuant to section 17 of the *Highway Traffic Act* (the "H.T.A.") while the notice of refusal to issue an Operating Licence was issued pursuant to section 7.(2) of the *Truck Transportation Act*. The reasons given by the Registrar for his refusal to issue both the CVOR certificate and the Operating Licence are:

- The unpaid fines, safety record and incomplete MTO Facility Audit dated October 8, 2002 of 1323109 Ontario Ltd, (Terminated CVOR certificate 130-703-555), an operator directly or indirectly related to you.
- The Refusal to Issue a Commercial Vehicle Operator's Registration certificate and an Operating Licence to Grade United Express Ltd., President Gowridevi Uthayakumar, an operator directly or indirectly related to you.
- The Cancelled Commercial Vehicle Operator's Registration certificate 136-202-108 of 1432561 Ontario Limited, an operator directly or indirectly related to you.
- The Cancelled Commercial Vehicle Operator's Registration certificate 144-622-846 of H

& B Transportation Ltd., an operator directly or indirectly related to you.

- I am of the opinion Ratnam Savaithiri, President and Ratnam Uthayakumar, Vice President of 1323109 Ontario Ltd, directly or indirectly control or manage or will directly or indirectly control the applicant.
- I am of the opinion Gowridevi Uthayakumar, President of Grade United Express Ltd., directly or indirectly controls or manages or will directly control or manage the applicant.
- I am of the opinion Harjit Aujula, Balwinder Benipal and Najinder Benipal, who directly or indirectly control or manage 1432561 Ontario Ltd and H & B Transportation Ltd., directly or indirectly control or manage or will directly or indirectly control or manage the applicant.

The Applicant has filed appeals to the Tribunal and has requested the hearing of its appeals by the Tribunal.

ISSUES:

The issues before the Tribunal are whether the Registrar was justified in refusing to issue the Commercial Vehicle Operator's Registration certificate (the "CVOR certificate") to the Applicant and in refusing to issue an Operating Licence to the Applicant.

EVIDENCE:

The only person to testify for the Registrar was John William Miller while Ratnam Uthayakumar testified for the Applicant.

TESTIMONY OF JOHN WILLIAM MILLER

Miller stated that he is employed by the Ministry of Transportation (the "M.T.O") in its Sanctions and Investigation Branch as a safety rating administrator which position he has held for the past five years. His duties involve doing integrity checks concerning certain files and records as well as holding interviews pursuant to his checks. He reports to the Registrar on his findings resultant upon his interviews and investigations and the Registrar then decides upon the future course an investigation will take.

Miller briefly reviewed the M.T.O.'s publication titled "Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline". He stated that ratings are applied to operators of commercial motor vehicles using Ontario's roadways and their ratings identify safety performance of commercial vehicle operators. He went on to state that one of five ratings are issued by the Registrar to such operators and the ratings are of importance not only in regard to public safety but also to the insurance industry which is involved in insuring public commercial vehicles. The five ratings that the Registrar may assign to a commercial vehicle operator are:

- Excellent
- Satisfactory
- Satisfactory-unaudited
- Conditional
- Unsatisfactory

An operator's safety record consists of information from the operator's CVOR record as well as audits of the operator which includes information regarding accidents, convictions, inspections, interviews, sanctions and other relevant information. An unsatisfactory rating indicates a one hundred percent violation rate and the M.T.O. will suspend an operator if it rates its operations unsatisfactory. Fleet size of an operator is taken into account when reviewing an operator's performance and rating. Also considered by M.T.O. in evaluating an operator's performance and its rating are violation rates and accidents involving property damage and injuries and convictions resulting from driver's performance.

Violation rates are based upon accidents and convictions of an operator as well as other criteria over a 24-month moving window. An unacceptable violation rate will trigger a warning letter where the violation rate exceeds 35% of the operator's threshold while a facility audit is triggered if the operator's violation rate exceeds 65% of its threshold. An interview with M.T.O. will be triggered if the violation rate exceeds 80% of the threshold while at the stage that an operator's violation rate exceeds 100% of its threshold sanctions are considered.

A conditional rating will be applied to an operator where the violation rate of that operator is in excess of 65% but less than 100%. This rating is a "very poor" rating and is close to a sanction stage.

Miller went on to state that where the Registrar has reason to believe, having regard to an applicant's safety record and any other information considered relevant, that an applicant will not operate a commercial motor vehicle safely or in accordance with the law the Registrar may refuse to issue a CVOR certificate. Furthermore the Registrar would refuse to issue such certificate to an applicant if that applicant is related to a person whose CVOR certificate has been cancelled. Miller went on to explain that persons could be considered related individuals where they are partners or were partners or where an applicant directly or indirectly controls or controlled or manages or managed the other.

Miller then proceeded to deal with the following entities in relation to matters before the Tribunal.

1323109 Ontario Ltd.

1323109 Ontario Ltd. ("1323109") was a commercial vehicle operator who held a CVOR certificate issued to it on August 18, 1999. This certificate was subsequently terminated by M.T.O. The officers of 1323109 are Ratnam Uthayakumar ("Ratnam") vice-president and

Savaithiri Uthayakumar ("Savaithiri") president. Ratnam was affiliated with another corporation namely Grade United Express Ltd.

Miller referred the Tribunal to the CVOR record maintained by M.T.O. relative to 1323109 (Exhibit 3 tab 6). This record reflects that an initial performance analysis was carried out by M.T.O. on September 25, 1999 at which time no violations were recorded. However, convictions commenced to be recorded in June 2000 with a speeding violation and followed in that year by a further four violations. Early in 2001 a warning letter was addressed to 1323109 followed by further violations being recorded and a sharp increase in violation rate. In February 2001 when an excessive violation rate was noted and when no response was received by M.T.O. to its request for updated information, 1323109's rating was changed to conditional and in May 2001 an interview was held and conducted by Miller at M.T.O.'s offices. Savaithiri was present on 1323109's behalf and agreed to undertake immediate remedial measures. M.T.O. then required to do an audit of 1323109 but was unable to complete the audit due to 1323109 avoiding contact with M.T.O. In September 2002 Ratnam contacted M.T.O. and advised he would attend on M.T.O. and would then sign termination papers regarding the CVOR certificate. He failed to attend to sign papers despite making further promises to attend on M.T.O. M.T.O. was unable to speak with Ratnam or to leave messages for him as he had his telephone "blocked" thereby preventing incoming calls (Exhibit 3 tab 3). Following this happening, M.T.O. terminated 1323109's CVOR certificate. Miller further stated that at the May 2001 interview Savaithiri advised him that Ratnam was her brother and attended to 1323109's vehicle's maintenance, the supervising of drivers' logs and pretrip inspections. Knowing that Ratnam was involved in 1323109 it is presently of concern to Miller that Ratnam is now also involved in the Applicant corporation.

Miller also stated that Savaithiri made a commitment at the May 2001 interview that 1323109's outstanding fines of \$875.50 would be paid (Exhibit 3 tab 9). The fines are still outstanding and unpaid.

1432561 Ontario Limited

1432561 according to the testimony of Miller operated under the name "H & B Trucking". Ratnam's connection with 1432561 was that he was employed as one of its drivers. 1432561 had an "unsatisfactory" safety rating and its CVOR registration was cancelled. On 1432561's CVOR record it was noted that Ratnam was convicted on June 25, 2004 of driving in excess of 15 hours (Exhibit 3, tab 13, page 67). Ratnam was also convicted on May 27, 2003 of failing to produce his driver's licence (Exhibit 3, tab 11, page 47). Further, that on June 1, 2002 Ratnam was the driver of a vehicle found to have major defects (Exhibit 3, tab 11, page 53) and which vehicle was placed "out of service". In addition Ratnam was convicted of speeding on July 16, 2002, while driving in the Thunder Bay district (Exhibit 3, page 54). Ratnam's convictions, according to Miller, contributed to the poor record of 1432561 whose CVOR certificate was cancelled.

TESTIMONY OF RATNAM UTHAYAKUMAR

Ratnam commenced his testimony by stating that insofar as 1323109 is concerned he remembers that he did attend at M.T.O.'s offices and signed the necessary papers to cancel 1323109's CVOR certificate.

Ratnam went on to state that he "owned" 1323109 together with his sister Savaithiri Uthayakumar. He acted as driver for 1323109 and hired other drivers to drive for the company. Ratnam was in charge of the vehicle's maintenance and trained the company's drivers how to write up the logbooks. Once 1323109's CVOR was cancelled he continued to drive and did so for H & B Transport using their trucks. When 1323109 ceased operations in 2001 it returned all its leased trucks to the lessor. He further stated that he was vice-president of 1323109. His experience in the trucking business was obtained when working for 1323109 and subsequently he worked for a short time with trucker Bruce R. Smith. After working for Bruce R. Smith he started driving for H & B Transport where he remained until about one year ago.

He stated that he has not taken any courses in operating a trucking company and subsequent to working with 1323109 he has not done anything to improve his knowledge relating to trucking. He went on to state that his wife is Gowridevi Uthayakumar who applied for the CVOR registration of Grade United Express Ltd. and for that company's Operating Licence which was refused by the registrar.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal.

1. The Applicant, United R Grade Canada Ltd., applied for a CVOR by written application dated August 22, 2004
2. The Applicant's written application was signed by Ratnam who styled himself as vice-president of the Applicant
3. Savaithiri Uthayakumar is the sister of Ratnam and the president of the Applicant.
4. Gowridevi Uthayakumar is the wife of Ratnam and is the first director of Grade United Express Ltd. Gowridevi on January 29, 2003, signed the written application by Grade United Express Ltd. for a CVOR certificate which was refused by the Registrar.
5. 1323109 received a CVOR certificate on or about August 13, 1999.
6. 1323109 has had its CVOR certificate terminated by M.T.O.
7. At all material times hereto Ratnam and his sister Savaithiri held the offices of

President or Vice-President of 1323109 and were jointly the controlling minds of 1323109.

8. The safety record of 1323109 progressively deteriorated after 1323109 was issued its CVOR certificate and was ultimately held to be unsatisfactory by M.T.O. whereupon such certificate was cancelled.
9. During the time that the CVOR certificate of 1323109 was operative Ratnam took an active ongoing role in the operation and management of that company which extended to and included the hiring and training of drivers, the maintenance of vehicles used by the company and the keeping of logs.
10. 1323109 during the time its CVOR certificate was operative became liable for the payment of numerous fines for violations under the H.T.A. committed in the course of its business. Such fines, totalling \$875.50, despite the corporation's promise and undertaking to pay same have not been paid whether in part or in full and remain outstanding, due and owing.
11. Ratnam consistently failed to cooperate with M.T.O. in fulfilling 1323109's and Ratnam's personal obligations under the H.T.A. and the *Truck Transportation Act*.
12. Ratnam, neither during such time as 1323109's CVOR certificate was in force and effect nor subsequent thereto, has attempted to in any manner whatsoever upgrade or improve his knowledge and understanding of Ontario's Carrier Safety Rating and Commercial Operator's Registration System Public Guidelines and the H.T.A. and the *Truck Transportation Act*.

LAW:

The *Highway Traffic Act* states as follows.

16. (1) "CVOR certificate" means a Commercial Vehicle Operator's Registration Certificate issued under this Act

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
 - (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.

The *Truck Transportation Act* states as follows.

7. (1) On being satisfied of the fitness of an applicant to hold a licence, the Registrar shall give thirty days notice of the intention to issue an operating licence to the applicant by publication in *The Ontario Gazette*.

(2) Where the registrar finds that an applicant is not fit to hold an operating licence, the Registrar shall give the applicant written notice thereof with reasons, and the applicant may, within thirty days after receiving the notice, appeal the decision to the Licence Suspension Appeal Board as defined in the *Highway Traffic Act*.

(3) After a hearing, the Licence Suspension Appeal Board as defined in the *Highway Traffic Act* may amend or confirm the decision of the Registrar.

APPLICATION OF FACTS TO THE LAW:

The onus of proof rests upon the Registrar to prove that the evidence presented to the Tribunal affords reasonable grounds for the Refusal to Issue a Commercial Vehicle Operator's Registration Certificate to the Applicant and for the Refusal to Issue an Operating Licence to the Applicant by virtue of section 17 of the *Highway Traffic Act* and section 7.(2) of the *Truck Transportation Act* respectively.

The Tribunal has considered the issues involved in this matter and its findings and conclusions are set out hereunder.

1323109 Ontario Ltd.

1323109 operated as a carrier and held a CVOR certificate from August 18, 1999 until the Registrar terminated that certificate. During the time 1323109 operated Ratnam and his sister Savaithiri were the President and Vice-President of that company. The evidence

shows that Ratnam was the controlling mind of that company. In his testimony before the Tribunal Ratnam did not deny his position in the company nor the fact that he actively managed and controlled the company. In addition he did not deny that that company's CVOR record as maintained by M.T.O. was accurate. That record shows a dismal safety record during the period it operated as a carrier. Convictions were regularly registered against 1323109. Warning letters were ignored by the company. The ongoing CVOR record of the company resulted in its safety rating being reduced to "unsatisfactory" with not the slightest improvement being registered in the company's performance. Promises by Ratnam to attend meetings with M.T.O. were never kept and it is clear from the CVOR record that Ratnam had no intention of cooperating with M.T.O. and was in fact ignoring and avoiding M.T.O. Fines imposed upon 1323109 for safety related violations that lead to convictions being registered against it in 2000/2001 have not been paid by it and remain outstanding to this day despite Savaithiri having undertaken to M.T.O. that 1323109 would pay same. Not only did Ratnam admit to having managed and controlled 1323109 but he also did not deny his role as driver of that company's trucks as well as his role in hiring and training other driver's employed by that company and in the maintenance of it's trucks. 1323109's safety record and Ratnam's driving record are poor in the extreme. However, what is most disturbing is Ratnam's total lack of cooperation with M.T.O. more particularly when this industry is a regulated industry and whose compliance with safety is of the utmost importance. The attitude displayed by Ratnam in ignoring and avoiding M.T.O. or in improving his own performance leads the Tribunal to find that he is ungovernable and should not be permitted to operate within this regulated industry.

1432561 Ontario Ltd.

There was no evidence placed before the Tribunal to show that Ratnam was involved in the management or control of 1432561. The only evidence before the Tribunal is that he worked as a driver for 1432561 after the termination of 1323109's registration.

It is however of note that in the CVOR record of 1432561 Ratnam does figure together with other drivers. In Ratnam's mention in that company's CVOR record it is evident that as recently as 2002 he was convicted of speeding as well as driving a vehicle with a serious suspension and brake defect that resulted in such vehicle being placed "out of service". These violations under the H.T.A. indicate an ongoing course of conduct by Ratnam insofar as ignoring speed restrictions and driving with safety related defects. It was also of interest to the Tribunal that during his testimony Ratnam conceded that he has taken no courses or tuition to attempt to upgrade his driving skills or knowledge of the published guidelines of commercial vehicle operator's registration system. Ratnam's conduct continues to show a lack of interest or knowledge in the proper and correct operation of carrier safety in Ontario and to comply with rules and regulations governing and pertaining to public carriers in Ontario.

H & B Transportation Ltd.

Here again there was no evidence placed before the Tribunal to indicate that Ratnam was

involved in the management or control of H & B Transportation. However, once again the CVOR record of this particular carrier does indicate that Ratnam did drive for this company whose safety rating in Ontario was rated as “unsatisfactory” and whose CVOR certificate has been cancelled. While driving for this company Ratnam was convicted, as recently as March of 2004, of driving in excess of 15 hours on duty. This fact and conviction, not contested by Ratnam, continues to reveal his lack of concern for compliance with the H.T.A. in safety related aspects of driving an excessive number of hours contrary to the requirements of the H.T.A.

The cumulative effect of the recent and ongoing conduct of Ratnam is clearly reflective of his non compliance with law. He is, to repeat, not governable. To allow Ratnam or the Applicant to obtain registration as he seeks to do would be a disservice to the public. 1323109 of which Ratnam was the controlling mind had a clearly unacceptable safety rating and stands in contradiction to the aim of improving safety on Ontario roads and thereby reduce fatalities and injuries as well as the cost associated with safety related collisions. The Registrar would be failing in his duty to safeguard the public if he were to grant the issue of a CVOR certificate or an Operating Licence to the Applicant.

The Tribunal accordingly finds that the Registrar is correct in his decision and confirms his decision to refuse to issue a CVOR certificate to the Applicant and to refuse to issue an Operating Licence to the Applicant. The Tribunal specifically finds that the Applicant is a related person to 1323109 in terms of section 17.(4) of the H.T.A. by virtue of the fact that Ratnam directly controlled and managed the latter company and directly controls and manages the Applicant. Having regard to the safety record of 1323109 as well as the personal driving safety record of Ratnam as well as the other relevant facts set out above in this decision the Tribunal finds the Applicant and/or Ratnam will not, if granted the registrations they seek, operate a commercial motor vehicle safely or in accordance with all the laws relating to highway safety in Ontario.

Order:

Accordingly, the Tribunal orders the Registrar to refuse to issue a CVOR certificate and Operating Licence to the Applicant, United R Grade Canada Ltd.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 14, 2005

FILE NAME: 2701.cv.or.United R Grade.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

Tribunal
d'appel en
matière de permis



WINSTON DOUGLAS and
GREGORY WAYNE DOUGLAS

IN THE MATTER OF an Application by Winston Douglas and Gregory Wayne Douglas dated October 19, 2004, 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 Deputy Registrar dated October 15, 2004;

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) certificates 109-520-050 and 024-074-947 issued to Gregory Wayne Douglas and Winston Douglas;

AND IN THE MATTER OF the Notice of Cancellation and Seizure issued to Gregory Wayne Douglas and Winston Douglas on the 23rd day of August 2004;

AND IN THE MATTER OF the safety record of Gregory Wayne Douglas;

TRIBUNAL: ELIZABETH L. SPROULE, Member

APPEARANCES: WINSTON DOUGLAS, Applicant, Representing himself

MURRAY FORBES, Counsel for the Registrar of Motor Vehicles
(the "Respondent" or the "Registrar")

No one appeared on behalf of the Applicant
GREGORY WAYNE DOUGLAS

DATE OF
HEARING: January 6, 2005

Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Gregory Wayne Douglas and Winston Douglas (the "Applicants") respecting a Cancellation and Seizure Order dated October 15, 2004, (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 Order, Exhibit #1, states in part the following:

...I have considered your submissions and your safety record, information confirmed from the Federal Motor Safety Administration stating that WD Charters is not permitted to operate in the United States, non-compliance with the Public Vehicles Act, IFTA and IRP requirements for Gregory Wayne Douglas.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the *Highway Traffic Act* that as of October 25, 2004, CVOR 109-520-050 and 024-074-947 and plate portion of permits for all commercial motor vehicles issued to Gregory Wayne Douglas and Winston Douglas be cancelled and the plate portion of permits, or is issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This Cancellation and Seizure will be effective MONDAY OCTOBER 25, 2004 at 9:00 a.m. Eastern Standard Time.

ISSUE:

Should the Tribunal confirm, modify or set aside the Registrar's order?

EXHIBITS:

- Exhibit #1 – Cancellation and Seizure Order dated October 15, 2004, issued by the Deputy Registrar of Motor Vehicles;
- Exhibit #2 – Notice of Appeal form received at the Tribunal October 21, 2004, filed by the Applicants;
- Exhibit #3 – Respondent's Appeal Book;
- Exhibit #4 – Copy of Commercial Vehicle Inspection Report dated November 26, 2004;
- Exhibit #5 – Copy of ICON inquiry into outstanding fines for Gregory Wayne Douglas, search date December 8, 2004;
- Exhibit #6 - Copy of Public Vehicle Operating Licence issued to Winston Douglas;

Exhibit #7 - Copy of Extra-Provincial Operating Licence issued to Winston Douglas;

Exhibit #8 - Commercial Vehicle Operator Summary for Winston Douglas dated September 2, 2003;

Exhibit #9 – Copy of Letter from U.S. Department of Transportation to WD Charters dated June 01, 2004, regarding the bi-annual filing requirements;

Exhibit #10 – Copy of Ontario IFTA Licence in the name of Winston Douglas, Expiry December 31, 2002;

Exhibit #11 - ICON update of outstanding of Gregory W. Douglas;

Exhibit #12 – ICON update of outstanding fines of Winston Douglas.

FACTS:

Registrar's Evidence

The Registrar's sole witness was Louis Janetos, a Carrier Safety Rating Administrator since 1999. Prior to this position he was a CVOR Analyst for many years

Mr. Janetos gave evidence about the CVOR system, when it applies, its purpose, what is monitored and how. He testified that when application for a CVOR certificate is made an applicant would be made aware of the CVOR System Public Guideline, produced at tab 24 of Exhibit 3. Mr. Janetos also testified as to the reporting requirements under the CVOR system as well as the maintenance requirements including documented annual inspections, daily inspections, and maintenance schedule. Mr. Janetos gave evidence as to the requirement for a Public Vehicle Operator Licence when operating a business such as the Applicants', a licence, which is non-transferable, and the requirement for an International Fuel Tax Agreement (IFTA) account.

Mr. Janetos confirmed that he was involved in the review of the Applicants' record which lead to the Notice of Cancellation and Seizure dated August 23, 2004, (tab 6, Ex. 3) and the assigning of a rating of 'Unsatisfactory' (tab 7, ex. 3). It was Mr. Janetos' evidence that the Applicants, a father and son, carry on business under the unregistered name of 'WD Charters'; the two buses used in the business are registered in the name of Mr. Gregory Wayne Douglas. Mr. Janetos reviewed Mr. Gregory Wayne Douglas's Commercial Vehicle Operator Record abstract, dated October 14, 2004, and testified that Mr. Gregory Douglas applied for and was issued his CVOR Certificate on December 11, 2003, after being charged with operating a commercial vehicle with out one on December 10, 2003. Mr. Janetos further testified that on July 23, 2004, one of the two buses registered in the name of Gregory Douglas was inspected and a total of 11 defects were found, six out of service defects. The same bus was inspected on August 13, 2004, and two defects were found, one out of service – the same as one of the out of service defects found in the July 23rd inspection. The same vehicle was

inspected on November 26, 2004, at which time five defects were found, two out of service. At the time of all these inspections there was a failure to provide proof of insurance and other documentation required to be carried in the vehicle and charges were laid in these regards. Copies of the Commercial Vehicle Inspection Reports relating to these inspections were produced at tab 17, Exhibit 3, and Exhibit 4.

Mr. Janetos testified that DW Charters was audited by the MTO on January 31, 2003, and that Winston Douglas was present at that time. The Facility Audit Findings report, tab 20, Exhibit 3, indicates that the audit compliance achieved was 46.7%. According to this report Mr. Winston Douglas made a commitment at that time to pay outstanding fines of \$1,085.00.

A Show Cause Meeting was held on Friday September 10th, 2004, which Mr. Janetos and the Applicants were in attendance. Mr. Janetos testified that as a result of this meeting it was learned that Mr. W. Douglas had sold his bus to his son in late 2003. It was also learned that Gregory Douglas was still operating the bus without a Public Vehicle Licence, that he was 'using' his father's PV licence, despite being advised by Mr. Janetos in 2003, that this was improper. It was also disclosed at this time that a second bus, also a 1985 MIC, was plated in September 2004, in the name of Wayne Douglas. These buses were being used primarily for charter trips from Toronto to New York City. The Applicants' indicated at this meeting that W. Douglas was acting as a salesman and attends most trips as a tour guide, but also hired drivers to make the trips.

Mr. Janetos testified that one of the concerns regarding the Applicants was whether they had proper insurance. Following the Show Cause Meeting it was confirmed by telephone by one of the Ministry's Facility Audit Administrators, on October 4, 2004, that a 'binder' of insurance had been issued to WD Charters, (an unregistered trade name) for the minimum required amounts, however, that no current insurance was issued in the name of Gregory Wayne Douglas, the registered owner of the buses.

Mr. Janetos also stated that according to the US Federal Motor Carrier Safety Administration Licensing and Insurance Web Site WD Charters has been issued an Unsatisfactory – Unfit rating. It was also Mr. Janetos evidence that it was confirmed with the Ministry of Finance that neither Gregory Wayne Douglas nor WD Charters applied for, or had been issued an IFTA account number, and that Winston Douglas did have an account but it had been de-activated as of June of 2003.

Lastly, Mr. Janetos gave evidence to the effect that given the nature of the Applicants' operation that WD Charters requires a USDOT number and an International Registration Plan (IRP) account, neither of which have been issued, and in fact that WD Charters is no longer permitted to carry on business in the U.S.

Evidence of Winston Douglas

Mr. Douglas testified that his CVOR is his livelihood that his son did not do a very good job and that he plans to 'take back the bus'.

In cross-examination Mr. Douglas indicated that he transferred the business to his son sometime after April 2003 – he was not certain about the date. He confirmed that his son was helping out in January 2003, but was not in attendance on January 31 for the facility audit. When asked if the name 'WD Charters' is registered he stated "just lately", but indicated he didn't bring the documents to show this. He confirmed that he was the owner of that trade name.

Mr. W. Douglas also testified that WD Charters had been insured but that the insurance has been changed to Gregory Douglas. When asked if he had proof of this change he indicated he hadn't brought the papers to this hearing.

Mr. W. Douglas was asked about the nature of his business and in response he stated that he advertises a trip to New York, that there is a designated pick up point that the passengers pay when they show up. When asked if a passenger can go one-way Mr. Douglas seemed to indicate that they could, the passenger can just pay for the trip down. Mr. Douglas indicated that he rents the buses for the trips from his son.

Mr. W. Douglas confirmed that he had been audited by the U.S. Department of Transport in March of 2004, that he had been under 'house arrest' for two days during that time and that a number of fines had been levied for failure to have log books and other records.

In answer to questions regarding the fact that WD Charters has not been issued a USDOT number it was Mr. W. Douglas evidence that one is not needed "when you go in and come out as a visitor all you need is an extra provincial licence".

When asked why he 'cancelled' his IFTA account he explained that he had simply indicated 'nil' on his June 2003 IFTA form.

When asked whether he produced logbooks at the time of the two audits Mr. W. Douglas indicated that they were at the accountants at the time.

In response to questions regarding the maintenance of the vehicles Mr. W. Douglas stated that they are taken to a garage every run in the states and every two runs in Canada. He confirmed that the company maintaining the buses is Maple Leaf Limos.

Mr. W. Douglas was asked as to why he had not paid his outstanding fines and he stated he wasn't paying because "he wasn't driving".

When asked by the Tribunal how he intends to 'take back the bus' registered in his son's name he indicated that it would not be a problem that he would simply ask for the bus back and his son would comply, as that is how his family works. He indicated he would then renew his CVOR.

FACTS AS FOUND:

1. Winston Douglas failed a Facility Audit in January 2003.
2. Winston Douglas failed a USDOT audit in March 2003.
3. Gregory Wayne Douglas operated a commercial vehicle without obtaining a CVOR certificate for a period of months in 2003 contrary to the Act.
4. Winston and Gregory Wayne Douglas carried on business together under the unregistered trade name "WD Charters".
5. Gregory Wayne Douglas operated a public vehicle without a licence contrary to the *Public Vehicles Act* and failed to apply for an IFTA account IRP number as required by law.
6. The buses being operated under the name of WD Charters were not being properly maintained as evidenced by the results of the three inspections referred to above and the lack of documentation confirming maintenance and repairs.
7. Both Applicants have failed to keep proper maintenance records, logs and time sheets relating to the vehicles used by WD Charters.
8. Winston Douglas failed to give notice to the MTO regarding the changes in fleet size and alleged cessation of operation.
9. Both Applicants have failed to pay numerous outstanding fines.
10. The evidence before the Tribunal brings into question whether the buses being used by WD Charters have in fact been properly insured during the entire period of operation.

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) 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).

Highway Traffic Act, Ontario Regulation 424/97

5. (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.
3. Any restriction imposed under subsection 47 (2) of the Act on the number of commercial motor vehicles that may be operated by the operator.
4. Any order under subsections 47 (8.1) or (10) of the Act for the seizure of the plate portion of permits, permits or number plates.
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.
10. The results of any investigation or inspection of the records of the operator,
 - i. under the Act, the Compulsory Automobile Insurance Act, the Dangerous Goods Transportation Act, the Public Vehicles Act, the Truck Transportation Act, the Fuel Tax Act, the Trades Qualifications and Apprenticeship Act, the Motor Vehicle Transport Act (Canada), or
 - ii. under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them if, in the Registrar's opinion, the results of the investigation or inspection contain information described in paragraphs 14, 15 or 16, or relate to the safe operation of its commercial motor vehicles or vehicles drawn by them.
11. Any safety rating that has been assigned to the operator.
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 any of paragraphs 1 to 12.
14. The operator's fleet size.
15. The total number of kilometers traveled in the previous 12 months by all the commercial motor vehicles operated by the operator in Ontario.
16. The total kilometers traveled in Ontario in the previous 12 months by all the commercial motor vehicles operated by the operator.
17. Any compilations or analyses of any of the information in paragraphs 1 to 16.

6. (1) Every holder of a CVOR certificate shall notify the Registrar of the holder's fleet size for the previous 12 months,

(a) within 15 days of the day the holder's fleet size is 20 per cent greater or less than it was when the fleet size was last reported to the Registrar;

(b) within 15 days of receiving a request from the Registrar for the information.

(2) The holder of a CVOR certificate shall, upon request, give the Registrar documentation to support the holder's fleet size determination. O. Reg. 424/97, s. 6.

APPLICATION OF THE LAW TO FACTS:

In his opening comments Mr. W. Douglas stated that he objected to being affected by his son's poor safety record and manner of operation. He suggested that his CVOR record was good and he should be judged on that basis. Pursuant to s. 47(1)(f) set out above the Registrar may take into consideration the safety record of a person related to the holder in making a decision to cancel a CVOR certificate. The Applicants, being father and son are clearly related and in this situation the degree of involvement of Mr. Winston Douglas in the business of WD Charters clearly makes it reasonable for the Registrar to take into consideration the safety record of his son in making a decision.

Prior to his son being so involved in the business it would appear that Mr. W. Douglas had obtained the required Ontario licences and complied with the IFTA requirements. However, the facility audit of January 2003, which according to Mr. Winston Douglas did not involve his son, indicated that he was not keeping proper maintenance documents or the required time records, among other things. In fact he was given a failing grade on the audit. At the time his explanation for the lack of time documents was that they were with the accountant. This was the same explanation in March of 2003 when a US audit was completed also with poor results. At the time of the MTO audit Mr. W. Douglas explained the lack of maintenance documents, (according to the written audit findings), was as the result of not receiving the service invoices from garage.

The Tribunal finds that there has been a consistent pattern of missing documentation from the initial audit to the date of this hearing, documentation which would have satisfied the concerns in part that the buses are being maintained properly, that proper insurance was in place, and that the driver's were complying with the rules regarding hours of work. These are all basic and appropriate concerns to have when you have someone operating older vehicles for passenger transportation. The numerous times that both Applicants have failed to produce evidence of compliance on these issues eventually brings into question the reliability of the explanations and assurances made. Even at this critical point Mr. W. Douglas did not come prepared to show that things are in order although he claims they are and that "all rules will be followed". In his reasons for appeal he states "the bus is now in satisfactory condition and has documentation to prove same" – yet no documentation relating to this was provided to the Tribunal.

During the hearing Mr. W. Douglas stated that the insurance for the buses is now in Gregory Douglas's name and he also indicated that WD Charters is now registered – when asked whether he brought any documentation to show this he indicated that no, he did not bring it.

In addition to creating a fog as to the issues of maintenance, insurance and driver safety Mr. W. Douglas has created confusion about the extent of his involvement in the operations of WD Charters. Mr. W. Douglas did not provide notice to the MTO regarding the change in his fleet size or that he was no longer an operator and as a result the exact point at which Mr. W. Douglas's son became more involved in the business is unclear. Mr. W. Douglas himself could not tell the Tribunal when the change took place except that it was sometime after April 2003 that he first left his son in charge of the business and that it was in December 2003 that he transferred the registration of his bus to him – no evidence was given as to what consideration if any was paid for the bus. Complicating matters, Mr. W. Douglas continues to claim ownership of the trade name WD Charters, the name under which his son operated and the name under which Insurance for his son's buses was apparently issued. (The Tribunal notes that the MTO confirmed by telephone in October 2004, that there was a 'binder' issued however it is not clear that a certificate of insurance was ever issued or produced). As well, Mr. W. Douglas has acted not only as a salesperson and guide but, according to his testimony, he also hires drivers for the business. Finally, the evidence indicates that Gregory Wayne Douglas was at all times relying on his father's Public Vehicle Licence and there is no evidence that Mr. W. Douglas was unaware of this or in objection to it.

Mr. W. Douglas would at this point like to distance himself from his son however, it would appear to the Tribunal that although he transferred his bus to his son he continued to participate and facilitate the operations of WD Charters to a significant extent notwithstanding that his son lacked the appropriate licences and accounts. At no time in this proceeding or in any documentation before the Tribunal has Mr. W. Douglas claimed not to be aware of the non-compliance of his son, which as indicated below was substantial, nor has he disputed any of the evidence before the Tribunal, although he disagreed with the Registrar's position that he required a USDOT number. Mr. Winston's involvement in WD Charters' business together with the statutory provisions of s. 47 (1) makes consideration of Gregory Wayne Douglas's safety record in deciding the cancellation of his certificate appropriate and that safety record is not good for the following reasons. Gregory Wayne Douglas began operating without a CVOR certificate and only made application when charged. He failed to get a Public Vehicle Operating Licence even though advised his continued operation without one was illegal. He failed to comply with the IFTA and IRP. He repeatedly failed to provide the proper documentation regarding insurance and logs at the time of inspections as required under the Act and he failed to pay the fines he incurred as a result of these offences. And most concerning is that at least one of the two buses, then registered in his name, was found to have out of service defects when inspected on three different occasions within a relatively short period of time. Based on these facts, and in the absence of any evidence being provided by Mr. Gregory Wayne Douglas, the Tribunal finds that the

Registrar's conclusion that he will not operate a commercial motor vehicle safely or in accordance with the Act was totally reasonable.

Mr. W. Douglas does not deny that his son has a poor safety record. His solution is to take back the bus. But as set out above Mr. W. Douglas's own record was not unblemished as he suggests and he was very much involved with the WD Charters business. Mr. W. Douglas is an intelligent man who understands the various legal requirements to be met when operating a business such as WD Charters. However, having reviewed all the evidence before the Tribunal there remains considerable doubt as to whether these requirements will be complied with. The Tribunal appreciates the impact of this CVOR cancellation on Mr. W. Douglas's livelihood, however, public safety must take precedent.

The Tribunal finds that the Registrar's decision is not in error and is in accordance with sections 47 and 47.1 of the Act. The evidence before the Tribunal supports the Registrar's conclusion that the Applicants will not operate a commercial motor vehicle safely or in accordance with the Act.

DECISION:

Accordingly, 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 Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles dated October 15, 2004, and orders that CVOR certificate numbers 109-520-050 and 024-074-947 be cancelled.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Member

RELEASED: February 4, 2005
FILE NAME: 2660.cvor.douglas.

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.



PRE-HEARING

1099261 ONTARIO LTD. O/A FORESHEW TRUCKING

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: CRAIG FORESHEW, representing 1099261 Ontario Ltd., o/a Foreshew Trucking and Carey Foreshew, owner.

PATRICK MOORE, Counsel representing the Deputy Registrar of Motor Vehicles.

DATE OF
PRE-HEARING: January 7, 2005 Toronto

ORDER

Following attendances on January 7, 2005 at a pre-hearing before this Tribunal of Craig Foreshew, appearing on behalf of 1099261 Ontario Ltd., o/a Foreshew Trucking (the "Applicant") and Patrick Moore, Counsel appearing on behalf of the Deputy Registrar of Motor Vehicles (the "Respondent");

The Tribunal makes the following order respecting the hearing to commence at 9:30 a.m. on Monday, April 11, 2005 on the Main Floor, 116 McIntyre Street West, North Bay, Ontario and to continue on Tuesday, April 12, 2005, if necessary;

1. The parties to the hearing are the Applicant and the Respondent.
2. The parties record that there is no resolution of the issues in this matter.
3. The Applicant's representative advised he would be relying upon:

- a. the 2004 DOT audit report;
 - b. an insurance and safety compliance report prepared by Markel Insurance Company of Canada ("Markel");
 - c. the company's interpretation of the 2003 interview and related reports;
 - d. the company's review and interpretation of the local enforcement branch reports.
4. The Applicant indicated he would be calling up to 3 witnesses, which would include a witness from Markel.
5. The Respondent indicated his intention to call two witnesses, including the North Bay area enforcement officer, and that he would be relying upon the 2001 suspension and seizure order which was set aside as well as the 2003 interview and the improvement plan discussed and the Ministry's analysis.
6. The parties were made aware of their obligations for full and timely disclosure under the Rules of Practice and both parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6.3 and Rule 6.4 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: January 12, 2005

File: 2688.cvor.foreshew.prhg



FURKAN CEVIZCI

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 Furkan Cevizci
for a Commercial Vehicle Operator's Registration Certificate;

AND IN THE MATTER OF the safety record of S & A
Haulage Ltd. (CVOR 103-665-111) and Sadik Cevizci
(CVOR 093-385-561) operators related to the Applicant.

TRIBUNAL: SIMON DANN, Member

APPEARANCES: FURKAN CEVIZCI, Applicant, appearing on his own behalf

PATRICK MOORE, Counsel, representing the Deputy
Registrar of Motor Vehicles

DATE OF HEARING: November 22, 2004

Toronto

REASONS FOR DECISIONS AND ORDER

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 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 June 25, 2004.

The Applicant had submitted an application for both by a form dated April 27, 2004, and received by the Carrier Sanction and Investigative Office of the Ministry on the same date. The application is signed by Furkan Cevizci as the applying individual.

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.

As is the standard procedure in such cases the Refusals were preceded by the issuance of Notices of the Refusals ("Notices") both dated May 28, 2004 and sent to the Applicant. In the Notices the Applicant was informed that he could make written submissions to the Deputy Registrar prior to June 14, 2004 to show cause why the Refusals should not issue. No submissions were received.

Another individual and company, both of which are CVOR holders, are of interest in the present appeal. They are S & A Haulage Ltd. ("S & A") and Sadik Cevizci who is both an individual CVOR holder and also listed as a corporate official of S & A. Mr. Sadik Cevizci ("Sadik") is the father of Furkan Cevizci ("Furkan") who has also worked for Sadik. The Ministry of Transportation has placed both S & A and Sadik under a "Conditional" safety rating due to a poor safety record.

Exhibits:

1. Notice of Refusal
2. Notice of Appeal
3. Respondent's Book of Documents
4. Accident Report, comprised of 6 pages (4-1 through 4-6 incl)
5. Performance Analysis Report by fax dated September 20, 2004, comprised of 4 pages
6. Driver Record of Furkan Cevizci

Preliminary Matters:

There were no preliminary matters however, when asked about the interpreter issue, as noted in the preliminary hearing order dated October 22, 2004, Furkan advised that he was unable to afford an interpreter and was prepared to proceed without one.

Opening statement:

Patrick Moore, Counsel for the Registrar, Motor Vehicles, advised that he would call on Louis Janetos as witness for the Deputy Registrar and to present evidence regarding the view that the operator would not operate safely and that in consideration of the affiliation of Furkan with Sadik, the refusal was to avoid giving another CVOR to Sadik.

The Applicant had no opening statement.

EVIDENCE:

Mr. Janetos has been a carrier safety-rating administrator with the Sanctions and Investigation Branch of the Ministry of Transportation since 1999 and is involved with the filing of Proposals.

In the present case the name of the Applicant, Cevizci was the same last name as that of Sadik Cevizci, a CVOR holder as well as the operator of S & A Haulage, also a CVOR operator and both with a conditional safety rating.

Mr. Janetos then reviewed the Ontario Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline (Exhibit 3, Tab 12). He explained that a safety rating is a public label issued by the Registrar of Motor Vehicles to operators of commercial motor vehicles to identify their safety performance.

He 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. 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. Janetos testified that poor safety ratings could result, among other things, in a carrier having difficulty acquiring insurance coverage, without which carriage in Ontario is illegal.

In the instance of Sadik, the violation rate was 145.2% (Exhibit 3, Tab 5) and while this was adjusted downwards to 129.4% (Exhibit 5) due to the reporting by Sadik of an increase in fleet size, it was still significantly above the 100% violation threshold level, as well as the 65% level at which a carrier is considered for a conditional rating. Regarding S & A, while the violation rate (Exhibit 3, Tab 9) was reported as 0%, the CVOR status showed a "Fail to Update". Since this company was affiliated with Sadik, whose CVOR was conditional; the S & A rating was "made conditional as well".

Mr. Janetos explained that the policy towards any application from an applicant related to a conditionally rated CVOR holder is to normally refuse the application. He also stated that if the CVOR holder had a satisfactory rating, the application would normally be granted.

The review of Furkan's CVOR application of April 27, 2004, showed the same address as Sadik. The information for contact person and telephone was also confirmed to be the same as Sadik's.

An extensive review of the CVOR record for Sadik (Exhibit 3, Tab 5) showed, among other events contributing to the poor safety record, that Furkan had also been the listed driver in a number of events, which occurred in the 2001 to 2002 period. This was viewed with concern about the potential driving performance of the Applicant and also regarded as confirmation of the working affiliation of Sadik and Furkan.

The personal driving record of Furkan (Exhibit 6) was considered relevant and when submitted, this showed convictions in the 2000 to 2003 period as well as a one-week suspension in 2002 for unpaid fines.

The CVOR application submitted by Furkan suggested that his business would be the same as Sadik's and therefore, based on the affiliation, other similarities, and safety concerns, a notice of refusal was sent out on May 28, 2004.

The notice of refusal advised the Applicant he could make a written submission, prior to June 14, 2004, to show cause why he should be granted the CVOR but no submission was received.

Testifying on his own behalf, a summary of Furkan's evidence is as follows:

- he arrived in Canada in 1998 and that his father had sponsored him;
- he acknowledged he had worked for his father but that he had stopped in late 2003, and then gone to work for another trucking company, 'Canamex' as a co-driver and did 4 long-haul trips in 3 months;
- he said he had returned to his country to get married and was not at home when the notice of refusal arrived; that it was his grandmother who received it and no one had told him about it so he was not able to reply with a submission to show cause why he should be granted the CVOR;
- he acknowledged he had listed his father as contact and the same address and telephone number because essentially that's where he was living.

Furkan concluded by stating that he wanted to start on his own now that he is married and be able to build his own business. He did not see why his application should suffer for his father's record.

In cross-examination, Furkan testified to the following:

- his education was high school only and he had gained that in his native country;
- he has been to language school for English;
- he confirmed he had stopped working for his father in December 2003;
- that his father's business was hauling gravel and asphalt and while he only had one truck when he started, he now had 4 trucks;
- that he had purchased a 1993 truck and paid for it with his own money but he has not driven it because he does not have his CVOR;

- he confirmed his first Canadian driving licence was obtained in Alberta and he also received his air brakes training course there.

Through additional cross-examination questions regarding his familiarity with driving hours, log book maintenance and conducting safety inspections, Furkan confirmed that he had some knowledge of details, some of it coming from contact with other drivers. He has not taken any formal training or educational courses.

Furkan also replied that he had discussed his CVOR application with his father and he received some advice on how to proceed in obtaining it. He also said he and his father had argued over his decision to apply for his own CVOR.

Closing statement:

Mr. Moore, as Counsel for the Deputy Registrar, referred to section 17(2) and (3)(c) as well as section 17(4)(a) of the *Highway Traffic Act* as the legislative grounds for the refusal to issue the Applicant a CVOR and an Operating Licence.

Mr. Moore argued that as the businesses are individuals, it could be assumed that Furkan will or may operate similarly to Sadik. In addition, Furkan had contributed to Sadik's poor safety record through his own driving record while driving for his father.

Mr. Moore argued that the issue is safety and that the Tribunal should accept the Deputy Registrar's safety concerns and confirm the refusal decision.

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 on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

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.

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.

17 (4) an applicant is related to a person for purposes of subsection (3) if...

(a) the applicant and the person are related individuals;

ANALYSIS:

The Deputy Registrar wishes to deny the Applicant, Furkan Cevizci a commercial vehicle operator's registration certificate or CVOR based on the Applicant being related to Sadik Cevizci and S & A Haulage Ltd. and the concerns posed by their safety record.

On the basis of the evidence presented through oral testimony and submitted documents, there is no dispute that.....

- the safety record of Sadik Cevizci and S & A Haulage is poor and conditional rated;
- Sadik Cevizci is Furkan Cevizci's father;
- the contact telephone and address for Furkan Cevizci is the same as that for Sadik Cevizci;
- the alternate contact for Furkan Cevizci is Sadik Cevizci;
- Furkan Cevizci has worked as a driver for his father and contributed to the poor driving record of Sadik Cevizci through his own driving performance;
- Furkan Cevizci's personal driving record has various offence convictions.

Based on the evidence presented, the Registrar has placed substantial reliance upon the natural relationship of a father and son as the basis of the connectedness between the Applicant and Sadik Cevizci; and based on that relationship, the safety concerns regarding Sadik Cevizci should therefore be viewed as being applicable to the Applicant, who may simply be representing another CVOR opportunity for Sadik Cevizci. The underlying motivation is seen to be that for Sadik a conditional rating increases insurance costs and is a barrier to obtaining provincial contracts.

In addition, Mr. Moore has pointed to the relationships in the residence, telephone number and past working relationship of the two as further evidence of the seeming relatedness between the parties.

From the Tribunal's perspective, it should be noted that while Sadik Cevizci is Furkan's father, it does not necessarily follow that Sadik Cevizci would be in control and command of the Applicant. In fact, there was no evidence presented to suggest that Furkan had any other relationship with Sadik beyond simply being a driver and therefore the Tribunal is not of the opinion that "Sadik Cevizci directly or indirectly controls or manages or will control or manage the Applicant".

The Tribunal is further prepared to accept that in the instance of Furkan's recent arrival in Canada, it would be natural for him to reside with his sponsoring relative (his father) and obtain guidance about what he could or should be doing to earn a living. In addition, it would also not be unreasonable to accept that Furkan, being newly married, would want to get out on his own and that he would likely follow in the same work path, claiming independence, as his father because that is the only work experience he has.

Therefore, and with regard to reasons noted as “b” and “c”, in the Notice of Refusal (Exhibit 3, Tab 2), the Tribunal is of the view that insufficient evidence was presented on these points as the basis of the refusal.

However, the Tribunal accepts the Deputy Registrar’s concern regarding the matter of the safety record of Furkan, while driving with Sadik, and also the supporting influence of Furkan’s personal driving record (Exhibit 6). The fact that Furkan largely gained his truck driving experience while working with Sadik is also considered.

While the Tribunal admired the Applicant’s express intent to want to go his own way, he did not submit any clear evidence, such as enrollment in safety training or knowledgeable testimony about the matters put to him in cross-examination, to show that on the balance of probabilities he would operate differently.

In summary, the Tribunal agrees with the Deputy Registrar’s decision on the basis of safety concerns as stated in sections 17(2) and (3)(c) and 17(4)(a).

DECISION:

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

Simon Dann, Member

RELEASED: December 3, 2004

File no. 2508.cvor.cevizci

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



3394603 CANADA INC.

APPEAL UNDER SECTION 50.0(1) OF THE *HIGHWAY TRAFFIC ACT* R.S.O., 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.

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: JORAM GOLD, Agent, for the Applicant

PATRICK MOORE, Counsel, for the Registrar of Motor Vehicles

DATE: December 15, 2004

Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended, (the "Act"), 3394603 Canada Inc. ("Applicant") appealed a Suspension and Seizure Order issued by the Deputy Registrar dated September 9, 2004 by way of Notice of Appeal dated September 21, 2004;

WHEREAS the parties attended on the appointed hearing date of December 15, 2004;

AND WHEREAS agreement was reached between the parties modifying the terms of the September 9, 2004 Suspension and Seizure Order;

IT IS THEREFORE ordered that this matter is dismissed in accordance with the attached Consent.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair

RELEASED: December 16, 2004
File no. 2616.cvor.3394603 Canada

Licence Appeal Tribunal

3394603 Canada Inc.

and

Registrar of Motor Vehicles

Consent

The parties consent to an Order modifying the Suspension and Seizure Order of the Registrar of Motor Vehicles as follows: of September 9, 2004 ^{PM}

1. The Registrar's seven day Order is modified to a six-day Suspension.
2. The suspension will be effective from Tuesday, January 4, 2005 at 8:00 am. Eastern Time to Monday, January 10, 2005 at 7:59 a.m. Eastern Time.

December 15, 2004

Jasvinder Shoker

Jasvinder Shoker
President
3394603 Canada Inc.

Patrick Moore

Patrick Moore
Counsel
Registrar of Motor Vehicles



PREHEARING

GREGORY WAYNE DOUGLAS
WINSTON DOUGLAS

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: GREGORY W. DOUGLAS and WINSTON DOUGLAS,
Applicants

MURRAY FORBES, Counsel for the Respondent, the Registrar
of Motor Vehicles

DATE OF
PREHEARING: November 24, 2004 Toronto

ORDER

Following participation at a pre-hearing conference before this Tribunal by the parties listed above, the Tribunal makes the following Order:

1. The Parties to the Appeal are Winston Douglas and his son, Gregory Wayne Douglas, together carrying on business under the unregistered name of W. D. Charters.
2. The issues have not been resolved by the Parties and are agreed to consist of the legality of the business as operated; the training of drivers; the condition of vehicles; and, the level of understanding and competency by the Registrant of the legal obligations and requirements in registration under the Act.

3. The Parties agreed that one day, scheduled for January 6, 2005, is sufficient time for the Hearing in this matter.
4. The Registrar undertakes to provide the Applicants with the following disclosure documentation by the 8th day of December, 2004. The Parties are agreed that the mailing or delivery of such to the address of Gregory Wayne Douglas is sufficient and adequate notice for both Applicants:
 - Registrar's Order of October 15, 2004.
 - Notes taken by Registrar's office from Show Cause Hearing held September 10, 2004.
 - Follow-up Inquiries by Registrar regarding status/safety record in USA; status of licence applications by Winston Douglas, Gregory Wayne Douglas and WD Charters; status of insurance; and registration of IRP and IFTA fuel tax.
 - Ministry search of Gregory Wayne Douglas dated November 4, 2004.
 - Copy of Notice of Cancellation & Seizure dated August 23, 2004.
 - CVOR Summary of Gregory Wayne Douglas dated August 14, 2004.
 - Copy of SafetyNet Record of Gregory Wayne Douglas between August 23, 2002 and August 23, 2004.
 - CVOR Summary of Winston Douglas dated August 23, 2004.
 - Copy of SafetyNet Record of Winston Douglas between August 23, 2002 and August 23, 2004.
 - Driver Record for Gregory Wayne Douglas.
 - Ontario Carrier Safety Rating & CVOR Registration System Public Guideline.
 - CVOR Driver abstract for Joseph Jean Guy Daigle dated Sept. 10, 2004.
 - Driver Record for Joseph Jean Guy Daigle.
 - CVOR Driver abstract for John F. Denton dated Sept. 10, 2004.
 - Driver Record for John F. Denton.
 - CVOR driver abstract for Gregory Wayne Douglas, dated Sept. 10, 2004.
 - Level 3 Records for Gregory Wayne and Winston Douglas dated August 14, 2004.
 - Commercial Vehicle Inspection Reports dated July 23, August 13 and August 20, 2004.
 - IFTA query and file notation of October 14, 2004.
 - Vehicle registration for Bus BL5! 2! Dated October 14, 2004.
 - International Registration Plan Inquiry dated October 14, 2004.
 - US Federal Motor Carrier Office response to Registrar's queries.
 - US SafetyNet on-line search of November 4, 2004.
 - Ministry of Transport audit conducted on Winston Douglas, January 31, 2003 and related documents.

5. The Applicants undertake to provide the Registrar with the following documentary evidence by December the 8th, 2004:
 - US Documentation concerning their licence.
 - Ontario OPV licence documentation.
 - Updated Certificates concerning the buses, which they operate.
 - IFTA Licence.
6. Both Parties undertake to ensure any other documentation to be relied upon during the Hearing will be disclosed to the other within the time periods set out in Rule 6 of the Tribunal's Rules of Procedure.
7. The Registrar intends to rely upon the testimony of one witness, to wit: Louis Janetos. The Applicant will confirm potential witnesses to the Tribunal and Registrar before the Hearing date.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

Released: December 2, 2004

File Name: 2660.cvor.Douglas.pre.hrg.



PREHEARING

ROSEWAY CONSTRUCTION LTD.

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: IRVIN H. SHERMAN Q.C., Vice-Chair

APPEARANCES: PIETRO MANCUSO, Agent for the Applicant, Roseway Construction Ltd.

MURRAY FORBES, Counsel for the Respondent, the Registrar of Motor Vehicles

DATE OF
PREHEARING: December 1, 2004 Toronto

ORDER AND REPORT

Following participation at a pre-hearing conference before this Tribunal by the parties listed above, the Tribunal makes the following Order:

1. The parties to the appeal are Roseway Construction Ltd. and the Registrar of Motor Vehicles, Ontario ("the Registrar"). The parties agree that the corporate applicant is correctly identified and is the holder of the CVOR licence at issue in this appeal.
2. The appeal is scheduled for one day, to be heard January 15, 2005

3. Roseway and the Registrar shall make disclosure of all documentary evidence in accordance with the Rules of the Licence Appeal Tribunal on or before January 4, 2005.
4. The sole issue is restitution or the payment of all outstanding fines owed by Roseway.
5. Roseway has been advised by the Tribunal of its right to counsel and of its right to a qualified interpreter.

It is noted that the Registrar intends to call one witness at the hearing.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: December 6, 2004

File Name: 2661.cvor.Roseway.prehrg



IMMEDIATE LOGISTICS LIMITED

Appeal under section 50.0(1) of the *Highway Traffic Act* R.S.O., 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.

TRIBUNAL: G. MAURICE POWER, Member, Presiding

APPEARANCES: M. REYNOLDS, Agent, for the Applicant
PATRICK MOORE, Counsel, for the Registrar of Motor Vehicles
(the "Respondent")

DATES: July 26 and 27, 2004, at 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 dated December 19, 2003, to issue a 14-day Suspension and Seizure Order relating to the Applicant's Ontario Commercial Vehicle Operator Registration (CVOR) certificate, pursuant to section 47 and 47(1) of the Act.

A CVOR certificate is the document which 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.

The 14-day Suspension and Seizure Order was to take effect January 19, 2004, 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 November 12, 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 a Cancellation and Seizure Order to show cause why its (CVOR) certificate should not be terminated.

After the show cause meeting was held, the Respondent altered the Cancellation to the lesser Suspension reflected in the Suspension and Seizure Order.

The effect of the Order if enforced is to suspend for a period of 14 days the operations of the Applicant in Ontario.

The Applicant is an Ontario-based trucking company, hauling various goods primarily in southern Ontario. Its adjusted fleet size for CVOR safety rating purposes is 15, making this a fair-sized operation.

EVIDENCE:

Louis Janetos:

The Respondent's witness, Mr. Janetos, is a Carrier Safety Rating Administrator with the branch of the Ontario Ministry of Transportation ("the Ministry") responsible under the *Highway Traffic Act* and Regulations ("the legislation") for regulation of the commercial-carrier trucking industry in this province. Much of his testimony related to explanation of the structure and application of the Commercial Vehicle Operator Registration (CVOR) System maintained by the Ministry. The witness explained that the work of Target 97, a joint industry-government task force, had developed recommendations upon which the present system is based.

In accordance with Mr. Janetos' evidence, and the substantial materials filed by the Respondent for the hearing in support of his testimony, the operation of the system may be summarized as follows:

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 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, 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 travelled in Ontario is of the total mileage travelled 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.

The witness also explained the use of terms and conditions on registration as permitted in Section 17 of the Act. The Respondent is very alert to the possibility of carriers with a bad safety record attempting to reduce that record by transferring some their problems to a newly-created company (or individual) who could apply for and receive a new CVOR certificate and thus start with a clean record. Accordingly, the Respondent reviews each application for a CVOR certificate carefully, and if it discovers that some or all of the persons involved in the operations of the new applicant were also involved in the operation of an existing or prior CVOR holder with a Conditional safety rating, or one whose CVOR has been suspended or revoked, it normally refuses the application. However, if satisfied that this is indeed a new operation, and not simply an attempt to avoid a problematic record, the Registrar may issue a CVOR certificate with terms and conditions.

This was done in this case when the Respondent realized that the Applicant company's operation would involve a person, John Douglas Kiley involved in the operations of three other CVOR holders. Two of these did not have bad safety records, but the third carrier, 705400 Ontario Limited, had been giving a Conditional safety rating after failing a Facility Audit. Mr. Kiley had been a managing director of that company. However, another family member appeared to be in charge, and the new applicant appeared to be a different operation.

Because of this and because two of the carriers Mr. Kiley had been involved with had satisfactory safety records, the Respondent therefore decided to issue the CVOR

certificate but with terms and conditions. These are set out in an attachment to a letter dated December 24, 2002, to the Applicant, in which they are termed "Performance Conditions". The attachment recites that the CVOR will be subject to cancellation in the event of:

- a) A failed facility audit conducted by the Ministry of Transportation for Ontario;
- b) An overall violation rate exceeding 65% of threshold;
- c) An accident violation rate exceeding 65% of threshold;
- d) An out of service rate exceeding 35% for the years 2002/03.

Following a sudden increase in the Applicant's violation rate following a serious accident in July, 2003, the Respondent conducted a review of the Applicant's safety record, a copy of which was included in the Respondent's Book of Documents (Exhibit 4) at Tab 10. This revealed that the Applicant had an overall violation rate of 93.3%, an accident violation rate of 119.8%, and an out of service rate of 57.14%. The Respondent concluded that the Applicant was in violation of three of the four conditions of its CVOR and issued the Notice of Cancellation and Seizure. After considering the case presented by the Applicant's representatives at the show cause hearing which took place December 9, 2003, the Cancellation was changed to a 14 day Suspension.

The witness explained that his information about the review and the show cause meeting came from the file and from discussion with Don Gillette, another Carrier Safety Administrator who had charge of the file at the time, but subsequently left the employ of the Respondent. It was Mr. Gillette who prepared both the review and the minutes of the show cause meeting also included in Exhibit 4.

On cross-examination the witness was challenged with the suggestion that the police report on the serious accident might have been in error, and would have been based on statements, hearsay, from persons the officer interviewed. He conceded that the possibility of error existed, and that the officer would have obtained information by talking to persons at the scene, but noted that in this case the officer had also made measurements at the scene and as he was a trained observer, the witness had no reason to doubt the accuracy of the report. He maintained this position even after it was drawn to his attention that a discipline letter from the Applicant to the driver involved referred to wet road conditions but the coding on the accident report indicated clear conditions.

Challenged to explain how one accident could have such a profound effect on a company's safety record, with the suggestion that this might have been a mistake, he pointed out that under the CVOR pointing system, an accident such as this in which two persons in the other vehicle involved were taken to hospital with serious injuries, and in which there was driver fault found by the investigating officer, were heavily weighted in the record.

He conceded that there had originally been an error in the case of another accident in which points had been assigned to the CVOR record incorrectly even though the

Applicant's driver was clearly not at fault. But he pointed out that this had been corrected by the Respondent on their own before the sanction had been notified.

Challenged with the suggestion that the Applicant's overall violation rate had fallen below 65% during the relevant period, if the correct information was considered, he stated that he could review the calculations for the analysis to determine whether this was so after the conclusion of his testimony for the day. The Tribunal asked him to do so in order to properly answer the question.

When the witness returned to the stand the next morning, he explained that he had had to perform two sets of calculations for the Tribunal. This was because upon reviewing the record back at the office, he had discovered additional inspection events which were in the relevant period but which had not been available to the Respondent at the time of the earlier analysis, as well as a delay in changing the adjusted fleet size for the Applicant from 20 to 15, after the Applicant had filed a notification that its actual fleet size had changed.

The Applicant's agent objected to the witness being allowed to present his calculations as they were based on new information not disclosed to the Applicant prior to the hearing. But the Tribunal ruled that it was reasonable for a government official required to check a calculation in order to answer a question in cross-examination properly, to first review the information on which the calculation was to be based, in order to satisfy himself that the information was correct, and that if he discovered discrepancies he was bound to bring these to the attention of the Tribunal as the basis of his calculations would necessarily be affected. The new information was therefore elicited as a reasonable response to the cross-examination question, as permitted by the Tribunal's Rules of Procedure.

The witness then explained that based on the new information the rate would have been as high as 98% overall at the time of the initial review, and no less than 74% at the time of the sanction. Adjusted for fleet size but without adding the later events (the most favourable approach to the Applicant, the Tribunal notes) the corresponding figures would have been 91% and 68%, respectively.

John Douglas Kiley

Mr. Kiley began by acknowledging that he was the principal shareholder, with his wife, and director of the Applicant company. He has been in the trucking business for many years, both as an operator and as a consultant, with a number of successful companies. 705400 Ontario was not one of these companies, but was a carrier operated by his brother Mike (Michael) Kiley in the early 1990's. Mike had decided to get into the business of local cartage, which complimented the haulage and distribution business of the company the witness was running at the time. So he had agreed to help Mike get started, operating out of the same premises as his company and sharing drivers and some equipment. As part of that help, he agreed to be an initial director of the company. But he had never been operations manager, as incorrectly reflected in Don Gillete's

facility audit of Mike's company, which states that he was "no longer" operations manager as William O'Connor occupied that role "now" (at the time of the audit in December 1999). He acknowledged that he had provided some documents to the auditor's assistant earlier, but this was only to help out, as his brother was out of the country on vacation at the time.

Later on, when his company moved to expanded premises for its distribution operation, Mike's company did not move with it. He did give Mike a minor job in his operation, but he was never in any way in charge.

He did not think Mike was still operating the 705400 company and was surprised to learn that he had still been a director as late as the audit. The arrangement had been that once the company was operating he would be removed from its books as a director. But he had not spoken with Mike in a long time, as there had been a family estrangement.

Early in 2002, he began to look around for a buyer for the company he was then operating, evidently with a view to retirement. He entered into a share purchase agreement with a company he called Global 3 Inc., but which seems to be referred to in the agreement copy in the exhibits as G3 Inc. That company was to take over the operation, including the fleet and the company CVOR, while he was to stay on as a consultant and to receive a series of payments. After the company defaulted, and he learned they had simply walked away from the operation, the remaining drivers and employees of the operation pleaded with him to come back in and run it. He realized he would need a new company and CVOR to do this. He had incorporated a company in connection with his consulting, so in December, 2002, he applied for a new CVOR for that company (the Applicant). He had gotten back the fleet, and had discovered that the trucks had not been maintained and were in such poor condition that he decided to keep only a few of them.

But at first he assumed the trailers would be in good condition. That was because the trailers, unlike the trucks, had all been leased from a leasing company that had its own maintenance schedule. He believed that Global 3/G3, when they took over the leases, would have had to follow that schedule. And in any case, the leasing company had taken back the vehicles following the insolvency of Global3/G3, and he believed they had brought the maintenance up to date. But he learned from the subsequent inspection violations on the trailers when his drivers were stopped that in many cases proper maintenance stickers had not been applied, resulting in the out of service violations and a number of 'failure to display device' charges. His demand letter to the leasing company in March, 2002, a copy of which was brought to the show cause and included in Exhibit 4, did not lead to significant rectification of the situation. So he was eventually forced to hire his own maintenance manager and take over the maintenance and certification of the trailers (and trucks) through a third party maintenance organization. He now has few problems. He pointed out, however, that in many cases the violation did not mean that the vehicles were actually in an unsafe condition. Even in the case of the two vehicles cited for failure to have automatic brake adjusters, the brakes could still

have been in adjustment. It was just that the new adjusters were required by a change to the Regulations.

Although he was aware that there had been problems with some of the drivers when they worked for Mike had problems. But many of them had also been working with him for years, and he could not fire a driver for one accident.

He admitted that during the first six months of the new company's operation he was struggling to make it economically viable and may not have reacted as early as he should have. But he had corrected the maintenance problems by the fall of 2003, and he now had a stricter policy for drivers as reflected in the discipline letters he brought to the show cause, and which were copied in Exhibit 4.

He brought all this to the attention of the Respondent's representatives at the show cause meeting, but felt it was simply ignored.

On cross-examination, the witness was asked to clarify certain remarks and statements. He conceded that for a time his former company and Mike's had not only shared drivers but, as noted in the facility audit on 705400, had run the same equipment under both CVORs. This was because he needed to do some runs to Quebec, where one company had operating authority but the other did not. He conceded that Mike's drivers generally reported to him on these runs. And while he claimed that one of two 'problem' drivers with Mike's company, H.M. (who was also the driver involved in the serious accident in July, 2003) had subsequently been terminated by the Applicant, he conceded that the other, J.L. was still working for the Applicant, though he claimed J.L. was now restricted to local cartage runs.

Don Gillette

Mr. Gillette is the former Carrier Safety Rating Administrator with the Respondent referred to by Mr. Janetos. However, he was called to testify by the Applicant. His evidence was largely in confirmation of Mr. Kiley's evidence regarding the possibility that vehicles put out of service for device violations or even lack of automatic adjusters could still be perfectly safe, and to some extent confirming that there had been at least one error in the Applicant's file, which had been corrected.

He also acknowledged that he could have been mistaken in implying in his comment in his 1999 audit report for 705400 that John Kiley had previously been operations manager for that company. William O'Conner had that role, and he recalls seeing John Kiley on the (shared) premises acting in a sales capacity (for his own company, presumably).

He was not asked by either the Applicant's Agent nor by Respondent's counsel in cross-examination for details behind the Respondent's decision to issue either the original Cancellation Notice of the subsequent substitution of the Suspension.

(The Tribunal did not find it appropriate to question Mr. Gillette on this point, when this issue had not been raised with him by either party. While the Tribunal certainly has both a right and an obligation to ask questions to clarify the testimony of a witness on issues which have been raised with him by one party or the other, a hearing before the Tribunal is not an inquiry or investigation, and the Tribunal should not intervene as an advocate to raise issues.)

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.

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.

(1.1) The Registrar may issue a CVOR certificate subject to any terms and conditions that the Registrar considers appropriate.

(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.

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:

The Tribunal also considered a number of cases:

IBL Transport Co. is 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.

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 Suspension and Seizure order of the Registrar of September 24, 1996. Similar to the present case the Suspension 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 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.

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 Applicant's 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 its safety record.

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.

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 Respondent's counsel, Mr. Moore, submitted that there was ample evidence to support the Respondent's continuing concern for highway safety after the show cause meeting. He pointed out that Mr. Janetos in his testimony had said that the Applicant was given credit by the Respondent for the measures which it had taken by then to improve its safety. (Presumably, as reflected in the reduction of the sanction contemplated after the meeting.) He asked the Tribunal to find that given the history of past involvement with a company, 705400, that he described as little more than an 'arm' of Mr. Kiley's previous trucking company, the seriousness of the incidents, including the accident, and the lack of adequate response to and appreciation of the seriousness shown by Mr. Kiley, a 14-day suspension was appropriate.

The Applicant's Agent, Mr. Reynolds asked the Tribunal to conclude that there had been at least one, and possibly more, errors which had crept into the Applicant's CVOR safety record, that the information in that record had not been properly scrutinized or maintained and could not be relied on to support the sanction in question. He also pointed out that the overall violation rate for the Applicant may have fallen as low as 68% (at one point – he originally stated "currently" but was corrected that this would actually have been at the end of the show cause meeting in December, or in early January from Janetos evidence). He also invited the Tribunal to conclude that the CVOR system was inherently unfair to his client in the circumstances and because of the exaggerated impact which a single serious accident had on their CVOR rates.

This Tribunal has considered the CVOR system in previous cases. "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).

The Tribunal was originally troubled by the documentation in this case, which appears to indicate that the conditions in this CVOR file may not have in fact been "terms and conditions" under Section 17 of the Act, but merely "Performance Conditions". The Tribunal has recently had occasion to consider the status of such "Performance Conditions" when imposed by the Registrar on an existing CVOR holder in the International Truckload Appeal, Order on Motion released October, 2004. The Tribunal in that case agreed with the submissions on behalf of the Respondent in this case that such "Performance Conditions" are in fact mere expectations on the part of the Respondent. As such they do not have the status of terms and conditions attached to a CVOR certificate under Section 17 and cannot, for example, be appealed. As noted by the Tribunal in the International Truckload case, however, actual conditions under section 17 raise an issue, on the modern trend in administrative law, whether an Applicant who failed to appeal the issue of its CVOR with those conditions attached, should be permitted to challenge the appropriateness or reasonableness of the conditions in a later appeal of a sanction imposed in whole or in part on violation of those conditions.

After considering all of the evidence in the present case, however, the Tribunal does not find it necessary to decide this point, for several reasons.

First, that evidence clearly established that the imposition of conditions on this Applicant, whether before or after issue of the CVOR certificate, was patently reasonable. Although Mr. Kiley sought in his testimony to minimize his involvement and that of his previous company with his brother Mike's company, that testimony, and the concessions he made, showed that two companies were for a time closely intertwined in their operations, and Mr. Kiley certainly was involved in and had oversight responsibilities for the drivers and many of the vehicles employed by his brother's company. Given these facts it was reasonable for the Respondent to require his new company to be given a lower tolerance for violations before sanctions were imposed, than someone without such a 'track record'.

Nor can the Tribunal find the actual conditions imposed to be so onerous as to be unreasonable. The evidence established that only a tiny percentage of CVOR holders in Ontario would fail to meet any, much less all, of the standards incorporated in the conditions.

Lastly, it is clear that the Respondent in this case did not act mechanically on the conditions once the levels imposed were slightly exceeded, and possibly on incorrect information as implied in the Applicant's submissions. The accident rate for this Applicant was over 100% of threshold, and the overall violation rate close to 100% however calculated. These are the levels at which the Respondent normally considers a

Suspension for a new carrier, irrespective of conditions, as set out in their materials and Mr. Janetos testimony. (The Tribunal notes that a Cancellation rather than a Suspension was originally notified in this case, perhaps because of the wording of the Performance Conditions as noted above. But a Suspension was substituted for this later, so no issue for the appeal arises out of this.)

Moreover, the principal event on the Applicant's CVOR record was a very severe accident which sent two people to hospital with serious injuries. And the driver in that case was HM, who had been a problem driver for 705400 at least as early as the facility audit of that company in 1999. Worse a close perusal of that audit report demonstrates that HM was responsible for a number of the infractions, besides equipment out of service defects, including incomplete logs, and logs showing excessive hours of driving. And he was responsible for at least one out of service problem of the Applicant company, when he deliberately took a trailer 'grounded' for repair from the Applicant's yard, rather than trouble to move the vehicle in order to get to the proper trailer he had been assigned for a pickup. This history clearly demonstrates a careless inattention to safety on his part. And although the accident report of the July accident indicates no defects in the vehicle, it is self evident that entering an intersection against a red light and colliding with another vehicle demonstrates inattention, at best.

The Tribunal notes that although the Applicant's agent sought at the outset of the hearing and was given permission by the Tribunal to challenge the accident report, despite an agreement at the pre-trial that he would not, such challenge consisted entirely of suggestions in cross-examination, with no actual evidence presented to show the accident report was in fact wrong. The Tribunal accepts the accident report evidence, and agrees with Mr. Janetos that it can be relied on as prepared by a trained police officer, in the absence of clear evidence to the contrary, not simply innuendo.

Given the history of this driver, the Tribunal finds that the witness Janetos comment that the discipline letter to drivers did not go far enough is understatement for this driver. To merely give him a letter after the accident indicating that failure to control his vehicle under all conditions will not be tolerated in future is incomprehensible. If he was not terminated immediately, one would expect that at the very least he would have received some form of fine or suspension without pay, to impress upon him the seriousness of his situation.

The Tribunal also declines to find, based on one error in the CVOR record which was corrected by the Respondent on its own, that that record is unreliable, or cannot support the seriousness claimed for it by the Respondent. The only other evidence offered to support such a finding was the discrepancy between the description of road conditions in the accident report of the July, 2003, accident as being clear, and a reference in the subsequent discipline letter to driver HM "although the road was wet...." The Tribunal finds a likelier explanation of this discrepancy is that HM lied to and misled his employer concerning the road conditions as the cause of the accident.

The apparent gullibility of that employer as demonstrated by its willingness to believe its driver in the face of a police report to the contrary does not accord well with John Kiley's claim at the show cause and in his testimony that he had 'fixed' all of the problems of his company by "putting the right people in place". Nor do the additional equipment violations discovered by Mr. Janetos, which he indicated were so recent they had not yet made their way to the Respondent's office at the time of the November analysis.

The Tribunal therefore finds that the Respondent, far from ignoring valid information at the show cause establishing that all of the Applicant's safety issues had been addressed, had good reason to remain concerned enough for safety to impose at least a short suspension, independent of the violations of the Performance Conditions.

Unfortunately, while Don Gillette, who was present when the Suspension was considered, was called to testify, he was not asked by either side to clarify the reasoning behind the length of suspension chosen. And the testimony indicates that Respondent may not have fully understood history of the measures which the Applicant had taken to address its safety issues. Mr. Janetos stressed that the equipment violations continued after the Applicant got back the trailers and once again became responsible for their safety. But the Tribunal accepts Mr. Kiley's evidence that it was reasonable for him to initially rely on a leasing company with a proven maintenance policy, and that his letter to them reminding them of their obligations was not an unreasonable way to first attempt to address the defects when they came to his attention.

After considering this information, and reviewing previous cases and considering the impact of various suspensions as considered in those cases, the Tribunal has concluded that that a shorter suspension would have been appropriate in this case, to shock the Applicant into an 'attitude correction' and/or strengthen its resolve to be more diligent.

Although the prehearing order in this matter indicated the Applicant expected to present evidence to establish that the 14-day suspension would put it out of business because of the unique type of business it engages in, no such evidence was presented, and there is certainly no evidence before the Tribunal that a shorter suspension would do so. Even a short suspension will cause economic hardship to any trucking company in the competitive trucking business. But as pointed out by counsel for the Respondent there is really no evidence the impact of a suspension on the Applicant would be any different than the impact on any other company in the industry. And, of course, any sanction must hurt if it is to be an effective stimulus to change.

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 substitute a

suspension of 7 days for the 14 day suspension in the Suspension and Seizure Order of February 11th, 2004, and to change the effective dates of the Suspension and Seizure Order to a begin on a date 30 days after the date of release of this Decision.

LICENCE APPEAL TRIBUNAL

G. Maurice Power,
Presiding Member

RELEASED: November 10, 2004

File no. 2122.cvor.Immediate Logistics

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.



LAMB'S CONTRACTING LTD.

IN THE MATTER OF an Application by Lamb's Contracting Ltd. dated August 9, 2004, 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 of Motor Vehicles dated August 3, 2004;

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 143-253-368 issued to Lamb's Contracting Ltd.;

AND IN THE MATTER OF the Notice of Suspension and Seizure issued to Lamb's Contracting Ltd. on the 11th day of June 2004;

AND IN THE MATTER OF the safety record of Lamb's Contracting Ltd.

TRIBUNAL: ELIZABETH L. SPROULE, Member

APPEARANCES: GURPREET BAL, Agent, appearing on behalf of Lamb's Contracting Ltd. (the "Applicant")

PATRICK MOORE, Counsel for the Registrar of Motor Vehicles (the "Respondent" or the "Registrar")

DATE OF
HEARING: October 4, 2004

Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Lamb's Contracting Ltd. (the "Applicant") respecting a Suspension and Seizure Order dated August 3, 2004, (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 Order, Exhibit #1, states in part the following:

...I have considered your submissions and your safety record, I still 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 the 16th day of August, 2004, CVOR **143-253-368** and the plate portion of permits for all commercial motor vehicles and trailers issued to **Lamb's Contracting Ltd.** be suspended **FOR 30 DAYS** and the plate portion of permits and the number plates be seized.

This suspension and seizure will be effective the 16th day of August, 2004 at 9:00 a.m. Eastern Standard Time to the 15th day of September, 2004 at 8:59 a.m.

ISSUE:

Should the Tribunal confirm, modify or set aside the Registrar's order?

PRELIMINARY MATTER:

Mr. Harpinder Marahar of ABS Training School was in attendance with the Applicant to act as an interpreter for Mr. Bal. Mr. Marahar indicated that he did not have any connection to the Applicant and that he was fluent in both English and Punjabi. The Registrar made no objection to his acting as interpreter.

EXHIBITS:

Exhibit #1 – Suspension and Seizure Order dated August 3, 2004, issued by the Deputy Registrar of Motor Vehicles;

Exhibit #2 – Notice of Appeal form received at the Tribunal August 10, 2004, filed by the Applicant;

Exhibit #3 – Respondent's Appeal Book;

Exhibit #4 – Copy of contract between Lamb's Contracting Ltd. and Stateside Transport Solutions Inc. dated September 17, 2004;

Exhibit #5 – Commercial Vehicle Operator Summary for 1401891 Ontario Inc. dated September 17, 2004.

FACTS:Registrar's Evidence

The Registrar's sole witness was John Miller, a Carrier Safety Rating Administrator. Mr. Miller has been with the Ministry of Transportation since 1985 in a variety of capacities related to road safety, the last four years as a Carrier Safety Rating Administrator. Mr. Miller indicated that Bernadette McKenna, another safety rating administrator, has had carriage of the Applicant's file but that he has discussed the file with Ms. McKenna, has reviewed it and is able to interpret the information.

Mr. Miller gave evidence about the CVOR system, how interventions are triggered in general and the normal impact of these interventions. He also described how violation rates are calculated and how thresholds are determined generally. Mr. Miller then testified as to the calculation of the Applicant's threshold and the interventions to date.

Mr. Miller referred to the CVOR update form completed by Mr. Bal, as president of Lamb's Contracting Ltd., in September, 2003 (Exhibit #3, tab 5) and forwarded to the MTO. According to this information, the Applicant's fleet size went from six commercial motor vehicles in January 2003 to 19 in March of 2003. Mr. Miller testified that using the fleet size of 19 and the Applicant's distance traveled as in Ontario, also provided by Mr. Bal, an adjusted fleet size of three was determined.

The Safety Record Review, dated June 2004 (Exhibit #3, tab 6) was also reviewed by Mr. Miller. This record included the calculation of the Applicant's Accident, Conviction and Inspection violation rates for the period August 2002 to May 2004. The overall violation rate was 160.8% over threshold. Mr. Miller gave evidence as to the details of the accidents involving the Applicant's vehicles and the impact, if any, of each on the calculation of the violation rates.

Mr. Miller gave evidence as to the chronology of intervention. He testified that an interview took place on December 11, 2003, and that Mr. Bal and Neil Hanford, the then Safety Director of the Applicant, were in attendance. Although Mr. Bal had been told, by letter dated November 18, 2003, that it was imperative that a written safety action plan outlining what steps were being taken to improve the Applicant's safety record, none was produced at the interview. A commitment was, however, given to prepare and forward one to the Ministry.

Mr. Miller referred to a letter dated June 4, 2004, sent to the MTO by a Mr. David Ralf Sr. of DWR Transportation Consultants (Exhibit #3, tab 16). Mr. Ralf Sr. indicated in his letter that DWR had been contracted, as of April 2, 2004, to oversee the drivers, equipment and general operating files of Lamb's Contracting Ltd., that he had been unaware of the interview or request for a Plan of Action until April 8, 2004, and that he had been so caught up with a U.S. DOT audit that the request for the Plan of Action had been overlooked. A Plan of Action was included with that letter.

A Notice of Suspension and Seizure was issued June 11, 2004, and a Show Cause Meeting was set for the 25th day of June, 2004. Mr. Miller referred to the notes of the Show Cause Meeting prepared by Ms. McKenna. He testified that Mr. Bal, Mr. Ralf Sr. and an interpreter attended the meeting and that Mr. Ralf Sr. had indicated at the meeting that changes had not been made by Lamb's Contracting Ltd. prior to his engagement in April of 2004.

Finally, Mr. Miller reviewed the Carrier Control Performance Analysis Report which sets out the overall violation rate for the period November 8, 2003 to May 7, 2004, and noted that it was in fact getting worse notwithstanding the MTO intervention.

Applicant's Evidence

Gurpreet Bal testified that after the interview on December 11, 2003, he hired Mr. David Ralf Sr. Mr. Ralf Sr. reviewed policy and changed maintenance and sent the driver's to training. It was Mr. Bal's evidence however that before the last court date they could not find Mr. Ralf Sr. Mr. Bal explained he has now hired Mr. Al Wyllie and that he is now the person taking care of safety. Mr. Bal stated that things had changed a lot and if the rating was checked now it would be a lot better.

Mr. Bal stated that he wants to comply and that's why he had hired a person in Mississauga and that a lot of money has been spent. He apologized and admitted that mistakes had been made in the past but asks for one more chance. Finally, Mr. Bal stated that the company can drive in the U.S. and Ontario knows it and it is complying with regulations.

In cross-examination, Mr. Bal testified that when he purchased the company it had no assets, that he had one truck and no trailers. When asked why the previous owner had applied for the CVOR and not him, he indicated it was because the company had not been fully transferred. It was his evidence that he borrowed money to start the company and that one of the creditors was Mr. Devinder Gill. Mr. Gill also comes to help with accounting and paper work. Mr. Bal also testified that Lamb's Contracting Ltd. is located in the adjacent unit to Mr. Gill's business and that they have a common warehouse. Mr. Bal denied being asked by Mr. Gill to set up the business and testified that he had no knowledge of the safety record of D S Freight Systems (Mr. Gill's company).

Mr. Bal also clarified in cross-examination that 'Mr. Neil Muldoon' referred to in the letter of Mr. Ralf Sr. was the same person as Mr. Neil Hanford and that he had worked in the safety department for two to three months. Mr. Bal testified that he hired Mr. Ralf Sr. as Mr. Muldoon's replacement in April of 2004 to work one day a week. Mr. Bal testified that Mr. Ralf Sr. worked for the company until August 2004 when he was fired. His successor is Mr. Wyllie as of September 17, 2004.

Mr. Bal produced Exhibit #4, 'Transportation Consulting and Compliance Agreement', between Lamb's Contracting Ltd. and Stateside Transport Solutions Inc. signed by Gurpreet Bal and Al Wyllie respectively. This document sets out what areas Stateside will address – no mention is made as to the duration of contract although Mr. Bal testified it was for one year. Mr. Wyllie has been to Lamb's Contracting Ltd. three or four times.

Mr. Devinder Singh Gill testified as to some of the changes that had been made in the last six months by the Applicant namely; Mr. Ralf Sr. had made a Safety Procedures Book, there had been log book training in July and August and new tires and brakes had been purchased and were being fixed by a Mr. James.

In cross-examination, Mr. Gill testified that he loaned Mr. Bal \$100,000 to start up his business, that he operates a number of trucks through the Applicant as well as renting a number of trailers to it. He confirmed that the unit occupied by the Applicant was previously used by D S Freight Systems (his company which currently has an unsatisfactory safety rating), and that the two units have a common lease. Although the details have not been worked out, Mr. Gill stated that he anticipates receiving 50 or 60 percent of the net profits of the Applicant to pay him back the money he has loaned.

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) 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).

APPLICATION OF THE LAW TO FACTS:

The Tribunal finds that the Registrar's decision is not in error and is in accordance with sections 47 and 47.1 of the Act. The evidence before the Tribunal supports the Registrar's conclusion that the Applicant will not operate a commercial motor vehicle safely or in accordance with the Act.

Mr. Bal was clearly told in the interview of December 2003 that a Plan of Action needed to be formed and implemented to improve the safety record of the Applicant. The evidence before the Tribunal is that this request was ignored completely. The blame was put on the safety manager at the time. In April 2004, despite the hiring of a new safety manager the request was ignored until June of 2004. The Tribunal notes that the original scheduled hearing date for this appeal was September 7, 2004, and that it was adjourned because the new safety manager Mr. Ralf Sr. was apparently unable to attend. The Tribunal's previous order granting the adjournment suggests that the reason given was illness. The evidence before the Tribunal today is that in fact the Applicant had fired Mr. Ralf Sr. in August. The newest safety manager, who was just hired in September, has been to the business a few times but was not prepared to come before the Tribunal.

Mr. Bal did not challenge any of the Registrar's evidence as to the safety record of the Applicant. He simply asked for more time and stated that changes have been made. Mr. Bal has had a fair and substantial period of time to make changes and improve the Applicant's safety record. There was no reliable evidence before the Tribunal that any real effort or actual changes have in fact been made. The current safety manager, the individual Mr. Bal is now relying on to correct the situation, has only been engaged since September 17, 2004 and did not provide any evidence. Mr. Bal appeared intentionally evasive and confusing in responding to questions of both the Registrar and the Tribunal which lead the Tribunal to question the honesty and accuracy of his testimony. Mr. Gill's testimony was not substantiated by any documentation and given his personal and financial connection with the Applicant could not be considered independent or of any probative value.

DECISION:

Accordingly, 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 Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles dated August 3, 2004, and orders that CVOR certificate number 143-253-368 be suspended and the plate portion of permits for all commercial motor vehicles registered in the name of Lamb's Contracting Ltd. be seized.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Member

RELEASED: November 10, 2004

FILE NAME: 2541.cv.or.Lamb's Contracting Ltd.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

TRIPMATE TRAVEL & TOUR GUIDE CO. LTD.

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: KENNETH JEPSON, Vice-Chair
KEITH PENNER, Member (as observer)

APPEARANCES: NILS R. CONNOR, Counsel for the Applicant, Tripmate Travel & Tour Guide Co. Ltd.
PATRICK S. MOORE, Counsel for the Respondent, the Registrar of Motor Vehicles

DATE OF
PREHEARING: November 10, 2004 *Toronto*

Also participating were Mr. Kin Kai Leung, President of the Applicant, Tripmate Travel & Tour Guide Co. Ltd. and Ms. Lam Ho, Vice-President of the Applicant, Tripmate Travel & Tour Guide Co. Ltd.

ORDER

Following participation at a pre-hearing conference before this Tribunal by the parties listed above, the Tribunal makes the following Order:

1. The parties to the appeal are Tripmate Travel & Tour Guide Co. Ltd. ("Tripmate") and the Registrar of Motor Vehicles, Ontario ("the Registrar"). The parties agree that the corporate applicant is correctly identified and is the holder of the CVOR licence at issue in this appeal.

2. The appeal is scheduled for two days, to be heard January 10, 2005 and January 12, 2005.
3. By no later than December 1, 2004, the Registrar shall deliver to Tripmate, and file with the Tribunal, all documentary evidence upon which it intends to rely in the hearing of this matter.
4. By no later than December 15, 2004, Tripmate shall deliver to the Registrar, and file with the Tribunal, all documentary evidence upon which it intends to rely in the hearing of this matter.

LICENCE APPEAL TRIBUNAL

Kenneth S. Jepson
Vice-Chair

RELEASED: November 15, 2004

File Name: 2638.cvor.Tripmate Travel.prehrg



DON HISLOP TRUCKING LIMITED

Appeal under section 50.0(1) of the *Highway Traffic Act* R.S.O., 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.

TRIBUNAL: G. MAURICE POWER; Member, Presiding

APPEARANCES: CAROL McAFEE WALLACE; Counsel for the Applicant
PATRICK MOORE; Counsel for the Respondent

DATES: June 28, 29, 30 and July 2, 2004

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 dated February 11, 2004, to issue a 30-day Suspension and Seizure Order relating to the Applicant's Ontario Commercial Vehicle Operator Registration (CVOR) certificate, pursuant to section 47 and 47(1) of the Act.

A CVOR certificate is the document which 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.

The 30 day Suspension and Seizure Order was to take effect March 1, 2004, 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 January 5, 2004, 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 terminated.

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

The Applicant is an Ontario-based trucking company, hauling various goods primarily in southern Ontario and Quebec. Some 22 vehicles are operated under the authority of its CVOR certificate. Its adjusted fleet size for CVOR safety rating purposes, however, is 9, indicating this is a medium-sized operation.

EVIDENCE:**Sherry Atallah:**

The Respondent's witness, Ms. Atallah, is a Carrier Safety Rating Administrator with the branch of the Ontario Ministry of Transportation ("the Ministry") responsible under the *Highway Traffic Act* and Regulations ("the legislation") for regulation of the commercial-carrier trucking industry in this province. Much of her testimony related to explanation of the structure and application of the Commercial Vehicle Operator Registration (CVOR) System maintained by the Ministry. The witness explained that the work of Target 97, a joint industry-government task force, had developed recommendations upon which the present system is based.

In accordance with Ms. Atallah's evidence, and the substantial materials filed by the Respondent for the hearing in support of her testimony, the operation of the system may be summarized as follows:

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 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 Applicant), 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 travelled in Ontario is of the total mileage travelled 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 from 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.

The Applicant company has been registered with the Respondent since the requirement for registration was imposed in 1989. Its safety record was of concern to the Registrar even prior to putting in place the modern system of tracking following the Target 97 recommendations.

On February 5, 1995, a warning letter was sent to the Applicant concerning safety violation rate.

In August, 1996, a Facility Audit of the company's operations disclosed concerns which were addressed at an interview with company representatives held April 17, 1997. At that interview, the company presented an action plan to the Registrar's representative. The plan included continued driver training at monthly driver meetings, with a goal of reducing its overall violation rate by 25% within six months.

However, in December 1998, the company failed a further Facility Audit, and in October, 1999, a warning letter was again issued to the company.

Despite this, in September, 1999, the company again failed a Facility Audit, and in December of that year a Conditional safety rating was assigned.

On April 30, 2003, representatives of the company again attended an interview at the Registrar's office, this time with the witness, Ms. Atallah. At that time the company made substantial commitments in an action plan with respect to expanded maintenance facilities for its vehicles, and improvements to driver training and safety bonuses.

When a safety record review of this carrier was conducted in December, 2003, however, its overall violation rate was 201% of threshold, with an accident violation rate of 149% of threshold, and a conviction rate 448% of threshold. Even the much lower inspection violation rate of 57% of threshold was noted to be some 23% above the average for Ontario-registered carriers.

Accordingly, on January 5, 2004, the Deputy Registrar issued a Notice of Suspension and Seizure Order to the Applicant, notifying it of the Registrar's intent to suspend its

CVOR registration and the plate portion of its license registrations for a period of 30 days.

The Notice provided for a meeting at which the Applicant could have the opportunity to show cause why the Registrar should not proceed with the suspension. This meeting was ultimately held on February 5, 2004 at the Registrar's office in St. Catherine's, Ontario. Representatives of the Registrar included the Deputy Registrar and the witness, Ms. Atallah, who took notes of the meeting which were later transcribed and entered into evidence for the hearing. The Applicant was represented by a number of persons, including its President Don Hislop; Hank Napran, a Licensed Mechanic at the company; Jodi Burness, a paralegal; and Mike Derry, an independent safety consultant. Ms. Burness indicated at the meeting that 46 of the 88 charges shown on the company's conviction record were then under appeal, though it is not clear from the notes whether she represented that she was prosecuting these appeals on behalf of the company or the drivers.

After reviewing the material and presentations at the show cause, the Deputy Registrar concluded there was insufficient reason to believe any of these latest efforts by the Applicant would result in a significant improvement in the safety record and he accordingly issued the Suspension and Seizure Order which is the subject of this appeal.

Mike Derry

Mr. Derry is an independent consultant specializing in the trucking industry. He reviewed his training and experience in the industry, He has a long experience in road safety, beginning in his youth when he did safety training with Young Drivers of Canada. After a number of years as a long-haul truck driver, he joined the Transportation Health and Safety Association of Ontario, putting together safety training programs. He did safety training with the Association's members, helping them get into compliance with safety requirements. He worked with various sizes of carriers including some, apparently, with over a thousand of truck and trailer units.

He was asked by a friend in the industry to help out with a carrier whose CVOR was in jeopardy because of their high violation rate. (This was apparently how he got started as an independent consultant.) He "fought tooth and nail" with the drivers for the carrier but after 18 to 20 months the company's record had apparently improved significantly.

He stressed that it can take this long and in any case takes over 12 months to show a really significant improvement in the CVOR record from the measures he implements, because of the two year time-frame on which these are measured.

He met Don Hislop through E & B Paralegal, with whom he now works. He did a detailed analysis of the violations and accidents on the record of Don's company, in order to determine what would be most effective in directing corrective measure. He reviewed his analysis as documented in Exhibit 4, the Appellant's Document Brief. It

was as a result of this analysis that he decided that improvements could best be achieved by focusing on driver training and addressing the maintenance situation.

In cross-examination, he did admit that his system of analysis is not the same as that used by the Registrar, and does not directly respond to the CVOR record. (The Tribunal notes however, that the witness had earlier indicated he did check the CVOR record, and that as of June, 2004, the overall violation rate was down to 130%. This evidence was not directly challenged by the Respondent.)

Sandy Baigent

Ms. Baigent and her partner Ms. Burness operate E & B Paralegal, of which firm she serves as vice-president. They are members of the Paralegal Association of Ontario and carry Errors and Omissions Insurance. Besides providing representation in court matters, they also assist carriers in the trucking industry in Ontario with audits and safety compliance. She admitted she has no certificates in safety training, but reviewed her training and experience, which includes a number of years working for a law firm and London after graduating from the Paralegal course at Fanshawe College. 100% of her firm's work is with the trucking industry at present.

On cross-examination, she admitted she had never worked at a trucking firm, nor did she as yet have any formal training in the field, although she indicated she was scheduled to take a Safety and Compliance Manager course in November of 2004. She admitted that she was giving advice in fleet management issues before taking the course, but claimed that was why she worked with Mike Derry. If anything comes up she is unfamiliar with, she consults with Mike (before giving advice to the client). She did concede that much of her own work time is spent in court cases.

Kim Nichols

Ms. Nichols is an employee of the Applicant. When she began with the company in 2003, she was originally working part-time two or three days a week, helping out with Accounts payable and a little bit of payroll. But then in March of this year, she was asked to work full time and was given added responsibility for Safety Coordination in the firm, along with other people in her department. She "audits" driver files, ordering copies of the CVOR records and Driver's Abstracts every six months to determine if there are any new entries, and also ensures that driver logs are reviewed regularly to ensure compliance. She also attended the safety meetings conducted by Mr. Derry and Ms. Baigent. She relies on Ms. Baigent, who gives her advice and is constantly putting in place procedures to help her with her new responsibilities.

In cross-examination, although she claimed drivers did get warning letters for violations, she admitted the bonus system for drivers is not yet in place. Don and Sandy (or Mike, she was not sure) are working in this and she believes it will be in place in a month or two.

Don Hislop

Mr. Hislop has been the president and principal shareholder of the Applicant company since its inception. He reviewed for the Tribunal in his testimony something of the history of his company, and the difficulties he had had to surmount over the years in the operation of the company, particularly with respect to improving the company's safety record.

Mr. Hislop was a commercial truck driver of many years experience, who operated his own "rig" and had his own CVOR registration (now inactive). He was apparently quite content doing so, until a major and prolonged illness took him off the road. During his illness, he had leased his truck to another driver, but when he recovered his discovered his customers had been poorly served and his truck loan payments had not been kept up. In order to salvage something from the situation, he decided to start his own company. He was fortunate to secure some initial contracts for haulage, and the company has grown from there to the present time where over 20 vehicles and a dozen drivers are operating under its CVOR.

It was very evident from his testimony that Mr. Hislop is a very "hands-on" manager, and all important decisions for the company must go through him. Unfortunately, many of the company's driver's, some of whom are owner-operators with their own trucks, were also very independent, and as the business and, with it, the demands on the witnesses' time grew, this became a serious problem. The witness admitted that his attitude, and that of most of his drivers, in the event of an incident such as a violation or accident on the road, was to "get on with business" by simply paying the fine or reporting the accident to the company's insurer. He admitted that at first he did not realize the impact this was having on the company's CVOR record, and that its registration could be in jeopardy as a result. Even after he realized this, his own shortage of time and hectic schedule made the situation difficult to control. This difficulty was increased by the independence of many of the drivers, some of whom would not even bother to report a ticket, just pay it themselves. There were also problems with a staff member, for example, whose private downloads introduced bugs which caused the company computer to crash completely. They had to get an entirely new system to replace this, though this seems to be one improvement as well.

He recognized the need for assistance in dealing with the company's problems and has attempted to secure help. But his efforts have been repeatedly frustrated by the difficulty in finding someone he can trust and who will be there for him when he has questions. An early effort involved a friend who was an experience driver, and who undertook to train his drivers. But the training sessions did not go well, in part because of this man's attitude. apparently, and the drivers rebelled or stopped attending the sessions. More recently, he thought he had found the help he needed with a safety consultant, B.G. He was impressed enough with this man's ideas to take him to one of the interviews with at the Registrar's office to present them there. But the consultant, like himself, was very busy, and he found that when he was having trouble understanding something, or his

staff needed assistance with a new procedure, there was often a long delay in getting the help they needed. As a result things tended to lapse.

Now, however, he is getting this day-to-day help and guidance through E & B, the paralegal firm with of which Sandy Baigent is a member. He was originally referred to her for help with the convictions which were pulling down with company's record. She and her partner Ms. Burness specialize in the trucking industry. Most importantly, through them he met Mr. Derry, who was able to do a complete review of his safety problems and recommend solutions he could understand and implement.

The three of them are always available when he has questions or needs guidance, and with their assistance he found it easier to follow through on the many new initiatives and procedure, including a complete upgrade to the company's methods of tracking drivers and improvements in maintenance such as new brake adjusters for the trailers in the fleet. His staff and drivers also work well with these people and as a result measures are finally being implemented and followed consistently. He took the Tribunal through some of these improvements, as documented in the two volumes of material filed by his Counsel for the hearing in Exhibit 4.

He is confident these measures will result in a dramatic improvement in the company's safety, but this will take time to be reflected in the CVOR record, which tracks events over a two year period. He indicated that the 30-day suspension, if implemented, could put the company out of business because of the nature of their contracts and the fact that they are Ontario-based, unlike many of the out-of-province competitors who would pick up the company's customers during the suspension period.

On cross-examination, the witness was challenged by Respondent's counsel regarding many of the individual incidents on his company's long record of safety infractions and accidents, and also over some discrepancies in the records of discipline for some of its drivers. He admitted that he had taken too much of the responsibility on himself. For example, he has road-tested every driver personally. And he admitted that he may not always have been diligent in following through. But he claimed he had made a firm commitment to work with the E & B firm to improve, not only because they had required it as a condition of working with him, but also because he had realized he was going to lose everything if he didn't step back and let a qualified team "take over" (when it came to responsibility for safety at the company).

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:

IBL Transport Co. is 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.

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 Suspension and Seizure order of the Registrar of September 24,

1996. Similar to the present case the Suspension 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 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.

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 Applicant's 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 its safety record.

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.

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.

Transport Provost Inc./provost Bulk Transport Inc., a decision of the Ontario License Suspension Appeal Board, a precursor of the present License Appeal Tribunal, dated July 15, 1996, considering an appeal of a fleet (size) limitation order against the carrier. The Board allowed the carrier to introduce evidence of its safety record after the date of the show cause meeting, but after allowing the carrier's witnesses to be cross-examined on that evidence, concluded that the inspections in the record continued to demonstrate of the same sort of mechanical defects which led to the issue of the fleet limitation order by the Registrar, although at a somewhat lower out-of-service rate. The Board

confirmed the decision of the Registrar to issue a fleet limitation order, but modified the actual order from 14 to 10 days, and from 100 to 200 vehicles.

APPLICATION OF LAW TO FACTS:

Mr. Moore, the counsel for Respondent, argued that the Deputy Registrar at the time the proposal was issued had ample grounds to believe, based on the Applicant's CVOR record, that it would not operate with due regard to safety. He pointed out that Ms. Atallah in her testimony noted that she did not recall seeing a carrier with such a high (conviction) violation rate in her years with the Respondent as that of the Applicant in December, 2003. Even if there were some new safety measures at the company, this was merely what he described as "a last minute flurry of activity" on the eve of a pending sanction. The Registrar had seen similar initiatives implemented and then allowed to drop at this company before. It was only "common sense" for the Deputy Registrar to bear in mind the longer term record of the carrier when assessing the significance of recent activity or proposed activity. Moreover, Ms. Atallah in her safety review in December, 2003, had focused on new information since her interview with the Applicant's representatives in April, 2003, after which (he claimed) the record was effectively "set back to zero". He compared the present case to the Muscillo situation, arguing that this company knew it had to improve "ASAP" yet did nothing (until just before the show cause meeting). He cited recent cases which he argued indicated that longer suspensions were appropriate where as in this case there were serious safety concerns.

The Applicant's counsel, Ms. McAfee Wallace, argued that the Tribunal should consider the significant steps the Applicant was taking to improve its record, as reflected in the recent improvement in the CVOR record. She argued that the system for regulating carriers in this province is actually twofold. First, charges exist through which the Courts can punish bad behaviour. On the other hand, the purpose of sanctions issued by the Registrar, as pointed out in the Muscillo case, is to "improve, assist and encourage compliance". To allow the suspension to proceed now would simply be punitive, without improving compliance (beyond what the Applicant had already done) and this is not the purpose of the legislation.

The Applicant's witnesses complained a number of times regarding the CVOR rating system, and especially about the length of time it takes for that system to recognize improvement in a carrier.

This Tribunal has considered the CVOR system in previous cases. "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 made even small CVOR holders such as the Applicant in this case aware of the importance efforts to understand and comply with the CVOR system, complex as it may be. It appears that in this case that did not happen until very "late in the day", primarily because the "directing mind" of the Applicant, Don Hislop, was not able until recently to obtain effective assistance in dealing with the company's problems and simply did not understand the significance of or was too busy to do anything effective himself about the accumulating impact of the company's problems upon its CVOR record.

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 regulator must also apply the system in a fair way, taking into account *all* of the information available to it, including the "track record" of any consultants being presented to it, and their information as to the measures they have already begun to implement at the carrier.

Certainly, from past cases which have come to this Tribunal, the Respondent has reason to beware of last-minute repentance, and has seen many action plan proposals at show cause meeting which ultimately went nowhere. The record of this particular carrier in failing to carry out past proposals was bound to give serious cause for concern. And the Respondent has a solemn duty to consider the safety of the public.

But the Applicant had brought to the show cause meeting the outside people with whom he was now working, at least one of whom, Mr. Derry, had substantial expertise in safety consulting. And he had brought his mechanic to speak to the improvements that had already taken place in fleet maintenance. In dismissing this new information, as the Deputy Registrar apparently did, as more show than substance without allowing time to see if the new measures would be effective, the Respondent was effectively acting on its beliefs regarding the carrier, rather than the totality of information before the Deputy Registrar. It was certainly wrong to issue such a lengthy suspension, which is bound to have a serious long-term impact on the financial viability of almost any firm in the competitive trucking industry. (The Tribunal is aware from past cases as well that a suspension of this length is often regarded by the Respondent as a prelude to a Cancellation Order for a "hopeless" carrier, which seems to have been the fixed idea the Deputy Registrar had formed concerning this carrier.)

Given the lengthy record of safety violations at this company, the Tribunal seriously considered imposing a shorter suspension instead. But the Tribunal accepts the testimony of Don Hislop that he realizes he will lose everything now if he does not let his "team" do their work. And, in view of the testimony of Mr. Derry as to the length of the time frame on which he is working with the Applicant and his uncontradicted evidence that the CVOR record is already showing improvement as a result of their work, the Tribunal concluded that even a shorter suspension would be merely punitive of past conduct and would not be likely to improve public safety. Improvement in the safety of the public using Ontario roads, not punishment, is the aim of the legislation. (The Courts and law enforcement agencies are well able to take carry of any appropriate

punishment, and there was some evidence that the Applicant is before those Courts, on appeal in some cases.)

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 not to proceed with the Suspension and Seizure under the Order of February 11th, 2004.

LICENCE APPEAL TRIBUNAL

G. Maurice Power,
Presiding Member

RELEASED: October 28, 2004

File no. 2237.cvor.Hislop

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.



FURKAN CEVIZCI

IN THE MATTER OF AN APPLICATION BY FURKAN CEVIZCI FOR A HEARING BEFORE THE LICENCE APPEAL TRIBUNAL PURSUANT TO SECTION 50 (1) OF THE *HIGHWAY TRAFFIC ACT* APPEALING THE REFUSAL TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE AND THE REFUSAL TO ISSUE AN OPERATING LICENCE OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED JUNE 25, 2004;

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 FURKAN CEVIZCI FOR A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE;

AND IN THE MATTER OF THE SAFETY RECORD OF S & A HAULAGE LTD. (CVOR 103-665-111) AND SADIK CEVIZCI (CVOR 093-385-561) OPERATORS RELATED TO THE APPLICANT.

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: FURKAN CEVIZCI, Applicant, appearing on his own behalf

PATRICK MOORE, Counsel, representing the Deputy Registrar of Motor Vehicles

DATE
OF HEARING: September 3, 2004

Toronto

ORDER

WHEREAS Furkan Cevizci (the "Applicant") has appealed the Refusal to Issue a Commercial Vehicle Operator's Registration Certificate and the Refusal to Issue an Operating Licence of the Deputy Registrar of Motor Vehicles (the "Respondent") dated June 25, 2004;

AND WHEREAS the Applicant's appeal to the Licence Appeal Tribunal (the "Tribunal") was set down to be heard by the Tribunal on September 3, 2004;

AND WHEREAS upon the hearing of the appeal commencing before the Tribunal on September 3, 2004, the Applicant moved that the hearing be adjourned so that he could retain the services of an interpreter;

AND WHEREAS Counsel for the Respondent consented to the hearing being adjourned and together with the Applicant agreed that the hearing be adjourned to any of November 22, 23 or 24, 2004;

NOW THEREFORE, this Tribunal Orders that:

1. The hearing of this matter shall, by the consent of the Applicant and the Respondent, be adjourned *peremptorily* against the Applicant to commence at 9:30 a.m. on Monday, November 22, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. By no later than November 5, 2004 the Applicant shall advise the Counsel for the Respondent and the Tribunal in writing of the full name, address and qualifications of the interpreter retained to interpret at the hearing of the Applicant's appeal.

Whatsoever fees and costs are incurred by the Applicant in relation to the services of an interpreter shall be borne solely and absolutely by the Applicant, and the interpreter retained by the Applicant shall not be directly or indirectly associated with the Applicant nor related to the Applicant.

3. The Applicant shall not less than ten (10) days prior to the hearing serve on the Respondent's Counsel and file with the Tribunal a Book of Documents upon which he intends to rely at the hearing and shall fully comply with Rule 6 relating to Disclosure as set forth in the Tribunal's Rules of Practice (November 3, 2003).

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

RELEASED: October 22, 2004

FILE NAME: 2508.cvor.Cevizci.order.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



PRE-HEARING

3394603 CANADA INC.

IN THE MATTER OF an application by 3394603 Canada Inc. dated September 21, 2004 for a pre-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 September 9, 2004;

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 128-142-156 issued to 3394603 Canada Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to 3394603 Canada Inc. on the 3rd day of August, 2004;

AND IN THE MATTER of the safety record of 3394603 Canada Inc.;

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: JORAM GOLD, Agent representing 3394603 Canada Inc.

PATRICK MOORE, Counsel representing the Deputy Registrar of Motor Vehicles

DATE OF
PRE-HEARING: October 21, 2004

Toronto

ORDER

Following attendances on October 21, 2004 at a pre-hearing before this Tribunal of Joram Gold, Agent appearing on behalf of 3394603 Canada Inc. (the "Applicant") and

Patrick Moore, Counsel appearing on behalf of the Deputy Registrar of Motor Vehicles (the "Respondent");

The Tribunal makes the following order respecting the hearing to commence at 9:30 a.m. on December 15, 2004, 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 Respondent.
2. The parties record that there is no resolution of the issues in this matter.
3. The parties agreed that more than one (1) day would be required for the hearing and that they would confirm with each other, within one day of the pre-hearing or by no later than 5:00 p.m., October 22, 2004, the additional dates that would be mutually acceptable, failing which the hearing would commence as scheduled for December 15, 2004.
4. By no later than 10 days before the hearing commencing on December 15, 2004 if there be any dispute and/or disputes as to the information contained in the Applicant's safety record, such dispute and/or disputes shall be identified by the Applicant's Agent in writing addressed to the Respondent's Counsel.
5. The Respondent indicated his intention to call one witness and the Applicant's Agent indicated that he may have several witnesses, who remain to be confirmed.
6. The parties were made aware of their obligations for full and timely disclosure under the Rules of Practice and both parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6.3 and Rule 6.4 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: October 26, 2004

File Name: 2616.cvor.3394603 Canada Inc.prhrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



INTERNATIONAL TRUCKLOAD SERVICES INC..

Appeal under section 50.0(1) of the *Highway Traffic Act* R.S.O., Chapter H.8 as amended (the "Act") from the performance expectations imposed by the Deputy Registrar pursuant to section 47(1) of the Act.

TRIBUNAL: G. MAURICE POWER, Member, presiding

APPEARANCES: CAROLE McAFEE WALLACE, Counsel, representing the Applicant
International Truckload Services Inc.

PATRICK MOORE, Counsel, representing the Deputy Registrar

DATE OF
HEARING: May 20, 2004

Toronto

REASONS FOR RULING AND ORDER

International Truckload Services Inc. ("the Applicant") filed a Notice of Appeal, seeking to appeal an "Amended" Set-Aside Notice of Suspension and Seizure, with Performance Conditions ("the Set-Aside Notice"). The Deputy Registrar of Motor Vehicles ("the Respondent") brought a Motion on Notice for an Order dismissing the Appeal without hearing. The Notice of Motion contends that the appeal is premature as the Respondent has made no order of suspension or cancellation against the Applicant.

THE FACTS

The Applicant and Respondent each filed a Motion Record and Factum with the Tribunal. The Respondent's Record contains the Affidavit of Michael McKay, Program Standards Manager in the Carrier Sanctions and Investigations Office of the Respondent, while the Applicant's Record contains the Affidavit of William R. Lindup, the Vice-President of Safety and Maintenance of the Applicant. There is little dispute about the facts upon which the appeal and motion are based, as set out in the two affidavits.

These facts may be briefly set out as follows:

The Applicant corporation has been operating trucks commercially in Ontario under the authority of a Commercial Vehicle Operator's Registration ("CVOR") since 1989. On December 18, 2003, the Respondent issued to the Applicant a Notice of Suspension and Seizure proposing a 10-day suspension of the Applicant's CVOR and the plate portion of its vehicle registrations. This notice was issued under the authority of Section 47 of the *Highway Traffic Act* of Ontario, as amended ("the Act").

The Notice invited the Applicant to attend a meeting on January 23, 2004, in the offices of the Respondent, to Show Cause why the Applicant's CVOR and plate portion should not be suspended ("the Show Cause "). Both affiants, Michael McKay and William R. Lindup, attended the Show Cause, along with the Deputy Registrar, Greg Beatty, the Applicant's counsel in the appeal, and a number of others.

At the Show Cause, the Applicant's representatives presented an action plan, which addressed what the Respondent had seen as a number of problem areas with the Applicant's safety record. The action plan provided for a number of safety-related initiatives by the Applicant, to be implemented at different dates.

After reviewing the action plan and representations of the Applicant as presented at the Show Cause, the Respondent issued the Set-Aside Notice, incorporating the following Performance Conditions:

1. The CVOR Certificate, plate portion of permits and numbered plates issued to INTERNATIONAL TRUCKLOAD SERVICES INC. will be subject to a Suspension and Seizure in the event of:
 - a) Your Out-Of-Service Rate exceeding 35% for the year 2004.
 - b) Your overall violation rate exceeding 65% using a performance analysis period commencing February 4, 2004.
 - c) The undertakings committed to are not implemented and monitored as outlined in the action plan submitted dated January 22, 2004.

Although the wording of the Set-Aside Notice might suggest that the Applicant would be subject to immediate Suspension and Seizure should it violate any of the performance conditions, Mr. McKay in paragraph 11 of his affidavit states: "The assignment of performance conditions indicates to a CVOR holder the Deputy Registrar's expectations with respect to future performance. They signal that the Deputy Registrar again intends to issue a Notice of sanction if the performance conditions are not met".

The Applicant then issued its Notice of Appeal, dated February 18, 2004, and received at the Tribunal February 19, 2004. The Notice seeks to challenge the Set-Aside Notice on two alternative grounds. First, that the Respondent has exceeded his jurisdiction "by imposing Performance Conditions on the Appellant's existing CVOR", and, second, that if the Respondent had authority to impose the Performance Conditions, that the Conditions are not necessary to ensure the Applicant's compliance with the Act.

ARGUMENT

The Respondent's counsel argued in his materials and before the Tribunal that under the Tribunal's Rules of Procedure it may dismiss without a hearing an Appeal in which it finds the subject matter of the Appeal is outside the Tribunal's jurisdiction. He argued that the Tribunal has jurisdiction to consider only decisions of the Respondent with respect to CVOR holders made under either sections 17 or 47 of the Act. Since, he argued, the Set-Aside Notice appealed from was not such a decision, but only a notice of the Respondent's future intent, similar to the warning letters also issued by the Respondent to CVOR holders, the Tribunal had no jurisdiction to consider it at a hearing.

The Applicant's counsel in her responding materials and before the Tribunal argued that the Respondent only has the authority, under the Act, to issue Notices to CVOR holders under the authority of Sections 17 and 47, and that the Set-Aside Notice must therefore have been issued under one of these sections. She further argued that in issuing the notice the Respondent had exceeded his authority under the Act, as section 17 provides for terms and conditions to be attached to a CVOR holder only upon issue of the CVOR certificate, and section 47 has no provision for attaching conditions. She argued that the general powers given to the Registrar under section 3 of the Act, to supervise highway traffic, cannot be extended to create new substantive power, relying on the case of *Canadian Airline Pilots Association et al. v Canadian Pacific Air Lines Ltd.*, [1993] 3 SCR 724, (the "CALPA" case) to support the proposition that a regulatory body may not rely upon general authorizing powers in its enabling legislation to ground actions not authorized in the specific authority given to it in that same legislation.

LEGISLATION

Sections 3 and 4 of the Act provide:

3. (1) There shall be a Registrar of Motor Vehicles appointed by the Lieutenant Governor in Council.

(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

(3) The Minister may authorize the Deputy Minister and the Registrar or either of them to exercise and discharge in his or her place any of the powers conferred or the duties imposed upon him or her under this Act or the regulations and, where both the Deputy Minister and the Registrar are so authorized, either of them may exercise and discharge any of the powers and duties.

(4) The Deputy Minister, with the consent of the Minister, may authorize any public servant or servants in the Ministry to exercise any or all of the powers and duties of the Registrar.

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.

Section 17 of the Act provides in part:

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.

(5) The Registrar may issue a CVOR certificate subject to any terms and conditions set out in the regulations that the Registrar considers appropriate.

Section 21 of the Act provides in part:

21.(3) Every person who contravenes or fails to comply with a term or condition of a CVOR certificate issued to the person is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than six months, or to both.

Section 47 of the Act provides:

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

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

REASONS FOR DECISION AND ORDER

Counsel for the Applicant and counsel for the Respondent both agreed that the Set-Aside Notice sought to be appealed in this case is not authorized, or required, under the provisions of either Section 17 or Section 47 of the Act. The Tribunal concurs with this view. But counsel disagreed on the nature of the Notice. Counsel for the respondent sought to characterize the document as nothing more than a statement of future intention, much in the

nature of a warning letter. Counsel for the Applicant, on the other hand, asks the Tribunal to view the Notice as an unauthorized, and therefore void, exercise of state power, one which has the effect of placing her client under a different regulatory regime from other CVOR holders.

The Tribunal agrees with counsel for the Applicant that Section 3 of the Act cannot be used to create new enforcement powers not given to the Registrar elsewhere in the Act. But the Tribunal notes that in the CALPA case cited by counsel, it was precisely the coercive nature of the power sought to be exercised that the Supreme Court of Canada was at pains to identify. Mr. Justice Gonthier, writing for the majority of the Court, pointed out that under the Canada Labour Relations Board's enabling legislation, subpoenas issued by the Board could be enforced as Orders of the Federal Court, with penalties of fine and imprisonment for disobedience. In concluding that reading in the coercive power sought was not consistent with the purpose and role of the Board, he noted (at page 742):

First, the Board does not only have an administrative function to perform. The Board is required to act in the manner of a court of law in assessing legal arguments in relation to complex factual circumstances. Second, and as a result, the procedural safeguards which normally accompany a process having a judicial character cannot be viewed as alien in relation to the activities of the Board.

Mr. Justice Gonthier concluded that it was the power the Board was attempting to derive from its general authority, to exercise its subpoena power outside the context of a hearing, which was "alien" to the purpose and role of the Board, as it violated the important judicial principal of *audi alteram partem*.

The Tribunal is strengthened in this view by a brief review of both the general manner in which the courts treat the actions of regulatory bodies, and of the specific manner in which the Respondent in this matter has exercised its authority in similar situations in the past.

From English law, the courts in Canada inherited a tendency to treat the actions of regulators as administrative in character, and thus not subject to appeal generally, unless those actions were clearly clothed with a judicial character by legislation (as in the CALPA case, above). See, for example, the English case of *Royal Aquarium v. Parkinson* [1892] Q.B. 431. This principle has been applied in Ontario even where the issue of a commercially valuable license was at stake, *R. v. Bd of Broadcast Governors, ex p. Swift Current Telecasting Co. Ltd.* [1962] O.R. 190.

The Respondent in this case would formerly, in situations where a CVOR holder was able to demonstrate at a Show Cause meeting that a longer suspension was not justified, go ahead and issue a short suspension in the nature of a warning. This practice was disapproved by the Tribunal in the *Star Van Systems Inc.* case, where the Tribunal suggested it would be better in such situations to refrain for a time from any sanction, provided that the expectations on the CVOR holder during such 'probationary' period were clear.

Accordingly, the Respondent now seems to be following this practice. If the expectations are not met, the Respondent then proceeds with a sanction, although this may be less severe than the sanction originally proposed, as happened in the case of *Thomas J. J. Herriman*, a Tribunal Decision released October 20, 2003.

It is important to note, as the *Herriman* case demonstrates, that if a further sanction is issued, the Applicant will have full rights to Appeal to this Tribunal.

The Tribunal therefore concludes that, as submitted by counsel for the Respondent, the Set-Aside Notice in this case is merely an administrative monitoring tool, and has no force or effect as a Proposal or Order under Section 47 of the Act, nor as terms and conditions attached to a CVOR Certificate under Section 17 of the Act. It is therefore not a decision of the Respondent which can be appealed to this Tribunal. It is thus outside the jurisdiction of the Tribunal to consider.

This Tribunal THEREFORE ORDERS that this Appeal is dismissed without hearing.

LICENCE APPEAL TRIBUNAL

Maurice Power, Member

RELEASED: September 24, 2004

FILE NAME: 2212.cvor.International Truckload.order.juris

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



H & B TRANSPORTATION LTD.

IN THE MATTER OF THE APPEAL TO A CANCELLATION AND
SEIZURE ORDER ISSUED TO H & B TRANSPORTATION LTD.;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION (CVOR) CERTIFICATE (144-622-
846) ISSUED TO H & B TRANSPORTATION LTD.;

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: HARJIT AUGLA and NAGINDER BENIPAL, Agents, representing
H & B Transportation Ltd.;

PATRICK MOORE, Counsel, representing the Registrar of Motor
Vehicles

DATES OF
HEARING: August 26 & 27, 2004

Toronto

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

Under the authority granted in Section 47 and 47.1 of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8, as amended ("the Act") the Deputy Registrar of Motor Vehicles issued a Cancellation and Seizure Order against the following companies and persons: 1432561 Ontario Limited, H & B Transportation Ltd., 1237716 Ontario Inc., 1309648 Ontario Ltd, Aujla, Harjit, Singh, Gagan Transport Ltd., 1344296 Ontario Inc and 1210183 Ontario Ltd.. The Order was issued February 23, 2004 with an effective date of March 8, 2004. Under the Act the entities upon whom the Order is served have a right of Appeal to the Tribunal pursuant to Section 50(1) of the Act. The terms of the Order were that the Commercial Vehicle Operator's Registration (CVOR) certificates issued to the enumerated entities be cancelled and the plate portions of permits be seized. The effect of the order was that the enumerated entities would no longer be able legally to conduct their transportation business in Ontario. Only H & B Transportation Ltd. appealed the Order.

The promulgation of the Order was preceded by the issuance of a Notice of Cancellation and Seizure dated December 11, 2003. This procedure, also authorized by Section 47 of the Act, acts as a notification to the subject operators that they must "show cause" to the Registrar that they should be allowed to remain in the haulage business in Ontario. In the present case a show cause hearing was convened on February 14, 2004. In attendance were the Deputy Registrar, John Miller, Carrier Safety Rating Administrator; Michael McKay, Programs Standards Manager; Harjit Aujla representing all listed operators and Patrick Doran, consultant to the operators.

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. The Respondent asserts that it 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 as seen through an examination of companies related to the Applicant.

Evidence was tendered through John Miller, a Carrier Safety Rating Administrator employed by the Respondent, who described the various operating companies as to both their safety records and, as he put it, the attempt to disguise those records by conducting operations through ever new incorporated entities. Mr. Miller was an attendee at the show cause hearing of February 14, 2004. The haulage operations in Ontario with which Harjit Aujla and Balwinder Benipal were associated had already come under regulatory scrutiny. The latest triggering event was the transfer and use of the equipment controlled by one their companies, 1237716 Ontario Inc., by H & B Transportation, a California corporation owned by Naginder Benipal the nephew of Mr. Balwinder Benipal.

The application for an Ontario CVOR by H & B Transportation of Fairfield California was received by the respondent February 10, 2003. Nowhere in the incorporating documents or in the Application is there a mention of Harjit Aujla or Balwinder Benipal. The only person listed as officer or director is Naginder Benipal. The filing date of the incorporation in California was November 7, 2002.

The Applicant took the position that the evidence is more consistent with the granting of time to the Applicant with the attendant possibility of corrective action being the appropriate finding of the Tribunal than with the draconian one of upholding the order of cancellation and seizure. The Applicant posited that other levels of sanction available to the regulator should be explored prior to putting the Applicant out of the haulage business in Ontario for all practical purposes. 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 safety records of employee drivers and owner operators operating under its certificate. Such drivers can get other employment but the CVOR certificate holder is banned. The Applicant also asserted that there had been improvements in his operation since the issuance of the Cancellation and Seizure Order.

The System

Trucking operations in Ontario are monitored via 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 described as any:

..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 data base 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 a two year moving window on a carriers 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% of the time 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. Or the carrier's accident violation rate is 5.9% above the accident threshold for operators of his 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 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.

Mr. Miller

As a safety analyst Mr. Miller assigns safety ratings and oversees sanctions imposed upon operators. As well he attends “show cause” hearings which allow an operator to explain any circumstances surrounding a bad record. An integral part of his duties is to monitor applications from operators seeking authorization to operate in Ontario. The object of this exercise is to spot operators with poor safety records attempting to obtain a CVOR and thereby commence operations with a clean safety record with all the licensing and insurance implications that would follow. In the present case this screening process was not successful and H & B Transport escaped detection. Mr. Miller testified that had the Applicant not slipped under his radar he would have opposed the issuance of a CVOR. He pointed out that the name Naginder Benipal showed on the Application, not Balwinder Benipal.

The explanation as to how the Applicant received a CVOR and the present circumstances of the operation lay in the fact that the corporations previously controlled by Mssrs. Aujla and Balwinder Benipal could not viably operate in Ontario. The safety record amongst other problems had made receiving insurance coverage next to impossible. Mr. Aujla testified that he attempted to remain in operation within Ontario as a large portion of his business was hauling produce from California to Toronto. One method lay in forming a Manitoba company. This allowed him to receive affordable insurance through the Manitoba government insurance scheme. The Manitoba authorities, however, insisted that after a period his operations would have to move to Manitoba. This resulted in a move to Saskatchewan where he met a similar fate. Balwinder Benipal's nephew, however, Naginder, operated a company base plated in California which operated one truck.

Harjit and Benipal controlled 1237716 Ontario Inc., in which the ownership of their fleet resided. This fleet was moved under the California operation and it was through this operation that application for a CVOR was sought and granted February 12, 2003. H & B operated some 25 commercial vehicles averaging 2½ trips per month into Ontario. Ninety percent of the gross revenue of the operation is divided between Harjit Aujla and Balwinder Benipal, with 10% going to Naginder Benipal.

A brief history of the companies through which Harjit Aujla and Balwinder Benipal carried on their carriage operations is instructive both as to the confusion over the safety record amassed by said companies, and how they wound up operating out of California through H & B.

1210183 Ontario Ltd.:

Mr. Aujla formed Gagan Transport and 1210183 Ontario Ltd. in 1995 and sold them in 1997. The minutes of the February 19, 2004 show cause meeting reveal that he sold the companys' operating license as part of the deal. He was advised that licenses are not transferable. The safety audits of this company after Mr. Aujla's involvement showed a reasonable safety record, at least one below necessary Ministry interventions.

1309648 Ontario Ltd.:

This company received its CVOR August 14, 1998. Operations terminated in November 2001. It had a “conditional” safety rating. Although operations had ceased the Ministry ran a safety analysis for the six months prior to cessation. It revealed a safety rating 252% above threshold.

1432561 Ontario Ltd.:

The company applied for a CVOR in July 2002 and was granted one in August. The application lists as the contact person, Harjit Aujla and Balwinder Benipal as dispatcher and Safety Manager respectively. A subsequent audit of the company lists Ms. Amarjeet Benipal, Balwinder’s wife as corporate officer. That audit, in December 2002, gave a failing grade to the company. In fact the company never passed a Ministry audit. Mr. Miller stated that his overall impression was that the company had very poor drivers. The log keeping was sub par and the accident rate was exceptionally bad in that many of the accidents detailed showed a lack of professionalism as opposed to poor driving conditions. Most significantly, there was no improvement over time. This can be explained by the audit’s finding that there were no programs within the company to improve the situation with the running of the operation. The company was inactive from July 2003. There was an interview that had been scheduled for October 30, 2003. No representative from the company showed up. Mr. Aujla claimed not to have received the letter. The minutes of the February show cause indicated that the such letters are sent registered mail to the address of the company. A copy of the Purolator receipt was produced.

The 17 owner operators from this company went over to H & B.

1237716 Ontario Inc.:

This company received a warning letter in July 1998. It failed an audit and received another warning letter in November 1999. This was followed with a conditional rating in February 2000. The termination notice of the company was received by the Ministry in January 2001. Mr. Aujla stated that this company was dropped as an insurance risk.

4466676 Manitoba Ltd:

This company sought a CVOR for Ontario operations by application dated November 1, 2000. The application listed Satnam Johal as president. Mr. Aujla stated that Johal was listed for, as he put it “paper purposes”. The move to Manitoba was for insurance purposes. Mr. Aujla stated that the Manitoba government insurance scheme allowed the company to acquire coverage not available in Ontario. He also explained that the Manitoba government told him that in order to maintain that coverage after one year, he

would have to move the operation to Manitoba. This he did not do. In the event the application for an Ontario CVOR was refused by Notice of Refusal dated May 24, 2002 stating as reasons the safety record of companies which had involvement of Messrs Benipal and Aujla. The refusal was not disputed.

Following this Mr. Aujla attempted a move to Saskatchewan where again the governmental insurance scheme would allow coverage. But, as in Manitoba, it would have required a move to that province to maintain coverage after one year. It was at this point that the scheme to operate out of California through Naginder Benipal's company was born.

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.

APPLICATION OF LAW TO FACT:

The Respondent is charged with ensuring that haulage operations within Ontario are carried out safely. To that end they both screen persons seeking to become carriers and, once in operation, scrutinize their operations through the safety analysis, intervention and sanction system described above. The reason the scrutiny regarding safety is directed to the officers of the corporation is obvious. It is the directing mind of the companies that is of concern to the regulator. If inquiries did not go beyond the corporate veil it would be impossible to track offending operators as they reincarnate themselves in one corporation after another.

The position of the Applicant that H & B be allowed to continue to operate under or after some sanction less than cancellation was considered by the Tribunal. The most telling evidence against such a course was the evidence that even since the show cause hearing to the date of this hearing there persists a poor safety record.

Even after identifying Messrs. Harjit Aujla and Balwinder Benipal as the minds behind H & B, and the beneficiaries of the operation, the regulator was still confused at the show cause hearing as to the correct fleet size of the company. It is the operators' onus to update that figure with the regulator.

It is apparent to the Tribunal that, on the evidence, not only do the safety records of H & B and its predecessors represent an unacceptable risk to highway safety it is also apparent that there was no evidence of any improvement. There are, therefore, no grounds upon which the Tribunal can take issue with the conclusions of the regulator regarding the appropriate disposal of this matter.

Aside from the safety record of the Applicants the Tribunal was also presented evidence both from the regulator and from the Applicant that the reason for the rather vagabond existence of the companies was the inability to acquire insurance coverage due to the safety record. That record also showed that when the operating companies in Ontario were dropped as risks forcing them to incorporate in Manitoba to get coverage they could not get a CVOR, again because of the affiliation of Messrs. Aujla and Benipal.

The disturbing thing about the California gambit of moving the equipment and operations under Naginder Benipal's name was the deliberateness of the Applicants in deceiving the regulator. For a time it worked and the use of the name Naginder allowed the Applicants to get under the radar of the Application screening system. The evidence of how the proceeds from this entity were divided made it clear that the scheme was set up to allow Harjit Aujla and Balwinder Benipal to stay in the trucking business, a circumstance which would clearly have been denied them if their involvement would have been known.

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, H & B Transportation Ltd.,

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice Chair

RELEASED: September 21, 2004

Filename: 2250.cvor.HBtransport.

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.



HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

2221-CVOR-CONSENT

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION of
T.E.A.M. LOGISTICS SYSTEMS INC.

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SUSPEND AND SEIZE
- Order dated: February 9, 2004

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

T.E.A.M. LOGISTICS SYSTEMS INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by the Representative for the Applicant, and by the Representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Representative for the Applicant and the Representative for the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 24, 2004

LICENCE APPEAL TRIBUNAL**B E T W E E N:****T.E.A.M. LOGISTICS SYSTEMS INC.**

Appellant

- and -**THE REGISTRAR OF MOTOR VEHICLES**

Respondent

CONSENT

The parties hereto by their respective solicitors consent to an order resolving this matter without a hearing on the following terms:

1. The Suspension and Seizure Order issued by the Respondent on February 9, 2004 shall be modified to 7 days from the original 14 days.
2. During the 7- day period of suspension and seizure, the CVOR certificate of the Appellant shall be suspended and the plate portion of permit for all commercial motor vehicles and trailers shall be suspended.
3. The Respondent shall seize the number plates of the Appellant's commercial motor vehicles and trailers during the 7-day period of suspension and seizure.
4. The Respondent shall fix the date for the commencement of the suspension period.

August 23, 2004

Counsel for Appellant

Counsel for Respondent

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



NORTH STAR LOGISTICS INC.

IN THE MATTER OF THE REFUSAL BY THE REGISTRAR OF MOTOR
VEHICLES TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S
REGISTRATION CERTIFICATE

TRIBUNAL: SIMON DANN, Member

APPEARANCES: REHAN FAROOQUI
Agent representing the Applicant,
North Star Logistics Inc.

PATRICK MOORE
Counsel for the Respondent

DATE OF HEARING: August 19, 2004

Toronto

REASONS FOR DECISIONS AND ORDER

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 April 16, 2004.

The Applicant had submitted an application for both by a form dated February 13, 2004 and received by the Carrier Sanction and Investigative Office of the Ministry on February 19, 2004. The Applicant was incorporated on February 9, 2004 and the application is signed by Rehan Farooqui as President of the applying entity.

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.

As is the standard procedure in such cases the Refusals were preceded by the issuance of Notices of the Refusals ("Notices") both dated March 24, 2004 and sent to the Applicant. In the Notices the Applicant was informed that it could make written submissions to the Deputy Registrar prior to April 6, 2004 to show cause why the Refusals should not issue. No submissions were received.

One other company which is of interest in the present appeal is Simcan Investment Inc. ("Simcan"). The President of Simcan is Saleem A. Farooqui who is the father of Rehan Farooqui who has also worked for Simcan. The Ministry of Transportation has placed Simcan under a "Conditional" safety rating due to a poor safety record and this was followed by a failed facility audit on February 23, 2004.

The Tribunal member then suggested that, for the record, and to avoid possible confusion between identification of Rehan Farooqui and Saleem Farooqui, it would be helpful if they could be referred to as "Rehan" and "Saleem". Both Rehan Farooqui and Saleem Farooqui agreed.

Preliminary Matters:

On a preliminary matters inquiry, and in view of the presence of both Rehan Farooqui and Saleem Farooqui, Mr. Moore requested the Applicant to confirm who would be representing North Star Logistics Inc. ("North Star"). Rehan confirmed that he would be speaking for North Star and Saleem would be called as a witness.

Opening statement:

Patrick Moore, Counsel for the Registrar, Motor Vehicles, advised that he would call on John Miller as witness for the Deputy Registrar and to present evidence regarding the view that the operator would not operate safely and that the companies are affiliated.

Rehan, representing the Applicant, stated he would show that North Star has nothing to do with Simcan and that the companies have no relationship.

EVIDENCE:

Before proceeding with John Miller, the witness for the Deputy Registrar, Mr. Moore requested that Saleem be excluded from the hearing as it had been indicated that he would be called as a witness. Rehan advised he did not have any objection to that request.

The Respondent entered into evidence the Notices of Refusal (Exhibit 3, Tab 8, 9) and confirmed that the grounds upon which the Deputy Registrar refused to grant permission to the Applicant to operate commercial vehicles in Ontario were contained in the Notice statement that

“I am not convinced that the applicant will operate commercial motor vehicles safely and in accordance with this Act, the regulations and other laws relating to highway safety based on:

a) The failed MTO Facility Audit and safety record of Simcan Investment Inc. (CVOR 142-213-570), an operator related to the applicant.

b) I am of the opinion that Saleem A. Farooqui, President of Simcan Investment Inc., directly or indirectly controls or manages or will control or manage the applicant.

Mr. Miller has been a carrier safety rating administrator with the Sanctions and Investigation Branch of the Ministry of Transportation for four years and deals with integrity checks of CVOR records. 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 transportation safety officer and a national safety code auditor.

In the present case the name of the Applicant, Rehan Farooqui was the same last name as that of Saleem Farooqui, the operator of Simcan Investments Inc., a CVOR operator with a conditional safety rating. Simcan is also named on an alert list of known “companies with issues”.

Mr. Miller explained that companies on the alert list are those with unsatisfactory and conditional ratings as well as “ones we have concern with”.

In considering a related company, Mr. Miller reviews such information as its corporate officers, 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 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 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. 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.

The significance of Simcan's conditional rating was that the company had an 85% violation rate and, according to Mr. Miller, Simcan had also received a warning letter in July 2003 "in lieu of a sanction" as it had been in operation for less than 2 years.

In addition, Simcan failed a facility audit check (Exhibit 3, Tab 7) on February 23, 2004. The audit compliance score achieved by Simcan was only 31.7% out of a possible 100%. The minimum needed to pass the audit was 55%.

Mr. Miller testified that the facts which suggested there was a relationship between the Applicant and Simcan, and which drew his attention included:

- Saleem's name (Farooqui), his credit card number and his signature on the CVOR application form (Exhibit 3, Tab 1);
- the address given by the Applicant, 4 Thorsby Court, was also shown on the address history of the Driver Record for Saleem (Exhibit 3, Tab 4);
- the Applicant's telephone number (Exhibit 3, Tab 1) was the same as Saleem's (Exhibit 3, Tab 3);
- the number of vehicles listed on the CVOR application form was only one (1) and the unusually low number of kilometers estimated to be driven within Ontario, which was at 5,000 and only 10,000 kilometers to be driven outside Ontario, (Exhibit 3, Tab 1);
- the address shown on the Applicant's driver licence record (Exhibit 3, Tab 2) was 89 Windmill Blvd., the same address as for Saleem.

Mr. Miller also said the date of North Star's incorporation, February 9, 2004, was of interest because, as a conditionally rated CVOR operator, Simcan would have difficulty obtaining insurance coverage and it is not unknown to the Ministry for a carrier with a poor rating to operate as a new corporate entity in an effort to avoid the consequences of those ratings.

Rehan stated he had no cross-examination questions.

The witness for the Applicant, Saleem, gave evidence as follows:

- he stated that there is no relationship between Simcan and North Star;
- that he never saw the application and how it was filled in;
- that Rehan is his son and as a father he wants to help him succeed on his own but he does not want any relationship with Rehan's company.

When asked about the status of Simcan, the witness confirmed that Simcan has some problems and that his experience with the company was a costly one. He explained that he had not previously thought about the trucking business because he had no knowledge or experience.

He added that “he doesn’t want the business” and that the business belongs to his son. The witness also confirmed that Rehan did work in dispatch at Simcan and that he liked the work.

During cross-examination, the witness confirmed the following:

- he currently lives at 89 Windmill Blvd.;
- he owns the house at 4 Thorsby Crt and actually lived there in 1991; the current tenants are friends of Rehan and Rehan uses one room as his office;
- that Simcan was not operating now because of his health and the company also had no insurance;
- that while his son was attending classes at Sheridan College, Rehan tried to help Simcan when he could and worked in dispatch and trying to find new business through the Internet while he (Saleem) and his wife managed all the administrative and paperwork tasks;
- that North Star might have the same telephone number as Simcan but it was up to Rehan to decide if he wanted to use the same number or get a new number.

The witness explained that he had taken a mortgage and acquired credit card debt to purchase his trucks, which had a value of \$40,000 to \$50,000, but that he was prepared to give the trucks to his son because “he’s my son [and] I want to help him”.

When asked about the credit card number and signature on the North Star application, the witness confirmed they were his and that any money which his son might need would come from him. The witness repeatedly stated that it was his desire to see his son succeed and attempted to explain his willingness to provide his son with everything he needed to succeed by saying “we have different customs and background”.

When asked if customers were calling Simcan, the witness stated “...for what, I’m not doing the business”.

The Applicant then took the witness stand and provided the following testimony:

Rehan testified that he had been enrolled in a 3 year co-op program at Sheridan but when he did not get a placement in his second year he started to help his father at Simcan. He also worked on dispatch with Lynxworth International, a Brampton-based trucking company with which he and his father had a compensation arrangement that

included a percentage of the load and a percentage of the operating profits. While this relationship did not last, Rehan said it gave him the opportunity to learn more about the business.

He agreed that his father started without knowing anything about the business but he (Rehan) likes the industry and wants to stay in it.

Rehan further stated that there is no relationship between Simcan and North Star and that his father would not be running the business.

In cross-examination, Mr. Moore referred to Exhibit 4, a letter the Respondent received from North Star, in which Rehan wrote...

"In the two years that Simcan was in business, my father and I both learned many of the pros and cons of the trucking industry.

"Although it seems as though Simcan had more cons than pros, I tried my best to work together with my father to keep Simcan in business, and fully functional. We've had many rough times in this business, from customers not paying us, to drivers cheating us for money, to even having the truck stolen from our own yard. It was a long and hard battle we had to overcome, but we managed."

Rehan testified he had stopped working with Simcan in May of 2004 but while working with the company he had only done dispatch and helped with refueling of trucks by providing transportation for the truck drivers to and from fuel depots as well as to mechanical repair shops. He testified he did not do any paperwork and he had nothing to do with the drivers with regard to the problems found with Simcan drivers (Exhibit 3, Tab 7).

The witness confirmed he has had his own credit card for "a couple of years" and that he also had student loans outstanding of between \$5,000 and \$10,000, and that he did not have a full-time job.

When asked about his income, he stated he was working on dispatch with an owner/operator who has one truck and he earns about 5% of the load value which is about \$500 or less per week.

When asked about North Star's business plan, the witness stated that his plan was to "get the CVOR and work with owner/operators and grow" from there.

In reply to a question about the low mileage numbers on the CVOR application form (Exhibit 3, Tab 1, page 4), Rehan stated that he "didn't know what to put here" and that he had no idea how to complete the columns which asked for the number of commercial motor vehicles which would be either leased or employed through owner/operators.

When asked to describe the on/off duty times that a driver must observe, the witness referred to some understanding of the on-duty period and the 8 hour off-duty requirement. He confirmed that he had learned a lot since starting with Simcan.

Closing statement:

Mr. Moore, as Counsel for the Deputy Registrar, referred to section 17 (3) and (3) (c) of the *Highway Traffic Act* as the legislative grounds for the refusal to issue the Applicant a CVOR and an Operating Licence.

Mr. Moore argued that while the poor safety record of Simcan was not in dispute, it was also not in question that the companies did not have a partnership or common officers or directors (section 17 (4) (b) (d)). However, there were questions about control of North Star as Saleem Farooqui would be its financial “under-pinning”.

In addition, the refusal is also based on section 17 (2) which states that

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.

Mr. Moore argued the “relatedness issue” by referencing...

- the decision *re 2023517 Ontario Inc. o/a Abest Carriers v. Registrar of Motor Vehicles* and the “interconnectedness of the Applicant and a company with a bad safety record”;
- the loss of Simcan’s insurance with the date of North Star’s incorporation;
- that Rehan and Saleem worked together, especially through Lynxworth International;
- that North Star was operating out of a house owned by the Applicant’s father, as well as using the Simcan telephone number;
- the absence of a business plan at the time of the CVOR application;
- the “unrealistic” mileage numbers on the application;
- and that the Applicant was not in a position to finance the business and Saleem was prepared to provide whatever he needed.

Mr. Moore also pointed to statements made in the Applicant’s letter of June 15, 2004 (Exhibit 4) to suggest that there is a substantial relatedness of work between Rehan and his father.

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 on a highway unless the operator is the holder of a CVOR certificate that is not under suspension.

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.

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.

17 (4) an Applicant is related to a person for purposes of subsection (3) if...

(a) the applicant and the person are related individuals;

ANALYSIS:

The Deputy Registrar wishes to deny the Applicant, North Star Logistics Inc., a commercial vehicle operator's registration certificate or CVOR based on the Applicant being related to Simcan Investment Inc.

Information found as facts include:

- Simcan Investment Inc., which has been in business for less than two years, is a CVOR holder and operator with problems;
- Saleem Farooqui is the sole officer and director of Simcan;
- Rehan Farooqui is the sole officer and director of North Star Logistics Inc.;
- Saleem is the father of Rehan;
- the North Star CVOR application form contained the personal credit card number and signature of Saleem;
- the address noted on North Star's CVOR application was a former residence of Saleem's and is currently owned by Saleem; the house is rented and occupied by friends of Rehan and he maintains one room as an office;

- the driver licence records of both Saleem and Rehan show the same address as the current residence address for Saleem; in addition, the telephone number provided on North Star's CVOR application is listed as belonging to Saleem and registered at his home address;
- the North Star CVOR application showed an unusually low number of kilometres planned to be travelled within Ontario and outside of Ontario;
- Rehan has worked with his father, at Simcan, doing work that included dispatch, searching for new customers, and providing truck drivers with rides to and from the truck yard as well as to fueling and mechanical service locations; Rehan did not do any other administrative paperwork;
- Saleem and Rehan worked together for Lynxworth International, a non-related trucking company;
- there is an implied close working relationship between Rehan and Saleem as Rehan stated that he "tried to work together with my father to keep Simcan in business and fully functional" and that "It was a long and hard battle we had to overcome, but we managed" (Exhibit 4);
- Saleem is prepared to give Rehan and North Star the trucks owned by Simcan and provide the financial support that may be needed by North Star (Saleem testified that as Rehan's father he was prepared to give him whatever he needed to get ahead and succeed);
- Rehan did not have a full time job, he also had outstanding debt and he was not in a position to finance a business;
- Rehan stated it was his plan to work with owner/operators but he did not have a formal business plan for North Star.

Based on the evidence presented, it would seem that the Registrar has placed substantial reliance upon the natural relationship of a father and son as the basis of the connectedness between the Applicant and Simcan. In addition, Mr. Moore has pointed to the relationships in the residences, telephone numbers, the proposed financial contribution of the father to the son as well as the implied close working relationship of the two as inferred by testimony and Exhibit 4 as further evidence of the seeming relatedness between the parties.

From the Tribunal's perspective, before discussing the merits or absence of evidence presented by either the Respondent and the Applicant, it should be noted that while Saleem Farooqui testified that he is a father who wants to help his son succeed in every way he can it does not necessarily follow that he would also be in control and command of the Applicant.

Therefore, in this case, there are two issues to be considered. The first is whether there is sufficient evidence to confirm the Registrar's opinion that the Applicant will actually be controlled and or influenced in its operations by Saleem Farooqui.

On this point, the Tribunal is unable to ignore the extent of Saleem's financial contribution to the Applicant who, in the absence of any evidence to the contrary, only has his time, energy, and ambition to contribute to the North Star business opportunity. This naturally leads to the question of whose views would prevail or at least be dominant in the Applicant's formative period.

From an 'officious bystander' test perspective, it could reasonably be expected that the person or party who made the largest financial contribution would have the deciding word. Since the Applicant failed to provide any substantive evidence, in an effort to prove beyond a reasonable probability, that Saleem Farooqui would not be involved in the operation or direction of North Star, as defined by section 17(4)(d), the Tribunal finds itself in agreement with the Registrar's opinion on this issue. The simple statement by the Applicant that Saleem was not and would not be involved with his company does not have any weight without any evidence to support this claim.

The second issue for the Tribunal to consider is whether the Applicant will operate commercial motor vehicles safely and in complete accord with the requirements of the Act, the regulations and other laws relating to highway safety.

Concerning the Applicant, the Tribunal is led to consider Rehan's experience, capabilities and plans, while with Simcan the focus is on that company's record as well as its policies, procedures and plans for corrective measures to improve its conditional rating. However, no evidence was presented by either the Applicant or Saleem to prove that action was taken, planned or intended in any of these areas.

In fact, the evidence was that neither the Applicant nor Saleem had had any formal training in safety procedures and operations. In addition, the testimony of Saleem confirmed that he had no prior knowledge of or experience with owning or operating trucks for hire and what he did know he learned through his less than two years of experience with the Simcan operation. There was no evidence that Simcan even responded to the Ministry's warning letter of July 2003.

While the Applicant also stated he had learned a lot from his experience he failed to provide any formal plan for the business or the safety and operating procedures he would implement to ensure that his company, North Star, would have positive ratings and pass future facility audits.

Without any such details the Tribunal has no basis upon which to conclude that the Applicant would operate North Star in a different, safer and more responsible way than how his father had operated Simcan.

In summary, the Applicant has failed to provide any evidence to support the appeal claims that:

- (1) there is no relationship between North Star and Simcan and therefore North Star's operations would not be influenced or directed by Saleem Farooqui, and
- (2) that North Star would operate differently than Simcan and be in full compliance with the Act and related safety requirements.

DECISION:

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

Simon Dann, Member

RELEASED: August 30, 2004

FILE NAME: 2416.cvor.Northstar Logistics 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.



PREHEARING

2122-CVOR-IMMEDIATE LOGISTICS LIMITED

IN THE MATTER OF an application by the Applicant dated January 2, 2004 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 December 19, 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 144-279-542 issued to the Applicant;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to the Applicant on the 12th day of November 2003;

AND IN THE MATTER of the safety record of the Applicant;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

J.D. KILEY, Agent, for the Applicant

DATE OF
PRE-HEARING: March 30, 2004

Toronto

ORDER

A Pre-hearing between the parties was held on March 30, 2004, in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated February 27, 2004.

FOLLOWING attendances on March 30, 2004 at a pre-hearing before this Tribunal of Patrick Moore, Counsel for the Registrar of Motor Vehicles, Ministry of Transportation (the "Respondent"), and John D. Kiley, Agent for the Applicant as set forth in the Tribunal's Notice of Pre-Hearing Conference dated February 11th, 2004;

WHEREAS it was outlined at the Pre-Hearing Conference that:

- (a) The Registrar issued a Suspension and Seizure Order for 14 days dated December 19th, 2004, pursuant to section 47 and subsection 47(1) of the *Highway Traffic Act*, for the Applicant;
- (b) The parties present at the Pre-Hearing confirmed that there was no resolution of the issues between them.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing shall commence at 9:30 a.m. **Monday, July 26th, 2004, and continue at 9:30 a.m. on Tuesday July 27th, 2004, and Wednesday July 28th, 2004**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The parties shall file their submissions and any documents in support **on or before 4:00 p.m. Tuesday July 13th, 2004.**

Each party will file one copy with the Tribunal and deliver one copy to the other party. Disclosure shall be provided no later than 10 days prior to the hearing.

3. The Respondent shall present evidence and testimony from one witness, Louis Janetos, a Carrier Safety Rating Administrator. Mr. Janetos will provide as evidence all relevant file documentation subsequent to the Applicant receiving its CVOR. Mr. Janetos will detail the Respondent's expectations of the Applicant's safety performance at the time of the issuance of the CVOR, and the actual safety performance of the Applicant after the CVOR was issued, and how it failed to meet those expectations.

Mr. Janetos will also show in his testimony the connections between John Kiley, who is the owner and sole proprietor of the Applicant, and his history and connections to other previous companies. These would include an Ontario numbered company, which received a conditional rating as a result of a previous facility audit, and BIDO Distributing Ltd., to which the trucking portion of the Applicant's business is to be transferred to, subsequent to the retirement of Mr. Kiley.

4. The Applicant shall present evidence and testimony from three witnesses, Mr. J.D. Kiley, sole owner of the Applicant, Operations Manager for the Applicant, and a former employee of the Applicant and currently with BIDO Distributing Ltd.

The witnesses for the Applicant will testify that the Applicant did in fact make changes to its operations, including the hiring of experienced personnel, the purchase of new equipment, and that the Applicant has improved and complied with the Respondent's expectations, and has resolved the problems that existed. Furthermore, the witnesses for the Applicant will testify that the imposition of a fourteen day suspension would result in business being lost to the Applicant's competitor's, and that due to the nature of the segment of the industry that the Applicant operates in, this sanction would result in the failure of the company.

5. It was disclosed at this pre hearing that as a result of the Order, there is a statutory freeze against BIDO Distributing. Furthermore, by a separate Order dated February 26th, 2004, a fourteen day suspension and seizure is to be carried out against BIDO Distributing Ltd. as a result of the Order against the Applicant.

At this pre-hearing, the Respondent stated that since the two companies were related, these two matters should be combined and heard at the same hearing. Since the Applicant and BIDO Logistics each hold separate CVOR's, and have had separate Orders issued against them by the Respondent, it was confirmed that BIDO Distribution did not wish to be a party to the Applicant's matter, and reserved the right to launch it's own appeal of the Order against it, if necessary, at a later time.

It was also confirmed that the Applicant did not intend to challenge the CVOR record of incidents.

6. At the hearing of this matter, the Tribunal will be asked to review in detail a time period from December 2002 until the date of the Suspension and Seizure Order. There will also be a general examination of the several years of history for other related companies with common corporate officers.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: April 16, 2004

The Tribunal makes the following Orders respecting the hearing:

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED:

File: 2122.cvor.Immediate Logistics Limited.prehrg



PREHEARING

2172-CVOR

IN THE MATTER OF an application by the Applicant dated January 29, 2004.

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 051-472-549;

AND IN THE MATTER OF the Notice of Suspension and Seizure issued to the Applicant on the 5th day of December 2003;

AND IN THE MATTER OF the safety record of the Applicant;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

JAMES LEE, Agent for the Applicant

DATE OF
PRE-HEARING: March 26th, 2004

Toronto

ORDER

A Pre-hearing between the parties was held on March 26th, 2004, in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated February 27, 2004.

FOLLOWING attendances on March 26, 2004 at a pre-hearing before this Tribunal of Patrick Moore, Counsel for the Registrar of Motor Vehicles, Ministry of Transportation (the "Respondent"), and James Lee, Agent for the Applicant as set forth in the Tribunal's Notice of Pre-Hearing Conference dated February 27, 2004.

WHEREAS it was outlined at the Pre-Hearing Conference that:

- (a) The Registrar issued a Suspension and Seizure Order for 30 days dated January 22nd, 2004, pursuant to section 47 and subsection 47(1) of the *Highway Traffic Act*, for the Applicant;
- (b) The parties present at the Pre-Hearing confirmed that there was no resolution of the issues between them.

AND WHEREAS the Parties have agreed to the following terms:

- 1. The hearing shall commence at 10:00 a.m. Thursday, May 6th, 2004, and continue at 10:00 a.m. on Monday May 10th, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
- 2. The parties shall file their submissions and any documents in support on or before 4:00 p.m. Friday April 26th, 2004.

Each party will file one copy with the Tribunal and deliver one copy to the other party. Disclosure shall be provided no later than 10 days prior to the hearing.

- 3. The Respondent shall present evidence and testimony from one witness, John Miller, a Carrier Safety Rating Administrator. Mr. Miller will introduce all Ministry history documentation regarding the Applicant, including the CVOR, accident reports, and Safety Net report. Testimony of Mr. Miller will also include information connecting the Applicant with McRoberts Trucking Inc., who had their CVOR cancelled in 2001 for safety issues, and how it appears that the McRoberts Trucking Inc., fleet has migrated over to the Applicant since then.

The Respondent may call a second witness, who would be an Inspection Officer who had made inspections of the Applicant.

- 4. The Applicant will call one witness, himself, who is the sole proprietor of the company. The Applicant will give evidence as to the nature of the operations and persons who operate under the Applicant's CVOR, and who are independent contractors. The Applicant will also testify as to the steps taken by the Applicant to come closer to achieving compliance both before and after the Show Causes meeting with the Registrar in January 2004.
- 5. Among the issues to be raised by the Applicant at this hearing will be to question the accuracy of its CVOR record and application of the incident point weighting system. In detail, the issue pertains to an incident regarding twelve points assigned to an accident, as well as a separate inspection involving driver Donald Deeton, who was not in the employ or in any way authorized by the Applicant, and that the evidence of this presented at the Show Cause meeting was not given sufficient weight by the Registrar.

The Applicant will also raise the issue of the length of the suspension, and that it is unduly harsh and would result in the Applicant going out of business.

6. The Respondent will raise the issue of the Applicant's record, including the company's convictions, accidents, and out of service rates.
7. It was confirmed at this Pre Hearing that other than challenging the incidents involving driver Donald Deeton, the Applicant concedes that the CVOR record as presented by the Respondent is accurate.
8. At the hearing of this matter, the Tribunal will be asked to review in detail a time period following the September 2001 cancellation of McRoberts Trucking Inc. and prior to the date of the Suspension and Seizure Order.

AND WHEREAS the Applicant notified the Tribunal by fax dated April 2, 2004 that he is withdrawing.

THEREFORE the Tribunal makes the following Order:

1. The appeal is withdrawn and the hearing dates scheduled for May 6 and 10, 2004 are cancelled.
2. This proceeding is hereby concluded.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: April 8, 2004

File: 2172.cvor.prehrg Order



INTERNATIONAL TRUCKLOAD SERVICES INC.

HIGHWAY TRAFFIC ACT

Revised Statutes of Ontario, 1990, Chapter H.8, as amended

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION of
INTERNATIONAL TRUCKLOAD SERVICES INC.

AND IN THE MATTER OF the SET-ASIDE
NOTICE OF SUSPENSION AND SEIZURE by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SET-ASIDE THE SUSPENSION AND SEIZURE
WITH PERFORMANCE CONDITIONS
- Notice dated: February 4, 2004

AND IN THE MATTER OF the MOTION TO DISMISS the said Appeal

INTERNATIONAL TRUCKLOAD SERVICES INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS a hearing of the motion in the above matter was scheduled to be held on Thursday, April 8, 2004, by the Tribunal;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing of the motion *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, May 20, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 6, 2004

PREHEARING

2221-CVOR-TEAM LOGISTICS SYSTEMS INC.

IN THE MATTER OF THE HIGHWAY TRAFFIC ACT, Revised Statutes of Ontario, 1990, Chapter H.8, as amended;

AND IN THE MATTER OF Commercial Vehicles Operator's Registration Certificates No. 118-825-691, No. 111-756-611, No. 134-235-654 and No. 134-508-034 issued to T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc.;

AND IN THE MATTER OF the Notice of Suspension and Seizure by the Registrar of Motor Vehicles issued to T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. dated the 12th day of December, 2003;

AND IN THE MATTER OF the Safety Records of T.E.A.M. Logistics Systems Inc.;

AND IN THE MATTER OF the Order of Suspension and Seizure by the Registrar of Motor Vehicles issued to T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. dated the 9th day of February, 2004;

AND IN THE MATTER OF the Notice of Appeal by T.E.A.M. Logistics Systems Inc. dated the 19th day of February, 2004;

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

APPEARANCES: PATRICK MOORE, Counsel, for the Respondent

TRACY HEARN, Agent, for the Applicant

DATE OF
PRE-HEARING: March 31, 2004

Toronto

ORDER

Background:

The Registrar of Motor Vehicles (the Registrar) issued a Notice of Suspension and Seizure dated the 12th day of December, 2003, (the Notice of Suspension) whereby it was proposed to suspend the Commercial Vehicle Operator's Registration Certificates issued to T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. for a period of 30 days and thereafter until all fines were paid subject only to a show cause meeting to be held on January 30, 2004. All fines were paid and the show cause meeting was held.

Subsequent to the said show cause hearing, the Registrar issued a Suspension and Seizure Order dated the 9th day of February, 2004 (the Suspension Order) whereby it ordered the Commercial Vehicle Operator's Registration Certificates issued to T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. and plate portion of permits for all commercial motor vehicles and trailers in the name of T.E.A.M. Logistics Systems Inc., 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. be suspended for a period of 14 days. The Suspension Order was to be in effect at 9:00 a.m. Eastern Standard Time on the 24th day of February, 2004 to 8:59 a.m. Eastern Standard Time on the 9th day of March, 2004.

T.E.A.M. Logistics Systems Inc. (the Appellant) by a Notice of Appeal dated February 19th, 2004, (the Appeal) appealed the Suspension Order.

This conference, upon the consent of both Parties, was conducted by means of teleconference communication and, pursuant to the Rules of Practice of the Tribunal, no testimony of witnesses was heard by the Tribunal at this 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.

It is notable that only the representative of the Appellant was in telecommunication as Counsel for the Registrar was physically present with the Tribunal at the conference at the Tribunal's Chambers in Toronto. There was no communication concerning the subject matter or issues of the Appeal between those physically present at the conference except such as was able to be heard by the representative of the Appellant by means of the telecommunication equipment.

At this conference, submissions were received from each Party and heard by the Tribunal as to the issues in dispute and the manner in which this matter should proceed in an orderly and expeditious way.

Although four corporations were made subject to the Suspension Order, only the Appellant filed the Appeal and the Appellant acknowledged that it had taken over the business undertakings of the other three corporations, and as such, they had become inactive. It was then agreed by the Appellant that it would represent the interests of the other three corporations at this conference.

It became apparent at the conference that the only issue to be dealt with by the Tribunal at the hearing was the actual suspension since the Appellant does not dispute the facts alleged by the Registrar which gave rise to the Suspension Order.

This Tribunal is content with the discovery process which took place at the conference and the representatives of the Parties had a full, open discussion of the issues.

The Registrar and the Appellant were confident that the said hearing could be completed within two 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. The oral Order of this Tribunal was to be confirmed by a written order to be issued by the Tribunal.

The Law:

The appeal comes to this Tribunal by virtue of section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, which provides:

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

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

Order:

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

1. The Suspension Order is varied to provide that it shall not apply to 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. and all Commercial Vehicles Operator's Registration Certificates including No. 118-825-691, No. 111-756-611, No. 134-235-654 and No. 134-508-034 issued to 924574 Ontario Inc., Team Logistics Distributions Inc. and Team West Inc. are hereby canceled and terminated.
2. The Parties to the hearing are the Appellant and the Registrar;
3. Since the facts alleged by the Registrar are not in dispute, the issues to be dealt with at the hearing shall be limited to the suspension of Commercial Vehicles Operator's Registration Certificates No. 118-825-691, No. 111-756-611, No. 134-235-654 and No. 134-508-034 issued to T.E.A.M. Logistics Systems Inc. and the seizure of plate portion of permits for all commercial motor vehicles and trailers in the name of T.E.A.M. Logistics Systems Inc. as noted in the Suspension Order.
4. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, June 21, 2004, commencing at 9:30 a.m., and shall be continued, if necessary, on Tuesday, June 22, 2004.
5. 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: April 14, 2004

Filename: 2221.cvor.Team Logistics Systems Inc.



PREHEARING

2237-CVOR

IN THE MATTER OF an application by the Applicant dated February 25, 2004 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 February 11, 2004;

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 096-474-735 issued to the Applicant;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to the Applicant on the 5th day of January 2004;

AND IN THE MATTER of the safety record of the Applicant;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

CAROLE McAFEE WALLACE, Counsel, for the Applicant

DATE OF
PRE-HEARING: March 30, 2004

Toronto

ORDER

A Pre-hearing between the parties was held on March 30, 2004, in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated March 11, 2004.

FOLLOWING attendances on March 30, 2004 at a pre-hearing before this Tribunal of Patrick Moore, Counsel for the Registrar of Motor Vehicles, Ministry of Transportation (the "Respondent"), and Carole McAfee Wallace, Counsel for the Applicant as set forth in the Tribunal's Notice of Pre-Hearing Conference dated March 11th, 2004;

WHEREAS it was outlined at the Pre-Hearing Conference that:

- (a) The Registrar issued a Suspension and Seizure Order for 30 days dated February 11th, 2004, pursuant to section 47 and subsection 47(1) of the *Highway Traffic Act*, for the Applicant;
- (b) The parties present at the Pre-Hearing confirmed that there was no resolution of the issues between them.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing shall commence at 9:30 a.m. **Monday, June 28th, 2004, and continue at 9:30 a.m. on Tuesday June 29th, 2004, Wednesday June 30th, 2004, and Friday July 2nd, 2004** at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The parties shall file their submissions and any documents in support **on or before 4:00 p.m. Friday June 18th, 2004.**

Each party will file one copy with the Tribunal and deliver one copy to the other party. Disclosure shall be provided no later than 10 days prior to the hearing.

3. The Respondent shall present evidence and testimony from one witness, Sherry Atallah, a Carrier Safety Rating Administrator. Ms. Atallah will present all MTO documentation and analysis for the Applicant, with a focus on the Applicant's recent record of accidents, convictions, and inspections for a two year period prior to the Order.

Ms. Atallah will also present testimony on the Applicant's violation rates and the CVOR thresholds, company record and history with the MTO, and relevant events, including letters, interventions, audits, and interviews. Some documentation and interventions in the history of the Applicant that will be presented, date back up to ten years prior to the Order.

4. The Applicant shall present evidence and testimony from five witnesses:

The Applicant, President of the company, who will speak to a general overview of Applicant's operations and history since incorporation and with a focus on recent months;

Hank Napran, Head of Mechanic Operations, who attended at the February 5th 2004 Show Cause Meeting, who will testify to company maintenance procedures;

Mike Derry, an Independent Transportation consultant specializing in safety compliance;

Sandy Baigent, an Independent Transportation consultant specializing in safety compliance;

Jodi Burness, Agent, who represented the Applicant at the February 5th 2004 Show Cause Meeting.

The witnesses for the Applicant will also give evidence on the Applicant's operations, accidents, convictions, and inspections. They will also present certain supporting documentation showing how the company is addressing these areas, including maintenance documents, training manuals and handbooks for drivers, and how the company is focusing on safety and compliance as related to accidents, convictions and inspections.

5. Among the issues to be raised by the Applicant will be whether the Deputy Registrar was correct to confirm the Notice of Suspension based upon the material before him at the Show Cause Meeting of February 5th, 2004. Furthermore, that the Deputy Registrar did not allow sufficient time for the company initiatives to have any effect to achieve what they were put in place to do.

Among the issues to be raised by the Respondent is whether the Deputy Registrar has sufficient reason to believe, based upon the Applicant's safety record, that the Applicant would not operate in a safe manner.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: April 8, 2004

File: 2237.cvor.prehrg Order



PREHEARING

H & B TRANSPORTATION LTD.

IN THE MATTER OF THE APPEAL TO A CANCELLATION AND
SEIZURE ORDER ISSUED TO H & B TRANSPORTATION LTD.;

AND IN THE MATTER OF THE COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION (CVOR) CERTIFICATE (144-622-
846) ISSUED TO H & B TRANSPORTATION LTD.;

TRIBUNAL: CARL F. DOMBEK, Chair

APPEARANCES: CAROLE McAFEE WALLACE, Counsel, representing
H & B Transportation Ltd.;

PATRICK MOORE, Counsel, representing the
Registrar of Motor Vehicles

DATE OF
PRE-HEARING: April 23, 2004

Toronto

ORDER

Following attendances on April 23, 2004 at a prehearing before this Tribunal of Carole McAfee Wallace, Counsel for H & B Transportation Ltd. (the "Applicant") and Patrick S. Moore, Counsel for the Registrar of Motor Vehicles (the "Registrar");

The Tribunal makes the following Order;

1. The parties to the hearing are the Applicant H & B Transportation and the Respondent Registrar of Motor Vehicles.

2. If any facts or evidence can be agreed upon, the Parties will file with the Tribunal an Agreed Statement of Facts no later than 5 days prior to the hearing.
3. The 2 issues to be resolved at the hearing are:
 - (i) Is H & B Transportation Ltd. or its officers or principals affiliated with any of the other companies named in the Cancellation and Seizure Order; and
 - (ii) Does the safety record of the Applicant by itself or combined with any of the affiliated companies warrant the issuance of the Cancellation and Seizure Order.
4. The hearing will commence on Monday, July 5, 2004 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 July 6, 7, and 8, 2004

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: April 26, 2004

Filename: 2250.cvor.H&B.pre

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

GTS EXPRESS INC.

IN THE MATTER OF an application by GTS Express Inc. dated December 29, 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 December 19, 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 143-345-017 issued to GTS Express Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to GTS Express Inc. on the 27th day of October 2003;

AND IN THE MATTER of the safety record of GTS Express Inc.;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
JAMES F. LEE, Agent, for the Applicant

DATE OF
PRE-HEARING: February 16, 2004

Toronto

ORDER

A Pre-hearing between the parties was held on February 16, 2004, in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated January 26, 2004.

The Tribunal makes the following Orders respecting the hearing:

FOLLOWING attendances on March 17, 2003 at a pre-hearing before this Tribunal of Patrick Moore, Counsel for the Registrar of Motor Vehicles, Ministry of Transportation (the "Respondent"), and James F. Lee, Agent for GTS Express Inc. (the "Applicant") as set forth in the Tribunal's Notice of Pre-Hearing Conference dated January 26, 2004;

WHEREAS it was outlined at the Pre-Hearing Conference that:

- (a) The Registrar issued a Suspension and Seizure Order dated December 19th, 2003, pursuant to section 47 and subsection 47(1) of the *Highway Traffic Act*, for GTS Express Inc.;
- (b) The parties present at the Pre-Hearing confirmed that there was no resolution of the issues between them.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing shall commence at 9:30 a.m. **Wednesday, April 28, 2004, and continue if necessary at 9:30 a.m. on Thursday April 29, 2004**, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The parties shall file their submissions and any documents in support **on or before 4:00 p.m. Friday April 16, 2004**.

Each party will file one copy with the Tribunal and deliver one copy to the other party. Disclosure shall be provided no later than 10 days prior to the hearing.

3. The Respondent shall present evidence and testimony from one witness, Bernadette McKenna, a Carrier Safety Rating Administrator. Ms. McKenna shall provide evidence of all the Applicant's relevant records and information, including minutes taken at a show cause meeting on December 3, 2003, the Applicant's safety history, operating records, fleet size information, and MTO correspondence.

Further evidence shall include all data relating to accident reports, and a United States Federal Carrier Audit of December 2003. Ms. McKenna's evidence shall also include CVOR records, and analysis of the Applicant, covering in detail a period of one year prior to the Order.

4. The Applicant shall present evidence and testimony from one witness. Mr. Tehal Singh, President of GTS Express Inc. The witness for the Applicant will present evidence of the initiatives that the Applicant has taken to improve the safety record of the company, including programs for training and monitoring of the drivers, and how they will impact upon company safety performance.

5. Among the issues to be raised by the Respondent will be the safety record of GTS Express Inc., including an excessive number of accidents, and a poor audit in the United States, as sufficient evidence to support the Registrar's December 19, 2004 Suspension and Seizure Order.
6. Among the issues to be raised by the Applicant will be to challenge the accuracy of the MTO process that gives weight to calculations of certain occurrences and the conclusions the MTO makes from those weightings. Also at issue with the Applicant is the evidence provided to the Registrar at the Show Cause meeting, and whether it was given sufficient weight by the Registrar in making his decision to impose the sanction. Furthermore, the sanction being imposed is too harsh, and the Applicant has programs that have resulted in improvements in the Applicant's safety.
7. The Applicant stated at this Pre-hearing that they did not intend to argue the accuracy of the reported occurrences on the CVOR, and confirmed that the record was accurate. Nor was the Applicant intending to dispute the findings of roadside inspections that it's vehicles underwent at truck inspection stations.
8. At the hearing of this matter, the Tribunal will be asked to review in detail a time period of one year prior to the date of the Suspension and Seizure Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: March 2, 2004

File: 2126.cvor.gts.prehrg

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CVOR - 2244

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: G. MAURICE POWER, Presiding Member

APPEARANCES: THE APPLICANT

PATRICK MOORE, Counsel representing the Registrar of Motor
Vehicles, the Respondent

DATE: April 14, 2004

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 February 24, 2004, 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 March 8, 2004, 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 January 19, 2004. The Notice advised the Applicant that he could meet with the Deputy Registrar

prior to the issuance of the Cancellation and Seizure Order to show cause why his CVOR certificate should not be terminated. The show cause meeting was held on February 5, 2004, with the Applicant, a paralegal with the Applicant, and the Deputy Registrar and representatives of the Ministry of Transportation of Ontario in attendance. The effect of the Order if enforced is to permanently terminate the Applicant's right to operate a commercial carriage business in Ontario.

These 2004 proceedings were preceded in 2003 with the issuance of a 7 day Suspension and Seizure Order dated January 27, 2003, suspending the Applicant's CVOR certificate and seizing the plate portions of the permits for commercial vehicles registered in the Applicant's name for that period. This Order was preceded by the issuance of a Notice, which was in fact for a proposed 30 day suspension. The suspension period was reduced to 7 days after a show cause meeting which took place January 8, 2003. The Suspension and Seizure Order took effect February 17, 2003.

The Applicant is the sole owner-operator and driver of an 11kg cube truck. He contracts for deliveries with a company which deals with the consignors of the goods he delivers.

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 too drastic under the circumstances. He admitted that he had been through a bad period, but believed he could show how he had improved.

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 the Guideline published by the Ministry as:

an automated 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 any:

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.

This information and the operator records are available through a web site.

The system is three parts. 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 period 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 a 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%. In this case the carrier has at all relevant times been the sole driver of a single vehicle.

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 point 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 which 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 times two 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.

The Applicant:

The Applicant carrier was assessed using the above methodology for the two year period from November 22, 2001 (the date the CVOR was issued) to October 19, 2002. The results are set out in the analysis report at Tab 11 in Exhibit 3, the Respondent's Book of Documents. A later analysis (Tab 15 of Exhibit 3) looked at the period from February 17, 2003 (the date of the Suspension) to December 30, 2003. This report also looked at the (then) most recent six month period, from July 1, 2003, to December 30, 2003.

Looking at the three categories individually the witness Mr. Louis Janetos, a Carrier Safety Rating Administrator, acknowledged that "inspection" data revealed the condition of the vehicle was not a concern. Despite this, the Applicant was required by the Ministry at the first show cause to produce a maintenance schedule for the vehicle. But this was apparently because he was doing most of his own maintenance, and the Ministry felt a need to require him to document what he was doing. By the time of the second show cause he had produced the required schedule, and this was not an issue for the hearing.

Under the "accident" and "conviction" headings the picture is quite different. Under "accidents" there were 3 events during the period looked at in the first analysis resulting in 28 assessed accident points. Under "convictions" there were 5 events for 19 total conviction points. The resultant overall figure using the formulae outlined above was 208.8% in excess of threshold. In the main period looked at in the second report, there were 2 accident events, resulting in 8 assessed points. There was one conviction resulting in 4 assessed conviction points. The resulting overall rate was 180.8 % of threshold.

The Tribunal notes that during the final six-month period looked at, although there was 1 accident event, it did not result in any assessed accident points, and there were no other events, so that the resultant overall rate was 0% of threshold.

Mr. Janetos indicated that the primary reasons for the cancellation were the large number of accidents in which this carrier had been involved in a relatively short period of time, and the serious nature of the convictions, especially the conviction for driving his commercial motor vehicle without insurance. He indicated that the typical single-vehicle carrier in Ontario has an average of less than one accident in a two year period.

A very large fine for the insurance offense also went unpaid. Although the Applicant had explained to the Ministry at the show cause hearing in February, 2004, that this was because the first paralegal firm he had hired to appeal the conviction had not done so and he had had to hire a second firm to replace them, the witness had checked, and up to the week before the hearing the fine had neither been paid nor appealed.

Also, the Applicant had agreed at the first show cause hearing to take a defensive driving course. He had not done so. At the second show cause he explained that he had registered for the course, and produced proof that he had done so. He said his father had been ill at the time of the course in July, 2003, so he had been unable to attend. But he had not reregistered for the course up to February, 2004.

In answer to a question from the Tribunal, the witness indicated that he had checked the CVOR record the week before the hearing and it was unchanged (indicating that no new event points had been recorded in any of the three categories. He had not done a new analysis, but the percentages would be the same, as all of the previous pointable events were still within the two-year "window".

The Applicant, testified on his own behalf. He admitted he had a terrible accident record, which he attributed in part to the stress of the divorce he had gone through and his father's illness and subsequent death in 2003, and in part to the difficult requirements of his previous contract employer. This employment had required him to take his truck on long trips out of town and deliver frequently in crowded downtown areas. He now delivers paper and general freight for his new employer, mostly within the city. Although he stated that the other drivers were also at fault in his accidents, he is trying to be more careful, as he needs his CVOR certificate. If he loses it and his job with it, he will lose his home and truck and go bankrupt and be on welfare.

In cross-examination, the Applicant was challenged on details of some of his accidents. Although he blamed the other drivers in part, claiming for instance that a woman who went to hospital as a result of the accident had swerved into his lane in front of him, he admitted he was also at fault. He was aware of the need to be more careful and detailed some of the steps he is taking. He has installed an extra mirror on his truck and checks the mirrors carefully before backing up. If he sees an alley is too narrow he will simply not go down to make his delivery. He conceded, however, that he has had an "awful lot" of accidents, and that mirrors wouldn't have helped with some of the accidents. However, he is now also staying an extra twenty feet back of the vehicle in front of him.

He admitted that he just forgot about the course he missed. He had booked several months before the course date, and by the time of the course in July, his father was ill. (He indicated his father died just before Christmas, 2003.) No one called or sent him a letter from the course to remind him, however.

When confronted with two accidents self-reports concerning one of his accidents, one by himself and one by the other driver involved, he had little to say. The other driver's report gave a dramatically different story than the Applicant, claiming among other

things that the Applicant had attempted to drive away after the accident without giving information to the other driver, and had only stopped and done so when confronted by a member of the other driver's party who had run after his truck.

In answer to a question from the Tribunal, the Applicant confirmed that, as appeared from the documentation filed, all of his outstanding traffic fines had been paid, except for the insurance offence fine, which he is still attempting to have appealed. He also clarified his earlier testimony by explaining that he was actually given no training by the people who set him up in the trucking business, though this had been promised. They just leased the truck for him and "left him hanging".

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 considered by the Tribunal:

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 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 Cancellation and Seizure. The final sanction was preceded by a 30 day suspension and prior 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.

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 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 indicator 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 two show cause meetings, and the Applicant failed to carry out the steps which he had indicated he would take to improve his record.

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 clearly 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 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.

But in considering 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 Applicant, he “will not operate a commercial motor vehicle safely...” in the province of Ontario, the Tribunal finds the Regulator acted precipitously in deciding to issue the Cancellation and Seizure Order rather than, at the most, a 30 day Suspension and Seizure Order, or preferably, the imposition of terms for the continuation of his CVOR certificate.

The safety record, as placed into evidence, is a very bad one, but although the Applicant had not taken all of the steps he promised to carry out at the first show cause, he had done some of them, and the stress of his personal situation was known to the Registrar and could have accounted, as he claimed, for some of his failure to attend to the other matters. More importantly, the information before the Registrar at the second show cause meeting, indicating no pointable events in the six months preceding the meeting, tended to support his claim that he was trying to be more careful, even though he did not articulate that claim well either at the meeting or this hearing, initially. Together with the further evidence of the Respondent's witness that there have been no subsequent points added to the record since the show cause, this convinces the Tribunal that the primary concern of highway safety can be satisfied by the continuation of the Applicant's operations in Ontario on terms.

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, rescinds the Cancellation and Seizure order to the Applicant, and orders the Registrar to continue the CVOR certificate with the following terms:

1. The Applicant is to provide the Registrar at least annually and promptly at any time upon the demand of the Registrar, with satisfactory proof of valid insurance of all vehicles he is operating.
2. The Applicant is to take an appropriate defensive driving course within six months of the issue of this Decision.
3. The Applicant is to immediately advise the Registrar of any accident he may be involved in or offences he may be charged with which involve the operation of his commercial motor vehicle or vehicles.

LICENCE APPEAL TRIBUNAL

G. Maurice Power,
Presiding Member

RELEASED: June 8, 2004

File name: 2244.cvor.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

Tribunal
d'appel en
matière de permis



H & B TRANSPORTATION LTD.-ADJ-Adjournment

HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

H & B TRANSPORTATION LTD.-ADJ-Adjournment

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION of
H & B TRANSPORTATION LTD.

AND IN THE MATTER of the
CANCELLATION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO CANCEL AND SEIZE
- Order dated: February 23, 2004

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

H & B TRANSPORTATION LTD.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 5, 6, 7 and 8, 2004;

TAKE NOTICE that after hearing submissions from both Parties at the onset of the hearing on July 5, 2004, 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 Thursday, August 26, 2004 and continue at 9:30 a.m. on Friday, August 27, 2004, and Monday and Tuesday, August 30 and 31, 2004, if necessary.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice Chair

RELEASED: July 5, 2004

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PREHEARING

NORTH STAR LOGISTICS INC.

IN THE MATTER OF an application by the Applicant dated June 4, 2004, 2004 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Refusal to Issue an Operating Licence dated April 16, 2004;

AND IN THE MATTER OF *Motor Vehicle Transportation 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 H.8 as amended;

AND IN THE MATTER OF the Application for an Operating Licence by North Star Logistics Inc.;

AND IN THE MATTER OF the failed MTO Facility Audit dated February 25, 2004 and the safety record of Simcan Investment Inc. (CVOR 142-213-570), an operator related to the Applicant.

TRIBUNAL: IRVIN H. SHERMAN, Q.C., Vice-Chair

APPEARANCES: PATRICK MOORE, Counsel for the Respondent

REHAN KAREEM FAROOQUI, Agent for the Applicant

SALEEM FAROOQUI, Agent for Simcan Investment Inc.

DATE OF
PRE-HEARING: July 9, 2004

Toronto

ORDER

Whereas a pre-hearing between the parties was held on July 9, 2004, in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated June 22, 2004;

And whereas there is no possibility of settlement of the issues between the parties;

And whereas the Applicant has been advised as to its right to counsel;

The Tribunal makes the following Orders respecting the hearing:

1. The hearing shall commence at **9:30 a.m., Thursday, August 19, 2004** at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The parties shall comply with all the applicable requirements of Disclosure as set forth in the Tribunal's Rules of Practice;
3. The parties shall not less than 10 days prior to the hearing serve on the other party and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: July 12, 2004

File Name: 2416.cvor.north star.prehrg.doc



LEE TRANS CORPORATION

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: ELIZABETH BENNETT-MARTIN, Presiding Member

APPEARANCES: MARK REYNOLDS, representative for Lee Trans Corporation
PATRICK S. MOORE, Counsel, Ministry of Transportation

HEARING: April 5, 6, 2004 and May 19, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal arises from a Suspension and Seizure Order (the "Suspension Order") dated February 4, 2004, issued by the Deputy Registrar of Motor Vehicles (the "Registrar") under the *Highway Traffic Act* (the "Act") to suspend for thirty (30) days the CVOR Certificate 125-495-116 and plate portion of permits for all commercial motor vehicles and trailers issued to LEE TRANS CORPORATION and seize the plate portion of permits, or if issued by a jurisdiction other than Ontario, seize the permits, and the number plates.

In support of the Suspension Order, the Registrar has furnished the following reasons:

"WHEREAS on the 12th day of December, 2003 a Notice of Suspension and Seizure was issued proposing a 30 day suspension of the CVOR certificate issued to LEE TRANS CORPORATION and suspension and seizure of the plate portion of permits for all commercial motor vehicles and trailers registered in the name of LEE TRANS CORPORATION;

AND WHEREAS on the 21st day of January you had the opportunity to make submissions at a meeting with the Deputy Registrar to show cause why the Suspension and Seizure Order should not be issued;

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."

ISSUES:

The issue to be decided on this appeal is whether or not the Registrar made an error in issuing the Suspension Order.

EVIDENCE OF THE MINISTRY OF TRANSPORTATION

Sherry Atallah

Ms. Atallah testified on behalf of the Ministry of Transportation, Carrier Safety and Enforcement Branch ("MTO"). She has worked at the MTO as a Rating Administrator for the past three (3) years. Her duties involve preparing and reviewing sanction files; conducting interviews regarding safety issues; and attending Show Cause Meetings. Her role with respect to Lee Trans Corporation ("Lee Trans") was to analyze the data collected with respect to Lee Trans' safety record; and to review and investigate in this regard.

Ontario Carrier Safety Rating and Commercial Vehicle Operators Registration

Ms. Atallah outlined for the Tribunal, the general purpose and provisions of Ontario Carrier Safety Rating and Commercial Vehicle Operators Registration Guidelines, which is a document available to the public, and reproduced as contained in Exhibit 4, Tab 18. She also testified as to provisions of the Guidelines to ensure on road safety and compliance records, as well as the Commercial Vehicle Operators Registration ("CVOR") System.

Ms. Atallah testified, as set out at page 179 of Exhibit 4, Tab 18, what may happen to a carrier with an unacceptable Violation Rate. Specifically, the disciplinary interventions are as follows:

First Intervention – when a carrier's overall Violation Rate exceeds 35% or its overall CVOR threshold (Warning Letter);

Second Intervention – is triggered if a carrier's overall Violation Rate exceeds 65% of its overall CVOR threshold (Facility Audit);

Third Intervention – is triggered if a carrier's overall Violation Rate exceeds 80% of its overall CVOR threshold (Interview);

Fourth Intervention – is triggered if a carrier's overall Violation Rate reaches 100% of its overall CVOR threshold (Sanction).

Ms. Atallah testified that of 80,000 carriers monitored, 3.5% received intervention, and therefore, this highlighted the fact that only a very small percentage of records require

interventions. She also stated that approximately 100 of 80,000 carriers are in the sanction stage.

Ms. Atallah went on to testify that it is important to determine which vehicles are considered a part of a carrier's fleet size in determining the threshold. The vehicles that must be registered as part of a carrier's fleet size include all heavy commercial vehicle power units (including leased, rented and owned) having a gross weight or registered gross weight of more than 4,500 KG or buses designed to carry 10 or more passengers. Trailers are not counted as part of the fleet size.

Ms. Atallah stated that all CVOR holders have access to their safety records via the website, and therefore all carriers will know their safety record. The CVOR abstract that is available will display information about a carrier and that carrier's safety performance. This information includes violation rates and other information from the last five years. Ms. Atallah went on to outline the specific information available to a carrier as set out on page 170 and 171 of Exhibit 4, Tab 18. Specifically, a carrier's CVOR abstract will include information related to accidents, convictions, inspections, facility audits, and Ministry interventions and sanctions.

Ms. Atallah then went on to describe for the Tribunal how points are assigned to a carrier's CVOR. The details in this regard are set out at pages 171 and 172 of Exhibit 4, Tab 18. Basically, point values are assigned for accidents encountered by drivers of commercial motor vehicles. Accidents are pointed based on the accident severity (property damage, personal injury or fatal injury) and impropriety (vehicle defect, driver action, driver condition) noted on the motor vehicle accident report completed by the police officer. Page 172 of Exhibit 4, Tab 18 sets out the point values assigned for accidents as follows:

Table 1 Accident Weighting Table			
SEVERITY	No IMPROPRIETY Factor = 0	One or more IMPROPRIETY No Charges Factor = 2	One or more IMPROPRIETY and Charge(s) Factor = 4
Property Damage Factor = 1	0	2	4
Personal Injury Factor = 2	0	4	8
Fatal Injury Factor = 3	0	6	12

Ms. Atallah emphasized that the MTO expects drivers of commercial motor vehicles to be aware of what is happening on the roads, to be defensive drivers, and to have a skill

level beyond regular drivers. Basically, she went on to explain that commercial drivers are expected to be well-trained and experienced professionals who strive to:

- Make allowances for the skill level or improper practices of other drivers sharing the road.
- Adjust their own driving to compensate for unusual weather, road and traffic conditions, and are not drawn into an accident by the unsafe actions of pedestrians and other drivers.
- Know when it is necessary to slow down, stop, or yield their right-of-way to avoid involvement in an accident.
- Ensure the vehicle is in safe operating condition.

Ms. Atallah provided evidence as to how inspections are carried out as specifically set out at page 171 of Exhibit 4, Tab 18. Basically, inspections are conducted according to the Commercial Vehicle Safety Alliance (CVSA) standards, a standard applied by all jurisdictions across North America. Vehicle defects that do not meet the minimum standards are considered out-of-service (OOS). These vehicles must be repaired before they are allowed to return to the road. The inspections are performed by enforcement officers of the MTO. The officer will note defects and charges, and this data is sent to the MTO, Safety Net System. Points are assigned to out-of-service defects up to 2 points per unit.

Ms. Atallah then went on to testify how the CVOR system evaluates a carrier. The CVOR system evaluates a carrier based on the events in its CVOR record, including accidents, driver and carrier convictions, CVSA inspections and detentions, and the results of Facility Audits. Three separate safety indicators are reviewed:

- Accident points per vehicle per month (Accident Violation Rate).
- Safety-related conviction points per vehicle per month (Conviction Violation Rate).
- Points on vehicle inspections per vehicle unit inspected (Inspection Violation Rate).

The overall rate of each of these three categories is looked at by the MTO to determine whether or not an intervention is necessary.

Notice of Suspension and Seizure Order

Ms. Atallah testified that the Suspension Order issued December 12, 2003 in respect of Lee Trans was issued based upon Lee Trans' safety record including:

- (a) Safety Record Review dated December, 2003;

- (b) Commercial Vehicle Operator records for Lee Trans and 887074 Ontario Ltd. (a related corporate entity);
- (c) Safety Net Inspection Reports for Lee Trans;
- (d) Facility Audit findings for Lee Trans and 887074 Ontario Ltd.; and
- (e) Accident Reports for Lee Trans.

Notice was given to Lee Trans on December 12, 2003, of a Show Cause Meeting to be held on Wednesday January 7, 2004 (the "Show Cause Meeting").

Ms. Atallah went on to testify that pursuant to Section 17.1(1) of the Act, the Registrar is required to assign a safety rating to every operator using Ontario's roadways. In accordance with this section, Lee Trans was notified that their safety rating was "unsatisfactory". This notice is reproduced at Exhibit 4, Tab 2.

Related Carrier Entities

Ms. Atallah testified that the corporate officers of Lee Trans were: Leela Gurprasad, President and Secretary, and Sahodra Gurprasad (wife of Leela Gurprasad), President of 887074.

During the Show Cause Meeting it was agreed that Lee Trans' CVOR should be combined with 887074 as they were essentially operating as the same entity. Therefore, the CVOR was terminated for the numbered company.

Safety Record Review – December, 2003

Ms. Atallah testified as to the safety record of Lee Trans as documented and prepared by her, and contained at Exhibit 4, Tab 4 (the "Safety Record Review"). This Safety Record Review was provided to both the Deputy Registrar and Lee Trans. The purpose of the Safety Record Review is to show the analysis of the company's safety record. It contains a 24-month analysis. Any events prior to the 24-month period would not be included in the calculation.

The Safety Record Review disclosed the following facts:

- April 24, 1997 Original CVOR Certificate issued.
- January 15, 2000 Satisfactory Unaudited safety rating assigned.
- January 21, 2003 Conditional safety rating assigned.
- February 19, 2003 Facility Audit conducted by F. Dimopoulos failed.
Drivers – 41.8%. Vehicles – 35.1% Overall rating – 38.4%.

In order to pass a Facility Audit, 55% is required in both the Driver and Vehicles portion of the Audit.

The Safety Record Review was completed for the period November 10, 2001 to November 9, 2003 (the "Review Period"). The Threshold Fleet size was 12. Based on the CVOR records, as contained in Exhibit 4, at Tab 5, the Accident Violation Rate was 138.0%, and the Conviction Violation Rate was 86.3%. Ms. Atallah went on to testify that these were extremely high ratings. The Accident Violation Rate was well over 100%, and therefore, considered very serious. She stated that the provincial average included in CVOR records was 2 motor vehicle accidents per Review Period.

Ms. Atallah testified that the Inspection Violation Rate was also very high. Out of 14 inspections there were 10 out-of-service inspections. She testified that the provincial average for out-of-service rates was 35.3%. The out-of-service rate for Lee Trans was 71.42%, which is more than double the provincial standard. The Safety Record Review disclosed an overall threshold percentage of 106.8% for Lee Trans.

The inspections report for the Safety Record Review disclosed that from November 8, 2001 to November 7, 2002 Lee Trans had a 66.7% out-of-service rate. During the second year, the out-of-service rate increased to 80% from November 8, 2002 to November 3, 2003.

Ms. Atallah then went on to provide evidence in respect of Lee Trans' CVOR record as contained at Exhibit 4, Tab 5. She reviewed with the Tribunal the inspections carried out and the defects noted thereon.

Ms. Atallah reviewed each of the accident reports for Lee Trans' drivers, including the additional accident report marked as Exhibit 5 to the hearing. Ms. Atallah's summary of the accident reports is contained at pages 10 to 12 of Exhibit 4, Tab 4.

Ms. Atallah stated that the CVOR, Exhibit 4, Tab 5, disclosed 22 convictions: 13 were driver related and 9 were operator related. Specifically the CVOR disclosed the following convictions:

- 3 speeding;
- 3 safety related or overweight;
- 3 maintenance – defective tires;
- 3 failure to maintain standards of vehicle;
- 2 driver disobeyed red light; and
- 2 load on vehicle not secure.

The other convictions included driving in the wrong lane, and unsafe moves.

The safety summary for 887074, as outlined at p. 12 to 13 of the Safety Record Review, showed an overall violation rate of 6.7 of threshold. This was based on 1 vehicle. A facility audit was conducted on February 19, 2003 of 887074, which resulted in a failed score, drivers 22.2%, vehicles 71.1%, overall 46.7%. Ms. Atallah also stated when a suspension order is issued by the MTO, any affiliated company is also included.

Combined Safety Records of Lee Trans and 887074

Exhibit 4, Tab 7, contains a combined CVOR for Lee Trans and 887074. This abstract record has a search date of February 27, 2004, and discloses for the 24-month period (January 28, 2002 to January 27, 2004) an increased Violation Rate of 112.2%. The record shows that there were 13 accidents worth 28 points, 22 convictions worth 72 points, and 18 inspections worth 23 points.

Exhibit 4, Tab 8, contains a CS Analysis Report, which was completed over an 8.7-month period from February 19, 2003 to November 9, 2003, to determine whether or not Lee Trans had improved since the Facility Audit conducted on February 18, 2003. The overall Violation Rate was 178.4%, which indicated that the company had not improved, but had in fact gotten worse. The accident rate had increased to 298%. Page 84 of Exhibit 4, Tab 8, contains an analysis of the 6-month period from May 10, 2003 to November 9, 2003 and the accident Violation Rate had increased to 432%. Page 85 of Exhibit 4, Tab 8 also shows that 6 inspections were completed, which resulted in 5 out-of-service inspections for a CVOR out-of-service rate of 83.33%. The average out-of-service rate is 35.30%.

Ms. Atallah testified that these reports showed an extremely poor safety performance on the part of Lee Trans. The MTO would have expected improvement in Lee Trans' records since the Facility Audit of February 18, 2003.

The particulars of the Facility Audit, are set out in Exhibit 4, Tab 10. Ms. Atallah testified that in completing the Facility Audit, the auditor, Freda Dimopoulos, would have dealt with the President of Lee Trans, Leela Gurprasad. The particulars of a MTO Facility Audit are set out in the Guide at Exhibit 4, Tab 19. Generally, the four areas reviewed are: vehicle defects, records of maintenance, daily vehicle (trip) inspections; and periodic mandatory commercial vehicle inspections. Ms. Atallah reviewed for the Tribunal the driver profile scoring as used in the Facility Audit together with the breakdown of the safety programs and training profile scoring.

In order to pass a Facility Audit, 55% was required for each of the driver and vehicle profile. For Lee Trans, the driver compliance rate was 41.8% and the vehicle compliance rate was 35.1%.

Ms. Atallah testified that at the end of the Audit an exit interview would have been conducted with the President of Lee Trans, and in particular, a discussion would have taken place on how to improve the company's performance. She was not certain if written instructions would have been provided on how to improve things but she was certain that the President would have been provided with the auditor's findings, including the majority of the problems such as maintenance and hours of work. With respect to the Facility Audit for 887074, although the vehicle passed the audit, the driver's portion did not, and a company is required to pass both the driver and vehicle portion of the audit in order to have a satisfactory Facility Audit finding.

As a result of its investigations, the MTO advised Lee Trans by way of letter dated December 12, 2002, located at Exhibit 4, Tab 12, that the safety rating proposed for Lee Trans and 887074 was "conditional". The company was given a specified time to dispute the rating assigned to it based upon its safety record but the rating was not disputed. As well, the CVOR record was given to the company so that the company could see all of the events on its record if they wished to dispute anything.

Show Cause Meeting – January 21, 2004

The Show Cause Meeting was held between the MTO and Lee Trans on January 21, 2004. The minutes of this meeting are contained at Exhibit 4, Tab 14. These minutes were prepared by Ms. Atallah. In attendance at the meeting on behalf of Lee Trans was Leela Gurprasad, President; Mark Reynolds, Transportation Consultant; and Dave Marynuik, Transportation Consultant. Present on behalf of the MTO was Greig Beatty, Deputy Registrar of Motor Vehicles; Bunny McKenna, Carrier Safety Rating Administrator; and Sherry Atallah, Carrier Safety Rating Administrator.

Ms. Atallah testified that both consultants (Reynolds and Marynuik) were hired by Lee Trans in May, 2003, to identify major problems and specify actions with respect to vehicle maintenance and accident identification.

The MTO was advised by Mr. Marynuik that vehicle maintenance was identified as being a major problem. Drivers were not taking the inspection procedures seriously and a language barrier was preventing full understanding of information to drivers. As a result, the MTO was advised that a safety and maintenance program would be implemented by Lee Trans. Details of this proposed safety plan would include preventative maintenance programs, pre-trip inspections, hours of work, and accidents. The proposed safety plan was not in place at the time of the Show Cause Meeting. As well, the MTO was advised that a disciplinary policy would also be put into place but that it was not yet available. Ms. Atallah also testified that at the Show Cause Meeting the President did not know the names of the four drivers who were currently working for the company.

Ms. Atallah stated that the Deputy Registrar acknowledged the company's commitment outlined during the meeting, however, he remained concerned with the speed at which these undertakings would be implemented, particularly because the company's record had continued to deteriorate since May, 2003, when the Consultants were retained. As well, the MTO felt the safety of the public was being jeopardized. The safety plan proposed by Lee Trans is contained at Exhibit 4, Tab 15. Ms. Atallah testified that the MTO was not satisfied with the action taken by the company because further safety related events continued to occur. For example, one driver was involved in four motor vehicle accidents. One of the drivers was still employed with the company as of June 17, 2003, and no action was taken with respect to this particular driver. Ms. Atallah also testified that the safety plan was not informative enough for the MTO. For example, with respect to the driver that was dismissed for a charge of no breath analyst device, the company should have known this before they hired the particular driver. As well,

she stated comments such as a "driver counselled" did not provide the MTO with any information with respect to the particular steps taken by Lee Trans.

Cross-Examination of Sherry Atallah

With respect to Ms. Atallah's duties and responsibilities, she confirmed that she does not do the enforcement part of the review, but is responsible for reviewing carrier records. Part of her job is to review accident reports to see if codes are correct. She does not make recommendations, she simply does the safety record review, analysis and overall summaries based on a carrier's records.

Ms. Atallah acknowledged that the sanction being imposed by the MTO with respect to Lee Trans is a form of punishment but that it is also hoped to be corrective as well.

With respect to the accident reports, Ms. Atallah confirmed that she does not question the accuracy or contents of the reports. She is simply checking the accident reports to confirm they match the MTO records.

A considerable amount of time was spent questioning Ms. Atallah with respect to the differences between a Level 1 and a Level 3 inspection. Ms. Atallah confirmed that the MTO is not concerned with Level 3 inspections, as a Level 1 inspection is related to safety issues. She did not know if the MTO officer would rule out a Level 1 inspection during a Level 3 inspection. She stated that enforcement officers use their own discretion with respect to carrying out a Level 1 or Level 3 inspection. She confirmed that convictions could result as a result of a Level 3 inspection. She further confirmed that points would be given for improprieties when drivers were charged. However, she stated that the same points are not levied twice. It is a different point system for the report and another point system for the conviction. She emphasized that both are separate issues.

When questioned as to whether or not points are removed from a driver's record if the charge is successfully challenged at Court, Ms. Atallah advised that no points would be awarded where there is no conviction, but points would, however, be awarded for the charge. Ms. Atallah confirmed that if a driver is not found guilty of a charge, the points would be removed only if the Court transcript stated that the officer made an error in making the charge. Ms. Atallah stated that there are many reasons why a conviction may not result. She acknowledged that the Guide does not say anything about obtaining transcripts, however, she stated that the Guide does say that you can contact the MTO if you dispute the charge.

Again, it was acknowledged by Ms. Atallah that accident reports are not analyzed further and are taken at face value. If a report comes from a collision reporting centre, it will result in zero (0) points because an officer was not present to complete the report. Ms. Atallah also acknowledged that an officer typically does not witness a motor vehicle accident when it is reported to the police. Ms. Atallah stated that a charge usually is subsequently laid by an officer as a result of an impropriety.

Ms. Atallah acknowledged that she was not a trained police officer, nor was she trained in completing reports. She is also not aware of police officer training. She did not know, but assumed that police officers are trained in accident reconstruction. She acknowledged that there is nothing on a police report to indicate the training of the police officer. Ms. Atallah was then questioned extensively with respect to the qualifications and experience of police officers in reporting motor vehicle accidents. Generally, she assumed that police officers were properly trained and that their police reports were accurate.

Ms. Atallah stated in the case of Lee Trans, the amount of motor vehicle accidents is severe. The standard is two (2) motor vehicle accidents, whereas Lee Trans has thirteen (13) motor vehicle accidents, six (6) of which are pointable and not acceptable. Ms. Atallah again reiterated that commercial vehicle drivers are expected to be better trained and better experienced, and that the MTO expects carriers to know how to run a transportation company.

Mr. Reynolds spent a considerable amount of time questioning Ms. Atallah with respect to the motor vehicle accident reports that are the subject matter of Lee Trans' records, including the details of each, and whether or not charges resulted, and whether or not it should have called into question an impropriety. Generally, although it is acknowledged that Mr. Reynolds was successful in pointing out what could be considered some flaws in the preparation of motor vehicle reports, in the Tribunal's view, this evidence did not have an overall significant impact on improving Lee Trans' safety record, and although the evidence was considered, it has not been summarized here.

Ms. Atallah acknowledged that Lee Trans did not receive a warning letter, and stated this was because the carrier's record had deteriorated so quickly before the audit stage.

Ms. Atallah was then questioned as to Lee Trans' Violation Rate if the MVA of September 17th, 2003 was not taken into consideration (given that Lee Trans disputed the reporting of this particular accident at the hearing), and assuming that there was no impropriety, and an error was made in the charge. Ms. Atallah stated that it would not have a significant impact on the overall rate.

With respect to the inspection reports, and whether or not the codes and remarks on the inspection reports are taken into consideration, Ms. Atallah stated that when she is analyzing the data, she ensures that the defects noted on the inspection reports match the data that is on the record, however, other than this the additional comments are not taken into consideration.

On the second day of cross-examination, Mr. Reynolds again questioned Ms. Atallah with respect to the Overall Violation Rate if the September 17th, 2003 accident was not included in the calculation. Ms. Atallah stated the overall Conviction Rate would still be 102.6%. In this regard, marked as Exhibit 6 are additional calculations as to Lee Trans' Conviction Rate prepared by Ms. Atallah based on hypothetical questions asked by Mr. Reynolds related to reducing the number of points on Lee Trans' records. Ms. Atallah

again confirmed that there was no improvement in the company's safety performance to date.

Ms. Atallah testified that the inspections included in the analysis are the Level 1 inspections, and not Level 3 inspections. Level 3 inspections are not included because they are directly related to documents, whereas Level 1 inspections are directly related to safety issues.

Ms. Atallah acknowledged that she could not say in detail what takes place during a Level 1 inspection. Generally, she stated that anything unsafe North American-wide would be noted. Again, Ms. Atallah confirmed that she does not perform any checks as to the accuracy of information provided on the inspection reports.

Ms. Atallah was questioned with respect to certain specific inspections, and their contents, and again, she stated that she does not check the contents of the inspections for accuracy. For the purposes of dealing with the Inspection Reports, the Tribunal took judicial notice that the witness could not provide any further information about the safety items noted on Inspection Reports.

EVIDENCE OF LEE TRANS CORPORATION

Leela Gurprasad

Mr. Gurprasad, president of Lee Trans, testified as to the steps being taken by the company to correct its safety performance problems. He presented to the Tribunal, Exhibit 3, Tab 1, an Action Plan by Lee Trans that was formulated last year. He stated that some of the action items and dates have changed.

Mr. Gurprasad stated that Mr. Marynuik was hired by Lee Trans on March 30, 2003, due to the ongoing problems with drivers, including their inspection reports and time cards. As well, Mr. Gurprasad said it was discovered that drivers were not advising management of interventions from enforcement officers. As a result, Mr. Marynuik started attending at Lee Trans in late July or early August, 2003. Mr. Marynuik completed interviews of drivers. Mr. Gurprasad was unable to advise the Tribunal as to what Mr. Marynuik spoke to the drivers about.

Disciplinary action was recommended with respect to some drivers. Mr. Gurprasad stated that two drivers were fired because of motor vehicle accidents, including the motor vehicle accident recorded on September 5th, 2003 (failure to stop at red light). After discussion with the driver about the circumstances surrounding the accident, it was determined that the accident occurred as a result of an impropriety and therefore, the driver was dismissed. The driver who was involved in three accidents since November, 2003 was also dismissed. No other drivers were dismissed. However, it was acknowledged by Mr. Gurprasad that there were some problems with the drivers not completing their daily inspections properly. Mr. Gurprasad then stated that a driver was recently dismissed because the driver would not attend the meetings being held by Lee Trans regarding the duties of the drivers and the completion of the daily

inspections. Both Mr. Reynolds and Mr. Marynuik were introduced to the drivers, and these gentlemen explained to the drivers the problems that were being encountered by Lee Trans as a result of improper inspections and paperwork not being completed properly by drivers.

Mr. Gurprasad testified that if accidents appear on a driver's abstract, then generally, they do not hire that particular driver. With respect to the driver that was pulled over three times by the MTO with respect to the breathalyzer requirement, a statement was signed by the driver stating he had a valid driver's licence, as contained at Exhibit 3, Tab 3. Mr. Gurprasad advised that the abstract for this driver was reviewed, but that the requirement for a breathalyzer machine was not noted. As well, he believed that when the driver signed a Statement of Valid Driver's Licence, that the driver was telling the truth.

Mr. Gurprasad went on to state that certain policies were implemented in accordance with the company's Safety Plan. These policies are contained at Exhibit 3, Tab 2. He stated the policies were provided to all drivers. Mr. Gurprasad introduced to the Tribunal the company's hiring policy, the accident reporting policy, the disciplinary policy, and the preventive maintenance policy. These policies were available and reviewed with the drivers by both Mr. Gurprasad and Mr. Marynuik. Each driver signed a document that they had received the policies as of March 31, 2004.

Mr. Gurprasad advised that they have employees who speak Punjabi, and therefore, assistance was provided to these employees by a shop employee and that these employees also signed the policies as read and understood. It was made clear to all employees that they must adhere to all policies as of March 31, 2004.

Mr. Gurprasad went on to advise the Tribunal that drivers were interviewed due to their incompetence with respect to their hours worked, and the completion of their daily inspections. It was subsequently discovered that there were still issues with respect to these said requirements, and it was believed that these issues were related to language barriers. Mr. Gurprasad testified that there were still ongoing problems related to the truck drivers' abilities to complete their inspections, however, he said things were improving. He said that since the last inspection report of December 18, 2003, none of the Lee Trans vehicles had been detained at the scale.

Mr. Gurprasad testified that the driver training that was started last year was ongoing, and included both classroom and practical instruction. He stated that most of the driver training was created by Mr. Marynuik.

Mr. Gurprasad testified that an interview program took place between Mr. Marynuik and the drivers, which involved one-on-one discussions between Mr. Marynuik and the drivers. Mr. Kenth, a full-time employee with Lee Trans, acted as interpreter in Mr. Marynuik's said interviews. Mr. Marynuik reviewed with the drivers their inspection documents. Mr. Gurprasad testified that Mr. Marynuik's intervention with the drivers continued with Mr. Marynuik checking vehicles, certification, and pre-trip inspection documents. All of this was done with a view to ensure a driver was completing a trip

properly. Mr. Marynuik continued to do spot checking following the one-on-one discussions with the drivers and has continued to do so since July/August, 2003.

With respect to the on-road training, Mr. Gurprasad advised that road tests were being set up with the drivers. The on-road training was anticipated to be completed in the week following this hearing. A defensive driving course had been completed prior to the hearing.

Driver record abstracts were requested and reviewed with respect to all drivers. Both Mr. Gurprasad and Mr. Marynuik reviewed the abstracts on March 17, 2004. Mr. Gurprasad advised that there were no major issues with the driver abstracts.

More formal training then took place with the drivers in relation to pre-trip requirements, which involved both classroom instruction and in-truck instruction. Mr. Gurprasad stated that the pre-trip training is still ongoing because of the problems encountered as a result of the language barriers. Mr. Gurprasad further stated that they knew there were still problems because they did not see an improvement in the pre-trip inspections. Therefore, the trip/safety inspection work is still ongoing. Off-road training is also taking place with respect to the gravel pit, speed, safety, and loading safety/operations.

Mr. Gurprasad testified that the company's preventive maintenance policy has been implemented, which is found at Exhibit 3, Tab 2, and this policy has been placed in all vehicles.

Mr. Gurprasad stated that all of the issues identified with the drivers were as a result of the Facility Audit. Ongoing corrective action is taking place, including training for trip inspections, with the assistance of Mr. Marynuik. Drivers are required to hand in their inspection documentation daily, and the documentation is reviewed. The trip inspection reports are now monitored and a mechanic is required to sign when a problem has been fixed, and this confirmation must be given back to the driver. Reported defects are reviewed by Mr. Gurprasad or Mr. Kenth to determine if they are safety related. If so, the repairs must be completed before the vehicle goes back on a highway. All repairs are kept on file.

Mr. Gurprasad testified that there were also ongoing problems with respect to the drivers maintaining their work logs. In this regard, Mr. Gurprasad pointed out that their drivers do not travel more than 160 kilometres. However, the drivers did not properly track their hours because drivers would mark when they got up in the morning, and when they went to bed at night, and did not mark themselves off for their breaks or lunches. The drivers have been instructed in how to properly complete their work logs.

With respect to the high number of motor vehicle accidents, Mr. Gurprasad stated that disciplinary action was not the sole solution taken by Lee Trans. Lee Trans has implemented a motor vehicle reporting policy, and has also required every driver to complete a defensive driving course. This is in addition to the training the drivers received in March/April, 2004.

Mr. Gurprasad emphasized that all of the new policies referred to above are now implemented. Abstracts of drivers are being reviewed.

With respect to the MTO Inspection Reports, Mr. Gurprasad advised that he did not have the March, 13, 2004 report at the Show Cause Meeting. He acknowledged that it was presented at the Show Cause Meeting but stated that he was advised that this document would not "count" with respect to disciplinary action. Mr. Gurprasad then reviewed the incidents of accidents or inspections located at Exhibit 3, Tab 5, and provided an explanation of the action that was taken by Lee Trans regarding each of these specific incidents.

Contained at Exhibit 3, Tab 7, is Lee Trans' audit findings. The document is dated January 4, 2004, and was completed by Mr. Marynuik. Mr. Gurprasad stated that this document lists the observations of Mr. Marynuik and the actions that have been implemented in response to his observations.

Exhibit 3, Tab 8, contains Mr. Marynuik's evaluations of the drivers. Mr. Gurprasad explained that the evaluations were done to ensure that every driver understands how to do daily inspections and complete their hours of work. Mr. Marynuik's interviews with the drivers are also documented in these evaluations. Mr. Gurprasad testified that he had not discussed the reports with Mr. Marynuik yet, but that Mr. Marynuik had prepared them a couple of weeks ago.

Exhibit 3, Tab 9 is a memo to all drivers with respect to trip inspection reports. It advises the drivers that if trip inspection reports are not submitted, that the failure to do so will be subject to disciplinary action. As well, Mr. Gurprasad stated that all drivers were told verbally of this requirement before January 5, 2004.

Contained at Exhibit 3, Tab 9 is a letter from Lee Trans to Sherry Atallah at the MTO. This letter provides further information with respect to the accident recorded on the December, 2003 CVOR. Mr. Gurprasad advised that at the Show Cause Meeting his memory was not good about this specific incident. Subsequently, he wanted to advise the MTO that the accident did not result in any damage to the Lee Trans' vehicle and that their driver was not deemed to be at fault for the accident.

Exhibit 3, Tab 9 also contains a memo dated December 29, 2003, which was issued from Lee Trans to all drivers with respect to the recording of their time off for their trip reports.

Mr. Gurprasad ended his testimony by stating that the Show Cause Meeting was a stressful event for him. With respect to the merging of both Lee Trans and 887074's CVORs, Mr. Gurprasad testified that this was suggested by the MTO, and that he did not have a choice in the matter as he was directed by the MTO in this regard.

Cross-Examination of Leela Gurprasad

Mr. Gurprasad, in cross-examination, acknowledged that he is the owner and operator of Lee Trans. Their business is hauling sand and gravel.

Mr. Gurprasad acknowledged that 887074 was involved in hauling sand and gravel as well. His wife owns this company and operated it until the end of last year. Mr. Gurprasad acknowledged that when the MTO suggested that he give up his CVOR for 887074, that neither he nor any of his representatives objected to the records being combined. He acknowledged that he understood the records would be combined.

The only other management position held in Lee Trans is by Baldeev Kenth. He has held this position since 1997. Mr. Kenth is in charge of the payroll, whereas the Kenth referred to earlier in respect of the interpretation problems is Wasiath Kenth who is responsible for collecting daily inspection reports and checking the trucks.

Mr. Wasiath Kenth is a Class A Mechanic. Mr. Gurprasad testified that the company had a periodic maintenance scheme in the past whereby the trucks would be inspected every thirty days. Mr. Gurprasad agreed that this meant that the trucks would come into the shop, be reviewed, greased and oil-changed every thirty days. He stated that although this scheme existed, it was not documented until late last year. However, the system was changed to reflect two maintenance schemes. The Plan A scheme meant that every three weeks a truck would go through a unit and grease; and the Plan B scheme meant that the truck would have its oil changed and its units would be reviewed and maintenance performed. Plan B depended upon the mileage on the truck, but generally took place every two to three months. The only difference is that there would be an oil change between Plan A and Plan B. Mr. Gurprasad acknowledged that this change was put in place as a result of the Facility Audit. He stated that the only improvement was that it was costing more money because they were replacing parts. He said the job was being done right, and signatures had to be provided when the job was done.

Mr. Gurprasad acknowledged that the policies contained at Exhibit 3, Tab 2 did not describe the maintenance policy about which he testified. However, Mr. Gurprasad went on to state that what he described is the main scheme because Lee Trans now has three mechanics. Mr. Gurprasad stated that three mechanics now take care of the maintenance. He stated that if a truck is detained, he would be called about the detention, and the practice is to send a mechanic from the shop for trucks that are detained. Prior to this procedure, Lee Trans had utilized a mobile service as they did not have any mechanics on staff.

When questioned about Lee Trans' high out-of-service rates, specifically that Mr. Gurprasad should have been aware of this high rate given that the drivers' contacted him when they were detained, Mr. Gurprasad acknowledged that he was, but he stated that it was never the same vehicle in the same period of time.

When asked why Mr. Gurprasad did not do anything about his out-of-service defects which were reported late 2001 to November 2002, Mr. Gurprasad advised that he did not have the financial backing to operate a repair shop, and that he was also dealing with language problems of drivers because he could not speak Punjabi. He stated that he took out a bank loan and invested money in the repair shop in order to hire three mechanics. Two of the mechanics started last year, September and October. Mr.

Gurprasad said that during 2001 he was relying upon the drivers to make reports, but this did not work out too well. During 2002, he attempted to have the mobile repair person perform inspections, but this did not work out very well either.

Mr. Gurprasad advised that when he got his conditional safety rating in December, 2002, there was not enough time between the notice and audit (two months) to deal with the problems. He stated that there was the intervening Christmas holidays and during the winter months their business tends to be slow. He acknowledged dealing with Officer Dimopoulos with respect to the Facility Audit.

Mr. Gurprasad stated that it was not clear to him that Lee Trans did not do well in the Facility Audit of February 18th, 2003. He went on to state that he did not do anything about the audit until Mr. Reynolds offered his assistance. Mr. Reynolds approached him in early May, 2003. However, they did not enter into an arrangement at that time. An agreement was reached in June/July, 2003 pursuant to which Mr. Reynolds would help out with the entire operation of the trucking business. The arrangement was to clean up Lee Trans' CVOR and have the company get back on track. There was no written contract between Lee Trans and Mr. Reynolds. Mr. Gurprasad testified that there was an understanding that Mr. Marynuik would attend at their facility every two weeks. Mr. Reynolds' task was to have the trucks running safely, and to help Lee Trans get clean CVOR. He would provide the experts to reach this result.

Mr. Gurprasad acknowledged that the Action Plan contained at Exhibit 3, Tab 1 was created prior to the Show Cause Meeting in St. Catharines. Mr. Gurprasad did not know how long it was in existence prior to this meeting. Mr. Gurprasad admitted there was no plan developed with Mr. Reynolds previously but that it was prepared specifically for the Show Cause Meeting.

Mr. Gurprasad testified that the company was following through on all the plans prepared by Mr. Marynuik and Mr. Reynolds.

Mr. Gurprasad acknowledged that the Facility Audit was completed. He said that he was not involved in the audit and did not speak to the person who completed it but that he did speak to Mr. Marynuik about it. Mr. Marynuik reported to him that there were still a few problems. Mr. Gurprasad stated he thinks there was a discussion with Mr. Marynuik regarding the score, but that he did not remember the score on the audit. When it was pointed out to Mr. Gurprasad that this would be important for him to know, he acknowledged that there was some improvement, but still problems to be worked on. Again, Mr. Gurprasad stated that they were working on a daily basis on resolving the problems.

Mr. Gurprasad was then cross-examined with respect to the drivers showing themselves as off-duty when they were working, which was in complete contradiction to the evidence given in his earlier testimony. In response, Mr. Gurprasad said that he understood the problem was the drivers showing themselves on duty when they were not notwithstanding that two specific incidents were recorded of drivers saying they were off duty when they were working.

Mr. Gurprasad testified that they were ordering driver abstracts on a regular basis, which was every two to three months. It was specifically pointed out to Mr. Gurprasad that a driver was hired in September, 2003, and subsequently fired because of his record in March 2003. If abstracts were ordered as stated this should have been noticed earlier. Mr. Gurprasad's response to this was "it must have slipped him".

When it was suggested that the evidence taken with respect to the abstracts and the discipline were simply for the purpose of this Show Cause Meeting, Mr. Gurprasad denied this. When it was put to him that this could have been done much earlier but it was not done until only two weeks before this hearing, Mr. Gurprasad had no response. As well, Mr. Gurprasad did not deny that a number of the items contained in the Action Plan indicated a flurry of activity in March, 2004, so that he would be in a position to give evidence before the Tribunal. In response, Mr. Gurprasad said activity had been going on since June of last year. When it was emphasized that the driver abstracts were ordered specifically for this hearing, Mr. Gurprasad stated that Mr. Marynuik would have to be asked about this. When it was emphasized to Mr. Gurprasad that they were having serious problems for a couple of years, but yet the bulk of the activity took place around the couple of weeks prior to this hearing, Mr. Gurprasad's only response was that a couple of the things in the Action Plan were done in July, 2003.

When it was suggested to Mr. Gurprasad that unless he is fully committed to overcome the problems with his business, nothing is going to happen, Mr. Gurprasad responded that he is fully committed. However, in 2002 and 2003 he did not have the finances to finance the mechanics, shops, and better equipment. In 2000 to 2001, there were an average of 3 out-of-service inspections, and therefore, it was suggested to him that he did not take truck maintenance seriously. In Mr. Gurprasad's view, the problem was with the drivers, and the mobile mechanics were not as good as they should have been. As a result, as mentioned, last year he obtained a bank loan to hire his own mechanics and to buy equipment, which took place in late 2003. It was pointed out to Mr. Gurprasad that after July, 2003 there were five inspections with out of service defects, and this is indicative of serious problems, Mr. Gurprasad acknowledged this to be the case. He stated that from January, 2004 to now, Lee Trans has been very clean with their maintenance.

In re-direct evidence, Mr. Gurprasad again stated that Lee Trans' goal with the help of Mr. Marynuik was to clean up its act, and to get the business running smoothly. Lee Trans' plan was that when things were cleaned up and running smoothly, Mr. Marynuik would be retained on a permanent basis. However, Mr. Gurprasad acknowledged that his initial contact with Mr. Reynolds was to receive assistance with respect to preparing and attending for the Show Cause Meeting. Company policies were developed in preparation for the Show Cause Meeting. At that time, Lee Trans did not know about the MTO's sanction, or that there would subsequently be a Licence Appeal Tribunal hearing. The explanation provided by Mr. Gurprasad for the flurry of activity at the end of March was because most of the regular drivers were away in India during the winter months and it was anticipated that they would be back in March, and therefore, could participate in training, counselling and disciplinary action. Mr. Gurprasad reiterated that X-Coppers (Mr. Reynolds) was hired so that he would be able to have the trucks

operate safely. Mr. Gurprasad stated that Lee Trans' vehicles go through the scales on a regular basis at least ten (10) times per day and none of the vehicles have been stopped because of mechanical problems since December 18, 2003.

Evidence of David Marynuik

Mr. David Marynuik testified on behalf of Lee Trans. He stated that he was contacted by Mr. Reynolds on August 8, 2003 to assist with the maintenance and safety requirements of Lee Trans. He had worked for 33½ years as an MTO Enforcement Officer. His duties were with commercial vehicles and inspection stations. Mr. Marynuik then went on to review his background information including his duties as an enforcement officer.

Mr. Marynuik stated that as of August 8, 2003, his function was to observe the complete operations of Lee Trans, to review their files, identify the vehicles and drivers that were not fulfilling their obligations of pre-trip inspections, and to insure necessary repairs were being carried out to tires and lights. He stated that drivers were not aware of the Regulations as set down, and were not documenting repairs. Generally, the drivers would tell the mechanics about required repairs verbally, and the mechanics had difficulty remembering every request. Therefore, a system was put in place for the necessary paperwork to be completed, which also included the issues noted in the MTO Facility Audit.

Mr. Marynuik documented every day of his attendance at Lee Trans. He then made recommendations to Lee Trans, particularly in relation to the drivers' paperwork. As of October 20, 2004, Mr. Marynuik began inspecting vehicles at night when they arrived back at Lee Trans. The drivers waited for his inspection to be completed. Mr. Marynuik noted that the drivers were not completing their paperwork as required, and therefore, procedures were put in place for written reports to be made, and for every vehicle to go to the service manager for repairs. Mr. Marynuik attended at Lee Trans on October 21, 22 and 27, 2003 for spot checks of the drivers and vehicles. The drivers assisted and cooperated in these spot checks. It was emphasized to the drivers that defects had to be corrected because it was negatively impacting Lee Trans' CVOR points and sanctions would be taken against the company if the drivers did not correct the problems.

A third spot check was conducted by Mr. Marynuik on November 20, 2003. Mr. Marynuik then met with Mr. Gurprasad to review the defects. As a result, written and verbal discipline was implemented, including the dismissal of three employees because of accidents. All other drivers cooperated in the process.

Mr. Marynuik stated that certain deficiencies could have been found by the drivers, for example, bald spots on tires. He stated two hours after a vehicle left Lee Trans, it was stopped at the Trafalgar scale, and the tires were noted as defects. Mr. Marynuik emphasized that tires were most important, and Lee Trans was paying between \$8,000.00 to \$10,000.00 per month for new tires, but they were not being replaced due to the disregard of drivers. Mr. Marynuik's second concern was with respect to brakes

being out of adjustment. Therefore, Mr. Marynuik trained the drivers with respect to how brakes should be observed and measured.

Mr. Marynuik testified that drivers did not understand the English language, and therefore, this caused some problems in improving the driver inspection reports. Mr. Marynuik stated that he was observing the same defects on his second round of inspections, and therefore, he knew there were problems with the training. As a result, Mr. Kenth was used as an interpreter, which helped to improve the situation. As a result of these efforts with the drivers, Mr. Marynuik stated that there seemed to be improvements to the vehicles. As well, the new policy of Lee Trans required every driver to complete daily trip inspection reports. The white copy of the report was provided to the garage for repairs to the trucks, as opposed to the earlier practice of repairs being made verbally. This resulted with improvements in the vehicles, and drivers taking responsibility to make reports and issue them to the mechanic to fix problems.

Initially, the drivers were concentrating on the most important items such as tires and brakes, but eventually, other areas began to improve such as inspection of lights. It was also noted that the mechanic was also now doing the paperwork to show that a repair had been completed. Mr. Marynuik did state that it was hard for some truck drivers to be paper conscious, but improvements were noted.

A further meeting was held with all drivers at Lee Trans to emphasize drivers' obligations, and to explain to them that without their cooperation, the company could not operate. This resulted in a different attitude from the drivers, and inspecting and reporting are now being completed on a regular basis.

Mr. Marynuik also met with the mechanics of Rena Road Garage located at Lee Trans. The garage is leased by Lee Trans. Mr. Marynuik worked with the mechanics to show them the operations of the business other than just the repairing of vehicles. Previously, the mechanics were only doing the work requested on a work order. Now efforts were being made to have them participate in the inspections, particularly given that the mechanic could observe different possible problems beyond the driver inspections. Mr. Marynuik stated that this initiative appears to be working.

Mr. Marynuik also testified that an auditor, Hank Van Pelt, was retained by Lee Trans. Mr. Van Pelt previously worked for the MTO, so was familiar with the issues. He was to function as an independent person, and to make recommendations with respect to Lee Trans efforts to improve its safety record. He also assisted with the implementation of the paperwork for the safety inspections.

The MTO Facility Audit was also reviewed with Mr. Van Pelt, including the deficiencies noted therein, and procedures were changed and implemented as a result of this audit, including instructions to the drivers as to how to complete their logbooks.

Mr. Marynuik stated that Mr. Gurprasad was very co-operative. However, he was very kind to the drivers, and therefore, in Mr. Marynuik's view the drivers were taking

advantage of the situation. Mr. Marynuik emphasized that his obligation was to ensure that Lee Trans was doing a proper job with the new formulated procedures, that the drivers understood the procedures, and that records were being properly maintained.

Mr. Marynuik stated that he attended the January 21st, 2004 Show Cause Meeting. Mr. Marynuik attempted to show at the meeting that Lee Trans had implemented strict rules and regulations to improve its safety record. Mr. Marynuik stated that at the end of the Show Cause Meeting Lee Trans was provided with a subsequent motor vehicle accident report that Mr. Marynuik did not know about. Mr. Marynuik testified that Mr. Gurprasad knew that the driver was not at fault. Mr. Marynuik acknowledged that Lee Trans' accident record was high as there were six recorded accidents on its CVOR.

Mr. Marynuik explained to the MTO at the Show Cause Meeting the procedures taken by Lee Trans, including the inspection procedures, to improve its Safety Record. As well, he stated that Lee Trans may not have been at fault for all of the points accumulated. He also advised the MTO that one driver had been let go because of his disregard for driving. He pointed out to the MTO that one of the accidents noted was for a situation where the police officer did not provide a ticket for the Court, and therefore, the charge was not within the Court system. Mr. Marynuik advised the MTO that a substantial amount of work had been done with respect to Lee Trans' future plans for safety, and he reviewed those plans with the MTO. Mr. Marynuik stated that the response from the MTO was that Lee Trans was similar to other companies where the drivers and company were not responsible, that their vehicles were unsafe, and that they had disregard for the laws of Ontario.

Mr. Marynuik then testified with respect to Level 1 and Level 3 inspections. The issue with respect to the Level 3 inspection is that if Lee Trans had no defect on a Level 3 inspection then this should be taken into consideration by the MTO given that if defects were found at a Level 3 inspection then the inspection would have converted to a Level 1 inspection. However, the response from the MTO was that a Level 3 "means nothing". In Mr. Marynuik's view, Level 3 inspections should be considered by the MTO because if an officer found a defect at a Level 3 inspection it would be reason to go to a Level 1 inspection.

Mr. Marynuik went on to testify that at the Show Cause Meeting the issue with respect to the language barriers was raised and explained to the MTO, as well as all the attempts made to correct the causes of the motor vehicle accidents, the different methods used, including defensive driving, education, testing, and subsequent spot-checks.

Mr. Marynuik testified that he was still active at Lee Trans. He indicated that work will continue with a view to improving Lee Trans' safety record. He stated that some drivers were still neglecting to record all of their time off. He would like to continue with the spot-checks of the vehicles while on the road to ensure that drivers are driving properly.

Mr. Marynuik testified that since December 18th, 2003, there was one incident but it was not pointable, and no trucks have been put out of service for the last six months. He also emphasized that Lee Trans had never previously gone that long without a problem.

Cross-Examination of David Marynuik

Mr. Marynuik's work history was reviewed since his retirement from the MTO in September 1999. Basically, he has been working as a consultant for two trucking companies, and as a full-time paralegal.

He again confirmed his first day with Lee Trans was August 8th, 2003, and that he attended on fourteen days since that date, including August 8th, September 9th, 17th, October 16th, 20th, 21st, 27th, November 10th, 20th, December 12th, 15th, 17th, 19th, 2003 and January 13th, 2004. He stated that Mr. Reynolds requested him to work with Lee Trans because of the defects on Lee Trans' CVOR. Since he has been at Lee Trans there have been three full-time mechanics, and he agreed that extra mechanics were not hired.

Mr. Marynuik admitted that Mr. Van Pelt's audit on December 9th, 2003, was in the lower range, and that the audit would fail. Mr. Marynuik went on to state that at the Show Cause Meeting the Level 3 inspection was presented by Lee Trans to show a clean inspection and that there were not noticeable defects to cause a Level 1 inspection. In Mr. Marynuik's view this was noteworthy because previous reports had defects, and this report had no noticeable defects, and was a complimentary report.

Mr. Marynuik acknowledged that pre-trip inspections were the significant area that he was dealing with. Mr. Marynuik also acknowledged that it was a fundamental error for a driver not to have inspected brakes. Therefore, this was a deficiency on both the driver and mechanic's part. He also stated that the mechanics were not properly trained in the inspection of the brakes. Of five inspection reports, Mr. Marynuik acknowledged that two drivers omitted brake inspection and one driver did not do any inspection at all. It was therefore put to Mr. Marynuik that after six months training drivers still did not know how to do proper inspections, and therefore, the training had not been effective. Mr. Marynuik said he would have to disagree as he has seen improvement in this area.

Mr. Marynuik acknowledged that he did not do on-road inspections because he did not have a Class A driver's licence. He has been a Class A driver in the past, and within the last year for another trucking company.

When it was pointed out to Mr. Marynuik that he had found defects in respect of every driver's pre-inspection reports, and notwithstanding this, all drivers are still working and no one has been disciplined, Mr. Marynuik stated that if the discipline policy had been implemented he would have had to question the validity of suspending a driver. If the company were to let a driver go, the driver would not come back to the company, given the high demand for drivers in the area. The reality of the situation according to Mr. Marynuik was that they were trying to discipline and educate the drivers at the same time. Mr. Marynuik acknowledged that he did not discipline any of the drivers

personally, and he had no records with respect to discipline. However, when the detailed activity of Lee Trans found at Exhibit 4, Tab 15, page 135-136 was put to Mr. Marynuik including the discipline disposition, Mr. Marynuik responded that he had seen this document before, and in fact, he had created the document. He indicated when he reviewed accidents, he put the information about discipline in the document, and that in his view, the dispositions were accurate. For September 13th, 2003, and September 9th, 2003 his information was that the President of Lee Trans disciplined the drivers by speaking to them. Mr. Marynuik confirmed that the driver who left the yard with defective tires on October 10th, 2003, was terminated by Lee Trans.

The evidence in respect of the maintenance policy was reviewed with Mr. Marynuik. Schedule "A" maintenance included a grease and oil every thirty days, and Schedule "B" included an inspection every three months.

On re-direct, Mr. Marynuik confirmed that three mechanics were employed by Lee Trans and that recently one of the mechanics was replaced. He also confirmed that Auditor Peter Van Pelt was brought in to assist him to correct the problems that may arise in a Fall audit. Mr. Marynuik re-iterated his testimony with respect to Level 1 and Level 3 inspections, and he reiterated some of the problems encountered with the drivers as a part of the re-training programme.

Evidence of Kamaldwep Singh Mangat

Mr. Mangat gave evidence that he was involved in a motor vehicle accident last year on September 17th, 2003. He explained the circumstances of the motor vehicle accident. He confirmed that he was struck from behind by a street car while stopped at a red light at Dundas and Bloor. The police attended the scene and took a statement from him. He was not at fault for the accident. On cross-examination he testified that he has been driving since 2000 and has worked for Lee Trans for three and a half years. He has not had any motor vehicles accident this year. When asked about his motor vehicle accidents in 2003, he stated that he could not fully remember because he had been sitting since morning and his "mind is upset".

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.

APPLICATION OF FACTS TO LAW

The only issue in this appeal is whether the Deputy Registrar of Motor Vehicles made an error in issuing the Suspension Order, and thus concluding that the Applicant will not operate commercial vehicles safely and in accordance with the *Highway Traffic Act*, the Regulations and the law.

The Tribunal heard from Ms. Atallah on behalf of the MTO. She reviewed the analysis used to determine a safety rating for Lee Trans. Although the Applicant took issue with some of the information that was considered by Ms. Atallah in her report, when the evidence is reviewed as a whole, including the evidence of MTO, Mr. Gurprasad and Mr. Marynuik, it is undisputed that Lee Trans vehicles were operating in an unsafe manner.

The Applicant acknowledges numerous accidents and traffic violations on the part of Lee Trans drivers, as well as a significant inspection violation rate. Although Lee Trans has taken significant steps to correct its safety issues, and is to be commended for its efforts, the Safety Record Review contained at Exhibit 4, Tab 4, shows an overall violation rate of 106%. The accident violation rate is well above the allowable threshold. At that point in time the out of service rate was 80%, which was an increase from 66.7% for the previous year.

The Applicant suggests that the Deputy Registrar is not properly informed under the circumstances in that the MTO analysis has to go further before issuing a Suspension Order. As well, the Applicant also suggests that the efforts taken on the part of Lee Trans in addressing the problems since July 2003, should be taken into consideration.

It is the Tribunal's view that the MTO reasonably carried out its duties in considering the data it did in respect of the safety record of Lee Trans, including taking into consideration all of the accidents, convictions, violation rates, etc. Although the Applicant disputes some of the incidents reported, and the manner in which inspection reports are viewed by the MTO, this does not provide sufficient justification for Lee Trans' unacceptable safety record. Furthermore, if the disputed information was excluded it would not have had a substantial impact on altering Lee Trans' safety rating. The Applicant admitted it has a very poor safety record. Lee Trans has six pointable motor vehicle accidents versus the Provincial average of two. It is possible, based upon the evidence of the Applicant, that only five of these accidents are pointable. However, when the evidence is looked at collectively, Lee Trans has a very poor performance record in all areas of safety, including a failed safety audit. As well, it was the evidence of Mr. Marynuik that Mr. Van Pelt's audit at the end of 2003 would have failed. Mr. Marynuik also testified with respect to the safety inspections that although there were improvements, there were still problems with some of the drivers. In February, 2004, three of five drivers did not do their inspections properly and in March, 2004 not one driver performed a proper safety inspection.

In the case of *Brenner v. Ontario (Registrar of Motor Vehicles Dealers and Salesman)* 1983 O.J. No. 1017, issued by the Divisional Court on April 7th, 1983 overruling a decision of the Tribunal, Selby, J. stated:

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 guidelines provided by the Court in the *Brenner* case can be applied to the issues in this Appeal now before this Tribunal. Although Lee Trans has made efforts to improve its safety record, it is only if the Tribunal finds that the Deputy Registrar was in error in issuing the Suspension Order that an order can be made directing the Registrar to refrain from carrying out the Suspension Order.

DECISION

In the Tribunal's view, in light of Lee Trans' serious safety issues, including the numerous accidents, convictions and safety issues described above, the Deputy Registrar did not make an error when it issued its Suspension and Seizure Order dated February 4th, 2004. The Tribunal finds no reason to therefore interfere with the Suspension and Seizure Order imposed by the Deputy Registrar in the circumstances of this case.

FOR THE REASONS GIVEN ABOVE the decision of the Deputy Registrar is confirmed.

LICENCE APPEAL TRIBUNAL

Elizabeth Bennett-Martin,
Member

Released: July 26, 2004

Filename: 2186.cvor.Lee Trans

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.



SERGIO M. LOURENCO O/A S & L TRANSPORT

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: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: SERGIO M. LOURENCO, Applicant, unrepresented
(the "Applicant")

PATRICK S. MOORE, Counsel, representing the Registrar
of Motor Vehicles (the "Respondent" or the "Registrar")

DATE
OF HEARING: June 8, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Sergio M. Lourenco o/a S & L Transport (the "Applicant") of the decision of the Deputy Registrar of Motor Vehicles (the "Respondent" or the "Registrar") dated March 18, 2004 to suspend the Commercial Vehicle Operator's Registration ("CVOR") certificate 021-328-983 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 and proof of valid insurance is produced for all commercial motor vehicles and trailers.

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 2, 2004.

The hearing was held in Toronto, Ontario on June 8, 2004. All parties were present in the hearing room.

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 and proof of valid insurance is produced for all commercial motor vehicles and trailers.

EVIDENCE:

Opening Statements

Counsel for the Registrar stated that a CVOR certificate had been issued to S & L Transport since 1988. The issues before the Tribunal are twofold: 1) The amount of the unpaid provincial fines; 2) The incidences of operating without insurance or making a false statement concerning insurance.

Testimony of John William Miller

Mr. Miller has been employed for nineteen years with the Ministry of Transportation ("MTO"). He is currently a carrier safety rating administrator who sanctions carriers and investigates their operations. He prepares the CVOR records for interventions, prepares integrity checks of files and assists with show cause hearings.

In February 2004, Mr. Miller did an analysis of the Applicant which showed substantial fines and incidences of no insurance or false statements on insurance. On March 18, 2004 an order was issued by the Deputy Registrar to have the CVOR certificate suspended and seizure of the plate portions of the permits until the fines were paid and there was proof of valid insurance.

Mr. Miller testified that the Applicant was informed of a show cause interview for March 29, 2004. The Applicant did not show for that interview. Later the Applicant telephoned to say that he had received the notice late. The order was put on hold until after the decision of the Tribunal.

Mr. Miller stated that once the CVOR is suspended, the rating of a carrier becomes unsatisfactory. Currently the Applicant has a safety rating of satisfactory unaudited. This is based on looking at the two year period. The Applicant has no accidents but has six convictions and one inspection. The Applicant's overall rate is 18%. There were outstanding fines of \$55,966.25. Mr. Miller also stated that there were two additional convictions not found on the CVOR but found on ICON (Integrated Court Offices Network). As well there were pending charges with a court date of June 17, 2004.

Mr. Miller stated that overall there were three convictions for having no insurance and two convictions for using false insurance on the record of the Applicant.

In regards to the outstanding fines, Mr. Miller expressed concern that if the Applicant cannot pay the fines then he probably cannot afford to maintain his vehicles. In his review of the outstanding fines the majority of them were related to motor vehicle offences. There were four convictions for failure to wear a seat belt, three convictions for operating without insurance and convictions for such offences as operating an unsafe vehicle, no visible plate and use of false insurance. The highest amounts of the fines related to the insurance convictions. As of March 16, 2004 the outstanding fines totaled \$55,682.25. On May 17, 2004 a further check was done on the ICON system and the total of outstanding fines totaled \$71,650.42.

Mr. Miller reviewed the receipts shown to him at the hearing by the Applicant. They totaled a payment of \$500.00 to the Burlington Provincial Offences Court. Mr. Miller was not aware of the Applicant having entered into any payment plan to pay off the fines.

In his investigation of the vehicles on the system under the name of the Applicant, Mr. Miller found that the plate #751 1KC had expired on May 31, 2004 and as of June 7, 2004 that plate had not been renewed.

Mr. Miller stated that the Applicant was the main driver of the vehicles as per the CVOR records though on occasion two other drivers were noted on that record. The Applicant has a current valid driver's licence. Since 1981 he has had 22 suspensions, usually for unpaid fines.

Mr. Miller testified that there was an inspection report done on the Applicant on July 18, 2003. Mr. Lourenco was the driver. Both the truck and trailer were placed out of service and the plates removed from both vehicles. There were three convictions registered for no insurance, failure to display the annual inspection sticker and no current validated permit. As only one inspection was done there were no violation points on the record of the Applicant.

It was the testimony of Mr. Miller that on November 13, 2003 he received a telephone call from a Mr. Luc Frigault, an inspection officer. Mr. Frigault stated that he was concerned that the Applicant had no insurance on his vehicles. Mr. Miller asked Mr. Frigault to send him the documents, which were produced as exhibits at the hearing. The Applicant had failed to produce registration, insurance or CVOR documents. Mr. Frigault sent a proof of insurance notice to the registered owner of the vehicle, Mr. H. Then Mr. H. spoke to Mr. Frigault and stated that he had sold the vehicle to the Applicant two years ago.

During the hearing, the Applicant showed to Mr. Miller a pink insurance slip from a Mr. D. of Choice Insurance of Bradford. Mr. Miller telephoned Mr. D. on the date of the hearing, June 8, 2004. He was told by Mr. D. that an installment payment for the insurance had not cleared the bank and there was no valid insurance on the vehicle.

Testimony of Sergio Lourenco

Mr. Lourenco stated that he had planned to have a meeting shortly with the lady from the Collections department at the Halton Court Services. He hoped to put into place a payment plan for one thousand dollars per month.

Mr. Lourenco stated that his troubles had begun approximately six years ago with his divorce. He then put his 1986 Freightliner in his girlfriend's name but lost the truck. He had obtained a loan to pay for his insurance. He had not realized there was a problem with the payments.

Mr. Lourenco stated that in prior years, he thought that he had insurance coverage through another carrier, F.W. Johnson. Mr. Lourenco had done a couple of loads in Milton for Mr. Johnson and he thought that was supposed to cover the cost of the insurance.

Mr. Lourenco stated that he did not attend the show cause hearing in March, 2004 due to problems with the delivery of his mail.

Under cross-examination, Mr. Lourenco stated that approximately four years ago he had insurance through a company in Keswick. Then he thought that he had insurance through Mr. Johnson. He agreed that the record showed that he knew he did not have insurance at the time of the inspection in July 2003 and when questioned by Mr. Frigault in November 2003. By that time, he knew the insurance via Mr. Johnson was false. Mr. Lourenco agreed that it was a serious offence to operate a commercial vehicle without insurance.

Mr. Lourenco stated that when he bought the truck from Mr. H. he did not want to put it in his name due to the divorce proceedings.

Mr. Lourenco could not recall the older convictions and outstanding fines. He thought he might have missed some court dates due to his family law troubles. Though he thought his fines were about \$50,000.00, he knew he had no choice but to pay them but he did not have that kind of money.

Mr. Lourenco stated that he had lacked money to do his annual inspection. He did ensure that his mechanic was paid for work performed on his vehicle. Mr. Lourenco stated that he had trouble paying the \$430.00 cost for the validation certificate every three months and that he had gone over a year without having it.

Closing Statements

Counsel for the Registrar referred to the case of *Kevin Hyatt Trucking Ltd.*, a LAT decision of October 1, 2003. In that case, the CVOR certificate was suspended for outstanding fines of approximately \$21,000.00. Counsel for the Registrar stated that there was a deterrence factor in having fines for convictions.

The Applicant stated that if the order was granted and his CVOR was suspended he would have no means to pay the outstanding fines.

THE LAW:

Highway Traffic Act

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

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

on the grounds of,

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

(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 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.

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.

ANALYSIS:

The Registrar has focused on two issues in his decision to suspend the CVOR certificate of the Applicant and to seize the plate portion of permits for all commercial motor vehicles and trailers issued to the Applicant. Those issues are the outstanding fines and the lack of valid insurance. Both issues relate to subsection (d) of Section 47. (1) of the Act relating to “misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle”.

Most of the outstanding fines deal with convictions related to the operation of the Applicant's commercial vehicles. Some of those convictions are over ten years old. Some of the convictions related to the safe operation of the vehicle such as improper or no muffler and push rod stroke over. Others related to failure to have validation certificates, failure to wear seat belts, not having a visible plate or lack of or false insurance. These convictions have an impact on the safety of the public, proper maintenance of the vehicle and the conduct of the Applicant in not obeying the Act.

The evidence is clear that the Applicant owes a large amount of unpaid fines. The Applicant feels it is about \$50,000.00 and the Registrar states it is over \$70,000.00. Where there is a dispute in the evidence between Mr. Miller, the witness for the Registrar, and the Applicant, the Tribunal accepts the evidence of Mr. Miller. The evidence of Mr. Miller was clear and convincing and was substantiated by the documentation. The evidence of the Applicant was hazy and vague.

It is clear that for a considerable period of time in 2003 and 2004 the Applicant operated his commercial vehicle without insurance. His latest effort to obtain insurance failed due to financial reasons. The Applicant knew in 2003 that he did not have insurance yet he continued to operate his commercial vehicle. There are substantial fines on his record dating from 2002 and 2004 for failure to have insurance. The evidence shows a definite pattern of behaviour by the Applicant to ignore the law.

The Applicant has stated that he has financial problems, which led him to not have annual inspections of his vehicle nor purchase the required validation certificates. This is another example of a pattern of behaviour by the Applicant whereby he violates the requirements of the Act.

While the Tribunal has sympathy with the financial circumstances of the Applicant, it cannot ignore the pattern of behaviour whereby the Applicant ignores the requirements of the law. The Tribunal agrees with the Registrar that the inability of the Applicant to pay the outstanding fines and to purchase valid insurance raises serious doubts as to the Applicant's ability to maintain the required safety standards for his vehicle. This raises concerns as to the safety of the general public using the highway.

The Tribunal therefore finds that the Applicant's failure to carry valid insurance and his failure to pay outstanding fines justifies the Registrar under Section 47. (1) of the Act to suspend the CVOR certificate and to seize the plate portion of the permits of the commercial vehicles of the Applicant.

ORDER:

Accordingly, for the reasons stated above, the Tribunal confirms the Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles dated March 18, 2004 that the CVOR certificate #021-328-983 be suspended and the plate portion of permits for all commercial motor vehicles or trailers issued to the Applicant be seized until such time as payment is made to the courts for the unpaid fines and proof of valid insurance is produced for all commercial motor vehicles and trailers.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

RELEASED: July 26, 2004

FILE NAME: 2300.cvor.Sergio Lourenco.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.



LAMB'S CONTRACTING LTD.

IN THE MATTER OF AN APPLICATION BY LAMB'S CONTRACTING 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 AUGUST 3, 2004.

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 143-253-368 ISSUED TO LAMB'S CONTRACTING LTD.;

AND IN THE MATTER OF THE NOTICE OF SUSPENSION AND SEIZURE ISSUED TO LAMB'S CONTRACTING LTD. ON THE 11TH DAY OF JUNE 2004;

AND IN THE MATTER OF THE SAFETY RECORD OF LAMB'S CONTRACTING LTD.

TO APPEAL THE SUSPENSION AND SEIZURE ORDER

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GURPREET BAL, Agent, appearing on behalf of Lamb's Contracting Ltd.

PATRICK MOORE, Counsel, representing the Deputy Registrar of Motor Vehicles

DATE
OF HEARING: September 7, 2004

Toronto

ORDER

WHEREAS Lamb's Contracting Ltd. (the "Applicant") has appealed the Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles (the "Respondent") dated August 3, 2004;

AND WHEREAS the Applicant's appeal to the Licence Appeal Tribunal (the "Tribunal") was set down to be heard by the Tribunal on September 7, 2004;

AND WHEREAS upon the hearing of the appeal commencing before the Tribunal on September 7, 2004, the Applicant moved that the hearing be adjourned as the Applicant's Agent, David Ralf Sr., was not able to appear;

AND WHEREAS Counsel for the Respondent consented to the hearing being adjourned and together with the Applicant agreed that the hearing be adjourned to 9:30 a.m. on Monday, October 4, 2004 and to continue, if necessary, on Tuesday, October 5, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

NOW THEREFORE, this Tribunal Orders that:

1. The hearing of this matter shall, by the consent of the Applicant and the Respondent, be adjourned *peremptorily* against the Applicant to commence at 9:30 a.m. on Monday, October 4, 2004 and to continue, if necessary, at 9:30 a.m. on Tuesday, October 5, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. The Applicant shall at the commencement of the hearing on October 4, 2004 hand to the Tribunal a written and signed medical certificate confirming the reason for David Ralf Sr.'s inability to attend at the Tribunal on September 7, 2004.
3. In the event of David Ralf Sr. being unable to appear before the Tribunal on either or both October 4 or 5, 2004 when this matter is due to proceed the said Ralf shall advise the Respondent's Counsel in writing of that fact immediately on his becoming aware of his inability to appear but in any event by no later than 14 days prior to October 4, 2004.
4. In the event that David Ralf Sr. is not able to appear and represent the Applicant at the hearing, the Applicant shall ensure that the new representative of the Applicant shall have delivered to him/her by the Applicant's Gurpreet Bal the Respondent's Appeal Book which was delivered to David Ralf Sr. under cover of Respondent's Counsel's letter of August 25, 2004.
5. By no later than 14 days before October 4, 2004 the Applicant shall advise the Counsel for the Respondent in writing of the full name, address and qualifications of the interpreter retained or to be retained by him to interpret at the hearing of the Applicant's appeal.

Whatsoever fees and costs are incurred by the Applicant in relation to the services of an interpreter shall be borne solely and absolutely by the Applicant, and the interpreter retained by the Applicant shall not be directly or indirectly associated with the Applicant or Gurpreet Bal nor related to the said Bal.

6. The Applicant shall not less than ten (10) days prior to the hearing serve on the Respondent's Counsel and file with the Tribunal a Book of Documents upon which it intends to rely at the hearing and shall fully comply with Rule 6 relating to Disclosure as set forth in the Tribunal's Rules of Practice (November 3, 2003).

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 13, 2004

FILE NAME: 2541.cvor.Lamb's Contracting Ltd.order.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

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Decisions under Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

Fiscal Year 2004 - 2005

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

- >> [2234-ADLS-DIS-Dismissal](#)
- >> [2265-ADLS-PULD-Pulmonary Disorder](#)
- >> [2271-ADLS-LUNG-Lungs](#)
- >> [2278-ADLS-PULD- Pulmonary Disorder](#)
- >> [2285-ADLS-MISTAKE-Mistaken Identity](#)
- >> [2304-ADLS-MISTAKE-Mistaken Identity](#)
- >> [3371-ADLS-LUNG](#)



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Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

2234-ADLS-DIS-Dismissal

IN THE MATTER OF an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to Section 48.3(2) of the *Highway Traffic
Act* TO SUSPEND A PERSON'S DRIVER'S LICENCE FOR A
PERIOD OF 90 DAYS

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

APPLICANT

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), the Applicant initiated an appeal under Section 50.1 of the Decision of the Registrar of Motor Vehicles made pursuant to Section 48.3(2) of the Act to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to Section 9 of the *Licence Appeal Tribunal Act, 1999*;

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under Section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under Section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles to suspend the driver's licence of the Applicant for a period of 90 days.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 7, 2004

FILE NAME: 2234.adls.dis.doc

2265-ADLS-PULD-Pulmonary Disorder

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 SUBSECTION 48.3(2) OF THAT ACT

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

TRIBUNAL: WILLIAM E. SETTATREE, Presiding Member

APPEARANCES: APPLICANT, unrepresented

LYNDA DUNBAR, Agent
Representative for the Registrar of Motor Vehicles (the "Respondent")

DATE OF
HEARING: April 20, 2004 Toronto

DECISION

A hearing was held on April 20, 2004, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended (the "HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended.

LICENCE APPEAL TRIBUNAL

William E. Settatree
Presiding Member

RELEASED: April 21, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2271-ADLS-LUNG-Lungs

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: WILLIAM SETTATREE
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

A. EDWARD TONELLO, B.A., LL.B
Representing the Applicant

DATE OF
HEARING: April 7, 2004

DECISION
RELEASED: April 8, 2004

Toronto

REASONS FOR DECISION

A hearing was held on April 7, 2004, 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 8, 2004, 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 16, 2004 and was received by the Tribunal on March 19, 2004, 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

Certified documents from the Ministry of Transportation were entered, copies of which had been previously provided.

The Applicant entered two letters, dated April 5 and 6 including more detailed medical reports from Dr. T. H. Yu. The Tribunal noted that this material should have been submitted 10 days prior to the hearing as required under the Act and asked the Respondent if she wished to object. There being no objection, the hearing commenced.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 2 Notice of Appeal dated March 16, 2004.
- b) Exhibit # 3 Report from Dr. Yu dated March 31, 2004.
- c) Exhibit # 4 Letter from Dr. Yu dated April 6, 2004.

By the Respondent:

- a) Exhibit # 1 Certified copies of Ministry position.

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:

Evidence in this hearing centred around whether the Applicant had been drinking when he was stopped and more specifically whether a medical condition prevented him from providing a proper breathalyzer test.

The Tribunal heard conflicting evidence on whether or not the Applicant consumed alcohol and symptoms that relate to this such as redness of the eyes, and a raspy voice, tremors and shaking. The Applicant’s evidence was that he has not consumed alcohol since 1958. His red eyes and shaking are health conditions which are always present. He does operate a winery and works with the product which would account for the scent of alcohol which the police officer had noted.

This matter is not the issue before the Tribunal. The question of whether or not the Applicant had been drinking and was intoxicated is for a Court to decide. The fact to be resolved by the Tribunal is that the police officer, Constable Knight, in doing his job was concerned enough to ask the Applicant to provide a breath sample. After several attempts, no sample was provided and he was charged under the Criminal Code with failing to provide a breath sample. His licence to drive was seized on the spot.

The Applicant presented testimony from himself and a witness and medical evidence from his physician. His Counsel argued that the evidence from an Expert Witness (Dr. Yu) was sufficient to explain why the Applicant had been unable to provide a suitable breath sample. Upon questioning by the Respondent, the Applicant said he did not have any lung problems for which he was being treated.

APPLICATION OF THE LAW TO FACTS:

There were three documents submitted by the Applicant from his physician, Dr. Yu. The Applicant’s medical conditions described in a March 31, 2004 letter (Exhibit 3) were

1. Ischemic heart disease
2. Essential Hypertension
3. Dyslipidemia
4. Chronic laryngitis, secondary to injury in his neck sustained in 1958
5. Morbid obesity with severe abdominal fat causing decrease on his lung capacity
6. Osteoarthritis in the knee.

With reference to lung capacity, Dr. Yu stated the Applicant “ is unable to do a full breathalyzer test because of his severe abdominal obesity and chronic laryngitis secondary to his neck injury sustained in 1958.” Dr. Yu’s report failed to provide any detail as to pulmonary function tests, which would clarify the conclusion that the Applicant could not perform a full breathalyzer test. Nor did the doctor indicate any professional knowledge of the breathalyzer test and how it is administered. In a letter dated April 6, (Exhibit 4) Dr. Yu stated that the Applicant “can’t do a full breathalyzer test because of his problem with his larynx. He can’t do a full expiration of more than six seconds.”

He also commented on the Applicant’s shaking condition which is a familiar type tremor for which there is no treatment. The doctor said his last consultation with the Applicant was on April 2, 2004. He did not provide any data on tests that may have been conducted at that time relative to the matter before the Tribunal.

Evidence by Constable Knight indicated that a full breath sample on the machine used in this case can be obtained in four to six seconds.

The Constable’s detailed evidence on the test attempts show that the police officer made every effort to assist the Applicant in completing the test. When it was not performed properly and the Applicant had been given appropriate warnings of what would happen, the licence was seized and the charges laid.

While the Applicant maintained he had asked the police officer to take him to a hospital for a blood test, the police officer’s evidence was that the Applicant had said he (the Applicant) was going to a hospital for a test and would sue the police officer.

After considering all the evidence in this matter, the Tribunal concluded that the Applicant had not provided strong enough medical evidence to prove his diminished breathing capacity and the effect of problems caused by the neck injury to his larynx, which would preclude him from providing the required breath sample.

Under the Act, the onus is on the Applicant to provide such proof. The Tribunal did take into account that there are health conditions that come into play here (such as the shaking and red eyes) which may have contributed to the police officer’s decision to ask for the breath test. But they were not the only factors. Detecting an odor of alcohol in itself was sufficient to warrant a decision to ask for a breath sample. A full expiration of six seconds, which Dr. Yu confirmed the Applicant could do, would have been sufficient to produce a breath sample.

Regulation 574 and section 50(1)(2)(a) or (b) are not met by the Applicant.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated March 2, 2004 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

William Settatree
Presiding Member

RELEASED: April 15, 2004

FILE NAME: 2271.adls.lung

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2278-ADLS-PULD- Pulmonary Disorder

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: WILLIAM E. SETTATREE
Presiding Member

APPEARANCES: APPLICANT, unrepresented

KYLE M. BIEL, Agent
Representative for the Registrar of Motor Vehicles (the "Respondent")

DATE OF
HEARING: April 14, 2004

DECISION
RELEASED: April 15, 2004 Sault Ste. Marie

REASONS FOR DECISION

A hearing was held on April 14, 2004, at Sault Ste. Marie, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended (the "HTA").

The Tribunal released its Decision on April 15, 2004, with Reasons to follow.

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

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an electronic hearing, however, the Registrar of Motor Vehicles objected to this type of hearing and accordingly, an oral hearing was scheduled. The form of Notice of Appeal under Section 50.1 of the *Highway Traffic Act* was received by the Tribunal on March 22, 2004, 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/blood sample because of a medical reason.

Preliminary Matters

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

Submission of Written Material

By the Applicant:

- a) Exhibit # 2 Notice of Appeal form received March 22, 2004.

By the Respondent:

- a) Exhibit # 1 Notice to Registrar effective February 29, 2004, issued by the Registrar of Motor Vehicles.
- b) Exhibit # 3 Ministry of Transportation submissions received April 6, 2004.

ISSUE:

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

LAW:

The legislation governing the Administrative Driver's Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (the "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), of the *Highway Traffic Act* at subsection 15(1), (2) and (3) require 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:

Evidence for the Applicant

The Applicant stated that on February 29, 2004 she had been visiting friends about ten minutes from her home. The visit lasted from about noon until sometime after 6:00 p.m. Her evidence was that she had consumed a few drinks before dinner and a few after. She estimated a total of six. She said she then drove home and enroute lost control of her vehicle and ended up in the ditch. She said she doesn't recall what happened and remembers waking up outside her vehicle.

She stated that she suffers from asthma and submitted a medical report completed by her doctor on the appeal notice (Dr. J.E. Marrack, M.D., D.A.).

She said that she suffered some anxiety when the police arrived and, when taken to the police station, was unable to perform her required breath sample due to her asthmatic condition. She says that she since has learned that a blood test was possible but one was not offered to her to get the required information.

She discussed the completed medical report from her doctor, which stated that she suffers from asthma, COPD, chronic anxiety, depression and obesity. The history of the condition is described as "Years of Asthma and COPD due to smoking". The medications prescribed are Advair, Ventolin, Spiriva and Prozac. The type of measurements taken in a recent test were stated by the doctor to be a "peak flow of 200L per min < 50 percent of expected". The doctor's report listed the last visit as "6/1/04" (Jan 6).

Under questioning from the Respondent's Agent, the Applicant agreed that the report was lacking in detail. In answer to questions from the Respondent's Agent, the Applicant said that she had seen the doctor on March 11, 2004 for the first time since she had been stopped, and that was to have the medical form completed. At that time, he had performed a test to determine her breathing capability by using a small tube device. She was only able to blow at the rate stated in his report (200 L per min).

In answer to questions from the Respondent's Agent, the Applicant said that the night of the arrest, she had never asked for her medication to assist her with breathing and had not complained of requiring medical aid. She did recall asking for a cigarette after completing test attempts. She did not recall that an ambulance was called to the location where she was stopped on a completely unrelated matter for another motorist and emergency medical personnel were available at the scene.

Evidence for the Respondent

The Respondent called three witnesses, the arresting officer, a police sergeant who was also at the scene, and the breath sample specialist from the detachment.

The breath sample technician Constable Gloria Barrett detailed what happened from the time the Applicant was brought to the detachment for a test until she was formally charged with failing to provide a sample.

Constable Barrett's detailed evidence showed that a total of nine attempts were made by the Applicant to provide the sample. In each case, the Applicant started to breathe properly but stopped and then started again, thus nullifying the attempt and making it incomplete. It was after the fifth or sixth attempt that the Applicant indicated that she suffers from COPD asthma. She never asked for her medication.

The police officer's testimony was that she too suffers from the same problem and so advised the Applicant. She tried to encourage the Applicant to continue with the test, as it was important that she do so. The officer said that she did not detect any significant breathing problems and ultimately issued the warning that failure to provide the sample would result in a charge. The Applicant never asked for medication but at the conclusion of the test asked for a cigarette.

Under questioning from the Respondent's Agent, the officer stated that no blood test was offered because it is not a requirement to do so and that the Applicant never asked for one.

Police Constable Keith Vaillancourt gave evidence as to the night (February 29, 2004) that the Applicant was taken into custody. He said that when he arrived on the scene at 7:51 p.m., he detected a strong odour of alcohol from the Applicant who was wandering around outside the vehicle. He asked her to get her licence and documents from her car and noted that she fell a few times in a snow bank while trying to retrieve them.

She was placed under arrest at 7:57 p.m. While in the police cruiser, another vehicle stopped and police were asked to get an ambulance for someone who had suffered a possible heart attack. The ambulance was parked in front of the police cruiser and Constable Vaillancourt was diverted to assist. His sergeant, Todd Pelletier remained in the cruiser with the Applicant.

Sergeant Todd Pelletier's evidence was similar to that of the other officer. He said that while he was with the Applicant he asked her if she had any medical problems and she said she was all right. At no time did she indicate a breathing problem and one was not noted. She did not ask for her medications.

The Respondent's submissions filed with the Tribunal and the Applicant as Exhibit #3 included a report from Dr. Roger S. Goldstein, MB, ChB, FRCP(UK), FRCP(C), FCCP, Director, Program in Respiratory Rehabilitation, Professor of Medicine, University of Toronto. Dr. Goldstein had been asked to review the medical report of Dr. J.E. Marrack with regard to the patient <Name of Applicant deleted> (the Applicant in this hearing).

Dr. Goldstein noted that the only measurement of pulmonary function is a peak flow of 200 litres/minute, which does fall below the normal range. He stated, "However, there are no other tests of lung function and in my experience, many patients with a peak flow of 200 litres/minute could satisfactorily provide a breath sample".

APPLICATION OF THE LAW TO FACTS:

Under Regulation 574 and Section 50.1(2)(b) the onus is on the Applicant to provide sufficient medical information to justify the setting aside of the licence suspension.

It is not the Tribunal's task to determine whether or not the driver was impaired but rather whether the driver was capable of providing a sufficient breath sample to the authorities.

There is no doubt that a person finding herself in the circumstances that the Applicant did on the night of February 29, 2004 would suffer some anxiety. The Tribunal notes, however, that all three police officers dealt with the matter in an appropriate way and their actions over the time that they were with the Applicant would not likely have increased that anxiety.

The Tribunal was particularly interested in the manner in which the breath test was administered and is satisfied that Constable Gloria Barrett, who suffers from similar ailments as the Applicant, did everything she possibly could to encourage the Applicant to relax, take it easy and provide the suitable sample. The evidence was that on more than one of the test attempts, the Applicant stopped just as the test was about to bring some results. There was no indication that the Applicant had to take a new breath to continue. In fact, Constable Barrett said that the Applicant resumed the test still with air in her lungs.

The Tribunal was troubled by the lack of detail in Dr. Marrack's medical report on behalf of the Applicant. This report lacked backup data, did not state when the report was done and was insufficient to satisfy this Tribunal that the Applicant's medical condition was such that she could not provide the required sample.

The Applicant has not proven her case as required under Regulation 574 and Section 50.1(2)(b) of the HTA.

The Tribunal notes that the question of a blood test as an alternate way of obtaining the required information is an option not offered by the police. Constable Barrett said that she was not required to do so.

Given the cumbersome process involved in securing such a sample (through a hospital or

medical practitioner with police present), the Tribunal recognizes the constraints involved. The Ministry of Transportation should explore whether the process could be simplified.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 29, 2004 of the Registrar of Motor Vehicles pursuant to Section 48.3 of the *Highway Traffic Act* (the "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

William E. Settatree
Presiding Member

RELEASED: April 20, 2004

FILE NAME: 2278.adls.PULD.reasons.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2285-ADLS-MISTAKE-Mistaken Identity

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: WILLIAM E. SETTATREE
Presiding Member

APPEARANCES: APPLICANT, unrepresented
Not appearing

KYLE M. BIEL, Agent
Representative for the Registrar of Motor Vehicles
(the "Respondent")

DATE OF
HEARING: April 13, 2004 Toronto

ORDER

WHEREAS the Deputy Registrar of Motor Vehicles issued an Administrative Driver's Licence Suspension Order dated March 19, 2004, ordering that, pursuant to Section 48.3(2) of the *Highway Traffic Act*, as of March 18, 2004, the Applicant's driver's licence be suspended for 90 days;

AND WHEREAS the Applicant 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 Tuesday, April 13, 2004, at the Tribunal's Chambers;

AND WHEREAS at the beginning of the hearing on April 13, 2004, the Agent for the Ministry of Transportation advised the Tribunal that the Applicant's 90 day administrative driver's licence suspension was rescinded effective April 9, 2004, and as a result a hearing in this matter is no longer required;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

William E. Settatree
Presiding Member

RELEASED: April 15, 2004

FILE NAME: 2285.adls.mistake.order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2304-ADLS-MISTAKE–Mistaken Identity

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: NIVES MONTANO
Presiding Member

APPEARANCES: APPLICANT, unrepresented

LYNDA G. DUNBAR,
Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: April 22, 2004

DECISION
RELEASED: April 27, 2004

Toronto

ORDER

WHEREAS the Deputy Registrar of Motor Vehicles issued an Administrative Driver's Licence Suspension Order No. 4902409 dated March 9, 2004, ordering that, pursuant to Section 48.3(2) of the *Highway Traffic Act*, as of March 5, 2004, the Applicant's driver's licence be suspended for 90 days;

AND WHEREAS the Applicant 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 9:00 a.m. on Thursday, April 22, 2004, at the Tribunal's Chambers;

AND WHEREAS at the beginning of the hearing on April 22, 2004, the Agent for the Ministry of Transportation requested a Motion to Dismiss the matter before the Tribunal since the officer who was called as a witness, confirmed that the Applicant was in fact, not the same individual to whom a demand for a sample of breath was made;

AND WHEREAS after the said officer spoke to his Sergeant the Tribunal received confirmation by fax that the Applicant's ADLS suspension would be rescinded due to the Applicant being falsely identified;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before the Licence Appeal Tribunal once the Ministry of Transportation issues the Applicant a copy of his driver's abstract wherein the Administrative Driver's Licence Suspension Order No. 4902409 dated March 9, 2004 has been cleared from his driver's record within ten (10) business days of the release of this Order, and a copy of the amended Applicant's driver's abstract is received by the Tribunal.

LICENCE APPEAL TRIBUNAL

Nives Montano,
Presiding Member

RELEASED: April 27, 2004

FILE NAME: 2304.adls.mistake

3371-ADLS-LUNG

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: WILLIAM SETTATREE
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

A. EDWARD TONELLO, Counsel for Applicant

DATE OF
HEARING: April 7, 2004

Toronto

DECISION

A hearing was held on April 7, 2004, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

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

LICENCE APPEAL TRIBUNAL

William Settatree
Presiding Member

RELEASED: April 8, 2004

FILE NAME: 2271adls.LUNG.decision



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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

Fiscal Year 2004 - 2005

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PRODUCT MANAGEMENT CORPORATION

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,
Presiding Member

APPEARANCES: ED VAGO, Agent
Representing the Applicant

PATRICK MOORE
Representing the Respondent

DATE OF
HEARING: February 22, 2005

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Product Management Corporation (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 – Respondent's Appeal Book, (Order to Impound and Suspend at Tab 1)

Exhibit 2 – Letter from Monstur Fleet Service & Maintenance Ltd. dated January 19th, 2005

Exhibit 3 – CVOR Product Management Corporation search date February 22, 2005

Exhibit 4 – Notice of Appeal

FACTS:

The Applicant's trailer was inspected on January 11th, 2005, at the Vineland Truck Inspection Station. The inspecting officers reached the conclusion that there was a critical defect with respect to the air brakes which resulted in an Order to Impound and Suspend.

Respondent's Evidence

The Respondent's sole witness was Luc Frigault, Inspection Officer with the MTO. Mr. Frigault gave evidence that the subject trailer had 2 axles and that air brakes were clamp type 30, short stroke. He gave detailed evidence as to the method used to measure the push rod travel out of the service brake chamber, which method included the use of a certified air gauge to ensure the appropriate air pressure had been applied. The pushrod travel was found to be:

Left side: 2 3/8" (front) 2 7/16" (back),
Right side: 2 5/16" (front) 2" (back).

In cross-examination Mr Frigault was asked how often the certified air gauge was recalibrated. Mr. Frigault responded that it is replaced annually. Mr. Frigault was also asked whether new brakes could go out of adjustment quickly and he responded that they could.

Applicant's Evidence

Mr. William Edward Vago, one of the owners of the Applicant and the VP of Operations, was the sole witness for the Applicant. He gave evidence to the effect that the Applicant had done and continues to do all that is reasonable in maintaining its trucks. He testified that the impounded trailer had new brakes as of December, 2004, and produced written confirmation to that affect. Mr. Vago testified that it had been recommended that the brakes be adjusted after 900 – 1000 kms use. At the outset of the hearing and in his evidence Mr. Vago did not dispute that the brakes were out of adjustment at the time of the inspection and did not challenge the measurements which lead to the critical defect being found. Although he questioned whether the certified air gauge used should not be recalibrated more frequently. No evidence was provided that the air gauge used was not accurate.

Mr. Vago, in cross-examination, agreed that at the time of impoundment the trailer had been driven more than the recommended 900-1000 kms, however, the exact amount over was not clear.

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 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

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

[illegible]

30	8 3/32" (205.58mm)	2" (50.8mm)

APPLICATION OF THE LAW TO FACTS:

The facts in this instance are not in dispute. The push-rod travel of more than 50 percent of the brakes of the impounded trailer were beyond the permitted 2 ¼" for that type of brake amounting to a critical defect pursuant to Regulation 512/97 as set out above. The Applicant gave evidence that the brakes were new, that they were going to be adjusted at the end of that trip and that new brakes often move out of adjustment quickly: therefore it was acting as reasonably as could be expected. Due diligence is not grounds for appeal and in any event the Applicant knew how quickly new brakes can go out of adjustment and the Tribunal finds that it was not diligent in ensuring that they were inspected and adjusted before exceeding the recommended mileage and before they became a critical defect.

There seemed to be a suggestion by the Applicant that there is uncertainty amongst its drivers now as to how to proceed as they believed they were doing all that was reasonable. Mr. Vago also suggested that his drivers' uncertainty stems from their belief that not every vehicle with brakes out of adjustment is impounded. There should not be any uncertainty. The rules around impoundment are well defined. The way to proceed is clear - prevent critical defects and there will be no impoundment. Allow a critical defect to occur and the Ministry of Transportation has the power to impound. In this particular case, with this particular trailer, the maintenance steps taken by the Applicant were simply not sufficient.

As the Applicant did not provide any evidence that the trailer was either stolen or that a critical defect did not exist at the time of inspection, the two grounds for appeal provided in 50.3(3) of the Act, the appeal must fail.

DECISION:

Upon the application by Product Management Corporation (the "Applicant") to appeal the order to impound and suspend dated January 11th, 2005, 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.

Elizabeth L. Sproule,
Presiding Member

RELEASED: March 8, 2005
FILE NAME: 2768.cvis.Product Management Corp.

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



4116241 CANADA 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: SIMON DANN, Member

APPEARANCES: BRUCE THIESSEN, Agent for Applicant

PATRICK MOORE, Solicitor for Respondent

DATE OF
HEARING: July 14, 2004

by teleconference

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by 4116241 Canada 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.

PRELIMINARY MATTERS:

As a preliminary matter, Mr. Moore, the Respondent's solicitor, requested that the Applicant proceed first since the burden of proving, on a balance of probabilities, that the vehicle was stolen was with the Applicant and he should therefore present his case first.

Mr. Moore acknowledged that typically the Registrar is first to proceed in laying out the basis of the Registrar's Order for a permit suspension or cancellation and the Applicant can then challenge the Registrar's evidence.

When Mr. Moore completed his request, Mr. Bruce Thiessen (“Thiessen”), the Applicant’s Representative, advised the Tribunal that he had no problem with the request and he was prepared to proceed.

Mr. Moore’s request was therefore accepted.

Mr. Thiessen then acknowledged that he accepted the matter of the “critical defect” and that this fact was not in question. The only issue he wished to focus on was to prove the vehicle was stolen.

This acknowledgement was accepted by Mr. Moore and noted by the Tribunal member.

As this hearing was taking place via a conference call, a review of all evidence documents and materials then occurred to ensure that each Party had all the same documents in their possession.

The Tribunal asked Mr. Thiessen if he understood he had the option of retaining counsel to represent him. Mr. Thiessen replied that he did understand that, and that he chose to represent himself.

A review of the hearing procedure was then provided to inform Mr. Thiessen how the hearing would proceed. Mr. Thiessen expressed his appreciation for the guidance.

FACTS:

Bruce Thiessen’s evidence:

Mr. Thiessen reviewed and confirmed the details of the letter, dated June 8, 2004, which was submitted by the Applicant, 4116241 Canada Ltd. (“Fastway”), with the Notice of Appeal, also dated June 8, 2004.

Mr. Thiessen submitted that the Fastway utility trailer, which was impounded at the Lancaster, Ontario, Ministry of Transportation inspection station for having “over 50% defective wheel brakes”, was actually stolen by Riley Thiessen (no relation to Bruce Thiessen)

The essential points of his argument in support of this contention are as follows:

- Thiessen explained that Fastway received a message from Riley on the company’s answering machine, on April 22, 2004 at 11:30 PM, to say he had received another job offer with better pay and that he would be leaving the company.
- Riley had joined Fastway on March 30, 2004 as a “long haul highway driver” and the delivery to Boucherville was “his fifth and final trip.” His employment period with the company was therefore 21 days.

- Riley Thiessen (“Riley”) completed this last trailer load delivery at about 9:00 AM on Sunday, April 25, 2004 when he contacted Fastway and was told to “stand by at Boucherville to await his reload on Monday AM” (Exhibit 2-pg 3).
- Thiessen also confirmed that his statement to the Boucherville Police on Saturday, May 8, 2004 (Exhibit 2-pg 4) included his report that Riley had called Fastway at 1:15 PM (CDT) to let Fastway know he had completed the delivery to Boucherville (Exhibit 2-pg 4).
- “At about 6:00 PM, April 25, Riley called to say that his trailer was being impounded at the Lancaster, ON, scale due to misadjusted brakes. He asked me (Bruce Thiessen) what to do and I told him we would find him a load already on a trailer or we would rent him a trailer to use.” (Exhibit 2-pg 4).
- Thiessen’s statement, immediately after describing the above, claims that the Sunday conversations with Riley “were very short” and ended “before I could ask him about his job situation, why he was not at Boucherville” (Exhibit 2-pg 4).

Thiessen’s May 8, 2004 statement to the Boucherville Police included his statement that:

Later on April 25 I called to the Lancaster scale to follow up on the trailer impound situation. The woman there said Riley had fled ‘long ago’.

Thiessen testified that he had no further contact with Riley until April 29, 2004 when he received a handwritten fax, which he testified, was from Riley (Exhibit 2-pg 5). This fax advised Thiessen where he could find the truck with the keys and company credit cards. This was reported to the RCMP at Treherne, Manitoba, who subsequently recovered the Fastway documents and keys from the truck

The actions taken by Thiessen between April 29 and April 25, 2004, when the trailer was impounded were:

- April 26: Thiessen called Riley’s wife and learned she had not heard from him. He then turned off the two fuel credit cards in Riley’s possession.
- April 27: Thiessen called Riley’s wife again to say he would “report Riley to the O.P.P. as a missing person”; Thiessen spoke to the Lancaster O.P.P. and provided information about the missing person and missing Volvo highway tractor as well as the impounded trailer;
- April 28: Thiessen reported the Volvo highway tractor to Manitoba Public Insurance as a missing vehicle;

- April 29: found Riley's driver log sheets on Fastway's fax, sent from what he recognized as Riley's in-laws' fax machine the previous evening;

Thiessen also testified that the Fastway trailer was repaired on April 25, 2004 at the Lancaster inspection station, before it was released for towing to Ottawa. The repair was paid for by his MasterCard (Exhibit 3, Tab 5). On May 4, 2004 he found that his MasterCard had been used for \$600 of fuel by Riley, who must have "read the credit card number off the work order for the repairs" (Exhibit 2-pg 6).

Thiessen argued that Riley had converted the truck to his personal use without authorization, after he was instructed to stand by at Boucherville, so that he could drive to "a interview in Toronto area on April 26th" (Exhibit 2-pg 6).

Thiessen stated in oral testimony that he originally considered Riley to be a competent driver as Riley was licensed and trained to do inspections. Fastway's policies and employment agreement (Exhibit 4B) require drivers to observe all compliance requirements. However, Thiessen also confirmed "Riley's failure to inspect and adjust brakes occurred despite his signing a Vehicle Inspection Report each day" (Exhibit 4B).

In his statement to the Boucherville Police, Thiessen said, "This unfortunate situation is entirely due to Riley's poor judgement and failure to perform his job requirements. I have had no quarrel with him....He has abandoned his job..." (Exhibit 2-pg 6).

The Longueuil Police Report (Exhibit 2-pgs 9-12), dated May 12, 2004, submitted by Thiessen confirms on page 12 of this exhibit that...

- the truck was returned on April 29;
- the complainant (Bruce Thiessen) called from Manitoba to file the complaint;
- the person named in the complaint was an employee of the complainant and after the employee made a delivery on April 25, the complainant had no further news from him;
- the complainant had filed a report with the RCMP that the driver had disappeared.

In his fax letter of May 3, 2004 to Riley (Exhibit 4B-pg 14), Thiessen advises he would like to "wrap up our relationship with you" and that "I don't know how you became so upset that you stopped calling in after about the first week with us." In addition Thiessen asks Riley for missing documents, expense reconciliation and for him to complete a resignation form attached to the faxed letter.

Facts arising from Mr. Moore's cross-examination of Mr. Thiessen:

In response to Mr. Moore's questions, the Tribunal learned the following:

- Fastway's discipline policy for theft is termination;
- that Riley came to the company as a qualified driver;
- that log forms (Exhibit 4A) were not properly completed from the beginning and that Riley had never found a problem with any of Fastway's equipment;
- that Thiessen was not happy with the log performance and while he stated he spoke with drivers every day, he did not provide evidence on any follow-up actions;
- Thiessen testified that Fastway was professionally operated with clear policies and driver compliance requirements;
- Thiessen did not have any evidence that disciplinary notices or actions had been taken to show that Fastway was unhappy with Riley's incomplete log forms.

Thiessen also replied to Mr. Moore that Riley made the empty trailer report about 1:15 PM on Sunday, April 25th and that at 6:00 PM he (Thiessen) received a call from a woman at the Lancaster inspection station to say that Riley had left 'a long time ago'.

Thiessen agreed with the O.P.P. report (Exhibit 3-pg 17) that it was April 28th when they were contacted about Riley and that he "has not been heard from in the last 48 hours".

Thiessen did not provide any specific information in response to the question of why, if the truck was stolen on the 25th, would he be speaking with Riley the same evening about a load for the next day.

Doug Reece's evidence:

Doug Reece is a Program Advisor with the Ministry of Transportation and provided evidence on the Registrar's behalf. He confirmed the details of the complete Exhibit 3 and that the Order to Impound and Suspend was served personally on the driver and then to the company by mail (received by P. Thiessen on April 28, 2004 - Exhibit 3, Tab 1, pg 2).

Closing Statement of Bruce Thiessen:

In his summation, Mr. Thiessen stressed Fastway is a professionally operated company and uses only certified drivers.

He stated that Riley's logs show they were not properly done and that perhaps he was not competent to carry out and complete the required daily inspections. Thiessen further stated

his view that during the 21 days Riley was with Fastway, Riley “had failed to properly discharge his duties”.

Mr. Thiessen argued the Tribunal should find the vehicle to have been stolen and stated he had “reported (the complaint) to any police who would listen”. He particularly referred to the Longueuil Police Report (Exhibit 4D) as evidence that the filing of theft charges against Riley was still an available option for Fastway.

Closing Statement of Patrick Moore:

In his closing, Mr. Moore argued that the issue is whether the vehicle was stolen or not and that the burden of proof is on the Applicant. He acknowledged that with a critical defect the onus is on the Ministry but the allegation of ‘stolen’ requires the Applicant to prove their claim.

To support the Registrar’s view that this is more a case of an employee “not listening to you (Bruce Thiessen/Fastway)” and not theft, Mr. Moore referred to case law as follows:

- *Marshall v. Ontario (Registrar of Motor Vehicles) [2002] O.J. No. 745* which allowed that a vehicle could be considered stolen ... “when it is taken without the owner’s consent and when the perpetrator intends to deprive the owner of it, whether permanently or [temporarily].”
- *R. v. Lafrance [1975] 2 S.C.R. 201* which refers to the taking of a vehicle “without consent” as “joy-riding” and that it does not always mean ‘theft’; where the taking and use of the vehicle “does not associate with the actus reus of the offence, and with the intent that is an element thereof (of Theft, as defined in the Criminal Code of Canada [now s.322], the dishonesty imported into the elements of theft.”

Further, Mr. Moore argued that as Riley had “lawful custody” of the vehicle and then moved it, he should be considered to be a “poor or disobedient employee” but that his action was not one of theft.

Mr. Moore also pointed to Fastway’s stated intention to find Riley another load and trailer, if required. Mr. Moore argued that Mr. Thiessen’s contact with Riley in both Boucherville and Lancaster is “not the attitude that would reflect [concern about] theft”.

Mr. Moore concluded by stating that, as Mr. Thiessen had written to the Boucherville Police, this is a case of “poor judgement” on Riley’s part. Also, that Fastway would have had no problem with Riley passing through Toronto on his way back to Manitoba, a point on which Thiessen had agreed.

Mr. Moore stated that as the police reports were filed more as missing persons reports, “all we have is disobedience versus theft”.

Mr. Thiessen responded to Mr. Moore's closing argument by adding that drivers can only go forward based on orders faxed to them; that Riley converted the truck to his own use by driving to the Toronto job interview before returning to Manitoba.

ISSUES:

The essential issue is whether the Fastway vehicle was stolen at the time of its impoundment and therefore, 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.

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 THE LAW TO FACTS:

The issue of the critical defect was accepted by the Applicant, and therefore does not factor in the Tribunal's review of the evidence.

However, a review of the Applicant’s testimony, through both cross-examination and his written submissions to the Boucherville Police, as well as documents submitted by the Registrar, raises questions the contact times between Riley and Fastway, as well as what was discussed during each contact.

It is worth noting that the matter of time zone differences was not addressed by either Party and therefore the Tribunal has considered times as presented in evidence without any

attempt to presume which time zone (Winnipeg, MAN, or Boucherville, QUE and Lancaster, ON) was being referenced - except for the time noted as "1:15 PM CDT" in Thiessen's report to the Boucherville Police.

Specifically, the question seems to revolve around when Thiessen determined Fastway's vehicle to have been stolen. The facts that suggest that this determination occurred after the impoundment are considered to be the following:

- 9:00 AM, April 25: Thiessen reports Riley had completed his Boucherville delivery; Fastway advised Riley to "standby" for information on his next load pick up (there is no clarification whether this advice was provided by Riley at 9:00 AM or during another contact);
- 1:15 PM CDT (or 2:15 PM EST), April 25: Thiessen reports Riley contacted Fastway to advise he had completed his delivery; Fastway advised Riley to "standby" for information on his next load pick up;
- 2:35 PM, April 25: is the time noted in the Inspection and Impoundment report;
- 6:00 PM, April 25: Thiessen writes in his report to the Boucherville Police that Riley called in to report the impound and request instructions; Thiessen tells Riley he will find him another load or trailer and load for the next day;
- No evidence was submitted in the course of the hearing to show Thiessen had raised the matter of 'stolen' with Riley regarding the truck and trailer.

In fact, Thiessen's testimony confirms that at 6:00 PM, Sunday, April 25, which is 3 hours and 25 minutes after the time of the Inspection and Impoundment Report, Thiessen advises Riley that he will find him another load or trailer for the next day.

While there is sufficient evidence to indicate there were problems in the relationship between Fastway and Riley, the evidence clearly shows that the Fastway equipment was not stolen at the time of the impoundment and, as a result, all other matters became issues for resolution between Fastway and its employee.

DECISION:

Upon the application by 116241 Canada Ltd. (the "Applicant") to appeal the order to impound and suspend dated April 25, 2004 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

Simon Dann, Member

RELEASED: July 23, 2004

FILE NAME: 2422.4416241_Canada.cvis

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



1266604 ONTARIO INC.
O/A TERRY N. VOGLER TRUCKING

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: PATRICK MOORE, Solicitor for Respondent
CAROLE MCFEE WALLACE, Solicitor for Applicant

DATE OF
HEARING: February 3, 2004 London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by 1266604 Ontario Inc. o/a Terry N. Vogler Trucking (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;
4. Applicant's Book of Documents

FACTS:

Respondent's Evidence:

Serge Rainville

Serge Rainville is a Provincial Offences Officer in the London District. He has been an officer with the Ministry of Transportation (MTO) for three years. He has received MTO training in respect of critical defect criteria and received a Critical Defect Inspection Certificate about eighteen months ago. Officer Rainville inspects commercial motor vehicles and checks for brake adjustments on commercial trucks and trailers almost every working day.

On November 12, 2003 at approximately 9:50 a.m., Officer Rainville started his Level 1 inspection on the subject trailer. The initial contact with the vehicle was at the Putnam weigh scales on the eastbound 401 highway while conducting lane enforcement. He requested that the driver place the truck in neutral and give a brake application. He then watches the push rod travel to see if excessive movement is observed. If it is observed then the driver is asked to pull the truck off to the side. The process entails a 30-45 second observation of the truck and trailer from the sides. The brake chamber is observed again to see if excessive push rod travel is noted.

The driver of the truck, Mr. Lorne Newport, was asked to provide a variety of relevant documents to Officer Rainville that were copied and later provided via facsimile transmission to the MTO. The defect in this case pertained to the trailer brakes. Officer Rainville determined that the trailer:

1. was owned by 1266604 Ontario Ltd.;
2. was plated as W50496;
3. had an empty weight of 5,910 kilograms;
4. had a registered weight at the time of the stop of 39,500 kilograms;
5. was of sufficient weight that it required it's own air braking system;
6. had two axles.

Officer Rainville completed the Level 1 inspection. The process followed can be summarized as follows:

1. vehicle tractor is put in neutral with the engine off;
2. trailer tires are chalked and the park brake is released;
3. driver confirms the system air pressure is between 90 and 100 psi;
4. the Officer checks the resting position;
5. the Officer requests the driver make a full brake application;
6. the Officer measures the push travel distance;
7. the driver is then asked to build the system pressure up to 100 psi and this is checked by the Officer on the driver's cab gauge;

Officer Rainville then used a fairly new Lufkin steel tape measure to make the critical measurements.

He observed the trailer to have manual slack adjusters and a 30/30 CAM type of brake system. Manual slack adjusters do not automatically re-adjust themselves if they fall out of adjustment. The “30” refers to the size of the brake chamber. It is checked with a device known as a Chamber mate. This is a Ministry issued tool utilized to measure the size of the chamber. The Officer determined, by using this tool, that the chamber was a very common size 30-short/regular stroke chamber. He estimated that 80% of trucks are a 30/30 type, short stroke chamber. There was no indication elsewhere on the chamber to suggest it was another size. The Officer also checked with his calipers to confirm the short stroke status of the chamber.

The officer measured the push-rod travel to be as follows:

Axle	Position	Push Rod Travel
4 th	Right side	2 5/16”
4 th	Left Side	2 7/16”
5 th	Right Side	2 1/8”
5 th	Left Side	2 3/8 “

The maximum allowable push rod travel is two inches. The impoundment criterion in the Regulations is met when 50% of the axles are 2.25 inches or more out of adjustment.

Having made these measurements, Officer Rainville instructed the driver the brakes were out of adjustment. The driver, Randy Newport, advised the officer that the brakes were new and had cost a lot of money. This was not a surprise to the Officer as new brakes are quite commonly out of adjustment.

Officer Rainville summoned Officer Thomas and said that he felt he had a Critical Defect. The two Officers then conducted a Critical Defect Inspection. At this point in the process there is a change in equipment. They use a digital measuring tape issued by the Ministry. The instrumentation provides readings to a 1/16th of an inch. The tape was checked prior to the inspection for accuracy at 2, 4 and six inches. They also test at 1 foot and 2 feet. The tape was functioning as expected. They also apply an air gauge to the air supply line to allow for an accurate system pressure measurement.

To begin the inspection, the driver is asked to place the vehicle in neutral with the parking brake released. The vehicle is chalked for measurement purposes and the driver is asked to build the pressure up in the system to 100 psi.

At this point, the Officers are head to head on their backs under the trailer at this point and measure the push rod travel as the distance from the face of the brake chamber to the jam nut. Officer Rainville makes the initial measurement. Officer Thomas is asked what

measurement he gets and if the two are the same they are recorded.

The first set of measurements is with the brakes released. They confirm the Ministry gauge is at 100 psi and then check the cab pressure gauge to ensure the same results. In this case they recorded 96 psi, which is within allowable limits.

They then conduct the same process of measurements with the brakes engaged and held. Officer Rainville stated that the presence of the second officer on a Critical Defect Inspection is a courtesy to the trucking industry to ensure verification of test results.

The results of the Critical Defect Inspection were as follows (see Exhibit 3, Tab 1):

Axle	Position	Push Rod Travel
4 th	Right side	2 5/16"
4 th	Left Side	2 7/16"
5 th	Right Side	2 1/8 "
5 th	Left Side	2 3/8"

Three of the four measurements yielded a result exceeding 2.25" contrary to the Regulations.

The driver wanted to check the brakes again. Officer Thomas went into the cab and they repeated the brake application. The driver was shown measurements using only the steel Lufkin tape initially used by Officer Rainville. The air pressure could be built up in the system to 100 psi. Officer Rainville held the tape and made the measurements. There was some initial disagreement over the measurements observed on the first axle. The driver was allowed to measure the other three axles. He expressed surprise at the results. He pulled on the slack adjusters and did not feel they were too bad.

The latter test was done entirely as a courtesy to the driver and took between ten and fifteen minutes.

The Notice to Registrar of Critical Defect Inspection is then prepared and faxed to the Ministry (Exhibit 3, Tab 1). The Ministry then faxes back an Order to Impound and Suspend (Exhibit 3, Tab 1). The driver is asked to sign the latter Order and it is faxed back to the Ministry. A copy of the Order is then given (served) upon the driver.

The trailer plates were pulled when the Order was received and the annual inspection report was scraped off.

Officer Rainville did not have any further dealings with the Company or a representative of the Company and had no further dealings with the driver.

On cross-examination, Officer Rainville confirmed that he used a block on the tires to

prevent rolling before chalking the vehicle. He did not keep notes from the first test similar to those he kept of the second test (Exhibit 3, Tab 2, Page 5). However, he recalled that the results were identical. He likely marked the numbers from the first test on the brake chamber with chalk.

The second test, the Critical Defect Inspection, took from 10:10 a.m. to 10:30 a.m.

The Officer could not recall the exact psi on the system during the first test. However, they ask the driver to build the system pressure to 100 psi.

On the second test, the psi was built up to 100 psi. Four-psi were lost with the brake application.

He clarified that the full amount of material sent by fax to the Ministry with the Notice to Registrar of Critical Defect Inspection included:

1. Driver's licence;
2. CVOR;
3. Registration for Tractor and Trailer;
4. Driver's Pre-Trip Inspection Log;
5. Driver's Log;
6. Bill of Lading;
7. CVIR;
8. Handwritten notes of Officer Rainville regarding second test.

These documents were sent to the Ministry even though he did not so indicate on the "attachments" section of the Notice of Critical Defect Inspection. He indicated he has never filled out that section in such an instance.

He stated that he conducted the third test with the driver simply to try and satisfy Mr. Newport that the brakes were out of adjustment. He thought he had achieved that goal.

Stephen Thomas

Officer Thomas is a Provincial Offences Officer with the MTO. He has been in this position since July 2000. He works at the Putnam Inspection Station on the 401 east of London. He performs truck-related enforcement and inspections including brake adjustments. He performs such inspections many times on any given shift. He holds a Critical Defect Certificate since August 2001, and has had training in the Critical Defect criteria.

He confirmed that the subject vehicle had an air brake system and not an air over hydraulic system.

He recalled that at approximately 10:10 a.m. on November 12, 2003, he was asked by Serge Rainville to be a confirming officer on a possible Critical Defect. Officer Rainville only indicated it was a possible brake adjustment matter and suggested no specific

findings to Officer Thomas.

He went out with Officer Rainville and commenced the inspection procedure. He noted the VIN and plate information in his notes. The air gauge was hooked on and he confirmed that it was attached to the system line. Officer Rainville gave the various instructions to the driver during the procedure.

The vehicle was placed in neutral, engine off, all brakes released and the vehicle was chalked. At this point it is safe to go under the trailer. After Officer Rainville confirmed the chamber size, they began their measurements. They measured each push rod from the face of the brake chamber to the edge of the jam nut. They used a Starrett 16-foot Digitape. Officer Rainville was holding the tape. They were head to head under the vehicle so they could observe the same points of measurement. Officer Rainville would take a measurement and Officer Thomas would confirm the measurement observed. He did not take notes at this time. The notes of Officer Thomas were made in the station house after the results were observed.

There was no disagreement on the various measurements as between the two Officers.

Officer Rainville then tells the driver to make a full brake application. The Officers check the air gauge. It was at 96 psi, which is within the allowable limits. He then went back under the trailer to take the second set of measurements. He checked the MTO air pressure gauge and observed it was still at 96 psi after the test results were recorded. They followed the same measurement methodology on the second set of tests.

He and Officer Rainville then reviewed the measurements taken, did the math and confirmed a Critical Defect was present.

He did not recall any further comments or conversations with the driver. However, Officer Rainville did come back into the house to ask if Officer Thomas would apply the brake. He did so for about seven to ten minutes while the third courtesy test was done. He made no observation of the air pressure in the system at this time, as this was a courtesy test. He returned to the station house to commence the paper work for the impound procedure.

Officer Thomas had no further dealings with the trailer owners that day. He and Officer Rainville had to leave early for some Ministry training. He did have some dealings the following day with the owners and driver while they were transferring the load to another trailer. However, he did not check the brakes that day and was not involved in a fifth wheel check that was completed.

On cross-examination, Officer Thomas indicated that the role of confirming officer on these inspections is a courtesy and intended simply to confirm the lead Officer's activities and recordings. It is a second set of trained eyes on the procedure. The first set of results is of no interest on the second test. He did see them on the CVIR after the inspection. It did not surprise him that the results were identical as this happens on occasion.

Officer Thomas had no idea if an air gauge was used on the third test with the driver underneath. He also did not know what type of tape was used to make the measurements. He stated that Officer Rainville collected all the information from the driver. They send everything they have to the Registrar together with the Notice of Critical Defect Inspection.

Applicant's Evidence:

Lorne Randall Newport

Mr. Newport was the driver of the subject trailer and works for Vogler Trucking.

He reviewed the events leading up to the inspection. He was in line at Putnam when he observed an MTO Officer motion him to release and apply the brakes. He was asked for two or three brake applications. The "PARK" light then came on and he took the truck to the back of the station.

At the rear of the station, the MTO Officer went under the trailer on a creeper. He was asked the pressure readings and asked to put it to 110 psi and then shut off. He was then asked to get the application gauge to 90 psi. He pushed with all his might to do so. He had no recollection if any observations were shared with him before the second Officer was summoned from the station.

He had to repeat the procedure when the second officer arrived. They connected a pressure gauge and satisfied themselves that the pressure was at 90 psi. The Officers then went under the trailer. When they came back up they told him that three brakes were out of adjustment.

The Officer then suggested they show him the push rod travel. He recalled they measured the travel from the brake chamber to the jam nut. He took exception to the procedure because he did not feel it was a proper way to measure the push rod stroke. He recalled the Officer used soapstone to chalk things, which, according to Mr. Newport, does not mark rubber very well. The soapstone marks were hard to read. He also felt that the regular tape measure he observed being used was moved around inconsistently in order to get the reading the Officer wanted.

At the end of the tests, Mr. Newport was told that the trailer may be impounded and would need another inspection. He was also told the repair work would need to be completed elsewhere. After waiting a while he was advised the trailer would be impounded.

Once the impoundment was confirmed, the witness called his employer's mechanic, Jim Paterson. He did not mention Mr. Paterson to the Ministry officers. The mechanic came to the scales. Mr. Vogler also attended at the scales. The witness thought Mr. Vogler arrived just before the mechanic. At that point, Mr. Vogler decided to call another mechanic to corroborate the events.

While they were waiting for the second mechanic to arrive, Mr. Paterson arrived and did

some minor repairs to the tractor. When the second mechanic arrived and they checked the trailer, they ran the truck to 125 psi and then shut it off to conduct some tests. The other mechanic joined Mr. Paterson under the trailer. They got the pressure up to 90 psi and did their measurements. He recalled their measurements indicated the push rods were not that far out. He recalled hearing the mechanics say that two of the push rods were fine, one was borderline and the fourth was out of adjustment.

The witness reviewed Exhibit 4, Tab 2 and confirmed that new brakes were installed on the trailer on August 23, 2003.

The vehicle was also given an Annual Inspection Certificate on October 28, 2003. The mechanic who did the repairs in August also did the Annual Inspection.

On cross-examination, the witness confirmed that he was the owner of the truck but not the trailer. He was responsible for the maintenance of the trailer. The repairs on this trailer were effected at Rodney Car Care. In fact, the August brake job was the first major repair done for the witness by Jim Paterson. He has known Jim Paterson for a very long time. He has talked with Mr. Paterson in the past about how brake adjustments are effected.

The brakes were adjusted after August 23, 2003 only once during the Annual Inspection in November, 2003. This process took ten minutes for which he was charged \$10.00. He did not feel that a ten-minute annual inspection involved short cuts. He conceded that things might have been omitted since a major repair was done a mere two months prior.

He stated that he checks the trailer himself for brake adjustment. It does not take very long and all that is required is a wrench and a pry bar. He keeps these tools in his truck and has made such an adjustment in the past.

He did not make any adjustments to the brakes after the Officers left for their training on the day of the inspection.

Mr. Newport agreed that when the trailer was inspected there was at least 90 psi each time. He did find that one brake was out of adjustment but did not check the other three with the brakes applied. He recalled that the left rear was out of adjustment but he could not recall how much push rod travel was observed. He did not check the other three at all because he felt the Officer's approach was subject to error. He agreed that he could have checked the other three if he had wished.

He did not agree that he told the Officer at the time that three of the brakes were out of adjustment. He offered no cogent explanation of what was wrong with measuring the push rod travel from the jam nut to the chamber face. He did agree that there was more travel than he thought in the left rear push rod than from his inspection earlier in the day.

The witness did not feel that he needed to get the system pressure to 90 psi to get a reading as he does not haul a lot of weight. He has never had to push the brake as hard as he did during the inspection. He had never been told before that 90-psi was a standard for the air pressure.

He checks the air pressure every day on the tractor. In respect of the trailer, he pulls out of the factory dock and pulls on the spike to see if the brakes all lock up. Some mornings he checks the rear stroke with a pry bar. On the day in question he just pulled the spike. He indicated that the brakes would lock if they were in adjustment. He checks the mirrors for wheel movement during the skidding. He agreed that checking the push-rod travel was a better way of measuring brake adjustment.

He recalled that Mr. Vogler attended the Putnam station at about 2:40 p.m. This was before Mr. Paterson, the mechanic, arrived at the scene around 3:00 p.m. The second mechanic arrived at about 4:00 p.m. While Mr. Vogler and Mr. Paterson were present he showed them the inspection results. None of those present went under the trailer prior to the arrival of the second mechanic at about 4:00 p.m.

They conducted their check of the brakes when Mr. Bennett arrived. They went under to mark the push-rod travel. He thought Mr. Paterson told him that one of the brakes was out of adjustment and another was at borderline.

He estimated that the trailer had traveled about five thousand kilometers from the date of the Annual Inspection to the date of the incident.

Mark Bennett

The witness has been a licensed mechanic for the last nineteen years and has been a mechanic for the last twenty-four years. He is a mechanic with Peterbilt trucks.

He attended on the Putnam station on the day of the Critical Defect Inspection. Mr. Paterson, Mr. Vogler and Mr. Newport were already present when he arrived. He had been asked by Mr. Vogler to check the brake adjustment because the vehicle had been impounded. He did not look at the previous measurements.

His results indicated that two of the brakes were out of adjustment (Exhibit 4, Tab 4).

Axle	Position	Push Rod Travel
4 th	Right side	2"
4 th	Left Side	2 1/8"
5 th	Right Side	1 7/8"
5 th	Left Side	2 1/4"

He did not have any contact with any MTO officials while at the site.

On cross-examination, he indicated that he has worked for Mr. Vogler in the past. He was not sure of the type of brake chamber but thought it was a 30/30.

He returned to his shop and recorded his measurements on paper about one half-hour

after they were taken at the site. He had made other notes at the scene that he used as a reference.

The witness advised that brakes should be re-adjusted after a new brake job within the first couple of trips. He agreed that two months was too long and that, as a result, he would have expected the brakes to be out of adjustment.

He suggested it takes fifteen to twenty minutes to complete a brake adjustment. The brakes need to be physically checked for correctness although only a wrench may actually be required.

He used a metal tape measure he purchased at Canadian Tire to make his measurements. Mr. Paterson was simply an observer during this process.

James Donald Paterson

Mr. Paterson has been a mechanic for twenty years. He is licensed and owns Rodney Car Care.

He did the August 2003 brake job on the subject vehicle and indicated that everything was re-done except the brake chamber.

The vehicle was subjected to a Safety Inspection on October 28, 2003. He charged a mere ten dollars for the inspection because of the very recent August 23, 2003 brake job.

Mr. Newport called him on November 12, 2003 to attend at the weigh station because the brakes were out of adjustment. As they were new brakes, he was not surprised to hear they were out of adjustment. He attended upon the weigh station as requested.

He did not understand why there would be an impound for a brake adjustment. At the site, he observed one slack adjuster that was past 90 degrees. The others did not look too bad. He did not go under the trailer until Mr. Bennett arrived.

He explained to Mr. Bennett that he was called just to back up the results. They chalked and did the measurements together. He was aware of and had seen the MTO results prior to this procedure. It was visually apparent that one brake was out of adjustment.

When they did their procedure to test the push rod travel he concluded that only one was out of adjustment.

On cross-examination he indicated that he would not have even left the brakes a full week after the new brake job before having a brake adjustment done. He stated that a two-month wait was much too long.

He was questioned about the ten-dollar charge for the Safety and Brake Inspection on October 28, 2003. He stated that he knew everything was brand new from August 2003. He stated that he did a full safety but did not have to pull the tires because of his knowledge of the prior repairs. He conceded that this inspection was fast. An annual inspection would usually take about one hour. He felt he was more than ten minutes doing the inspection. He did not agree that he took shortcuts.

Although he had the necessary tools with him when he attended on the trailer on November 12, he did not adjust the brakes at that time. He did not see Mr. Newport adjust the brakes.

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 Council 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, 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.

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 Embossment 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 Embossment 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 Rainville and Officer Thomas 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 as required by the Regulation 512/97;
3. The brake chamber size on the vehicle was a 30-short/regular-stroke chamber.
4. 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 emphasised in bold above) on more than 50% of the brakes;
5. It was established by Officer Rainville that this vehicle had a 30 clamp type brake chamber and, on two separate tests, the push rod travel on three out of four brakes on this trailer were in excess of $2 \frac{1}{4}$ inches;
6. In this case, the results of the first test and the second were identical. The Tribunal accepts these results;
7. Both Officer Rainville and Officer Thomas were certified to conduct Critical Defect testing. Officer Rainville conducted the testing initially and obtained results that, standing alone, established the presence of a critical defect.
8. The second officer using a different measuring approach obtained identical results. This result, standing alone, also established the presence of a critical defect.
9. There was no contrary evidence to suggest that the officers were anything but careful and professional in conducting the measurements. The Tribunal does not find anything untoward or unusual in the identical results. Based on the facts presented, the Tribunal accepts that the tests were done carefully with a full attempt to be as accurate as possible and acceptable results were obtained.

In this case, Officer Rainville made an extended and gratuitous effort to the driver, Mr. Newport, to demonstrate his findings. It was the evidence of Officer Rainville that, while there was some initial resistance about the results and methodology used to obtain measurements, he eventually satisfied Mr. Newport that the three relevant brakes were out of adjustment. Mr. Newport stated that he did not agree with the approach taken and, after finding one push rod out of adjustment, he did not check the other three with the brakes applied. He did not agree that he stated to Officer Rainville that all three were out of adjustment.

The Tribunal prefers the recollection of Officer Rainville in this respect. The Officer did not have to do the extra test for the driver at all. In fact, he put his results at some risk of

discredit by so doing. It was possible that the third set of tests would result in different outcomes. However, it appears that Officer Rainville was sufficiently confident in his results and his methodology that he could undertake such a risk. Mr. Newport's evidence was that he in essence did not participate in the measurement of the final three brakes. His explanation was not that the measurements themselves were inaccurate but he felt the approach was self-serving and subject to error. Whether or not he agreed with the methodology, the Tribunal prefers to find that he was shown measurements that, on their face, revealed a critical defect.

The Applicant conducted another set of tests after the Officer's had left the station for a training session. Those results indicated two brakes out of adjustment. It is worthwhile to set the results beside one another for comparison:

Axle	Position	MTO - Push Rod Travel	Bennett - Push Rod Travel
4 th	Right side	2 5/16"	2"
4 th	Left Side	2 7/16"	2 1/8"
5 th	Right Side	2 1/8 "	1 7/8"
5 th	Left Side	2 3/8"	2 1/4"

The Tribunal does not have any reason to dispute the accuracy of the test results taken by Mr. Bennett. What is striking is the difference in the results as between the Ministry tests and Mr. Bennett's. Except for the rear-left brake, the remaining comparisons are starkly different. Counsel for the Applicant suggested that it was a stretch to find that the brakes had been tampered with after the Ministry tests but before Mr. Bennett's test. With respect, the results are so different that it seems impossible to escape that conclusion. Two of the brakes improved by an identical and not inconsequential amount of 5/16ths of an inch. There was no explanation offered for the difference in the results except the inference that the Officers tests were incorrect. The Tribunal has already found that the Officers conducted the tests in an appropriate manner and that reliable results were obtained. The Tribunal finds that, on a balance of probabilities, the difference between the results was the product of tampering before the arrival of Mr. Bennett. Those results must be viewed with suspicion and given little weight under the circumstances.

In any event, the Tribunal finds that at the relevant time (being the second, Critical Defect test) more than half of the brakes on this trailer were out of adjustment contrary to the provisions of 512/97. There is no cogent or reliable evidence to suggest that the two tests done by the Officers were inaccurate or improper. Those results are preferred over and are not overcome by any of the subsequent tests. The Tribunal finds that the informal third test done for Mr. Newport supports the Officers findings on the first two tests. The results obtained by Mr. Bennett are too unreliable to be of any value to the Tribunal.

The Tribunal therefore finds as a fact that the Respondent has established, based on clear and cogent evidence, 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 three of the four brakes, contrary to Regulation 512/97 of the

Highway Traffic Act.

DECISION:

Upon the application by 1266604 Ontario Inc. o/a Terry N. Vogler Trucking (the "Applicant") to appeal the order to impound and suspend dated November 12, 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: March 29, 2004
FILE NAME: 2059.cvis.vogler

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



MOORE FREIGHT SERVICE INC.

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 E. SPROULE, Presiding Member

APPEARANCES: PATRICK MOORE, Solicitor for Respondent

DAN MOORE, Agent for the Applicant

DATE OF
HEARING: April 19, 2004

by teleconference

ORDER

WHEREAS, this is an appeal to the Licence Appeal Tribunal by Moore Freight Service Inc. (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.

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal the Decision;

AND WHEREAS the Tribunal scheduled a hearing of this matter to be held on April 19, 2004;

AND WHEREAS when the hearing of the appeal convened before the Tribunal on April 19, 2004, the Agent for the Applicant requested clarification on the Law of Ontario with respect to the impoundment of commercial vehicles: section 82.1(7) was then read out loud and the grounds for appeal outlined.

AND WHEREAS the Applicant indicated that it did not challenge the finding of a critical defect by the Registrar, it was agreed by the Parties that the Appeal be dismissed.

NOW THEREFORE this Tribunal orders this matter dismissed and declares that these proceedings are concluded before the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

Elizabeth E. Sproule
Presiding Member

RELEASED: April 19, 2004

FILENAME: 2248.cvis.moore



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Decisions under Highway Traffic Act

Section 95(1) - Motor Vehicle Inspection Licence - (GARAGE)

Fiscal Year 2004 - 2005

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

>>	AZAM KHAN DBA KHAN AUTO AND TRUCK REPAIRS	
>>	BRENT J. CAMPBELL dba BRIAN.S AUTO CENTRE & SALES	
>>	SHEILA COLE o/a S & R TRUCK and TRAILER REPAIR and RANDLE COLE	
>>	BRENT J. CAMPBELL dba BRIAN'S AUTO CENTRE AND SALES	

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PREHEARING

AZAM KHAN DBA KHAN AUTO AND TRUCK REPAIRS

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO CLAUSE 91(e) OF THE
HIGHWAY TRAFFIC ACT R.S.O. 1990, CHAPTER H.8 AS
AMENDED

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE TO AZAM KHAN DBA KHAN AUTO
AND TRUCK REPAIRS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: AHMAD A. KHAN, Agent for the Applicant

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

DATE OF PRE-HEARING: March 1, 2005

Toronto

ORDER

Following attendances on March 1, 2005 at a pre-Hearing before this Tribunal of Ahmad Khan, Agent for the Applicant and Patrick Moore, Counsel to the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the Hearing into this matter:

1. The Parties to the Hearing will be:
 - Azam Khan dba Khan Auto and Truck Repairs, and
 - The Director of Vehicle Inspection Standards

2. The Tribunal has set a date of April 15, 2005, for hearing two preliminary motions which the Parties have agreed are necessary and which concern:
 - Evidentiary issues concerning the use of documentation relied upon in civil proceedings separate to the Proposal - in particular the Examination for Discovery transcript; and
 - Compellability of the Director at the Hearing to give evidence and be subject to cross-examination on his Proposal.

The Parties will ensure Motion Records and other material upon which they intended to rely in the above motions, will be filed with the Tribunal and served upon the other Party in accordance with Rules 4 and 11 of the Tribunal's Rules of Practice.

3. The Parties agree that dates for the Hearing will be set following the Tribunal's decision on the Motions, however it is their mutual expectation that the Hearing will take a minimum of five (5) days.
4. It is the Applicant's intention to put the competency of the Director's witness, John Tomasone, in issue.
5. It is the Director's intention to put the competency of the Applicant in issue.
6. It is the Applicant's intention to put in issue the Director's reliance on Ministry of Transportation records as proof of the alleged convictions of the Applicant as noted in the Proposal.
7. The Applicant's Agent agreed to provide the Director's Counsel with a draft "Agreed Statement of Facts" prior to or on April 15th with a view to the Parties formalizing a Final joint "Agreed Statement of Facts" prior to the Hearing for submission to the Tribunal.
8. The Applicant intends to call eight (8) witnesses, not including the Director, to wit:
 - a. Larry Grimaldi
 - b. John Gee
 - c. The Applicant
 - d. Amzad Khan -
 - e. The Applicant's Agent
 - f. Terry Singh
 - g. Ganesh Sing
 - h. A Nissan employee viz-a-viz the Applicant's competency.

9. Counsel for the Director indicated the Ministry would be relying upon three witnesses at the Hearing, to wit:
 - a. Larry Grimaldi
 - b. John Gee
 - c. A Nissan employee viz-a-viz the Applicant's competency.
10. Disclosure has been provided by both Parties. Any further documents upon which either Party intends to rely will be made in accordance with the Tribunal's Rules of practice.

The Parties acknowledged that no further agreement as to resolution of the issues was likely.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: March 7, 2005

FILE NAME: 2707. gar. khan. Prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BRENT J. CAMPBELL dba BRIAN'S AUTO CENTRE & SALES
BRENT J. CAMPBELL

Appeal under section 50.0(1) of the *Highway Traffic Act*
R.S.O. Chapter H.8 as amended from a Notice of
Revocation under sections 91(8)(b) and (e) and section
93(b) and (c) of the *Highway Traffic Act*

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: BRENT THOMAS HURST, Counsel for the Applicants

PATRICK MOORE, Counsel for the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: January 4, 2005 Toronto

DECISION

BACKGROUND:

The present appeal is brought under section 95(2) of the *Highway Traffic Act* R.S.O. 1990 chapter H.8 as amended ("the Act") from a decision by the Director of Vehicle Inspection Standards ("the Director") to revoke the license of Brian's Auto Centre & Sales as a licensed Vehicle Inspection Station and Brent Campbell's licence as a Motor Vehicle Inspection Mechanic. That decision was contained in a Notice dated September 13, 2004, duly served upon the Applicants.

The Applicants had been licensed in their respective capacities since November 7, 2001.

Both parties were represented by counsel.

The Applicant did not attend at the hearing and after a reasonable interval and attempts to contact the hearing proceeded in his absence.

ISSUES:

The grounds upon which the Director based the proposed revocations were:
That the Applicants had:

Carried out inspections incompetently.

Carried out inspections that were not performed in accordance with the Act and regulations.

Failed to produce records as required under clause 10 (b) of Ontario Regulation 601.

There was an agreed statement of facts filed as to the allegations.

It was the position of the Ministry that the Tribunal should order the Director to proceed with the revocations.

It was the position of the Applicant that permanent revocation was not merited under the circumstances.

EVIDENCE:

Counsel for the Respondent reviewed the agreed statement of facts. The Ministry as represented by a Director became involved in the matter on the basis of anonymous information to the effect that inspections were not being carried on properly within the Applicant premise. Mr. Douglas Roy Durham is the Ministry's inspector for the area involved and in that capacity looked into the information imparted to the Ministry and collected information for the Director's review. Mr. Durham was called to testify as to his findings.

The premises are operated by the Applicant, Mr. Campbell and he is the sole licenced mechanic doing the inspections. Seven vehicles, which had been purportedly inspected by the Applicants, were traced and the results of those inspections were produced in the form of completed Safety Standards Certificates. These Certificates represent that the vehicle has been inspected by a mechanic duly licensed to carry out safety inspection on behalf of the Ministry in accordance with issued guidelines and is roadworthy. Six of the seven vehicles had serious defects, which should have prevented them from receiving their Certificates.

Photographs were produced as part of the agreed facts to corroborate the documentary evidence.

The Applicant given these revelations admitted that;

“The defects on the six vehicles described above were obvious and not difficult to see. The officers did not have the benefit of a hoist in conducting their investigations yet they were able to discover the defects. The defects were not such that they could have been missed through inadvertence.”

“The presence of the defects means either that Mr. Campbell had certified the vehicles without inspecting the vehicles or that he had inspected the vehicles but not applied the regulated standards.”

“Safety Standards Certificates have two sides. On the back of the certificate the inspecting mechanic is required to note defects that needed to be repaired before the vehicle was certified or to note that there were no such defects. This information has not been filled in on any of the six safety standards certificates. Also on the back of the certificate the mechanic is required to fill in the work order number that corresponds to the safety standards certificate. This information has not been filled in on any of the six safety standards certificates.”

“ On February 10, 2004, Mr. Campbell was requested to produce the work orders that correspond to the six safety standards certificates ...Section 10(b) of the regulation 601 requires that licensees keep such records for a period of one year after an inspection. He did not produce the work orders he was given one week to produce the work orders but did not do so.”

Charges were laid against Mr. Campbell for his failure to produce the requested work orders. On July 8, 2004 he pleaded guilty and was convicted four times under regulation 601, section 10(b) in relation to safety standards certificates.”
As to the grounds of not producing documents as required

THE LAW:

Highway Traffic Act

Section 89

The Minister shall appoint an officer of the Ministry to be the Director of Vehicle Inspections Standards,

Section 89(3)

A safety Standards Certificate in respect of a motor vehicle or a vehicle inspection sticker affixed to a vehicle unless,

- (a) the vehicle has been inspected by a motor vehicle inspection mechanic in the motor vehicle inspection station and the vehicle complies with the inspection requirements and performance standards prescribed by the regulations.
- (b) the safety standards certificate or a vehicle inspection record
 - (i) is made by the motor vehicle inspection mechanic who inspected the vehicle, and
 - (ii) is countersigned by the licensee or a person authorized in writing by the licensee

Section 95(1)

Where the Director proposes,

- (a) to revoke a license or registration the Director shall serve notice of his or her proposal, together with written reasons therefore,
- (e) in the case of a proposal to revoke or to refuse to renew a license, upon the licensee,
- (g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed
- (2) A notice under subsection 1 shall inform the person who is the Applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the Tribunal if the person mails or delivers within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the Tribunal requiring a hearing by the tribunal and the person may so require the hearing.

Section 91(8)

The Director may revoke or refuse to renew a motor vehicle inspection station license where,

- (b) any inspection authorized by the license is incompetently performed,
- (e) the licensee does not comply with this Act or the regulations

Section 93

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

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

APPLICATION OF LAW

The photographs submitted into evidence to corroborate the agreed statement of facts clearly showed the breaches of the regulations by the Applicant. The vehicles that were issued their safety certificates by the Applicants were manifestly not in the condition required by the regulations. The only conclusions available to the Tribunal on the evidence is that either the required inspections were not in fact carried out or that defects were disregarded prior to the issuance of the safety certificate.

The most damning piece of evidence was the fact that forms pre-signed by the Applicant were left for employees to fill out and issue. This could only mean that vehicles were certified as safe without the necessary review by a licensed mechanic. This in the view of the Tribunal was evidence of the Applicant treating both the regulations and his responsibility as a safety inspector with disdain.

The Legislature has seen fit to ensure that vehicles using the highways are in a safe condition. To that end there have been standards set forth in regulations and persons and facilities licensed to certify that those standards have been met through the issuance of a "vehicle inspection sticker". Neither Brian's Auto Centre and Service as the licensed motor vehicle inspection station nor Brent Campbell as the licensed motor vehicle inspection mechanic lived up to the requirements under the Act. The Director was perfectly within his responsibility under the Act to put the Applicants on notice that their licenses were to be revoked.

Counsel for the Applicants submitted on behalf of his absent client that while the evidence was virtually on all fours with the conclusions drawn by the Director from Mr. Durham's investigation a revocation of the licenses for both the premises and for Mr. Campbell would render it difficult to carry on business. He stated that the more reasonable resolution would be for the revocation of Mr. Campbell's motor vehicle inspection mechanic's license while allowing the motor vehicle inspection station license of Brian's Auto Center to remain in force. This would require the hiring of a licensed motor vehicle inspection mechanic to allow the business to continue. This seemed a most inappropriate resolution from a consumer protection viewpoint as it would still result in Mr. Campbell's continued defacto involvement in the issuance of "vehicle inspection stickers", and as consumer protection is the guiding force behind the legislation the submission must be respectfully viewed as bricks without straw.

Order:

The Tribunal by the powers vested in it directs the Director to carry out the revocations of the Applicants' licences as a Motor Vehicle Inspection Station and a Motor Vehicle Inspection Mechanic respectively contained in the Notice of September 13, 2004.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair

RELEASED: January 25, 2005
FILE NAME: 2641.gar.campbell.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

SHEILA COLE o/a S & R TRUCK and TRAILER REPAIR and RANDLE COLE

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. 41-40963 ISSUED TO SHEILA COLE o/a S &
R TRUCK and TRAILER REPAIR, AND TO REVOKE
RANDLE COLE'S REGISTRATION AS A MOTOR VEHICLE
INSPECTION MECHANIC WHOSE APPLICATION BEARS
TRADE CERTIFICATE No. 999a-049351.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: DOUGLAS CALDWELL, Counsel for the Applicants

MURRAY FORBES, Counsel, representing the Director of
Vehicle Inspection Standards

DATES OF November 19, 2004
PRE-HEARING: and December 6, 2004

Teleconference

ORDER

Following attendances on November 19, 2004 at a pre-hearing, which was adjourned and continued on December 6, 2004, before this Tribunal of Douglas Caldwell, Counsel for the "Applicant" and Murray Forbes, 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 GKA Reporting Services, 117 Wellington Street, Suite 303, Kingston, Ontario; at 9:30 a.m. on March 21, 2005, and continuing if necessary at 9:30 a.m. on March 22, 2005.

1. The Parties to the hearing will be:
 - Sheila Cole, o/a S & R Truck and Trailer Repair;
 - The Director of Vehicle Inspection Standards
2. At the prehearing of November 19, 2004, Counsel for the Applicants advised that he had been instructed by his client, Randle Cole, to abandon the appeal on his behalf and that he (Randle Cole) was no longer registered on the licence and that only the matter of Sheila Cole o/a S & R Truck and Trailer Repair would be appealed.
3. The Respondent advised that he intended to present the testimony and evidence of Robert Stickman, MTO Inspector. The witness will testify regarding vehicle safety standards, vehicle inspections, and facility inspections that led to convictions or cautions against the Applicant, including incidents up to 2004. The Respondent's witness will rely upon notes, Field Inspection Reports, and MTO records.
4. The Applicant's Counsel indicated he planned to call Sheila Cole and one or two employees of S & R Truck and Trailer Repair but did not have copies of all incident information which were referred to by the Respondent and therefore could not confirm to the extent of the evidence or witnesses he would present.
5. The prehearing was then adjourned, on consent by the parties, to 3:00 p.m, December 6, 2004, to enable the Respondent to courier, for arrival by or before November 26, 2004, to the Applicant's Counsel a complete copy of the documents which the Respondent would be relying upon. The parties agreed they did not require an adjournment order in the interim.
6. During the prehearing of December 6, 2004, the Applicant's Counsel confirmed he had received the agreed upon materials from the Respondent's Counsel. He reconfirmed that he intended to call Sheila Cole and identified Robert Spencer, a mechanic and employee of S & R Truck and Trailer Repair, as well as possibly Randle Cole and perhaps one other employee.
7. The Applicant's position is that whatever has happened in the past, the pattern has been broken and the Applicant intended to focus on materials to show efforts to overcome the problem and operate in an appropriate manner to meet the requirements for an inspection facility under the Act.
8. The Respondent's position is that the pattern is not broken and the body of evidence is sufficient for the revocation. He reconfirmed the appearance of Robert Stickman as a witness to be called as well as possibly one other officer.

9. The parties recorded that there was no resolution of the issues between them.
10. All submissions and documents shall be filed by the parties on or before Friday, March 4, 2005.

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

Simon Dann, Presiding Member

Released: December 14, 2004

File: 2644.gar.Cole.prehrg

PRE-HEARING

BRENT J. CAMPBELL dba BRIAN'S AUTO CENTRE AND SALES
BRENT J. CAMPBELL

APPEALS FROM THE PROPOSAL OF THE DIRECTOR OF
THE VEHICLE INSPECTION STANDARDS DATED
SEPTEMBER 13, 2004, TO REVOKE THE MOTOR
VEHICLE INSPECTION STATION LICENCE OF BRENT J.
CAMPBELL dba BRIAN'S AUTO CENTRE AND SALES
AND TO REVOKE THE MOTOR VEHICLE INSPECTION
MECHANIC LICENCE OF BRENT J. CAMPBELL

TRIBUNAL: IRVIN H. SHERMAN Q.C., Vice Chair

APPEARANCES: BRENT THOMAS HURST, Counsel for Brent J. Campbell
dba Brian's Auto Centre and Sales and
BRENT J. CAMPBELL, Applicant

PATRICK MOORE, Counsel for the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: November 24, 2004 *by teleconference*

ORDER

Following attendances at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") on November 24, 2004, of Brent Thomas Hurst, Counsel for Brent J. Campbell dba Brian's Auto Centre and Sales and Brent J. Campbell, and Patrick Moore, Counsel for the Director of Vehicle Inspection Standards.

The Tribunal makes the following order:

- 1) The Parties hereto by their Counsel shall jointly prepare an agreed statement of facts on or before December 22, 2004.

- 2) The sole issue to be determined is the appropriateness of the penalty imposed by the Director of Vehicle Inspection Standards.
- 3) Counsel for the Applicants shall provide Counsel for the Director of Vehicle Inspection Standards with a list of witnesses on or before December 22, 2004.
- 4) The hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Tuesday, the 4th day of January, 2005, and will continue, if necessary, on Wednesday, the 5th day of January, 2005, Thursday, the 6th day of January, 2005, and Friday, the 7th day of January, 2005.
- 5) It is expected that the hearing of the appeal shall take one day.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C., Vice Chair

RELEASED: November 29, 2005
FILE NAME: 2641.gar.campbell.prehrg.order



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Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2004 - 2005

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2260-MVIA-DUDI & EXHP-Due Diligence and Exceptional Hardship

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 SUBSECTION 55.1(3) OF THE ACT

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

TRIBUNAL: NIVES MONTANO
Presiding Member

APPEARANCES: APPLICANT, unrepresented

LYNDA DUNBAR, Agent
Representative for the Registrar of Motor Vehicles
(the "Respondent")

DATE
OF HEARING: April 2, 2004

DECISION
RELEASED: April 7, 2004

by teleconference

REASONS FOR DECISION

A hearing was held on April 2, 2004, 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 (the "HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to subsection 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

This is an appeal under Section 50.2 of the HTA.

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: the Applicant
Motor Vehicle: 2000 Saturn SC1 (the "vehicle")
Date of Appeal: March 17, 2004

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

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

This matter came before the Tribunal on April 2, 2004 and proceeded as an electronic hearing.

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

The Respondent submitted a set of original certified documents, copies of which had previously been filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

To whom this may concern,

This letter is to briefly summarize my position in regards to the impoundment of my vehicle. Also to inform you that the loss of my vehicle has indeed resulted in exceptional hardship and that I exercised due diligence to determine that the driver's licence was not suspended. Friday evening myself two friends from out of town and the driver stopped at a local pub. The only person who consumed no alcohol was ____ (the suspended driver.) I was parked in a no over night parking lot so ____ was moving my to his friends house across the lane way about thirty to forty feet. The only reason why we were pulled over was because the police were searching for a missing girl. We were not doing anything wrong just trying to avoid conflict in regards to having a g2 licenced person drive a vehicle while alcohol is in my system or obstructing the by-law and having my car towed I also can not afford that! This is when I learned that ____ did not have a valid drivers licence. I have been dating Mr. ____ to quit some time, through out our relationship he has been employed by Barrie Property Services ____ operates heavy machinery and plows snow for them. I have even witnessed him operating a plow machine. I have also driven him to the M.T.O. because he said that he had to pay some fines to keep his licence in good standing. Never once did he inform me his licence was not valid. When I spoke to his employer it was news to him as well. Enclosed is a letter from Barrie property services confirming his employment as a heavy equipment operator. I am also suffering because I have recently started my own business and I am unable to work with out my own vehicle. I have already lost clients and income due to the loss of my vehicle. I live in Victoria Harbour, my office is in Penetanguishene and my clients are in Orillia. I am unable to rent a car because I do not have a credit car do not have enough funds or a full G licence. I ca not take a taxi for I do not have the funds and I do not know any one I can receive a ride from. I have exercised all possible options. Because I can not work and spending what money I did have on taxi's I am unable to pay rent and my car payment this month. There is absolutely no way I will be able to come up the any money to get my car out of impoundment. I am now losing everything my business my home, car and credit. For my father co-signed my vehicle for me. Because of ____'s neglect to inform me of his driving record. On top of all things my licence expires soon and I need my vehicle before I can confirm my appointment. The Monday following the incident I learnt that I am pregnant and have no idea how I am going to cope with the situation with out my vehicle. I promise you that you will never hear form me again. I was taking all possible precautions due to the fact I can not drink and operate a vehicle and I could not leave my car there I was trying to avoid all possible mishaps. The individual I was with is twenty eight years of age and operates heavy machinery for a living therefor I understood that he was more then a fully licenced driver. I have taken all avenues to resolve this with my local police who were more than very cooperative with myself and the accused as it seemed there may have been discrepancies involving the suspension of his licence.

You can contact _____ at Midland O.P.P. Major Crime Unit at _____. I thank you for your time and help! I hope that you realize that none of this was intentional and we were only trying to avoid any conflict.

Sincerely,

"Applicant's signature"

(sic)

Re. Employee _____ Driving Disqualified

To whom this May Concern,

The Applicant has brought this incident to my attention regarding my employee _____, explaining that she needs confirmation that _____ is working for me operating heavy machinery and plowing snow at Spring Water Provincial Park. I _____ owner operator of Barrie Property Services confirm that all of this is all true. I also was under the impression that _____ had his full licence. Since this has been brought to my attention I have requested a driver's abstract from _____ for him to continue his position at Barrie Property Services. I find this situation to be very unfortunate for the Applicant and strongly believe that _____ should be held responsible for his actions and hope that this situation can be easily resolved. If you have further more questions you can reach me at (705) 331-4854 or (705) 322-4951.

"Owner/Operator"

Barrie Property Services

The following is a summary of the Applicant's affirmed testimony. The Applicant is a single young woman currently residing in Victoria Harbour with her boyfriend, who was the driver at the time the vehicle was impounded. The driver moved in with the Applicant in December 2003. In her testimony, the Applicant confirmed that her boyfriend is not providing any household financial assistance. Due to the impoundment, he will soon be moving out of her home.

Last July, 2003, the Applicant registered a sales and marketing company in partnership with her sister's boyfriend. Since that time, the partnership has dissolved. The Applicant's father is assisting the Applicant with the start-up of the business. She is currently putting together a business plan, a client list as well as applying for business loans. The Applicant will be running the business from a spare room in her father's home, which is located in Penetanguishene. She currently has no clients and therefore has not entered into any contractual obligations.

As the Applicant is trying to define her business, she supports herself by modelling on a contract basis. Her last modelling contract was in February and she has another contract scheduled in Montreal before Easter. No modelling contracts have been lost due to the impoundment. She has also attempted to supplement her income by trying to look for other jobs near her home, but has been unsuccessful. She is not receiving any monies from social assistance.

To summarize the events surrounding the impoundment, as outlined in the Owner's Position, the Applicant testified that she, her boyfriend and two friends drove in her vehicle to attend a local pub.

The Applicant's boyfriend allegedly did not consume any alcohol. In an effort to avoid being towed from a parking lot that does not permit overnight parking, the Applicant's boyfriend attempted to move the Applicant's vehicle to a friend's driveway approximately 40 feet away from where the vehicle was parked. He was stopped on the road by the police who were searching for a missing girl. Upon further inquiry, the police discovered that he was a suspended driver and the vehicle was then towed and impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified or Prohibited under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 18, 2005.

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 subsections 50.2(3)(c) and (d).

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

Appeal – Exceptional Hardship

The first issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the ground of “exceptional hardship” under subsection 50.2 (3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for her appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant is assisting various family members in their time of need as there are a few issues, which they are all trying to deal with:

1. The Applicant’s mother is currently ill and resides alone in Midland. She does not drive nor does she have a vehicle;
2. The Applicant’s sister, who also resides in Midland, is 18 years old and had a child last August. Her boyfriend (the Applicant’s former business partner as mentioned above) no longer lives with her. She also has no vehicle.
3. The Applicant’s father’s girlfriend was diagnosed with a brain tumour and was operated on in December 2003. Her mental capacity has been reduced to that of a child. The Applicant helps her father around the house as he cares for his ailing girlfriend. As mentioned earlier, he has a vehicle and, on occasion, provides the Applicant with transportation.
4. Two days after the vehicle was impounded, the Applicant discovered that she was pregnant.

The Applicant has a registered company. Although she is still defining it, it is currently on hold and not in operation. Therefore, there is no risk of an immediate, significant and lasting loss. The business one day will move forward.

Victoria Harbour is 911 accessible. Police, fire department and ambulance services are available.

The Applicant testified that she has relied on the kindness of her father and friends to provide her with transportation. She has also borrowed her friend’s vehicle on occasion. Until recently, she has taken taxis to various business and doctor’s appointments. The Applicant advised the Tribunal that there is no public transportation from Victoria Harbour to Midland or Penetanguishene.

Since there is an alternative to the impounded motor vehicle, the Tribunal cannot consider clauses 22(2) (b) financial, (c) loss of employment or (d) loss of education.

The Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the HTA:

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.

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

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due diligence, in attempting to determine that her boyfriend's driver's licence, the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, which is required under this section of the Act.

The evidence before the Tribunal was that the Applicant "never asked to see his driver's licence". She assumed that her boyfriend had a valid driver's licence because (1) he had used her vehicle in the past; and (2) he is employed at a company wherein his responsibilities include operating heavy machinery as well as plowing snow at a provincial park. His employer submitted a letter on behalf of the Applicant advising that he was also unaware of the driver's suspended licence.

The Applicant did not take any measures to ensure that her boyfriend had a valid driver's licence. There was no evidence heard that would confirm that the Applicant's actions were anything but passive in nature.

Due diligence requires that the Applicant take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number, 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.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under subsection 50.2(5) of the HTA, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: April 7, 2004

FILE NAME: 2260.mvia.dudi & exhp.doc

2262-MVIA-DUDI-Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: April 2, 2004

DECISION RELEASED: April 13, 2004 Toronto

REASONS FOR DECISION

A hearing was held on April 2, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle 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:	Applicant
Motor Vehicle:	2002, CHEV CAC, (the "vehicle")
Date of Appeal:	March 18, 2004

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 18, 2004 and proceeded as an oral hearing.

Prior to the commencement of the hearing, the Presiding Member was advised by the Tribunal's staff that the Applicant had not received the Notice of Hearing. As well, the Respondent advised the Tribunal that the Applicant had not retrieved his copy of the Ministry's submissions from the courier company. Upon further investigation, and due to a matrimonial conflict, the Applicant's wife had not advised the Applicant of the foregoing.

The Applicant, upon his arrival, had an opportunity to review all the documents.

Once the hearing commenced, the Tribunal inquired whether he had sufficient time or had any questions regarding the package that was provided to him. He indicated that he had reviewed and understood the documents and did not have any questions.

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

The Respondent submitted a set of original certified documents, copies of which had previously been filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I am appealing this desition because I lent my car to a friend and I thought that his licence was ok besides, he told everything was ok, that he had something to do and I believed him. However, I need my car, I can't afford to pay that great amount of money for impoundment, besides, I still have to pay for the car and the insurance, and I believe I don't deserve to be punished in this way. My friend is coming to testify on this matter, wich I wish it could be over soon, please understand this is very stressful for me and my family. (sic)

The following is a summary of the Applicant's sworn testimony. The driver at the time the vehicle was impounded was present at today's hearing as a witness on behalf of the Applicant. This witness was excluded during the testimony of the Applicant.

The Applicant has been employed with Westwood Garage Doors since July 2003. He installs garage doors on contract.

The Applicant testified that he received a call from his colleague, the driver at the time the vehicle was impounded, on Sunday evening to ask if he could borrow the Applicant's vehicle the next day because it "was very important". The Applicant agreed and drove his vehicle to his colleague's home the next morning. The Applicant received a ride to work from another co-worker.

On his way home that evening, the Applicant stopped at his colleague's home to pick up his vehicle and was informed that it had been impounded and his colleague was a suspended driver and did not have a valid driver's licence.

In the witness's sworn testimony, he advised the Tribunal that he works with the Applicant for the same employer. He indicated that he called the Applicant and advised him that he needed to accompany his cousin to court in Orangeville on Monday. The person that would have accompanied his cousin was unavailable and if his cousin did not appear in court, a bench warrant would have been issued.

The circumstance surrounding the impoundment was due to expired licence plate stickers which the Applicant admitted was his fault since he did not drive his vehicle often because he carpools to work.

After hearing evidence from both parties, the Ministry as well as the Tribunal asked if the Applicant wished to appeal on any other grounds. The Applicant declined.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows: The circumstances surrounding the impoundment resulted (Exhibit 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 14, 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 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:

The issue to be considered in this appeal is whether the Applicant exercised due diligence on behalf of the Applicant, in attempting to determine that his colleague, the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed which is required under this section of the Act.

The evidence before the Tribunal was that the Applicant "did not ask to see his (the impounded driver's) licence". He assumed that his colleague had a valid driver's licence because the Applicant had seen his colleague driving his own vehicle in the past.

The Applicant did not take any measures to ensure that his colleague had a valid driver's

licence. There was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

Due diligence requires that the Applicant take further steps to verify the validity of the driver's licence. This can be accomplished by contacting 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.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 13, 2004

FILE NAME:.2262.mvia.DUDI

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2266-MVIA-EXHP-Exceptional Hardship

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, Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 13, 2004

DECISION RELEASED: April 15, 2004 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 13, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the Applicant
Motor Vehicle:	1999 Pontiac Sunfire (the “vehicle”)
Date of Appeal:	March 24, 2004

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 13, 2004 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:

The Reason why I'm appealing the impound of my vehicle is because I need the vehicle for work, it is a necessity. Without my vehicle, I will lose my job as there is no other transportation available.

Another reason, which is very important to getting my vehicle back are for health reasons. On a regular basis I take my boyfriends dad to his doctors appointments when his mom is working. He has heart problems and suffers from Black Out Spells. He has no other transportation during the time his mom is at work and doesnt drive due to his condition.

Overall the vehicle is a necessity, it will result in the loss of my job and will be a health risk for my boyfriends father. And due to my car payments and insurance cost, I can't afford any other means of transportation (ie cab)

(sic)

During the Applicant's testimony it was found that she worked for Wal Mart some 45-minute walk from her home. The Applicant works as a return to shelf clerk and as a result starts work at 7:00 a.m. Bus service in her area does not start until 7:30 a.m.

The Applicant nets \$500 every two weeks and has car payments and other bills to pay, which leave her without any significant disposable income. Her tight financial position makes the rental of a car or taking taxis an unaffordable option.

The Applicant testified that her boyfriend, the driver, thought that since he had appealed an earlier conviction that he was still free to drive. As a result of this charge he has employed a new lawyer and according to the Applicant his parents paid \$5000 to this new lawyer as a retainer for his defence. As a former truck driver he feels he will not get a job in this field without a clean abstract.

The Applicant testified that the boyfriend's parents were not wealthy but were comfortable. Apparently his mother runs her own accounting business.

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 the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
1. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
2. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 23, 2004.

During the cross examination it came to light that the Applicant had not approached her employer for a later starting time in order to make public transit available to her to get to work, nor had she approached her boyfriend's family to help her rent a car. This would seem a very real possibility since she takes the boyfriend's father to medical appointments according to her submission. The Representative for the Registrar of Motor Vehicles also believed temporary financial help should be available from her boyfriend's parents, as they had just paid out a \$5000 retainer for their son's lawyer to appeal his conviction. The Registrar's Representative also suggested that the Applicant could take a taxi in the morning only and public transit after work.

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) on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship and has caused her difficulty in getting to work on time and continuing to provide transportation for her boyfriend's father's medical appointments. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear and specific 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 vehicle is available. Furthermore, section 22(4) of the Regulation requires the Applicant to demonstrate that every option has been explored including an alternative vehicle and making arrangements to do without the impounded vehicle during the impoundment period.

In this case the Applicant failed to demonstrate to the Tribunal that all options to her impounded vehicle had been explored. More specifically the Applicant had failed to ask her employer for a temporary and minor change in her start time so that she could bus to work. Additionally there was evidence given that her boyfriend's parents were in a financial position to rent a car on her behalf.

The Tribunal is in sympathy with the Applicant's position in this matter but no evidence, specific to the Act, was provided to support her Appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Charles Sandiford, Member

RELEASED: April 15, 2004

FILE NAME: 2266.mvia.Exhp.doc



2270-MVIA-NUSP-EXHP Not under suspension/exceptional hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: KENNETH KOPROWSKI
Presiding member

APPEARANCES: KIM BEINTEMA, Representative for the Registrar of
Motor Vehicles, by written submissions only

Applicant, by written submissions only

DATE OF HEARING: April 16, 2004

DECISION RELEASED: April 16, 2004 Written

REASONS FOR DECISION

A written hearing was held on April 16, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the "Applicant"
Motor Vehicle:	2002 Brown Chevy Impala (the "vehicle")
Date of Appeal:	March 23, 2004

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 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 16, 2004 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 were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUES:

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:

On the evening of Feb. 28, Friday night, I gave the driver permission
To drive my granddaughter across town.
He failed to put his driver licence in his pocket and was stopped in a
Ride check. He was told he was driving while his licence was under
Licence suspension and the Police impounded my car.
The driver went down to the Police office Sat. morning with his licence.
He has had his licence since September 2003.
HE DID NOT KNOW HE WAS STILL UNDER SUSPENSION
NOR DID I.
He has been down to the police station countless times, they have his
Licence and his papers and still no answer. Meanwhile, I am without my
Car.

In addition, the Applicant forwarded, to this Tribunal, a letter by facsimile transmission on April 2, 2004. In that letter, the Applicant states the following:

- (1) I am a car salesman, my car is a sales tool.
- (2) I use my car to transport customers.
- (3) I am wearing a new hip and my knees are shot.
- (4) It is a hardship getting in and out of an astro van.
- (5) The astro van has 216000 kilometers on it and is not presentable to customers
- (6) I had no knowledge of any suspension.
- (7) What law have I broken?

This letter was filed as Exhibit #3.

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 the driver;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver, at the time of impoundment, had been convicted of the offence of failure or refusal to provide a breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

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

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

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized Snow Vehicles Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;

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

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:

This Tribunal will deal with the Applicant's first ground of appeal; namely, that the driver's licence of the person who had been driving the Applicant's vehicle on the date in question was not under suspension. The Applicant states that the date was February 28, 2004. However, the Notice of Impoundment, filed with the Registrar's Materials and Submissions, Exhibit #4, indicates that the date is February 27, 2004. This Tribunal will, therefore, treat February 27, 2004, as the date of impoundment.

Attached to the materials submitted by the Registrar, as Exhibit #4 is a certified copy of the driving record, as provided by the Ministry of Transportation, of the person who had been driving the Applicant's vehicle. The record clearly states that, on September 11, 2001, that person's licence had been suspended for life as a result of a conviction under the *Criminal Code of Canada* for refusal or failure to provide a breath or blood sample. Therefore, on February 27, 2004, the date of the impoundment, the driver's licence of that driver would still be under suspension.

The Applicant, in his Notice of Appeal, states that the driver did not know he was still under suspension, nor did the Applicant. However, knowledge that the driver's licence was suspended is not an ingredient of section 50.2 (3) (b), referred to earlier in these reasons.

It is significant that the critical aspect of that provision is that the driver's licence has been suspended. It does not state that it is a ground of appeal if the driver knows that his/her licence is suspended.

In this case, the evidence in Exhibit #4 demonstrates that the licence of the person driving the Applicant's vehicle was, without question, suspended.

Therefore, this first ground of appeal of the Applicant must fail.

The second ground of appeal of the Applicant is that the loss of his vehicle will result in exceptional hardship.

Pursuant to section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, referred to earlier in these Reasons, this Tribunal is compelled to consider whether no alternative to the impounded vehicle is available.

Furthermore, section 22(4) of the same Regulation requires that, to show that no alternative is available, under section 22(1), the owner, who is the Applicant in this appeal, 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 another vehicle

to replace the impounded vehicle.

It is noteworthy that the Applicant himself states, in Exhibit #3, that he has the use of an Astro van. However, since it has 216,000 kilometers on it, it is not presentable to customers. Presumably, he is stating that, although he has an alternative vehicle, he would prefer not to use it in his business.

Nevertheless, it seems abundantly clear, on this evidence, that the Applicant does, in fact, have an alternative vehicle.

Therefore, this Tribunal must conclude, on the evidence before it, that the Applicant has not demonstrated that no alternative to the impounded vehicle was available, nor that every reasonable option has been considered.

Since this Tribunal has found, on the evidence, that the Applicant has not satisfied the Tribunal that there was no alternative to the impounded vehicle, it is unnecessary to consider the provisions of section 22(2) and of section 22(3), referred to earlier in these Reasons. However, even if this Tribunal were to consider those provisions, there was no evidence presented to it which would permit this Tribunal to conclude that the Applicant had proved any of the matters outlined in those subsections.

Therefore, this Tribunal must conclude that the Applicant has not satisfied his burden of proof on this second ground of appeal either.

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, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski, Presiding Member

RELEASED: April 16, 2004

FILE NAME: 2270.mvia.nusp.exhp



ALCO CONSTRUCTION LTD.

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: GURDEV S. GILL, Member

APPEARANCES: CARLO FABRIZI, Agent for Applicant

KIM BEINTEMA, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 5, 2004

DECISION RELEASED: April 14, 2004 Toronto

REASONS FOR DECISION

A hearing was held on April 5, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	Alco Construction Ltd. (the “Applicant”)
Motor Vehicle:	1987 Western Star CNV (the “vehicle”)
Date of Appeal:	March 19, 2004

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 5, 2004 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

ALCO Construction position on the ground of appeal would be that we exercised due diligence in attempting to determine that the drivers license of the driver of the vehicle at the time he was pulled over his drivers license was not under suspension.

(sic)

On behalf of Alco Construction Ltd., Mr. Carlo Fabrizi and Ms. Jennifer Fabrizi appeared before the Tribunal, but only Ms. Fabrizi gave testimony. In her sworn testimony, Ms. Fabrizi stated that she was responsible for the hiring at Alco Construction Ltd. When the person driving the vehicle at the time of the impoundment was hired, she was away on vacation and he was hired by the owner's wife, who did not check his driving record. She also stated that Alco Construction Ltd. is a very small company run by the family and has only two other vehicles. The impoundment of this vehicle will cause exceptional hardship. She also stated that the company is using only two vehicles and it uses the third vehicle as a spare. She also stated that the company does not have a standard procedure to verify the driving records of their drivers. The MTO representative later explained to them the methods of how they can verify the driving records, such as through Internet, telephone, etc.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
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 Fail or Refuse to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 17, 2004.

Ms. Kim Beintema, the MTO representative, stated that the Registrar's decision of impoundment was not appealed on the grounds of exceptional hardship, so that ground should not be considered by the Tribunal.

The person who hired the person driving the vehicle at the time of the impoundment did not check verify his driver's record or licence and as per Ms. Jennifer Fabrizi, there is no piece of information on this driver's file. This shows that due diligence was not exercised by the person who hired the person driving the vehicle at the time of the impoundment, so the vehicle should remain impounded.

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:

Due Diligence:

The Tribunal finds as a fact the Applicant did not verify the validity of the driver's licence by independent means. Though Ms. Jennifer Fabrizi, who is responsible for hiring, was on

vacation, the person who replaced her should know the correct procedure to hire new drivers. Ms. Fabrizi, in her sworn testimony, stated that there is no set method to verify the driver's record at the company, which clearly shows the due diligence was not exercised in hiring the new drivers.

Due diligence requires that an applicant take independent action 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 by 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 by accessing the MTO website at www.mto.gov.on.ca.

As a result, the Tribunal finds that the Applicant did not exercise due diligence.

Exceptional Hardship:

Though Ms. Jennifer Fabrizi raised the issue of exceptional hardship, the Tribunal was not in a position to hear the matter because the decision of the Registrar was not appealed on the grounds of exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Gurdev S. Gill, Member

RELEASED: April 14, 2004

FILE NAME: 2274.mvia.AlcoConstruction.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2276-MVIA-DUDI/EXHP
Due Diligence and Exceptional Hardship

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: VICTOR H. BRANEY
Presiding Member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: April 8, 2004 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 8, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle 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:	Applicant
Motor Vehicle:	2000 Dodge Ram 2500 (the "vehicle")
Date of Appeal:	March 22, 2004

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

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

This matter came before this Tribunal on April 8, 2004 and proceeded as a teleconference hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

To Appeal Tribunal.

The truck was a company truck. I was told I could drive on Mar 9/2004 by clerk at M.T.O. when at said renewal. I have my driver as witness. I was pulled over on (9th March 1st time behind I was behind wheel in a year) told I was told suspension was to 19/of Mar/2004) after 1 year of no driving this has been a terrible mistake. I had completed all programs paid fines and now have my licence. Along with my-self, my employees have not been able to work. This is a heavy-duty truck and a major price of equipment to all of on us. Anything you could do to help would be greatly appreciated
Thank you. (sic)

The Applicant confirmed his appeal for the impoundment on the basis that he exercised due diligence and that the loss will result in exceptional hardship.

The Applicant stated that he had been charged with driving over .80 mgs and on March 19, 2003, he was convicted on this charge. His licence was suspended for one year. Since the suspension he has been conducting business as a roofer using the now impounded vehicle. During the suspension period he has been having one of his employees drive him to the job sites.

On March 2, 2004, he and his driver were in the area of the M.T.O. licence office located on Bailey Ave, Pickering. He attended this office to pay the reinstatement fee of \$100.00 and at that time the clerk advised him that he would be able to drive on March 9, 2004.

The Applicant stated that during the suspension period the police had stopped his truck on two occasions and each time he was the passenger and had a driver for the truck.

Because of the nature of his work he requires the truck to conduct his business. The impoundment will expire on April 23, 2004. He had to rent a vehicle after the impoundment to complete his contracts, but now he has no money to rent a truck.

In closing the Applicant stated that the impaired charge was a stupid mistake and since his conviction he would not place himself or his business in jeopardy.

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 the Applicant;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of drinking and driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 19, 2004.

Ms. Adelaide Pinder, hearing officer for the Registrar of Motor Vehicles cross-examined the Applicant. The Applicant stated that he did not obtain the name of the clerk at the M.T.O. office that had told him that he would be able to drive on March 9, 2004. On March 9, 2004, the Applicant was stopped by police and charged with driving the vehicle that is currently impounded while his licence was under suspension. Ms. Pinder advised the Applicant that the M.T.O. would have issued him a temporary licence on March 11, 2004, which is seven days prior to the reinstatement date of March 19, 2004.

The Applicant described his business as a roofing company and he is the sole owner and has had the business for the past seven years. He works out of his home and he has six employees. The business is now primarily in the Durham Region doing commercial and residential roofing. He estimates an average of three houses a week at this time of year for net income of four to six thousand dollars. Since the truck has been impounded he has completed four jobs. He has had to rely on friends in the business and has sub-contracted out his work. One of his employees has a mini van, but it is not appropriate for this kind of business. The Applicant stated his employees are still able to get work. The loss of the vehicle will not be lasting and after it is released he feels it will take to June 2004 to be able to get his business on an even keel.

In closing, Ms. Pinder stated that the owner of the impounded vehicle was the suspended driver. If the Applicant had been told that he could drive on March 9, 2004 then notice would have been given to him prior to March 9, 2004. The Applicant did not practice due diligence.

The Applicant had appealed on the basis of exceptional hardship, but he has had the opportunity to continue to work. He had rented a vehicle for his business, but he discontinued renting because of the cost. His employees are working and his losses are not lasting. The Applicant did not demonstrate 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 sections 50.2(3)(c) and (d).

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [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:

DUE DILIGENCE

Section 50.2(3)(c) of the Act requires the owner of a motor vehicle to establish that due diligence was exercised in attempting to determine that the drivers licence of a motor vehicle was not under suspension.

As to whether the vehicle owner exercised due diligence, the Tribunal finds as a fact that the Applicant did not make the proper inquiries regarding the status of his licence before driving the involved vehicle.

Furthermore, the Tribunal finds that the Applicant is not credible given his evidence that he drove his vehicle while his driver's licence was under suspension on the day the vehicle was impounded. He was driving the vehicle before the suspension was lifted. He had no temporary licence to support his appeal nor did he has any factual information to confirm his claim that the M.T.O. clerk had advised him that his licence would be valid on March 9, 2004.

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 drivers abstract at a local MTO Drivers 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.

The Tribunal finds that the Applicant did not make any such inquires and was not duly diligent.

EXCEPTIONAL HARDSHIP

As to whether the loss of the vehicle will result in exceptional hardship the Tribunal finds the following facts.

- 1) The Applicant did not demonstrate that the financial and economic loss would be significant and lasting.
- 2) The Applicant did not demonstrate that no alternative to the impounded vehicle is available.

The Applicant has the burden of proving the basis for his appeal. The Applicant to establish exceptional hardship must be first established that there are no alternatives to the impounded vehicle under section 22(3)(a) and section 22(4) of Regulation 574 R.R.O. 1990 as amended by Ontario Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Victor H. Braney
Presiding Member

RELEASED: April 20, 2004

FILE NAME: 2276.mvia.dudi/exhp

2280-MVIA-EXHP

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: VICTOR H. BRANEY
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF HEARING: April 8, 2004

DECISION RELEASED: April 14, 2004

By Teleconference

REASONS FOR DECISION

An electronic hearing was held on April 8, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the Applicant
Motor Vehicle:	1990 Toyota Corolla (the "vehicle")
Date of Appeal:	March 23, 2004

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 8, 2004 and proceeded as a teleconference.

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

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

ISSUE

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I did not know my son licence was under suspended (*sic*) he never told me. If I know about no way let use the car. I really need my car to get to the doctor office & clinic. I am 77 years old and is very inconveniente (*sic*) for me to getting around.

Thank you & very much for your cooperation.

The Applicant confirmed his appeal was based on exceptional hardship. He and his wife both are in their seventies. They require the use of the Corolla to transport them to the doctor on a weekly basis and for shopping purposes. Since the vehicle has been impounded they have had to rely on using the bus, friends and neighbours. He stated that the family owns a 1985 Buick Regal, but the brakes need to be repaired and an emission test had to be done before it would be able to be used.

In closing the Applicant stated the vehicle is needed to get to the doctor.

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 the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 30, 2007.

Ms. Adelaide Pinder, Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant. He stated he was not aware until he received the Driver's driving record that his son's licence was under suspension. His daughter lives in Peterborough and they can not rely on her assistance. The vehicle is used to get to the doctor and to get groceries. The Applicant and his wife have not missed any of their doctor's appointments.

The Applicant attends once a week and his wife every second week. They have been able to get their groceries by having friends drive or using the bus and taxi. The Applicant stated the impoundment of the vehicle did not present an economic loss nor any lasting effects.

In closing Ms. Pinder stated the impounded vehicle did not create a health or safety problem. There was no evidence to indicate financial hardship. Also, there were reasonable alternatives for the Applicant and his wife to get to the doctor, by using a bus, taxi, friends and neighbors vehicles. The inconvenience of having friends and neighbors to take him and his wife to do shopping is not of issue, because there is an alternative.

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:

As to whether the loss of the vehicle will result in exceptional hardship, the Tribunal finds as a fact the following.

- 1) The Applicant and his wife have access to public transportation, taxi service and friends and neighbors to assist with their appointments and needs.
- 2) There is an emergency service in the community if the need should arise.
- 3) The Applicant has a second vehicle as an option which could be used as an alternative if repairs are made to the vehicle.

The Applicant has the burden of proving the basis for his appeal. The Applicant, to establish exceptional hardship, must first establish that there are no alternatives to the impounded vehicle under subsection 22(3) of Regulation 574 R.R.O. 1990 as amended by Ontario Regulation 632/98.

Since the Applicant has alternatives to the impounded vehicle, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under subsection 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Victor H. Braney, Presiding
Member

RELEASED: April 14, 2004

FILE NAME: 2280.mvia.exhp.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2293-MVIA-EXHP

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 J. SANDIFORD
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF HEARING: April 13, 2004

DECISION RELEASED: April 16, 2004 Toronto

REASONS FOR DECISION

A hearing was held on April 13, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the Applicant
Motor Vehicle:	1988 Ford Tempo, (the “vehicle”)
Date of Appeal:	March 30, 2004

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 13, 2004 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

My car was taken without my permission or knowledge. I would never have authorized my car to be taken by anyone for any reason. I am over 70 years old and suffer from heart trouble and arthritis and have trouble getting around without a car. My wife has suffered from cancer, diabetes, high blood pressure and meningitis and can not walk without assistance and needs continues medical care. I am living on a limited pension and cannot afford taxis and I desperately need my car to take my wife to her medical appointments. I would appreciate a speedy resolve of this problem.

The Applicant is a retired pensioner from the Toronto Stock Exchange who has a net family income of approximately \$2000. The Applicant lives in a rental apartment ½ a block south of Highway #2 in Whitby, Ontario.

The Applicant's son took his car without his permission and was the driver of the Applicant's car when he was stopped and charged with driving while impaired. The driver is currently suspended for life; in fact he has three life suspensions and now faces a new charge for the same type of offence. Since 1998 he has been convicted of twelve driving offences. Many of these charges were defended at the Applicant's expense and totalled many thousands of dollars. The Applicant could not explain how his son got the keys to his car as he kept them in his night table.

The son and driver charged is expected to start work at a Canadian Tire Store before month end and is prepared to pay the Applicant for his 'keep'.

The medical appointments for both the Applicant and his wife are of a maintenance nature and not urgent. The Applicant's medical appointments are no more frequent than 4 times monthly. The Applicant was not familiar with the local bus service schedules, nor was he aware of the transportation help he could receive from local agencies such as the Canadian Cancer Society and United Way.

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 the Applicant's son;
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 for life.

During the Respondent's examination of the Applicant it was discovered that the Applicant's 69 year old wife should have been receiving the old age security pension of \$400 plus monthly. The Applicant claimed he was unaware of this income source but was to immediately investigate. It also came to light that the Applicant came to the hearing courtesy of a friend.

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 that'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) on the basis that the impoundment of his vehicle will and has resulted in exceptional hardship and has caused him difficulty in keeping his and his wife's medical appointments. Section 22 of Regulation 632/98 is very

specific and provides the Tribunal with clear and specific 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 find 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 vehicle is available. Furthermore, section 22(4) of the Regulation requires that every option have been explored including an alternative vehicle and making arrangements to do without the impounded vehicle during the impoundment period.

In this case the Applicant failed to demonstrate to the Tribunal that all options to his impounded vehicle have been explored. More specifically the Applicant does not know the local bus schedules. He does not know the cost of renting a car. He has not contacted community service organizations that provide transit for the disabled. In addition he has previously unknown income sources that should allow him to selectively rent a car as needed for the family medical appointments.

The Tribunal is in sympathy with the Applicant's position in this matter, but no evidence specific to the Act to support his appeal was provided to the Tribunal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford, Presiding Member

RELEASED: April 16, 2004

FILE NAME: 2293.mvia.exhp.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2295-MVIA-EXHP-Exceptional Hardship

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: DONALD BENNINGER
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: April 16, 2004

DECISION RELEASED: April 22, 2004

TORONTO

REASONS FOR DECISION

A hearing was held on April 16, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the Applicant
Motor Vehicle:	1998 Toyota Camry XL (the “vehicle”)
Date of Appeal:	March 31, 2004

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, 2004 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

The reason I am filing for this appeal is because I would reach hardship. I desperately need my vehicle. I use my vehicle to take my child to the baby sitter and then proceed to work. I travel a distance from where I live to the sitter because it is affordable for me since I am a single mother. I depend on it to do my grocery and take care of child and most of all I rely on it to take me to work so I could pay bills. My daily schedule is:

5:00 am – wake up get baby ready
6:00 am – leave home and proceed to Jane & Steeles (sitter)
6:45 am – return home take transit (more affordable for me) to work
8:30-4:30 pm – work (temp to hire positions)
6:00 pm – return home get car pick up baby do shopping
8:00 pm – return home cook dinner bathe clean child
10:30 pm – child sleeps
11:30 pm – tidy house, sleep and up again for 5am

If I do not have my vehicle I would need to leave my 19mth baby at least my 5am in order to proceed with my daily schedule. Please take this into consideration. I do not want to be punished for someone else's care less behaviour.

The Applicant in her affirmed testimony stated that the impounded vehicle was in fact hers, that she had lent it to her friend to use in order to pick up a rental vehicle as he had recently been involved in an accident and could not use his own car. In her testimony, she advised the Tribunal that her friend had driven her vehicle to the plaza and entered a store to purchase some articles. While he was in the store her ex-husband, who was travelling with her friend got into the drivers seat with the keys in the ignition and was playing with a lock box when a passer by thought it looked suspicious and telephoned the police. She continued under oath to state that when the police arrived and checked the licence of her ex-husband they found his licence to be under suspension. Then the police decided to impound the subject vehicle.

The Applicant testified that she depends on her vehicle to transport her son to the baby sitters in the morning before she takes public transit to work. She uses her vehicle in the evening to pick up her son and take him home. The Applicant stated that she could use public transit but it was not convenient and it was crowded. She continued and stated she uses her vehicle to do shopping and pay bills.

On cross- examination the Applicant testified that her father and her friend have, as much as possible, picked up and dropped off her son at the baby sitters. But they both work and /or attend classes so are not always available. The Applicant agreed with the Respondent that she could take taxi to and from the baby sitters but this was too expensive. The Applicant also agreed with the Respondent that she did have others she could ask but she did not wish to impose on or bother them.

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;(Exhibit 3)
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;(Exhibit 3)
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;(Exhibit 2)
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Failure to Provide Breath or Blood Sample under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until October 29, 2004.(Exhibit 3)

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 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 issue to be considered in this appeal is the Applicant's request to appeal on the grounds of exceptional hardship, in accordance with Section 55.2(30)(d) of the HTA. Section 22 of Regulation 574 R.R.O.1990, as amended by Ontario Regulation 623/98 is very specific in that it provides the Tribunal with specific criteria the Applicant must meet to determine if, in fact, exceptional hardship will result.

In order for the Applicant's claim to be considered under section 22(2) (a) threat to health and safety, (b) financial or economic loss, and (c) loss of employment of the Regulation, the Applicant must have demonstrated that all of section 22(3) has been met, that is to say no alternative to the impounded vehicle is available. Furthermore, section 22(4) of the Regulation provides that every reasonable option has been considered regarding any alternative vehicle.

In regard to section 22(3), the Applicant testified that she had a couple of alternatives to the impounded vehicle, namely her friend and her father. If they were not available she could use public transit or taxi even though they were inconvenient and expensive. She also testified that she did not wish to bother other people.

After considering all the evidence, although sympathetic, the Tribunal finds that the Applicant has not met the onus under section 22(3)(a) of the Regulation and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

The Tribunal finds on the basis of the testimony of the Applicant that she has not sufficiently considered or inquired into other options to the impounded vehicle. The Applicant therefore does not meet the criterion of section 22(4) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

RELEASED: April 22, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2298-MVIA-DUDI-Due Diligence

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: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

APPLICANT,
unrepresented

DATE OF HEARING: April 19, 2004

DECISION RELEASED: Toronto

REASONS FOR DECISION

A hearing was held on April 19, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle 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:	Applicant
Motor Vehicle:	1991 Ford (the "vehicle")
Date of Appeal:	April 1, 2004

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 19, 2004 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 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:

This infraction has caused a major inconvenience because of my need for my work vehicle. I also cannot afford the \$1100 to retrieve the vehicle from the impound yard.

I have never had a vehicle impounded and would not allow this situation to happen again.

On March 17th (St. Patrick's Day) I was at a late night party and someone needed to go to the store. I had just met Bert (the driver of impounded vehicle) and he didn't even give me a chance to ask for a licence. I knew I wasn't going to drive because of consumed alcohol.

The driver of the vehicle was charged with a suspended licence. I have been unable to contact the driver ever since, but was able to get a phone number. March 20, 2004.

Additional evidence from the Applicant at the hearing indicated that he was an apprentice millwright and continued to work in spite of the loss of his vehicle. He stated that he was under the influence of alcohol and not fit to drive his vehicle March 17th 2004 the night of the party. The only person deemed capable of taking the Applicant's vehicle was the driver. He did not question the driver in respect to his driving record nor did he see his drivers licence. In fact he the Applicant did not believe his degree of sobriety would permit him to make an informed decision as to whether or not the driver should be allowed to take his vehicle. The Applicant had no idea what precautions he should have exercised before lending his vehicle.

EVIDENCE FOR THE REGISTRAR

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the driver;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until May 5, 2006.
5. The Respondent provided the driver's abstract that revealed a number of previous convictions and the fact that he was under suspension until May 5, 2006. Furthermore he had no current licence in his possession.
6. The Registrar made note of the fact that the Applicant had not demonstrated any evidence of diligence as required under the Act and as a result the order to confirm the impoundment should be upheld by the Tribunal.
7. It was also revealed that the Applicant currently goes to work on a Honda motor cycle which the respondent had discovered through a vehicle search.

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:

The Applicant in this case has appealed under section 50.2(3)(c) that he exercised due diligence before releasing his vehicle to the charged driver. The definition of diligence due in respect to the Act has much to do with the circumstance at the time of decision. In this case a party was in progress and all participants but the driver were drinking excessively. The Applicant did not know the driver not even his name...He did not ask to see his licence nor question him about his driving record. The Applicant admitted during his testimony that in his state of alcoholic influence he would be unable to make an informed decision as to whether or not to release his vehicle to another party.

The Applicant by his own testimony has indicated that he failed to exercise any diligence due the circumstances and as a result failed to support his Appeal under 50.2(3)(c).

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Charles Sandiford
Presiding Member

RELEASED: April 21, 2004

FILE NAME:.2298.mvia.DUDI

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2303-MVIA-EXHP-Exceptional Hardship

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 SUBSECTION 55.1(3) OF THE ACT

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

TRIBUNAL: VICTOR H. BRANEY
Presiding Member

APPEARANCES: APPLICANT, unrepresented

KIM BEINTEMA, Agent
Representative for the Registrar of Motor Vehicles
(the "Respondent")

DATE OF
HEARING: April 20, 2004

DECISION
RELEASED: April 28, 2004

Toronto

REASONS FOR DECISION

A hearing was held on April 20, 2004, 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 (the "HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to subsection 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

This is an appeal under Section 50.2 of the HTA.

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: the Applicant
Motor Vehicle: 1995 Dodge NES (the “vehicle”)
Date of Appeal: April 5, 2004

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 subsection 50.2(3)(d) of the Act.

This matter came before the Tribunal on April 20, 2004 and proceeded as an oral hearing.

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

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

ISSUE:

The Applicant’s Notice of Appeal filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I have concurrently acquired a new job that involves sales and seeing new potential clients. I was in Virginia (U.S.A.) for a seminar while all this happened. My brother drove my vehicle under a suspended licence which I had no knowledge of and under those circumstances they impounded my vehicle without myself having anything to do with the above incident. I only found out of the above events that took place while I was outside of the country upon my arrival. I for myself have had a clean and respective licence since I was sixteen. I will also be relying on this car for my financial future as I've switched occupations to better myself and my family's situation. My brother is residing with me but will be moving out in June/04 in which he will not have any access to my vehicles or house.

"Applicant's signature"
April 5th/04

(sic)

The Applicant confirmed that his appeal was filed on the ground that the loss of the vehicle would result in exceptional hardship.

He stated that he had taken a bus to Virginia, U.S.A. to attend a business seminar on Thursday prior to the day the vehicle was impounded. The vehicle was impounded on April 2, 2004. On his return home on the Monday, he was made aware that the vehicle had been used by his brother, who at the time of impoundment was driving with his licence under suspension. When the Applicant made an inquiry to the police regarding the impounded vehicle, he was advised that he could have his brother charged with theft of the vehicle. The Applicant then could appeal the impoundment on the basis that the vehicle involved was stolen at the time it was being driven. The Applicant didn't wish to pursue this charge because he felt his brother and the family had enough problems.

The Applicant stated that his brother, who is a resident in his home, never drives his vehicle. His brother was told not to drive the Applicant's vehicle and also not to drive the vehicle owned by the Applicant's wife. The Applicant was not aware of his brother's driving record and had never asked him about the status of his licence. His brother usually drove a van owned by their mother who also lives at the same residence. The keys of the impounded vehicle had been kept in the kitchen.

The Applicant is a salesperson for a household goods company. He works on a commission basis only and requires a vehicle to attend to clients. Also, he needs the vehicle to drive his child to school in the morning and to pick the child up after school.

In closing, the Applicant stated that his brother was not allowed to drive his vehicle or the vehicle of his wife and that the loss of the impounded vehicle has caused exceptional hardship for himself and his family. By June 2004 his brother and his mother will be moving out of the family home and these problems will not occur after that date.

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 the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with More than 80 Mgs Alcohol in Blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until August 21, 2004.

Ms. Kim Beintema, Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant. The Applicant stated that his wife who owns her own vehicle requires her vehicle to get to her own job. His wife works from 8:00 a.m. to 5:00 p.m. and then the next week she works from 12:00 noon to 8:30 p.m. His mother owns a van that she uses to get to work. His mother's normal hours of work are from 7:00 a.m. to 7:00 p.m. There is hardship for his wife and his mother along with the Applicant with the loss of the impounded vehicle. The Applicant now has to use his mother's van to take his child to school and to pick up the child. Also, he has to take his mother to work in the morning and to pick her up in the evening. The wife has been able to drive the Applicant's mother to work on occasion but can't be expected to continue to provide this service to the family.

The Applicant is new at his business and his family obligations, and the loss of the impounded vehicle has created problems in not allowing him to attend to his clients. He has been able to use his mother's van but the problems of picking up family members during the evening when he would normally be attending to clients is a hardship. He estimates that the time involved or lost during the period that he cannot be with his clients is about a half an hour.

In closing, Ms. Beintema stated that the appeal of exceptional hardship did not meet the criteria, which the owner would have to demonstrate. He did have alternatives to the impounded vehicle. The family owned two other vehicles including the impounded vehicle. The Applicant had the use of his mother's van. The Applicant neither demonstrated financial loss nor that the loss of the vehicle was a threat to the health or safety of any person ordinarily transported by the motor vehicle.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

As to whether the loss of the vehicle will result in exceptional hardship, the Tribunal finds as a fact the following:

- 1) The Applicant did not demonstrate that the financial and economic loss would be significant and lasting.
- 2) The Applicant did not demonstrate that no alternative to the impounded vehicle is available.

The Applicant has the burden of proving the basis of his appeal. The Applicant, to establish exceptional hardship, must first establish that there are no alternatives to the impounded vehicle under Section 22(3)(a) and Section 22(4) of Regulation 574, R.R.O. 1990 as amended by Ontario Regulation 632/98.

Since the Applicant has alternatives to the impounded vehicle, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under Section 22(2) of the regulation.

The Tribunal, however, would like to make the Applicant aware that he may pursue compensation from the suspended driver, as is stated in subsection 55.1(21) of the *Highway Traffic Act*, which reads:

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 subsection 50.2(5) of the HTA, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Victor H. Braney
Presiding Member

RELEASED: April 28, 2004

FILE NAME: 2303.mvia.exhp.doc



2308-MVIA-STLN -EXHP-Stolen and Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: NIVES MONTANO,
Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 22, 2004

DECISION RELEASED: April 27, 2004 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 22, 2004, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	the Applicant
Motor Vehicle:	1997 Dodge Caravan (the “vehicle”)
Date of Appeal:	April 7, 2004

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on April 22, 2004 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 Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had previously been filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I am asking the tribunal to please allow me to get my vehicle back as soon as possible and grant this appeal on the grounds that my vehicle was driven without my permission and the loss of my vehicle has been detrimental + could cost me the loss of my job + livelihood. I am a single mom and I work 2 jobs to support my daughter and I, and to pay for our mortgage + bills. I have to get my daughter to daycare + back + I work shift work in a factory in <place name deleted> which is a 40 min drive away from my home. I do not have a second vehicle to use, and have been relying on friends + neighbours from a day to day basis just to try + get back + forth from work. This is difficult as I live in the country. If I can't make it to work, I will lose my job, my house + everything. I also worry about my safety + safety of my daughter, as I have asthma + if I was to take an attack or if my daughter was to become injured or if we would not have the means to get to a hospital, which is a 25 min drive away. The reason my vehicle is impounded is because it was driven by an unlicensed driver. This individual did not have my permission to drive my vehicle. I was at work the day that the impoundment occurred, and my vehicle was left at my premises for this individual to fix for me as a favour. My power steering pump was rotted out + would not hold fluid. I did not have the money to take it to a garage to have it fixed so the individual offered to come to my house + repair my van for my in my garage. Later that morning I received a call at work to say my van had been impounded + this individual had been arrested. It is my understanding that he took my van aprox. a mile up the road to his own house to get tools so that he could do the repairs (when he was arrested). Please understand that my vehicle was left with this individual only to be fixed + repaired, not to be driven. I was aware that this individual did not have a licence + it was understood that under no circumstances he was to drive my van. I have helped this individual and have given him a ride to various places, banks, grocery stores, work when needed etc. as a favour because he did not have a licence, and his offer to fix my vehicle was in kind, to repay me for the favours I had done for him. My van was supposed to be torn apart + fixed. Now it is impounded. I have no money to rent a car, I am running out of friends + neighbours who can help and I don't want to, can't lose my job or I lose everything. Please understand I have spoken to a Justice of the Peace, Seargant of Police, everyone I can + am going through this process to try and get my van back + life + job secure as soon as possible.

I have included a form from the Justice of the Peace who wrote this in hopes that it might help. She did not feel that my van should be held from me and could not understand why I am forced to suffer in this regard. The piece of paper she included was all that she could think of to do to help. I hope it helps. If there is any other thing I can do or send you please let me know A.S.A.P. I am honestly scared + not knowing how I am going to make it to work + back from one day to the next. This could cost me my livelihood + everything.

(sic)

The following is a summary of the Applicant's affirmed testimony. The Applicant is a single mom of a 4½-year-old daughter. She has been separated from her husband since January 2003 and currently lives alone with her daughter. She is also employed full-time by a factory in <place name deleted> as an assembly line worker. She also runs a part-time corporate health and wellness business. She is a certified massage practitioner wherein she offers companies onsite massages during the day when she is on the afternoon shift of her full-time job.

To summarize the events surrounding the impoundment, as outlined in the Owner's Position, the Applicant testified that she has known the driver, at the time the vehicle was impounded, since public school. They were reacquainted 9 months ago and have supported each other emotionally during each of their matrimonial separations. He owns a home about 4 blocks from the Applicant's home.

The driver is employed as a carpenter in <place name deleted>. The day before the vehicle was impounded, the driver advised the Applicant that the weather predicted rain the next day and that he would not be able to work on the construction site. He suggested that she find a ride to work as he and his friend would come to her home and fix her vehicle's power steering pump in her garage. The Applicant did not find this unusual as he had worked on her car in the past and was doing her a favour in return for all the times she had driven him to and from his errands. The Applicant testified that she "told him not to drive the vehicle" even though she was aware he was a suspended driver.

The next day, the Applicant's neighbour drove her to work. She left her garage open and "left the keys in the van". She is unaware of whether the driver's friend accompanied the driver to her house. The Applicant received a call on her cellphone while she was on a break at work. The driver advised her that her vehicle had been impounded and that he had been arrested. He was very apologetic and only told her that he had taken her vehicle to drive back to his house because he needed some tools. To date, he has not provided her with a reason surrounding the impoundment. Since the impoundment, the driver has remained in custody.

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 (Exhibits 5 & 6):

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
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 for life.

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 sections 50.2(3)(a) and (d).

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

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

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

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

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.”

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:

Appeal - Stolen

The issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

The Tribunal finds as a fact the following:

- 1) The evening prior to the impoundment, the Applicant had been asked by the driver to leave her vehicle at home because he and his friend were going to fix her power steering pump because it would not hold fluid for more than 1 day and was becoming quite noisy and difficult to steer;
- 2) The Applicant believed and did not question whether the driver's friend would help fix her vehicle, and felt that if the need arose, that the driver's friend had a valid driver's licence and could drive her vehicle;
- 3) The driver did not request nor receive the Applicant's consent to drive her automobile but was specifically told not to drive it. She was aware that the driver was under suspension;
- 4) The driver of the motor vehicle was driving without the consent of the Applicant on the day that it was impounded. She does not know if his friend was with him at the time or whether he came to her home to help fix her vehicle; and
- 5) The Applicant indicated that the driver "*took my van approx. a mile up the road to his house to get tools so that he could do the repairs...*" When the Tribunal inquired as to the location of where the driver was stopped, the Applicant advised that it was one concession road north of the driver's home, in the opposite direction of the Applicant's home.

In her testimony, the Applicant indicated that she left the keys in her vehicle. The Tribunal finds this reasonable because to determine whether the power steering pump has been repaired and to ensure the fluids are flowing through the pipes, the vehicle's ignition needs to be started. The power steering works on hydraulics and starting the vehicle would unlock the steering column. If the vehicle needed to be driven, the Applicant thought that the driver's friend, who allegedly has a valid driver's licence, would drive her vehicle.

The Divisional Court clearly stated 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 term "stolen" could also apply to an intention to take the vehicle temporarily.

The driver's removal of the Applicant's motor vehicle without her consent in this instance constitutes theft.

The Applicant advised that she wasn't aware that she could charge the driver with theft because neither the police nor the Justice of the Peace suggested it. The Applicant felt the driver did not intend to permanently deprive her of her vehicle, but the evidence was clear that he did temporarily and therefore wrongfully take the vehicle without the Applicant's consent.

Therefore, the Tribunal finds as a fact that the impounded vehicle was stolen from the Applicant within the meaning of section 50.2(3)(a) of the Act.

As a result the Tribunal orders the return of the Applicant's motor vehicle to her.

Appeal - Exceptional Hardship

The Applicant filed an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific. It provides the Tribunal with the criteria that the Applicant must meet to determine if "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in exceptional hardship as described by section 22(2).

Subsection 22(1) requires that the Tribunal consider whether no alternative to the impounded motor vehicle is available to determine whether exceptional hardship will result from an order to impound.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows:

- (a) **"no alternative to the impounded motor vehicle is available"**. The Applicant testified that since the impoundment, she has relied on the generosity of friends and neighbours to drive her to and from work. The Applicant lives in an area where public transit is not available and accessible to her. She is unable to rent a vehicle since she does not have a credit card and could not ultimately afford it. She had borrowed a vehicle for 4 days and unfortunately the gas line broke. She is currently borrowing her neighbour's friend's Jeep who will be selling it once it is returned to him.

Since there is an alternative to the impounded motor vehicle, the Tribunal cannot consider clauses 22(2) (b) financial, (c) loss of employment or (d) loss of education.

- (b) **"the loss will be immediate, significant and lasting"**. The evidence put forth at today's hearing gives rise that the loss will not be immediate, significant and lasting since:
 - (i) the Applicant indicated that her part-time business clients have been currently been put on hold, but has continued to provide service to her main

- client, the _____ Memorial Hospital in <place name deleted> on Tuesday mornings;
- (ii) the Applicant has not missed any days from work or any doctor's appointments;
 - (iii) in the event of an emergency, <place name deleted> is 911 accessible by police, fire department and ambulance services albeit the nearest hospital is 25 minutes away;
 - (iv) the Applicant indicated that both her father and stepmother who reside approximately 45 minutes from the Applicant, each have vehicles and have driven to <place name deleted> during the impoundment to occasionally care for the Applicant's daughter when the Applicant works the afternoon shift;
 - (v) the Applicant's grandmother who resides in <place name deleted> has a vehicle and has also assisted in the care of the Applicant's child;
 - (vi) the child's father also cares for his daughter on Tuesday and Thursday afternoons when the Applicant works the afternoon shift and cares for the child every other weekend; and
 - (vii) although the Applicant has asthma, she has not had a serious occurrence since the impoundment. Her child has no health issues.

The Tribunal is of the view that she does have reasonable alternatives to remedy this. The foregoing is not evidence of a loss that is immediate, significant or lasting.

- (c) **"the impact of loss will be upon a person ordinarily transported by the motor vehicle"**. The Applicant's child has not missed any days from childcare or from junior kindergarten.

In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. There is also no evidence of the loss being immediate, significant and lasting.

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence, none of the criteria have been met.

Although the driver did offer the Applicant financial assistance, the Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the HTA:

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.

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 27, 2004

FILE NAME: 2308.mvia.stln.exhp

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



LECOS AUTO SALES LTD.

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: DONALD BENNINGER, Presiding member

APPEARANCES: GUS LECOS, Agent for the Applicant
KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 26, 2004

DECISION RELEASED: April 29, 2004 Toronto

REASONS FOR DECISION

A hearing was held on April 26, 2004, 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. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle 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:	Lecos Auto Sales Ltd. (the “Applicant”)
Motor Vehicle:	1997 Jeep Grande Cherokee (the “vehicle”)
Date of Appeal:	April 13, 2004

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 26, 2004 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Dear sir or Madam,

This is the owner's position on the impoundment of a 1997 Jeep Grand Cherokee VIN # <deleted>, plate <deleted>, file <deleted>.

We, Lecos Auto Sales, leased the above mentioned vehicle to Mr. <deleted> on the 13th day of June 2002 for a period of 60 months. Starting around the month of November, 2003, he had difficulty keeping up with his payments. He was also late with his January, February and march Payment. In addition to that, on March 2 2004, we received from his insurance company a letter confirming that his policy would be cancelled on March 22 2004. Since he was late for a few months and his insurance was being cancelled, and we could not get in contact with him after numerous phone calls, his vehicle was repossessed on march 8 2004. After giving him a few weeks to catch up with his payments, he applied for insurance and got a policy effective march 26 2004. As far as we know, insurance companies check the driver's license before issuing a policy. When the company faxed us with proof of insurance, we thought they had already checked his license to make sure everything was in order. We do not want our vehicles on the road driven by people with suspended licenses because the insurance would not be valid. We have included all supporting documentation for your viewing.

Thank you for your time,
Lecos auto sales
Vista finance

(sic)

The Agent for Lecos Auto Sales in his sworn testimony confirmed that they had leased the subject vehicle to the driver not knowing that his licence was suspended .The Agent for the Applicant stated that his company had leased this vehicle to the driver in 2002 and at that time they took a photocopy of the driver's licence and checked with M.T.O. which advised them that his licence was valid. He stated that the driver had missed or was behind in his payments but they work with their customers to remedy the situation. But he continued when they received notice from the insurance company that they had cancelled the drivers insurance they had no alternative but to re-posses and to bring the vehicle to their compound. He testified that they did not check to see if his licence was still valid when they released the subject vehicle to the driver after he had paid his unpaid payments and produced a completed form from his insurance company. The insurance company confirmed this coverage by fax to his company. He continued his testimony by stating he was of the opinion that the insurance company always checked to confirm a drivers licence

was valid before they issued an insurance policy. Under cross examination the Agent for the Applicant testified that on the second time they leased him the subject vehicle they did not get a copy of the driver's licence or check with M.T.O. to see if the licence was valid. He continued by stating that the next time he will be more careful and that he will develop a company policy in this matter immediately.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as registered plate owner; (Exhibit 3)
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below; (Exhibit 3)
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle; (Exhibit 2)
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 November 10, 2004. (Exhibit 3)

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 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:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that licence of the driver of the leased vehicle at the time in respect of which the order was made, was not then under suspension.

The Tribunal finds that although the Agent for the Applicant testified that he did what he thought was reasonable when he got proof of insurance from the insurance company and he was of the opinion that the insurance company ensured that a driver had a valid licence before issuing insurance coverage, it is not adequate to meet the test of due diligence.

The Respondent indicated to the Agent for the Applicant and to the Tribunal that the opinion of some staff at the Ministry of Transportation, although not documented or stated in law, is that the validity of a driver’s licence should be checked by a leaser on a regular basis and within a six-month timeframe.

Due diligence requires that the Applicant take further steps to verify the validity of the driver’s licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver’s name and the driver’s licence number, or obtaining a driver’s abstract of a licence at the 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.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act. The Applicant will therefore be liable for the additional cost of the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger, Presiding Member

RELEASED: April 29, 2004

FILE NAME:2315.mvia.LecosAutoSales



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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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>> [MOTOR VEHICLE DEALERS ACT](#)



>> [BHABISHAN GOBERDHAN o/a RIGHT CHOICE AUTO SALES & LEASING](#)



>> [FIRST PLACE FINE CAR SALES INC. and DOMENIC CERULLO](#)



>> [De-ULTIMATE INVESTMENT INC. AND JOHNBULL OSAYANDE](#)



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

IN THE MATTER OF

C.I.A. LEASING CANADA INCORPORATED AND C.I.A. PUBLIC
AUCTIONS & SALES INC. AND PETER CAPRARELLA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
AND REFUSE A REGISTRATION
- Proposal dated: September 17, 2003

AND IN THE MATTER of a hearing of a motion to consider an application for an order
staying the decision of the Tribunal

C.I.A. LEASING CANADA INCORPORATED AND
C.I.A. PUBLIC AUCTIONS & SALES INC.
AND PETER CAPRARELLA

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by C.I.A. Leasing Canada Incorporated, C.I.A. Public Auctions & Sales Inc. and Peter Caprarella, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing of a motion pursuant to Section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "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 of a motion on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 20, 2004

SCHEDULE 'A'

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
800-789 Don Mills Rd
Toronto, ON M3C 1T5

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

FROM: C.I.A. Leasing Canada Incorporated
1032 Martin Grove Rd
Etobicoke, ON M9W 4W1

C.I.A. Public Auctions & Sales Inc.
1032 Martin Grove Rd
Etobicoke, ON M9W 4W1

Peter Caprarella
5340 Richborough Dr
Mississauga, ON L0G 1A0

In accordance with the *Statutory Powers Procedure Act*, and the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, C.I.A. Leasing Canada Incorporated, C.I.A. Public Auctions & Sales Inc. and Peter Caprarella and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing with respect to the motion for a stay brought by C.I.A. Leasing Canada Incorporated, C.I.A. Public Auctions & Sales Inc. and Peter Caprarella and consent to a stay of the revocation of C.I.A. Leasing Canada Incorporated and Peter Caprarella based on the following terms and conditions:

1. C.I.A. Leasing Canada Incorporated and Peter Caprarella will ensure that all personnel, agents, assignees or anyone acting on behalf of the Registrants to buy, sell or lease motor vehicles shall be registered as a salesperson to the Registrants.
2. C.I.A. Leasing Canada Incorporated, C.I.A. Public Auctions & Sales Inc. and Peter Caprarella agree they will not be involved with the buying, selling or leasing of motor vehicles without the benefit of registration.
3. C.I.A. Leasing Canada Incorporated and Peter Caprarella will not knowingly purchase a vehicle from a person other than the registered owner.
4. All transaction shall occur with C.I.A. Leasing Canada Incorporated and not through C.I.A. Public Auctions & Sales Inc.
5. C.I.A. Public Auctions & Sales Inc. shall not be registered as nor act as a motor vehicle dealer. This includes, but is not limited to entering into consignment contracts with sellers.
6. All contracts, bank accounts, consignment agreements and other documents relating to the acquiring, sale or lease of motor vehicles shall be in the name of C.I.A. Leasing Canada Incorporated.

7. C.I.A. Leasing Canada Incorporated and Peter Caprarella acknowledge and understand that when the C.I.A. Leasing Canada Incorporated receives funds towards the purchase of a vehicle consigned to it, the entire amount received will be deemed to be trust funds.
8. C.I.A. Leasing Canada Incorporated agrees to maintain a ledger account into which shall be entered the names and address of all persons from whom trust funds are obtained with details of the amounts retained and a record of all disbursements from the funds.
9. C.I.A. Leasing Canada Incorporated agrees to maintain, in respect of all funds that come into the Registrant's control, in accordance with clause 7 of these Terms and Conditions, a separate trust account into which the Registrants shall deposit the funds and the Registrants shall, at all times, keep the funds secure and make disbursements from the trust account, in accordance with the terms of the trust.
10. Where trust funds are paid to C.I.A. Leasing Canada Incorporated in accordance with clause 7 of these Terms and Conditions, whether by way of deposit, down payment or otherwise, C.I.A. Leasing Canada Incorporated agrees to retain the funds in trust for the consignor until such time as the funds are disbursed to the consignor. After disbursing funds to the consignor, any remaining funds related to the transaction may be withdrawn from the trust account by the Dealer.
11. Without limiting the generality of the foregoing, C.I.A. Leasing Canada Incorporated and Peter Caprarella will not knowingly involve Stanley Lynne Munshaw in the operation of the dealerships without the prior written consent of the Registrar except as it relates to assistance with and maintenance of the Dealers' computer system and programs. Munshaw shall not be involved in any way with the buying, selling, leasing, consigning or trading of motor vehicles. This includes but is not limited to, any administrative, supervisory, management or customer service responsibilities.
12. C.I.A. Leasing Canada Incorporated will comply with OMVIC's Code of Ethics and Standards of Business Practices as may be amended from time to time.
13. C.I.A. Leasing Canada Incorporated and Peter Caprarella hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. C.I.A. Leasing Canada Incorporated and Peter Caprarella acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar may bring a motion before the Licence Appeal Tribunal for an order to revoke the stay.
15. C.I.A. Leasing Canada Incorporated, C.I.A. Public Auctions & Sales Inc. and Peter Caprarella hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of April 2004.

(Signature) C.I.A. Leasing Canada Incorporated
I have authority to bind the corporation

(Signature) C.I.A. Public Auctions & Sales Inc.

I have authority to bind the corporation

(Signature) Peter Caprarella

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

Carl Compton, Registrar.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BHABISHAN GOBERDHAN o/a RIGHT CHOICE AUTO SALES & LEASING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BHABISHAN GOBERDHAN, Applicant
representing himself

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF
HEARING:

March 4, 2004 and April 15, 2004

Toronto

DECISION AND ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the "Proposal") dated November 17, 2003 issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of Bhabishan Boberdan, also known as Bhabishan Goberdhan as a motor vehicle dealer (the "Dealer") under the provisions of the Act.

The Registrar bases his proposal to revoke the registration of the Dealer under section 7 of the Act as read with sections 5.(1) (b) and sections 6.(1) and 6.(2) of the Act.

In support of his Notice of Proposal the Registrar furnished the following particulars;

1. Bhabishan Boberdhan (aka Bhabishan Goberdhan) is a sole proprietorship operating as Right Choice Auto Sales & Leasing. (the "Dealer") and was first registered as a motor vehicle dealer under the Act on or about August 29, 1996.
2. The registered business premises of the Dealer is 15 Hale Road, Brampton, Ontario.
3. 1205045 Ontario Ltd. (heinafter referred to as the "Corporation") is an Ontario corporation that was incorporated on or about October 17, 1996.
4. The records of the Ministry of Consumer and Business Services Companies Branch revealed, the corporation has a registered business name of Right Choice Auto Sales & Leasing and is carrying on the activity of auto sales & leasing.
5. Bhabishan Goberdhan is an officer and director of the Corporation.
6. The records of the Ministry of Consumer and Business Services Companies Branch indicate the Corporation operates from 15 Hale Road, Brampton, Ontario.
7. The Corporation has failed to comply with the requirements of the *Retail Sales Tax Act* as to filing of returns, remitting of tax due and paying assessments when due.
8. As a result of failure to comply with the *Retail Sales Tax Act*, the Corporation is indebted to the Ministry of Finance for retail sales tax arrears in the amount of \$101,762.97 as at June 30, 2003.
9. The Corporation has been involved in the process of buying and selling motor vehicles without the benefit of registration as is required under the Act.

By Notice of Further and Other Particulars the Registrar broadened the particulars beyond the particulars in the proposal and furnished the following further particulars;

1. On or about April 27, 2000 Bhabishan Goberdhan (aka Bhabishan Boberdhan) o/a Right Choice Auto Sales & Leasing (the "Dealer") purchased a 1996 Chevrolet Cavalier VIN 1G1JC124XT7251999 from Salvage Management of Syracuse. The vehicle had a salvage title. On or about November 9, 2000 the vehicle was sold at Canadian Auction Group by the Dealer to Parkdale Auto without full disclosure.
2. On or about August 10, 2000 the Dealer purchased a 1995 Acura Integra VIN JH4DC4356SS018970 at Copart Auto Sale. The vehicle had a salvage title. On or about October 30, 2000 the vehicle was sold by Skyline Motors 27 & 7 Ltd on behalf of the Dealer to Ben Latour without full disclosure.
3. On or about May 23, 2000 the Dealer purchased a 1993 Ford Escort VIN 1FAPP15J9W328869 at Copart Auto Sales. The vehicle had a salvage title. On or about May 5, 2000 the vehicle was sold by the Dealer to Carl Rose-Green without full disclosure.
4. On or about November 1, 2001 the Dealer purchased a 1999 Ford Windstar VIN 2FMZA5148XBB18241 from Copart Auto Sale. The vehicle had a salvage title. On or about August 18, 2002 the vehicle was sold by the Dealer to Inderjit Sian without full disclosure.
5. On or about May 1, 2001 the Dealer purchased a 1999 Nissan Pathfinder VIN JN8AR07YXXW352469 at N.E. Penn Salvage. The vehicle had a salvage title. On or about July 17, 2002 the vehicle was sold by the Dealer to Festus Exeter without full disclosure.

6. The Dealer has submitted false documents to the Registrar, *Motor Vehicle Dealers Act*.
7. The Bhabishan Goberdhan o/a Right Choice Auto Sales & Leasing (the "Dealer") has failed to renew his business name in accordance with the *Business Names Act*. The business name expired on June 23, 2001.
8. 1205045 Ontario Ltd. o/a Right Choice Auto Sale & Leasing (the "Corporation") has failed to renew its business name in accordance with the *Business Names Act*. The business name expired on June 19, 2002.

The Dealer filed a written Notice of Appeal with the Tribunal in terms of section 7.(4) of the Act and stated that the reasons for the appeal were;

1. REASON: Since I was the principal, and officer and director, of the Corporation, it was my understanding and belief that I and the Corporation were one and the same, and together operated Right Choice Auto Sales & Leasing, and were both entitled to do so because of my registration. It was never the intent of the Corporation to buy and sell motor vehicles without the benefit of registration, since, in the circumstances, it understood it was registered through and with me.
2. REASON: The Corporation did not file its returns under the Retail Sales Tax because of difficulties with our accountant, which difficulties continued even when the Corporation responded to the Ministry demands and filed its returns. Because I and the Corporation now believe that the returns prepared by our former accountant are incorrect, we have hired a new accountant to revise and resubmit the returns. It is therefore also our position that the Corporation is not indebted to the Ministry of Finance for the amount set out in paragraph 8, and that the Corporation and I continue to attempt to resolve such difficulties, including payment proposals made to and rejected by the Ministry of Finance.
3. REASON: The notice of the Registrar was directed to a person (Bhabhisan Boberdhan) who is not registered under the *Motor Vehicle Dealers Act*; the person so registered is Bhabhisan Goberdhan.
4. REASON: Financial difficulties incurred by me and the Corporation had been primarily responsible for the problems we have had in paying whatever amount of RST is properly owing.

EVIDENCE:

The evidence presented by the Registrar consisted of the testimony of David J. Erwin ("Erwin") and Louise Gingras ("Gingras") as well as documentary evidence, while the Dealer relied on the testimony and certain documents he tendered in evidence. The testimonies of Erwin, Gingras and the Dealer are summarized hereunder.

DAVID J. ERWIN

Erwin testified that he is employed by the Ministry of Finance as a senior tax collection and compliance officer with the duties of ensuring collection of tax arrears owing and full compliance with the tax Acts in force.

Erwin stated he is familiar with the matters of Retail Sales Taxes due and owing by the Dealer and 1205045 Ontario Ltd. (the Corporation") of which Corporation the Dealer is and has been, since October 17, 1996, director, president and officer. Erwin also stated that the Dealer carries on business as a motor vehicle Dealer using the business name of Right Choice Auto Sales and Leasing ("Right Choice"). The name Right Choice was registered under the *Business Names Act* by both the Corporation and the Dealer in 1997 but was allowed to lapse by the Corporation and Dealer on June 19, 2002. The Dealer has a vendor permit which he uses to register motor vehicles purchased into the name of the Corporation.

Erwin further stated that the *Retail Sales Tax Act* requires all motor vehicle dealers to file returns and to pay assessments in full when they are due. An audit of the Corporation was conducted by the Ministry of Finance. The audit revealed that the Corporation had an outstanding balance in the sum of \$101,762.97. There had been various conversations with the Dealer regarding monies collected by the Dealer in regard to the sale of motor vehicles that had not been remitted by the Dealer to the Ministry. The Dealer's solicitor made an offer to pay \$1,000.00 per month in respect of the Dealer's Retail Sales Tax obligations but the Ministry would not accept that offer as the Dealer was not filing ongoing retail sales tax returns with the Ministry. The latter was accordingly not able to calculate an up to date balance owing and thereby enable the Ministry to determine if the offer was either reasonable or acceptable. The Dealer had failed to file any returns with the Ministry since June 2002 and had never made any payments to the Ministry in respect of tax collected. The Ministry considers the Retail Sales Tax to be trust funds in a dealers hands and should be remitted when due.

Erwin summarized that the outstanding balance of \$101,762.97 owing for retail sales tax as at June 30, 2003 consist of;

Tax collected but not remitted	\$ 72,081.24
Penalty	3,168.58
Interest	24,013.15
Estimated tax June 1, 2002 to June 30, 2003	2,500.00
	\$101,762.97

Erwin concluded his testimony by stating that the Ministry had combined the total outstanding balances of the Dealer and the Corporation and now treats those balances as the Corporations liability.

LOUISE GINGRAS

Gingras testified that she is the Manager of Inspections with the Ontario Motor Vehicle Industry Council ("OMVIC") with the duties of overseeing the inspectors who conduct inspections of motor vehicle dealerships. She also explained that OMVIC is a not-for-profit organization that since 1997 has had the duty of overseeing the administration of the Act and its regulations. She also reviewed the proposal and further particulars (Exhibit 4, tabs 1 and 2).

Gingras also testified that the Dealer carries on business under the business name of Right Choice and has been registered since June 1996. The Corporation was incorporated on October 17, 1996 and its present Officer and Director is the Dealer. According to the Ministry of Consumer and Business Services' records the Corporation has registered the business name of Right Choice and is carrying on the business of selling motor vehicles. (Exhibit 4, tab 5). Gingras confirmed that the Dealer is the Director and Officer of the Corporation and that on June 23, 2001 the business name Right Choice lapsed in so far as registration is concerned.

Gingras went on to state that the Corporation is not registered under the Act as a dealer yet according to the Ministry of Transport's records (Exhibit 4, tab 9(b)) the Corporation has purchased and sold motor vehicles from November 13, 2001 until the present time. Gingras spoke with the Dealer when this information came to light in December 2, 2002 and informed the Dealer that the Corporation was not registered under the Act and should seek immediate registration as a dealer. This has not taken place.

Gingras also testified as to a number of vehicles that had been purchased and then sold by the Dealer. When selling these vehicles, the bills of sale did not contain disclosures of material facts that should have been disclosed by the Dealer in the various sales. Gingras then dealt with the following instances of the Dealer's alleged failure to make full or adequate disclosure to the vehicle's purchasers.

1996 CHEVROLET CAVALIER (Exhibit 3, Tab 10 A, B & C)

Pursuant to an inspection by OMVIC of the records of the Dealer, copies of which records were taken by OMVIC for copying purposes, it was ascertained that this vehicle was purchased by the Dealer at a salvage auction in Cicero, New York State. The copy of the document showing its purchase by the Dealer had been altered by the Dealer so as to disguise the fact that the vehicle had been purchased at an auction of salvage vehicles. The vehicle had been sold at auction as salvage to indicate a vehicle damaged to the extent that the cost of repairs to the vehicle for safe operation exceeded its fair market value. When the Dealer imported this vehicle into Canada the completed "Vehicle Import Form", signed by the Dealer on June 10, 2000, clearly indicated the status of the vehicle to be "salvage" (Exhibit 3, Tab 10 A). Subsequently the Dealer sold the vehicle to Parkdale Automotive for \$4,150.00 CAD.

The Dealer had purchased the vehicle at auction for \$550.00 US. The disclosure on the auction sales agreement was the vehicle was an accident repair.

Gingras noted that a report to OMVIC by Carfax, a United States provider of vehicle information history, advised that the vehicle had been involved in a "severe accident or total loss event " and was on May 5, 2000 titled by the New York State Motor Vehicle Department as "salvage" with fire damage reported. (Exhibit 3, Tab 10 B)

Gingras also stated the Ontario Ministry of Transport's records (Exhibit 3, Tab 10 C) indicate the first registration of the vehicle in Ontario was to the Dealer on November 6, 2000 when the vehicle's sale to Parkdale Automotive was recorded as having occurred on November 10, 2000.

1995 ACURA INTEGRA (Exhibit 3, Tab 11 A, B & C)

This vehicle was imported from the United States to Ontario by the Dealer on August 29, 2000. It was imported as salvage according to the vehicle import form signed by the Dealer. (Exhibit 3, Tab 11 A)

A certificate of title to the vehicle from the Commonwealth of Pennsylvania indicated that it had been certified as "salvage".

On October 30, 2000 the Dealer sold this vehicle to Ben Latour Ravinth under a written bill of sale for \$6,000.00. The Canada Customs import declaration indicated that the Dealer declared the purchase price to be \$1,150.00 CAD when he imported the vehicle.

On the bill of sale from the Dealer to Ravinth there was no disclosure as to the vehicle's condition save and except the words "sold as is". The purchase price is shown on that bill of sale as \$6,000.00. (Exhibit 3, Tab 11 A)

The Carfax vehicle History Report obtained by OMVIC regarding this vehicle (Exhibit 4, Tab 11 A) indicates the vehicle was a "total loss or severe accident" and was titled as "salvage" when the vehicle was sold in Ohio at a salvage auction on August 10, 2000. (Exhibit 3, Tab 11 B)

The Ontario Ministry of Transport's records regarding this vehicle indicate that it was first registered in Ontario in the Dealers name on October 31, 2000 and that it was then sold by the Dealer on November 1, 2000 to Ravinth.

1993 FORD ESCORT (Exhibit 3, Tab 12 A, B and C)

This vehicle was imported from the United States into Ontario by the Dealer on March 22, 2000. It was imported as salvage according to the vehicle import form signed by the Dealer. (Exhibit 3, Tab 12 A)

The Canada Customs declaration by the Dealer indicated the price paid for the vehicle by the Dealer was \$1,203.00.

On May 5, 2000 the Corporation sold this vehicle to Carl Rose Green for \$500.00. The bill of sale had the words "sold as is" under the sections reserved for remarks. (Exhibit 3, Tab 12 A)

The Carfax vehicle history report obtained by OMVIC regarding this vehicle (Exhibit 4, Tab 12 B) indicates this vehicle was a "total loss or severe accident" and was titled as "salvage" by the New York Department of Motor Vehicles on April 22, 2000. Subsequently on December 27, 2002 this vehicles title was changed in New York State to "Rebuilt", which title indicated the rebuilt vehicle was a salvage vehicle that has been repaired and restored to operation. (Exhibit 3, Tab 12 C)

The Ontario Ministry of Transport's records indicate that this vehicle was first registered in Ontario by the Corporation on May 23, 2000 and was then registered in Green's name on the same date.

1999 FORD WINDSTAR (Exhibit 3, Tab 13 A, B and C)

This vehicle was sold by Erie Insurance Company of Pennsylvania to Right Choice under a bill of sale dated October 26, 2001. Right Choice imported the vehicle into Ontario on November 8, 2001 and declared the vehicle to be salvage on the vehicle import form signed by the Dealer. (Exhibit 3, Tab 13 A)

The vehicle was sold under bill of sale by the Dealer to Inderjit Sian and the bill of sale contained no disclosure as to it being salvage (Exhibit 3, Tab 13 A)

The Carfax vehicle history report obtained by OMVIC regarding this vehicle (Exhibit 3, Tab 13 B) indicated the vehicle was a "total loss or severe accident" and on October 22, 2001 the Pennsylvania Motor Vehicle Department declared the vehicle "Junk". The report stated further that a junk title "is issued on a vehicle damaged to the extent that the cost of repairing the vehicle for safe operation exceeds its fair market value".

The Ontario Ministry of Transport's records indicate that this vehicle was initially registered in Ontario April 16, 2002 when the Dealer caused it to be registered in his name. On the same date the records indicate the Dealer transferred ownership on the vehicle to Inderjit Sian. (Exhibit 3, Tab 13, C)

1999 NISSAN PATHFINDER (Exhibit 3, Tab 14 A, B and C)

This vehicle was sold at auction on January 5, 2001 by N.E. Penn Salvage of Pennsylvania to the Dealer. The "Buyer's Receipt" stated "all purchased salvage is your responsibility". (Exhibit 3, Tab 14 A)

The vehicle was subsequently imported into Ontario by the Dealer under a vehicle import

form. (Exhibit 3, Tab 14, A)

The vehicle was then sold, by the Dealer to Festufia Exeter under a bill of sale with the notation thereon "sold as is". The bill of sale was dated July 17, 2002.

The Carfax vehicle history report obtained by OMVIC regarding this vehicle (Exhibit 3, Tab 14, Tab B) indicated that on April 5, 2001 this vehicle was given the title of "Junk" by the Pennsylvania Motor Vehicle Department and was sold as salvage at a salvage auction in Pennsylvania on May 1, 2001. The report repeated what was stated in Exhibit 3, Tab 13 regarding the junk title given to this vehicle.

The Ontario Ministry of Transport's records indicate that this vehicle was initially registered in Ontario on July 19, 2002 when the Dealer caused it to be registered in his name. On the same date the records indicate the Dealer transferred ownership in the vehicle to Festus Exeter. At the conclusion of Gingras' testimony regarding all the above vehicles she went on to state that pursuant to a previous Notice of Proposal dated February 5, 1999 issued by the Registrar to the Dealer, the latter signed a document agreeing to abide by certain terms and conditions. Following the signing of the terms and conditions, which by consent of the Registrar and the Dealer were made an Order of the Tribunal, the aforesaid proposal was withdrawn by the Registrar. One of the terms and conditions to which the Dealer consented, reads as follows:

The Dealer agrees that he is under a positive obligation to disclose all material fact about the vehicles he sells, including but not limited to disclosure of accidents, salvage, accurate odometer reading and distance travelled. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

Gingras also testified that the "Standards of Business Practice", a code of ethics, prepared by OMVIC and sent to all dealers and salespersons, including the Dealer, in November 2000 specifically required all dealers to disclose in writing all material facts about a vehicle's condition (section 2.5.1) Gingras further stated that where a vehicle is sold on an "as is" basis, this fact must be in terms of section 2.5.1 of the above document, clearly stated on the front of the bill of sale with the words:

" VEHICLE SOLD AS IS: I agree that if the appropriate space is initialed by me, the vehicle is sold AS IS and is not represented as being in a road worthy condition, mechanically sound or maintained at any guaranteed level of quality. The vehicle may not be fit for use as a means of transportation and may require substantial repairs at my expense.

Purchaser's Initials "

Gingras concluded her testimony by stating there were serious concerns regarding in the Dealer's handling of the sale of vehicles that were, to the knowledge of the Dealer, salvage vehicles in that he had failed to comply with the OMVIC'S Standards of Business Practice as to disclosure of material facts to all purchasers. Furthermore the Dealer's failure to comply with the Retail Sales Tax Act and to pay to the Ministry of Finance tax monies collected by him show an absence of honesty and integrity and a failure to act in accordance with law.

BABHISAN GOBERDHAN

The Dealer testified at the hearing and stated that he did make disclosure "as best I know".

Insofar as the Chevrolet Cavalier vehicle was concerned the Dealer stated that there was disclosure when the vehicle was sold at auction on the Dealer's instructions. (Exhibit 3, Tab 10 A). The Dealer pointed to the words on the auction bill of sale that read "ACC REP" which he contended conveys the meaning that the vehicle was disclosed as an accident repair vehicle. The Dealer did not deal in his testimony with any of the other vehicles dealt with in the evidence of Gingras

The Dealer in cross-examination disagreed with the amount owing for retail sales tax. He did admit to not having remitted to the Ministry of Finance any retail sales tax whatsoever and further conceded that he had not appealed the Ministry of Finance's claim for unpaid taxes in the sum of \$101,762.97. He further admitted that he is the sole Officer and Director of the Corporation, that that Corporation is not a registered Dealer under the Act and that despite having no registration under the Act the Corporation has bought and sold motor vehicles. He furthermore admitted to signing the terms and conditions that were, with his consent, made on Order of the Tribunal. He admitted further that in regard to the five vehicles referenced in the Registrar's Notice of Further and Other Particulars (Exhibit 3, Tab 2) he was aware all such vehicles were salvage vehicles when he and /or the Corporation purchased these vehicles in the United States prior to selling those vehicles in Ontario. He conceded that when he resold the vehicles in Ontario none of the bills of sale disclosed that the vehicles were salvage.

He stated that although he was aware of the existence of OMVIC's Standards of Business Practice, he had never received a copy from OMVIC and had never requested a copy from OMVIC. He was aware that the aforesaid document existed as he had read about it in various newsletters he had received from OMVIC.

Finally, he handed to the Tribunal two letters he stated he had received from Carl Rose Green, the purchaser of the Ford Escort and from Inderjit Sian the purchaser of the Ford Windstar. (Exhibit 6 and 7 respectively). He admitted to typing both letters for the above parties. Neither party appeared to testify. Both letters were admitted into evidence by the Tribunal, subject to weight and despite their non disclosure by the Dealer. In the letter of Inderjit Sian the latter made mention that Sian was aware when purchasing the vehicle that it had been involved in an accident and was declared salvage.

Carl Rose Green also stated in his letter that he was shown all necessary documents including Canada-customs Import forms and that he bought the vehicle "as is".

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal:

1. The Dealer was registered as a motor vehicle dealer on August 29, 1996.
2. The Dealer was at all material times the sole Officer and Director of the Corporation.
3. The Corporation was incorporated in October 1996.
4. Both the Corporation and the Dealer traded using the business name Right Choice Auto Sales and Leasing.
5. The Corporation without the benefit of registration under the Act has purchased and sold motor vehicles in Ontario.
6. The Corporation and the Dealer have failed to remit to the Ministry of Finance monies collected in respect of Retail Sales Tax in the sum of \$72,081.24 plus penalties thereof in the sum of \$3,168.58, together with accrued interest in the sum of \$24,013.15 and estimated taxes for the period June 1, 2002 to June 30, 2003 for a total amount as at June 30, 2003 of \$101,762.97.
7. During the period April 2000 to November 2001 the Dealer purchased certain 1996 Chevrolet Cavalier, certain 1995 Acura Integra, certain Ford Escort, certain 1999 Ford Windstar and certain 1999 Nissan Pathfinder in the United States of America (collectively referred to as "the vehicles").
8. The vehicles, at the time of purchase by the Dealer, were salvage vehicles pursuant to accident damage suffered by those vehicles and were titled as "salvage" in the respective States in which they were registered.
9. "Salvage Title" which applied to the vehicles at the time of their purchase by the Dealer and Corporation in the United States of America denotes a vehicle damaged to the extent that the cost of repairing the vehicle for safe operation exceeds its fair market value.
10. The vehicles, to the knowledge of the Dealer, were purchased by the Dealer and Corporation as salvage vehicles and with the title "salvage".
11. The Dealer in selling the vehicles in Ontario pursuant to their purchase in the United States of America failed to disclose to the vehicles' purchasers' the fact that

the vehicles were salvage vehicles and /or that the vehicles had suffered material damage in accidents.

12. The name Right Choice Auto Sales and Leasing used by the Dealer and the Corporation was registered under the *Business Names Act* R.S.O. by those parties in June 1997. Such registration expired in June 2002.
13. By notice dated February 5, 1999 the Registrar previously proposed to revoke the registration of the Dealer and included in that notice as grounds for the proposal was the allegation that the Dealer had failed to disclose to purchasers of motor vehicles that such vehicles were salvage.
14. On June 4, 1999 the Dealer signed a written consent in terms of which an order was made by the Tribunal and in which order the Dealer agreed and undertook, inter alia, that his registration under the Act would continue subject to his disclosing to purchasers all material facts relating to vehicles sold by him including the fact that a vehicle had been declared a salvage vehicle.

THE LAW:

The relevant legislation is contained in the Act which states as follows:

3. (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a sales person of such dealer and such dealer is registered as a motor vehicle dealer under this Act.
5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) 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
 - (b) the applicant is a corporation and,
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
6. (1) Subject to section 7, the registrar may refuse to register an applicant where in the registrar's opinion the applicant is disentitled to registration under section 5.
 - (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of

the registration.

7. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written therefore, on the applicant or registrant.

DECISION AND REASONS

The issue for decision is whether the Registrar erred in his decision that Goberdan's registration as dealer under the Act should be revoked.

Section 6.(2) of the Act states that the Registrar may revoke a registration for any reason that would disentitle registration under section 5 of the Act or where a registrant is in breach of a term or condition of registration.

Section 5. (1)(b) of the Act entitles a dealer to registration by the Registrar except where the past conduct of that dealer affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Registrar has the onus of proof to satisfy the Tribunal that he has reasonable grounds to believe that the registration of a dealer should be refused as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Numerous allegations have been made against the Dealer by the Registrar and those allegations will be analyzed by the Tribunal hereunder.

FIRST ALLEGATION – FAILURE TO DISCLOSE MATERIAL FACTS

The Dealer was registered under the Act in August, 1996. In February 1999 the Registrar issued a proposal to revoke the Dealer's registration with one of the three grounds for such proposal being that the Dealer had not made disclosure "on bills of sale that vehicles were salvage". (Exhibit 3, tab 6). That proposal lead to the Dealer signing a written consent to have his continued registration subject to terms and conditions which were made an Order of the Tribunal. (Exhibit 3, tab 7). One of the terms and conditions to which the Dealer had consented was clause 7 of the Order which clearly set out the Dealer's obligation to disclose "all material facts about vehicles he sells including.....disclosure of salvage."

In the matter presently before the Tribunal there are five transactions that deal with five separate motor vehicles purchased by the Dealer in the United States of America and thereafter imported into Ontario by the Dealer. In each and every instance regarding the five vehicles it is abundantly clear that each vehicle was purchased by the Dealer as salvage and was imported into Ontario with a customs declaration signed by the Dealer that such vehicles were salvage. There was also evidence that each vehicle had sustained significant damage as a result of which a salvage title was issued regarding each vehicle. It was also clear from the documentary evidence that each vehicle was purchased by the

Dealer at a salvage auction. None of this evidence was disputed or contested by the Dealer.

When the five vehicles were sold by the Dealer in Ontario three bills of sale relating to three of the five vehicles had no disclosure whatsoever of the vehicles being salvage only that they were being sold “as is” by the Dealer. On the other two bills of sale concerning the two other vehicles there was no disclosure whatsoever. None of these allegations were disputed by the Dealer.

The Dealer has been patently in breach of his obligation to disclose the material fact that each vehicle was salvage. The Dealer did hand in at the hearing two letters he obtained from two of the five purchasers of the above vehicles, in which letters – both of which were by the Dealer’s own admission prepared by the Dealer – they alluded to those two purchasers being aware that the vehicles were salvage vehicles. The two purchasers did not testify before the Tribunal and the Registrar was denied the opportunity to question them under oath. The Tribunal places no weight or value on their statements in the absence of any other independent evidence to support such statements.

The breach of the Dealer’s obligation to make material disclosure regarding these five vehicles is all the more serious and disturbing in that the Dealer faced a previous allegation of non-disclosure relating to salvage vehicles and had pursuant to such allegation undertaken to ensure full disclosure would take place when selling salvage vehicles in the future. His actions in these five incidents reflect a complete absence of honesty and integrity and compliance with law including section 2 (xiii) of the *Business Practices Act*, R.S.O.

The conduct of the Dealer as set out above supports the Registrar’s decision that he has reasonable grounds for belief that the Dealer will not carry on business in accordance with law and with integrity and honesty.

SECOND ISSUE – DEALER SUBMITTED FALSE DOCUMENTS TO THE REGISTRAR

The Dealer made copies of various documents available to the Registrar when the latter called for their production during the investigation of the Dealer by the Registrar’s investigators.

One of those documents received by the Registrar from the Dealer is the Canada Customs Coding Form which reflects that one of the five vehicles that the Dealer purchased in the United States and then imported into Ontario was sold to the Dealer by “Salvage Management of Syracuse”.

However, a copy of another document obtained by the Registrar from the Dealer’s records, according to OMVIC inspector Gingras, is merely headed “Management of Syracuse” without the word “Salvage” appearing on such copy before the words “Management of Syracuse”. According to Gingras, the word “Salvage” was deleted from the original

document photocopied by the Dealer before submitting it to OMVIC.

On the original of that same copy of the document, again according to Gingras, appeared the words "Salvage Pool No. 7003131" whereas on the photocopy of the document furnished to OMVIC by the Dealer were the words "Pool No. 7003131" only. In addition, according to Gingras' testimony the Dealer's name and address did not appear on the photocopy obtained by OMVIC from the Dealer and which indicates the Dealer's name had been deleted by the Dealer before photocopying and handing the photocopy to OMVIC.

No explanation of these deletions was offered by the Dealer at the hearing and he did not contest the testimony of Gingras. The Tribunal accepts the testimony of Gingras in the total absence by the Dealer of offering an explanation of the allegations made against the Dealer and in the absence of the Dealer contradicting or contesting Gingras's evidence.

The Tribunal finds that the Dealer deliberately and intentionally tried to mislead OMVIC in its investigation by furnishing OMVIC with "doctored" documents and as such affords the Registrar with reasonable grounds for belief that the Dealer will not carry on business in accordance with law and integrity and honesty.

THIRD ISSUE – OUTSTANDING AND UNPAID RETAIL SALES TAX

The evidence of the collection officer at the Ministry of Finance was that \$101,762.00 in Retail Sales Tax remains outstanding and owing to that Ministry by the Dealer. This sum is made up of actual tax collected and not remitted by the Dealer in the sum of \$72,081.00 together with penalty, interest and estimated further tax as of June 30, 2003. No payments have at any time been made by the Dealer in reduction or part payment of the sum owing. The Dealer conceded that he owes the Ministry retail sales tax and that he has failed to remit to the Ministry. He believed less than the amount claimed by the Ministry is in fact owing. Nevertheless he has made no payments to the Ministry and continues to this very day to make no payments. The Tribunal accepts the Ministry's figures as to the amount owing by the Dealer.

The sum of \$72,081.00 was the amount of retail sales tax collected and not remitted to the Ministry. That sum constitutes trust funds that rightly belong to the Ministry and which funds the Dealer has no right to retain. It is the public purse that is being denied its rightful due by the ongoing conduct of the Dealer to remit those trust funds to the Ministry. To continue to do so reflects adversely on the integrity and honesty of the Dealer.

This continuous nefarious course of conduct by the Dealer, in and of itself, affords reasonable grounds for belief that the Dealer will not carry on business in accordance with law and with integrity and honesty. In the alternative it indicates having regard to the Dealer's financial position that the Dealer cannot reasonably be expected to be financially responsible in the conduct of business.

DECISION:

Pursuant to the authority vested in it by section 7. (4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his Proposal to revoke the registration of Bhabishan Goberdhan as a motor vehicle dealer under the *Motor Vehicle Dealers Act*, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 28, 2004

Filename:2091.mvda.Bhabhisan Goberdhan

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.

FIRST PLACE FINE CAR SALES INC. and DOMENIC CERULLO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE AND REVOKE REGISTRATION

TRIBUNAL: MAXWELL L. ROTSTEIN, Vice-Chair

APPEARANCES: ANTHONY E. BAK, Counsel, representing First Place
Fine Cars Sales Inc. and Domenic Cerullo

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: March 1, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") dated November 28, 2003 issued by the Registrar ("Respondent") under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of First Place Fine Car Sales Inc., as a motor vehicle dealer (the "First Place") and to revoke the registration of Domenic Cerullo, as a salesman under the provisions of the Act.

The Proposal sets out the Registrar's reasons for seeking an Order for the revocation of the registration under the Act and for the refusal of registration for First Place and Domenic Cerullo under the Act. The reasons are stated as follows in the Registrar's Proposal:

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 past conduct of Domenic Cerullo and First Place Fine Car Sales Inc. is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act. Therefore, the Registrar is unwilling to register Domenic Cerullo or First Place Fine Car Sales Inc. under the Act.

- 1) Domenic Cerullo is a salesperson who has been registered under the Act since on or about August 28, 1996.

- 2) First Place is a corporation which applied for registration as a motor vehicle dealer on or about November 30, 2001. Domenic Cerullo is the sole officer or director of First Place.
- 3) Domenic Cerullo failed to provide the Registrar with full or truthful answers to questions concerning the nature of various financial transactions relating to First Place. Domenic Cerullo refused to provide the Registrar with the requested documentation to substantiate his explanation concerning the nature of these financial transactions.

As Indicated, the Registrar's Proposal under Section 7(1) of the Act was issued on November 28, 2003. On December 2, 2003 Domenic Cerullo and First Place Fine Car Sales Inc. filed a Notice of Appeal from this Proposal with this Tribunal under section 7(2).

There is also some confusion as to the exact legal name of one of the Applicants. The name on incorporation document 1467731 indicates the correct name to be First Place Fine Car Sales Inc ("First Place"). The Notice of Appeal and some of the correspondence refers to "Cars Sales" but this error was subsequently corrected and was not objected to by the Respondent.

Mr. Cerullo has been a salesperson registered under the provisions of the Act since August 28, 1996. First Place applied for a dealer's licence on or about November 30, 2001. For the next two years, the Registrar's Office conducted research (specifically not called "an investigation") on Mr. Cerullo's fitness to have a dealer's licence. The Respondent's Book of Documents, which was filed with the Tribunal, contains numerous bank statements, leases and income tax returns pertaining to Mr. Cerullo and First Place. These materials would have undoubtedly been relevant to the Tribunal had the matter proceeded on its merits on March 1st. However, the hearing on that day focused on the narrow issue of jurisdiction, and, therefore, these documents were not relevant.

The Respondent's Book of Documents does, however, contain three letters which are helpful as background to the Proposal that were issued on November 28, 2003. The three letters were correspondence between Mr. Anthony E. Bak of Lawrence, Lawrence & Stevenson LLP and Ms. Aviva Harari, Counsel to the Ontario Motor Vehicle Industry Council (OMVIC).

1. Mr. Bak's Letter of November 11, 2003 to Ms. Harari

I am writing this letter to you on behalf of my client, First Place Fine Cars Inc., who have had an application for a dealer's licence before the Registrar since the early part of 2002. Amazingly, my client has received neither a licence nor a proper Refusal for Registration under section 7(1) of the *Motor Vehicle Dealers Act*.

If the Registrar does not comply, we will bring the necessary *mandamus* application based on the Ontario Court of Appeal decision in *Hassan* which I am sure you are more

than acquainted with. We of course will be seeking costs on a substantial indemnity scale given this outrageous delay.

2. Ms. Harari's response to Mr. Bak of November 13, 2003

Despite repeated requests for information, which your client had agreed to provide, the information was not received by this office. Any delay with this application is solely the responsibility of your client. Should your client instruct you to commence any legal action, in the circumstances, my client will be seeking full indemnity as to costs.

3. Mr. Bak's response to Ms. Harari of November 14, 2003

My client requires a response from the Registrar by November 22, 2003 that is compliant with section 7 of the *Motor Vehicle Dealers Act*. OMVIC's insistence on my client providing information which has no bearing on his application is not a legitimate screening procedure. It is outside the jurisdictional governing framework.

The Registrar has had long enough to deal with this matter appropriately. If we do not have a response by November 22, 2003, we will proceed with our application.

One can appreciate from this exchange between the lawyers that this Proposal might be the subject matter of future litigation. Mr. Bak seemed very anxious for the Proposal to be issued and Ms. Harari appeared to feel it was not in the public interest to issue a Proposal without more information. There can be no question that Ms. Harari and the Registrar were on notice that this Proposal was going to be carefully edited and possibly challenged by Mr. Bak.

This matter came before the Tribunal for hearing on March 1, 2004.

On February 20, 2004 the Applicant served a Notice of Motion returnable at the outset of this hearing.

The relief sought in the Applicant's Notice of Motion was as follows:

- a) An order quashing or setting aside the Notice of Proposal to Refuse and Revoke Registration dated November 28, 2003, signed by one Mary Jane South;
- b) An Order compelling the Registrar, *Motor Vehicle Dealers Act* to forthwith issue a dealer's licence to the Applicant, First Place Fine Car Sales Inc.;
- c) An Order confirming that the Applicant Domenic Cerullo will retain his licence as a salesperson and that such licence shall be transferred upon the request of the Applicant Domenic Cerullo to the Applicant First Place Fine Car Sales Inc. after a dealership licence is issued to First Place Fine Car Sales Inc.;
- d) A Declaratory Order confirming that one Mary Jane South has acted outside the scope and authority of the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 and Regulations as amended;

- e) A Declaratory Order to the effect that the current Notice of Proposal to Refuse and Revoke Registration is of no force and effect and not compliant with section 7 of the *Motor Vehicle Dealers Act*;
- f) An Order requiring the Registrar of *Motor Vehicle Dealers Act* to forward a copy of this Order to everyone receiving a Notice of Proposal to Refuse and Revoke Registration signed by Mary Jane South or anyone other than the Registrar, *Motor Vehicle Dealers Act*;
- g) Costs of this motion and proceedings to date fixed in an amount this Honourable Tribunal may deem just payable by the Registrar, *Motor Vehicles Dealers Act* and/or one Mary Jane South;
- h) Such other and further relief this Honourable Tribunal may deem just.

The Notice of Motion was in compliance with the Rules of Practice of this Tribunal (Rule 11) and specifically complied with Rule 11.2 as to the time the Notice of Motion had to be served and Rule 11.3 as to the proof that such Notice had been served was filed with the Tribunal prior to the hearing of the Motion. In addition Mr. Rothe, representing the Registrar, did not object to the Motion being proceeded with on the hearing date.

THE NOTICE OF MOTION

The Notice of Motion essentially deals with the jurisdiction of this Tribunal to hear this matter under section 7(4) of the Act. The grounds of this Motion are that the proper steps under section 7(1) were not taken by the Registrar to place this matter properly before the Tribunal and, therefore, a hearing of this matter would be outside the jurisdiction of the Tribunal.

Counsel for both parties agreed that a hearing before this Tribunal could only take place under section 7(4) of the Act if a Proposal had been made by the Registrar under section 7(1) of the Act. The issue before the Tribunal was therefore whether the Proposal that was sent to the applicants on November 28, 2003 was in compliance with the requirements of section 7(1) of the Act. While the parties had completely opposite views concerning such compliance, both did agree that the Tribunal only had jurisdiction if in fact there had been a properly issued proposal. The Proposal of November 28, 2003 is attached to this Decision and Order as Schedule "A".

In addition to the Notice of Motion, the Applicant relied on a Brief of Authorities which contained the Act, proposed legislation amending the Act (unproclaimed), case law on the issue of delegated authority and the Ontario Court of Appeal's Decision in the *Hassan v. Ontario (Registrar of Motor Vehicles)* 2001 O.J. 421 (Docket C34896). The Respondent did not file a Book of Authorities in response. Both parties presented extensive oral arguments and were permitted to reply to the arguments of opposing counsel.

There follows a summary of the oral arguments made by the parties.

The Applicant's position can be summarized as follows:

- (a) Section 7(1) requires a Proposal to be issued by the Registrar or the mandated "decision maker" under the Act.
- (b) The purported Proposal of November 28, 2003 was not in compliance with section 7(1) because it was not issued personally by the current Registrar, Mr. Carl Compton.
- (c) The Act does not have any provision allowing any other person or employee of OMVIC to make a Proposal under section 7(1) other than the Registrar.
- (d) The purported Proposal was issued by Ms. Mary Jane South, as "Deputy Registrar" of OMVIC. Her name and title appear at the bottom left-hand corner of the Proposal on the second page. (See Schedule "A".)
- (e) The Act does not contain any provision for the appointment of a Deputy Registrar and Ms. Mary Jane South does not have the authority to make a Proposal under section 7(1) as she is not the named Proposal issuer under the Act.
- (f) The Registrar has no power to delegate his/her authority or his/her responsibilities under the Act to any other person in regards to issuing Proposals.
- (g) If the Registrar has appointed a Deputy Registrar for purposes of issuing a Proposal under section 7(1) of the Act, such person has not been "lawfully appointed" since there is no authority under the legislation for such appointment.
- (h) The Proposal of November 28, 2003 issued by Ms. Mary Jane South does not comply with section 7(1) and is a nullity.

The Respondent's position can be summarized as follows:

- (a) The issuing of a Proposal under section 7(1) is a matter considered by a number of people "in the office of the Registrar" who in this case collaborated on the application made by Mr. Cerullo and First Place and Ms. South was the person most familiar with the file. Ms. South issued the Proposal on behalf of the Office of the Registrar and was authorized to act in the name of the Registrar.
- (b) That the filing of an Appeal under section 7(2) by the applicants on December 2, 2003 was an acceptance of the Proposal by the applicant and it is not now open to them to challenge it – i.e. they are now estopped from challenging what they have relied upon by appealing to the Tribunal.
- (c) The Applicants had ample opportunity to challenge the issuance of this Proposal by making an Application to the Divisional Court and have not chosen to do so.

- (d) The issuance of a Proposal is an administrative function, not one of a disciplinary nature, since only after a hearing by this Tribunal can the dealer or salesman be deprived of his/her licence. The Proposal itself is only to initiate proceedings.
- (e) The Respondent also raised the *Interpretations Act* R.S.O. 1990 Chapter 111, but specific sections were not cited. It is assumed that the relevant sections of the *Interpretations Act* relied on were sections 28 and 29.

Implied provisions:

28. In every Act, unless the contrary intention appears,

directions to public officer to apply to successors and deputy

- (m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to the public officer by his or her name of office, include his or her successors in office and lawful deputy; (emphasis added)

Words and terms

29. "registrar" includes a deputy registrar;

THE LEGISLATION – STATUTORY INTERPRETATION PRESENT AND PROPOSED ACTS

1. THE EXISTING LEGISLATION

The *Motor Vehicle Dealers Act* (the "Act"), has the following provisions:

Registrar

Sec 2 (1) The Deputy Minister shall appoint a person as the Registrar of Motor Vehicle Dealers and Salespersons. 1998, c. 18, Sched. E, s. 185.

Duties of Registrar

- (2) The Registrar may exercise the powers and shall perform the duties conferred or imposed upon him or her by or under this Act under the supervision of the Director. R.S.O. 1990, C. M.42, s. 2(2).

Sec 3 (1) No person shall,

- (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
- (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Sec 5 (1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Sec 6 (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Sec 7 (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant. R.S.O. 1990, c. M.42, s. 7 (1).

- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing. R.S.O. 1990, c. M.42, s. 7 (2).

- (3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1). R.S.O. 1990, c. M.42, s. 7 (3).

- (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. R.S.O. 1990, c. M.42, s. 7 (4).

- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act. R.S.O. 1990, c. M.42, s. 7 (5).

- (6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section. R.S.O. 1990, c. M.42, s. 7 (6).

- (7) Despite subsection (1), the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering the registrant's registration. R.S.O. 1990, c. M.42, s. 7 (7).
- (8) Where, within the time prescribed therefor or, if no time is prescribed, before expiry of the registration, a registrant has applied for renewal of a registration and paid the prescribed fee, the registration shall be deemed to continue,
 - (a) until the renewal is granted; or
 - (b) where the registrant is served with notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its order. R.S.O. 1990, c. M.42, s. 7 (8).
- (9) Even if a registrant appeals an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act, 1999*, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal. 1999, c. 12, Sched. G, s. 29 (2).

In considering the Act, it should be noted that Section 2 of the Act calls for a Registrar to be appointed by the Deputy Minister and such Registrar shall exercise the powers and shall perform the duties conferred or imposed upon him/her under the Act under the supervision of the Director. There is no provision in the definition section or other sections of the Act suggesting a position of Deputy Registrar.

Under section 10 of the Act, the Registrar has power to designate persons in writing to make inspections and the Act gives these inspectors wide powers under section 11. There is no similar language dealing with section 7 or any other section making reference to a Deputy Registrar being designated by the Registrar for any duties.

Section 24 of the Act provides for the Lieutenant Governor and Council to make Regulations. However there is no provision made for an appointment of a Deputy Registrar under the Regulations.

THE PROPOSED REVISED ACT 2002

The *MOTOR VEHICLE DEALERS ACT 2002* (2002 Act) has received three readings in the legislature but has not yet been proclaimed. Unproclaimed legislation cannot be considered by this Tribunal as in any way binding in law. However, the Tribunal is free to consider whether any inferences can be drawn from a pending unproclaimed legislation and whether any guidance can be obtained from its provisions.

Under section 3(1) of the 2002 Act, there is a provision for the appointment of a Registrar and a maximum of two Deputy Registrars. The powers and duties of such Deputy Registrar(s) are set out in proposed section 3(3) as "such duties as are assigned by the Registrar and shall act as the Registrar in the Registrar's absence".

Section 3(4) of the 2002 Act states "if more than one Deputy Registrar has been appointed, only one Deputy Registrar may act as the Registrar at any one time". Clearly if the Act had already been proclaimed this Tribunal would have no difficulty in finding as valid a document signed by a Deputy Registrar, provided that the Registrar had so designated such Deputy in accordance with that Act. However, in the absence of such

proclaimed legislation, we are left with the existing Act which is completely silent on the position of Deputy Registrar.

The acknowledgement that the legislature has now specifically dealt with the issue of a Deputy Registrar's position creates an inference that there previously was a missing element in the legislation and that a Deputy Registrar's position should not be assumed under the present Act.

In the *Hassan v. Ontario (Registrar of Motor Vehicles)* Case 2001 O.J. 421 (Docket C34896), Mme Justice Abella confirmed that the Registrar is mandated by the Act to administer and enforce it. In paragraph 9 of her Ruling she says in part "in any circumstance where the Registrar *decides* to refuse, suspend or revoke registration, the applicant is entitled to invoke the process set out in s. 7, namely entitlement to a hearing by the Tribunal if requested in a timely manner." We take from Mme Justice Abella's ruling the key word *decision*. It appears that in her view there is a requirement that the Registrar issue a *decision* under section 7(1). A *decision* is something that clearly must be made by the person mandated under the Act.

The Respondent did not introduce any supporting evidence buttressing Ms. South's authority. It was suggested by the Applicant that the Registrar could file an Affidavit or even a letter stating that the Registrar had reviewed the file and had merely asked Mary Jane South to issue it on his behalf. Alternatively, it was suggested the Respondent could have filed some internal manual or documentation evidencing that Ms. Mary Jane South had received her authorization from the Board of OMVIC in a more formal way. There was also no evidence placed before the Tribunal that the Registrar in this case had ever reviewed the file relating to First Place and Mr. Cerullo. From Mr. Rothe's submission, I was left with the impression that the Registrar had not done so in this case.

The *Interpretations Act* (sections 28 and 29) is not helpful to the Respondents since there has been absolutely no evidence introduced that Ms. South was ever created a "lawful Deputy". To be a lawful Deputy one has to be lawful. In order to be "lawful" an individual has to be mandated by the Legislation or else by the administrative framework of the body itself. Although the word Registrar includes the position of Deputy Registrar, this can only apply if a Deputy Registrar had lawfully been created by the Legislation or by some internal authority. I, therefore, conclude that the *Interpretations Act* is of no assistance to the Respondent in this matter.

As to the question of estoppel, it has been long established law that jurisdiction cannot be waived or consented to by parties. The jurisdiction of this Tribunal is based on a pre-condition of a Proposal under section 7(1) being filed. If no Proposal is found to exist, there can be no jurisdiction. That is why, for example, in the *Hassan v. Ontario (Registrar of Motor Vehicles)* Case 2001 O.J. 421 (Docket C34896) an appeal was made not to this Tribunal but to the Divisional Court. An appeal under section 7(2) does not act as consent to the inadequacies of the Proposal under section 7(1). Furthermore, it is not incumbent upon an applicant to apply to the Divisional Court when it is permitted to make a jurisdictional argument before this Tribunal.

The issue of the delegation of authority has been dealt with by leading Canadian scholars in the area of administrative law. Professor John Willis' seminal article "**Delegatus Non Protest Delegare**" (1943) 21 *Can. Bar Rev.* 257-61 is quoted in **Administrative Law** - Evans, Janisch, Mullan, and Risk Fourth Edition 1995 - (Emond Montgomery Publications - Toronto) at pages 516/517.

When is delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negated by any contrary indications found in the language, scope or object of the statute; to put the matter in another way, the word "personally" is to be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words "or any person authorized by it" are to be read thereinto in its place. This *prima facie* rule of construction dealing with delegation is derived in part from the "literal" rule of construction, in part from the political theory known as "the rule of law," and in part from the presumption that the naming of a person to exercise some discretion indicates that he was deliberately selected because of some aptitude peculiar to himself. The literal rule of construction prescribes that nothing is to be added to a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express; to read in the word "personally" adds nothing to the statute, to read in the words "or any person authorized by it" does. This "rule of law" says that, since the common law recognizes no distinction between government officials and private citizens, all being equal before the law, no official can justify interference with the common law rights of the citizen unless he can point to some statutory provision which expressly or impliedly permits him to do so; to point to a provision justifying interference by A does not, of course, justify interference by B. (emphasis added). The presumption that the person named was selected because of some aptitude peculiar to himself requires the authority named in the statute to use its own peculiar aptitude and forbids it to entrust its statutory discretion to another who may be less apt than it, unless it is clear from the circumstances that some reason other than its aptitude dictated the naming of it to exercise the discretion.

Also see the following which is excerpted from **Administrative Law** - David J. Mullan - Third Edition 1996 - (Carswell Thomson Publishing) at page 195.

42 In considering whether legislation impliedly authorizes delegation, the courts look to the following factors: the nature of the authority on whom the power is originally conferred; the nature of the person to whom the purported delegation is made; the nature and extent of the power possessed by the original authority and the conditions upon which it can be exercised; the extent of the delegation in relation to the total power and the controls and conditions imposed by the original decision-maker on the exercise of power by the delegate.

43 The more important the power, the more likely it is that it cannot be delegated and must be exercised by the person or authority named in the empowering statute. This is particularly so if the power authorizes interference with the common law rights and also if something in the grant of power indicates that the legislature places special trust in the named authority, such as where it requires of the named authority special qualifications peculiar to the task.

DECISION AND ORDER

The Act places a great power and responsibility in the office of the “Registrar”. While seeking to protect the consuming public, he/she can effectively take away an individual’s livelihood. He can, however, do even more. He/she can make determinations as to a person’s character and integrity.

If the Legislature had intended this significant power to be delegated – it could have so stated in the Act. If the Cabinet (the Legislative Council) wanted these powers to be delegated – it could have passed Regulations to this effect. The fact that pending legislation now creates and empowers specifically two Deputy Registrars to assume the duties of the Registrar if lawfully appointed creates a strong inference that this position (Deputy Registrar) had not been previously created or empowered.

Applying the tests suggested by Professors Willis and Mullan leads one to initially question whether the *prima facie* words of the Statute conferring the authority to issue a Proposal by the Registrar is negated by any contrary indications “in the language, scope and object of the Statute”.

The Act itself is a consumer protection statute and should be read in terms of its primary goal of protecting the consuming public from certain persons who because of their background or lack of financial stability ought not to be dealing with the public in the capacity of car dealers or automobile salesmen. However, at the same time the Statute and the *decisions* made under it do affect in a very substantial way the economic rights of the individual. A Proposal has the effect of banning an individual from the automobile trade in Ontario and, therefore, that “*decision*” is a very important one and one which ought to be made by a senior official appointed for that purpose. It seems clear that the legislature intended that the power of the Registrar be employed by that person and not by a delegate.

In this matter, the Proposal was signed by Mary Jane South, who has for many years worked in the Registrar’s Office. Although she calls herself a Deputy Registrar, I cannot find any legislative authority for the creation of such a position or title. Even if such a position of Deputy Registrar can be created for administrative purposes within the Registrar’s Office, there is absolutely no specific or implied right to delegate the Registrar’s role under section 7(1) of the Act to a Deputy Registrar.

It is important to note that although the appeal procedure is available to this Tribunal - under section 7(2) to allow the Tribunal to deal with the matter under section 7(4), there is the option to the individual affected not to appeal and in which case section 7(3) automatically comes into effect and turns the Proposal into a Final Order. This analysis makes it easier to appreciate why the arguments of the Respondent are not persuasive. If this were merely an administrative matter leading automatically to a hearing, then the decision over the future of a car dealer or a car salesman would be made only at this Tribunal. However since the Proposal can lead to stripping the individual of his licence if he remains silent, the *decision* involved in the Proposal is a very significant one and one which ought to be made personally by the Registrar.

The Proposal under section 7(1) of the Act must be issued by the Registrar. There is no requirement that it be signed by the Registrar personally, but it must not appear to be issued by another person or designate.

The Proposal of November 28, 2003 is therefore declared to be a nullity since it was not issued by the Registrar under the Act. This decision is without prejudice to the issuance of another Proposal to the same individuals by the Registrar in the proper manner.

The Applicant has been successful in challenging this specific Proposal and the Tribunal issues the following Order.

- (I) An Order declaring that the current Notice of Proposal to Refuse and Revoke Registration is of no force and effect as not being compliant with section 7 of the *Motor Vehicle Dealers Act*.
- (II) An Order quashing or setting aside the Notice of Proposal to Refuse and Revoke Registration dated November 28, 2003, signed by one Mary Jane South.

However, the Applicant is denied the other relief sought in its Notice of Motion since as agreed by the parties, there is no jurisdiction to rule on these other matters.

The Applicant has requested costs. As to costs, Rule 14 of the Tribunal's Rules is quite specific in this regard.

- 14. Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

Since there has been no such conduct here, there will be no Order as to costs.

Nothing in this Decision should be construed in any way to criticize the competence or ability of Ms. Mary Jane South. From a review of a number of other cases in the records of this Tribunal, it appears that Ms. South has played an important role in the operation of the Act. The concern here, however, is that administratively within OMVIC there has been a delegation of authority from the mandated official (the Registrar) to a person not mentioned in the Act or the regulations.

I want to thank Mr. Rothe and Mr. Bak for the high quality of the discussion on this jurisdictional issue.

LICENCE APPEAL TRIBUNAL

Maxwell Rotstein, Vice-Chair

RELEASED: April 15, 2004

FILE NAME: 2096.mvda.First Place & Domenic Cerullo.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.

PRIVATE & CONFIDENTIAL
SENT BY XPRESSPOST

SCHEDULE "A"

*IN THE MATTER OF the Motor Vehicle Dealers Act, R.S.O. 1990, c. U42
 and Regulations, as amended
 -and-*

*IN THE MATTER OF the registration of First Place Fine Car Sales Inc. ("First
 Place")
 -and -*

IN THE MATTER OF the registration of Domenic Cerullo

TO: **Domenic Cerullo**
119 Codsell Avenue
Toronto, ON M3H 3W3

AND TO: **First Place Fine Cars Sales Inc. Unit**
Unit 3, 8635 Keele Street
Concord, ON L4K 2N1

NOTICE OF PROPOSAL TO REFUSE AND REVOKE REGISTRATION

Take notice that pursuant to Section 7 of the Motor Vehicle Dealers Act (the "Act") the Registrar is proposing to refuse the registration of First Place and to revoke the registration of Domenic Cerullo under the Act.

REASONS

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 past conduct of Domenic Cerullo and First Place is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to register Domenic Cerullo or First Place under the Act.

PARTICULARS

The reasons for this proposal are:

- 1) Domenic Cerullo is a salesperson who has been registered under the Act since on or about August 28, 1996.
- 2) First Place is a corporation which applied for registration as a motor vehicle dealer on or about November 30, 2001. Domenic Cerullo is the sole officer or director of First Place.
- 3) Domenic Cerullo failed to provide the Registrar with full or truthful answers to questions concerning the nature of various financial transactions relating to First Place. Domenic Cerullo refused to provide the Registrar with the requested documentation to substantiate his explanation concerning the nature of these financial transactions.

RIGHT TO A HEARING

Section 7(2) of the Act provides that an applicant/registrant is entitled to a hearing by the Licence Appeal Tribunal in respect of this proposal, if **WITHIN 15 DAYS** after service of this proposal, the applicant/registrant files an appeal, in writing, to the following parties:

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

-AND TO -

Ontario Motor Vehicle Industry Council
Registrar / Motor *Vehicle* Dealers Act
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

Note that Section 7(3) of the Act provides that where the applicant/registrant does not require a hearing by the Tribunal in accordance with subsection 7(2), the Registrar may carry out the proposal to refuse/ revoke the registration, without further notice to you.

Section 7(4) of the Act provides that where an applicant/registrant requires a hearing, the Tribunal shall schedule a hearing. At that time, the Tribunal may order the Registrar to carry out, or refrain from carrying out this proposal, or may order that the Registrar take such action as the Tribunal considers appropriate, in accordance with the Act and the regulations.

Section 7 (5) of the Act provides that the Tribunal may attach such terms and conditions to its Order or to the registration, as it considers proper to give effect to the purposes of the Act.

APPLICATION OF THE STATUTORY POWERS PROCEDURE ACT

The Statutory Powers Procedure Act, R.S.O. 1990, Chapter S.22, as amended, applies to the hearing to be held by this Tribunal. A party to a proceeding may be represented by counsel or an agent.

The Registrar states that the good character, propriety of conduct or competence of the Applicant/Registrant shall be an issue in any hearing before the Tribunal and the Registrar has, therefore, furnished herein reasonable information of allegations with respect thereto.

APPLICATION OF THE RULES OF PRACTICE OF THE LICENCE APPEAL TRIBUNAL

This is to serve as notice that the Registrar shall make application for its costs pursuant to Rule 14 of the Rules of Practice.

FURTHER PARTICULARS/SUPPLEMENTAL NOTICE

The Registrar may provide further and other particulars in respect of any other matters herein or in respect to any other matter including further grounds for refusal/revocation of registration.

DATED at Toronto, this 28 day of November, 2003.

Mary South
Deputy Registrar
Motor Vehicle Dealers Act

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



De-ULTIMATE INVESTMENT INC. AND JOHNBULL OSAYANDE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BONIFACE AHUNWAN, Counsel, representing De-Ultimate
Investment Inc. and Johnbull Osayande

AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle
Dealers Act*

DATES
OF HEARING: March 10, 2004 and April 8, 2004

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the "Proposal") dated October 24, 2003, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) to revoke the registration as motor vehicle dealer of De-Ultimate Investment Inc. (the "Dealer").

The Registrar bases his Proposal to Revoke the registration of the Dealer under section 7 of the Act as read with sections 5.(c)(ii) and 6.(2).

In support of his Notice of Proposal the Registrar furnished the following particulars:

1. De-Ultimate Investment Inc. (the "Dealer") is a Corporation, which was first registered as a Motor Vehicle Dealer, with terms and conditions, on or about April 17, 2002.
2. On or about September 17, 2002 the Dealer purchased a 1999 Toyota Corolla VIN# 2T1BR12E6XC759734 from Impact Auto Auctions Ltd. with a notation "the true distance traveled is unknown." The vehicle was sold on or about October 25, 2002 to _____ with an odometer disclosure of 71,828 kilometers.

3. On or about October 10, 2002 The Dealer purchased a 1992 Precidia VIN# JM1EC4344N0123598 from Toronto Auto Auction showing an odometer disclosure of 292,485 kms and sold it on or about November 5, 2002 with an odometer disclosure of True Kilometers Unknown (TKU).
4. Bills of Sale provided by the Dealer to OMVIC for the above referenced transactions differed from the Bills of Sale the Dealer had provided to the consumers.
5. The Dealer has not complied with his terms and conditions specifically clause 13:

'The Dealer agrees that it is under a positive obligation to disclose all material facts in writing about the vehicles it sells to its customers. The Dealer agrees to make reasonable efforts to research the history of all the Dealer's vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.'

(Exhibit 5, tab 1)

By Notice of Further and Other Particulars dated December 3, 2003 the Registrar added Johnbull Osayande ("Osayande") as a party to the proceedings as well as Mostafa Seyed. Seyed did not appeal the Proposal to Revoke him as a salesperson and was therefore not a party to the hearing.

Both the Dealer and Osayande, the latter as a registered salesperson under the Act, appealed the Proposal and the hearing proceeded against them. The Notice of Further and Other Particulars reads as follows:

1. Johnbull Osayande has been a motor vehicle salesperson registered under the Act and an officer of De-Ultimate Investment Inc. since on or about June 20, 2002.
2. Mostafa Seyed has been a motor vehicle salesperson registered under the Act and an officer of De-Ultimate Investment Inc. since on or about September 10, 2002.
3. The Registrar proposes to add the revocations of the registrations of Johnbull Osayande and Mostafa Seyed as salespersons under the Act to the revocation of De-Ultimate Investment Inc. dated October 24, 2003.

(Exhibit 5, tab 2)

By a further Notice of Further and Other Particulars II dated February 24, 2002 the Registrar added the following allegations:

1. De-Ultimate Investment Inc. was registered as a motor vehicle dealer on Terms and Conditions. In addition to having breached clause 13 of the Terms and Conditions as set out in paragraph 5 of the Proposal dated October 24, 2003, the dealer has also breached clauses 1, 2, 5, 6, 7, 8, 10, 14 and 17. Attached hereto as Schedule "A" is a copy of the Terms and Conditions.
2. The Registrar's office has received complaints with respect to the Dealer.

Schedule "A" to the above Notice of Further and Other Particulars II reads as follows:

In accordance with subsection 5(2) of the Motor Vehicle Dealers Act (hereinafter the "Act" DE-ULTIMATE INVESTMENT INC. (hereinafter referred to as "the Dealer"), agrees to the following terms and conditions to be attached to its registration as a motor vehicle dealer:

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
4. The Dealer agrees that all books and records shall be kept at the Dealer's registered premise (sic), and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.
5. The Dealer agrees to maintain a sign at the Dealer's registered premise (sic) that will be visible to the public.
6. The Dealer agrees to operate exclusively from the location provided by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
7. The Dealer agrees not to invite the public to deal at a place other than the approved location.
8. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
9. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
10. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
11. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
12. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
13. The Dealer agrees that it is under a positive obligation to disclose all materials (sic) facts in writing about the vehicles it sells to its customers. The Dealer agrees to make

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

14. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer know or ought to know that the purchase or sale of those vehicles will facilitate an illegal or unethical practice.
15. The Dealer will comply with all aspects of the Retail Sales Act (sic) with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
16. The Dealer agrees it will not be involved with the buying and selling of motor vehicles without the benefit of registration.
17. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
18. The Dealer understands that its registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
19. The Dealer acknowledges that the Registrar may take further administrative action in the form of a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and conditions.
20. The Dealer acknowledges that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
21. The Dealer hereby acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to the Dealer's consent to the terms and conditions set out in this document.

(Exhibit 5, tab 3)

The Dealer and Osayande filed with their Notice of Appeal written reasons in support of such appeal.

(Exhibit 5, tab 5)

At the commencement of the hearing Counsel for the Dealer and Osayande introduced a Motion (Exhibit 8) to strike out all the allegations contained in the Registrar's Notice of Further and Other Particulars II dated February 24, 2004.

The Tribunal heard submissions from both Counsel in regard to the Motion and at the conclusion of submissions Counsel for the Registrar withdrew the allegation contained in paragraph 2 of the above noted Notice of Further and Other Particulars II of February 24, 2004. The Tribunal ruled to strike out paragraphs 1, 2, 8 and 14 of schedule "A" to the above noted Notice of February 24, 2004. The balance of the allegations stand.

THE EVIDENCE:

The evidence presented by the Registrar at the hearing consisted of the testimony of Consumer #1A and his spouse, Consumer #1B, Paul Parkin of Bracklands Auto Sales, Consumer #2, David Lee, Ralph Baley and Laura Gordon. In addition to the above persons' testimonies, the Registrar relied on documents as disclosed in its Book of Documents. The Dealer and Osayande relied on the testimony of Osayande and the documents disclosed.

A summary of the various testimonies follows.

Consumer #1A

Consumer #1A stated he is the spouse of Consumer #1B who purchased a 1992 Mazda Precidia motor vehicle from the Dealer. He viewed the Mazda at 789 Arrow Road, Toronto, on November 5, 2002. When Consumer #1A arrived at the Dealer's premises at 789 Arrow Road it was locked. A male person arrived at the dealership who introduced himself to Consumer #1A as "Kevin." Kevin unlocked and opened the premises and it was there that Consumer #1A viewed the Mazda. Consumer #1A test drove the Mazda, liked it, and gave Kevin a cash deposit of \$200.00. When he left 789 Arrow Road, Consumer #1A was not given a bill of sale regarding the Mazda and had not signed any document. Later, Kevin presented Consumer #1A with a blank bill of sale and requested that his spouse complete the bill of sale. Consumer #1A's spouse filled in the blank bill of sale under the section headed the "Purchasers Particulars" and the section headed "Insurance Information." She also placed her initials in the section headed "Terms of the Contract" (Exhibit 5, tab 9B, third page).

Kevin later picked up the bill of sale as partially completed by Consumer #1B. The Mazda vehicle was delivered a few days thereafter at which time the vehicle's plates were affixed and Consumer #1A paid the balance owing. At this stage Consumer #1A was given a copy of the completed and signed bill of sale (Exhibit 5, tab 9B, third page). Delivery of the Mazda took place at the Dealer's premises at 789 Arrow Road. Kevin was present at the time of delivery, as was Osayande. Kevin and Osayande spoke to each other although Consumer #1A was not a party to any discussions between Kevin and Osayande.

At the time he initially inspected the Mazda on November 5, 2002, Consumer #1A noted it had 196,569 kms registering on it. Kevin told Consumer #1A he could not verify the mileage shown on the odometer. Consumer #1A stated that had he known the Mazda had travelled "in excess of 290,000 kms" he would not have considered purchasing it.

Shown a copy of a bill of sale (Exhibit 5, tab A, second page) Consumer #1A stated that he had never seen this particular document prior to being shown it by an employee of OMVIC when he was recently interviewed by that employee.

In cross-examination, Consumer #1A stated that he was never told by Kevin that there was a problem with the odometer of the Mazda, only that the kilometres registering on it could not be verified by Kevin.

Consumer #1B

In her testimony, Consumer #1B testified that when her spouse brought her a blank bill of sale, she completed the personal information and insurance portions contained in that bill of sale (Exhibit 5, tab 9B, third page.) Shown a bill of sale (Exhibit 5, tab 9A, second page) Consumer #1B denied that that document was the document she partially completed and stated that the initials on the latter document are not her initials. The first time she saw the latter document was when an OMVIC inspector showed it to her when he recently interviewed her.

Paul Parkin

Parkin stated that he is a salesperson with Bracklands Auto Sales ("Bracklands") of St. Catharines. He confirmed that he faxed certain documents to OMVIC's inspector, David Lee, relating to a 1992 Mazda Precidia motor vehicle. (Exhibit 5, tab 9A)

Parkin stated that the Mazda was purchased by Bracklands under a bill of sale dated October 8, 2002 from Performance BMW of St. Catharines (Exhibit 5, tab 9D, second page). At the time of Bracklands purchasing the Mazda, the odometer registered 291,568 kms. Subsequently, on October 10, 2002, Bracklands sold the Mazda at an auction sale conducted by Toronto Auto Auctions. The purchaser of the Mazda at that auction was the Dealer. The bill of sale issued by Toronto Auto Auctions disclosed that the Mazda had an odometer reading at time of sale of 292,485 kms (Exhibit 5, tab 9D, third page). Parkin further stated under cross-examination that he drove the Mazda to the auction and the vehicle's odometer was registering when he delivered the vehicle to the Toronto Auto Auctions.

On re-examination, Parkin stated that if a purchaser lodges a complaint with the auction house concerning a vehicle bought at auction, the auction house communicates the complaint to the seller in an effort to resolve the complaint. In this particular instance, Toronto Auto Auctions did not communicate with Bracklands to advise it of any problem reported by the Dealer.

Consumer #2

Consumer #2 testified that he purchased a 1999 Toyota Corolla from the Dealer. He had observed an advertisement in the Auto Trader, a trade publication, that the Toyota was being offered for sale. He spoke by telephone with one "Kevin Raheem" who had placed the advertisement in the Auto Trader. When Consumer #2 spoke with Kevin and expressed an interest in purchasing the Toyota, he requested that Kevin obtain for him a Used Vehicle Information Package in regard to the Toyota. After speaking with "Kevin Raheem" he inspected the Toyota on October 21, 2002 at a private house where he met with Kevin.

Consumer #2 was then told by Kevin that the Toyota had been involved in a minor accident. Consumer #2 informed Kevin that he would buy the Toyota subject to "certain things" being attended to before delivery. He gave Kevin a \$280.00 cash deposit on October 21, 2002 and received a handwritten notation from Kevin concerning the sale. (Exhibit 5, tab 8B, second last page)

On October 25, 2003 Consumer #2 went to an address where Kevin had told him he could pick up the Toyota and where it was being prepared for delivery. The address he went to was the Dealer's address at 789 Arrow Road where he was then told that he would be buying the Toyota from the Dealer. He was presented with a bill of sale regarding the Toyota (Exhibit 5, tab 8B, third page). Consumer #2 paid the balance due under the bill of sale. Having previously requested a used vehicle information package relative to the Toyota, Kevin obtained same on Consumer #2's behalf and gave it to Consumer #2 on October 25, 2002. When Consumer #2 read the information in the package he noted that the Toyota was branded "rebuilt." When he queried what rebuilt means he was advised by Kevin that even if a vehicle had been in a minor accident, that vehicle must be branded "rebuilt."

Consumer #2 observed that Osayande was present, as was Kevin, when he went to the dealership premises on October 25, 2002. At that time Consumer #2 gave Osayande the balance owing under the bill of sale. He observed Osayande sign the bill of sale regarding the Toyota after Consumer #2 gave Osayande a money order and cash in respect of the balance owing under the bill of sale. Shown a bill of sale (Exhibit 5, tab 8B, third page) he identified that document as the bill of sale he initialled and signed, and which was also signed by Osayande.

When, during his testimony, Consumer #2 was shown a bill of sale (Exhibit 5, tab 8A, second page) his attention was drawn to the portion thereon under the heading "comments." Consumer #2 stated that when he signed the bill of sale (Exhibit 5, tab 8B, third page) there was nothing written in under the "comments" portion. Consumer #2 stated further that he was given a copy of the bill of sale that he signed (Exhibit 5, tab 8B, third page) and he denied he signed a bill of sale in which anything was written in under the comments section.

David Lee

Lee stated in his testimony that he is an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC") and has been employed as such for the past 4 years. In the course of his employment with OMVIC he inspected the Dealer's premises on February 21, 2003. Again on March 10, 2003 he attended at the Dealer's premises to inspect the Dealer's books and records. There he met with Osayande and his salesperson Mostafa Seyed ("Seyed"). Lee removed certain boxes and records for the purpose of copying same and left his inspection findings with Osayande when he left the Dealer. Those findings reminded Osayande of the necessity of complying with sections 16 and 17 of Regulation 807 to the Act. Among the books and records removed by Lee from the Dealer was a bill of sale regarding the sale of a 1999 Toyota from Impact Auto Auction ("Impact") to the Dealer

dated September 17, 2002 and a further bill of sale dated October 25, 2002 of that vehicle from the Dealer to Consumer #2 (Exhibit 5, tab 8A, second page). The Impact bill of sale (Exhibit 5, tab 8, page one) had the following words appear on the face of that bill:

The true distance travelled is unknown but may be in excess of which is recorded to date.

and

Vehicle ownership is branded as follows: on-salvage.

Lee contacted Consumer #2 after obtaining the above documents from the Dealer. He also obtained from Impact a report by Impact on the Toyota's condition when it was received for auction and which showed significant damage to the vehicle's right and left front, and right rear. The vehicle was not driveable, only towable (Exhibit 5, Tab 8D). Lee made arrangements to meet with Osayande on June 23, 2003.

Ralph Bayley

Bayley testified that he is and has been with OMVIC as an inspector since July 2001. Osayande was to meet with Lee at OMVIC's offices on June 23, 2003 but Lee was not available so Bayley met with Osayande, having familiarized himself with the file. At that meeting Bayley took notes of his discussion with Osayande (Exhibit 5, tab 12) and Osayande told Bayley that he used a form of bill of sale that is provided by the Used Car Dealers Association ("UDCA ") which is a "three part" form. The yellow carbon copy of the form, or first part, goes to the consumer, the white and pink carbon copies of the form are kept by the dealer. Informed by Bayley that OMVIC had obtained a copy of the Impact bill of sale (Exhibit 5, tab 8A) Osayande was shown a copy of that bill of sale and was also shown a copy of a subsequent bill of sale between the Dealer and Consumer #2 (Exhibit 5, tab 8, page 3). Osayande was asked by Bayley to comment on the non disclosure of the true distance travelled by the vehicle being unknown. Osayande stated "Mostefa makes mistakes" and asked if Osayande had lost the original bill of sale Osayande paused and then stated "No" (Exhibit 5, tab 12.)

At that interview Osayande was also asked in regard to the Mazda transaction with Consumer #1B why the mileage on the auction bill of sale differs from the mileage shown on the subsequent bill of sale to Consumer #1B (Exhibit 5, tab 9(b)) in that the latter reflected approximately 100,000 kilometers less than what appeared on the former bill of sale. In answer to these queries Osayande stated that Seyed had "lost our copies" and when at a later stage he had to do "the taxes" Osayande made up a new bill of sale.

Laura Gordon

Gordon testified that she is Director of Compliance with OMVIC and had been with the latter organization since 1997. She described OMVIC, which came into operation in 1997 as having delegated to it the responsibilities of administering the Act and its Regulations and described the Act as a public protection statute.

Gordon also testified that from 1998 to 2002 Osayande operated his dealership as a sole proprietorship during which time there were concerns that he was not operating from authorized premises and was not making necessary written disclosures on bills of sale and was breaching sections 15 and 16 of Regulation 801 of the Act insofar as records were concerned. When Osayande changed from sole proprietorship to a Corporation the Registrar required him to sign certain terms and conditions, which was executed by the Corporation on June 17, 2002 (Exhibit 5, tab 6). Gordon further testified that according to the records of the Companies branch of the Ministry of Consumer and Corporate Relations Osayande became an officer, first Director and President of the Dealer on July 7, 2000 and remains so to date.

Gordon testified further that Impact only sells motor vehicles at auction that are insurance write-offs and also stated that section 16 of Regulation 801 requires all three carbon copies of a bill of sale to have original signatures on each. Her concerns as far as Osayande and the Dealer are concerned relate to the various differences in the contents of bills of sale supplied by the Dealer and bills of sale supplied by consumers, failure to comply with section 19 of the above regulation, which deals with repairs and replacement odometers; inappropriate and untrue disclosures made by the Dealer in that it should have disclosed that the vehicle(s) had travelled a minimum stated distance when the vehicles' odometers ceased to function; in relation to the Toyota vehicle no "odometer cluster" invoice was available to show that the cluster had been replaced with a new or replacement cluster and that section 16(2)(o) of Regulation 801 had been violated.

Johnbull Osayande

Osayande testified that he was originally registered as a dealer in 1998 and that in 2000 he decided to incorporate. Accordingly that corporation, De-Ultimate Investments Inc., was registered as Dealer in April 2002 under the Act subject to certain terms and conditions. Osayande became first Director and President of the Corporation and presently holds those offices. He stated that he has had no customer complaints registered against the Dealer.

On February 17, 2003 when the Dealer was visited by David Lee, an OMVIC inspector, Osayande was not on the premises and arranged to attend at OMVIC's office. On June 23, 2003 he was interviewed by Inspector Bayley as Lee was not available.

At that time Mostafa Seyed ("Seyed") was a salesperson in the Dealer's employ having commenced working for the Dealer in September/October 2002. Seyed's duties included his showing and demonstrating vehicles of the Dealer. Osayande supervised Seyed and gave Seyed instructions. Osayande instructed Seyed on the completion of bills of sale. Seyed had access to vehicles of the Dealer but was not permitted to take vehicles home with him. Seyed was appointed a Director of the Dealer.

In dealing with the Toyota vehicle purchased by Consumer #2, Osayande stated the Dealer purchased that vehicle from Impact and at the time of purchase no kilometers were showing on the odometer, as it was a digital odometer. The Dealer paid \$4296.05 for the

vehicle and did have repairs made to the vehicle after it was towed to a repair facility. The cost of repairs was \$3981.45. In support of these repair costs and the cost of the vehicle's purchase he handed in a handwritten list of expenses totalling \$8,287.50, which included the purchase price of the vehicle at auction (Exhibit 9). He took the vehicle to First Class Auto Body, a Designated Structural Repair Station, which did the structural repairs to the vehicle and issued a Structural Inspection Certificate (Exhibit 7).

Osayande stated that Seyed informed him that there was someone interested in purchasing the Toyota vehicle and Consumer #2 came to the Dealer's premises to conclude the sale. Osayande stated further that he "walked" Consumer #2 through the vehicle's condition and was told by Consumer #2 that Seyed had "told him everything about the car." Consumer #2 asked Osayande to explain to him what was meant by "rebuilt" and he explained that the vehicle's status had been branded "salvage" and that status had subsequently been changed to "rebuilt" through the Ministry.

Shown Exhibit 5, Tab 8B, third page, Osayande testified that this document, a bill of sale, was presented to him by Seyed. Osayande stated he completed part of the bill of sale, namely the "vehicle information" section, the "comments" section and the "terms of settlement" section. He did not complete the section dealing with "purchaser's information." The section headed "Terms of Contract" had been initialled by Consumer #2 and signed by the latter. After completing and signing this bill of sale Osayande gave it to Seyed who gave it to Consumer #2.

In dealing with the Mazda vehicle which was purchased at Toronto Auto Auctions by Consumer #1B, Osayande stated that the vehicle was driven from the auction to the Dealer's premises. Osayande stated that he completed the signature part at the foot of the bill of sale (Exhibit 5, tab 9B, third page) while the balance of that bill of sale was partly completed by Seyed and partly by Consumer #1B. Seyed told Osayande that he had shown the Mazda vehicle to Consumer #1A "on a Saturday" and had taken it outside the showroom to show Consumer #1A. Osayande went on to state that a copy of the bill of sale was given to Consumer #1A upon completion of the transaction. Later he found that the Dealer's copy of the bill of sale was missing and the Dealer had no other copy of the bill. Seyed gave him information relating to the transaction so that Osayande could "make up a bill of sale." The bill of sale that was made up was the document found at Exhibit 5, Tab 9A, page 2 and it was this bill of sale that Osayande gave to OMVIC's inspector. When he gave this bill of sale to OMVIC's inspector he told the inspector it was not a copy of the original bill of sale but was a bill he had made up. Shown the note signed by Kevin, in which not Kevin acknowledges receipt of \$280.00, being the deposit received from Consumer #1B (Exhibit 5, tab 9B, last page) Osayande stated he "never wrote this note."

Under cross-examination by OMVIC's Counsel, Osayande identified the Terms and Conditions he signed on June 17, 2002 and acknowledged he understood what he signed and in particular paragraph 14 thereof dealing with material disclosures to be made by the Dealer (Exhibit 5, tab 6). Osayande conceded that Seyed remained an Officer and Director of the Dealer for some 9 months after Seyed's serious mistakes had come to light and was only removed as such in February 2004. He acknowledged that although he terminated

Seyed's authority "to carry out any transfer, or registration of vehicles" with the Ministry on behalf of the Dealer on October 31, 2003 (Exhibit 7, third last page) he never terminated Seyed as a salesperson with the Dealer.

With regard to the Mazda/Consumer #1B transaction and the bill of sale in that transaction Osayande acknowledged that there was no disclosure on the bill that the kilometres travelled by the vehicle was not accurate. He further acknowledged that the deposit of \$280.00 (Exhibit 5, tab 8B, second last page) in respect of the Consumer #2/Toyota transaction came to the Dealer "through Seyed." Osayande further acknowledged he could not produce an invoice from the repairer of the Mazda respecting repairs he stated the Dealer had had made to the vehicle.

Osayande stated that the Mazda's odometer cluster was replaced by the Dealer as the vehicle's original cluster was stolen from the vehicle while on the Dealer's premises. He acknowledged that he could not produce an invoice or receipt for the purchase of a replacement cluster and he conceded he did not report the theft of the original cluster to the police.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal:

1. The Dealer was registered as a motor vehicle dealer under the Act on or about April 17, 2002.
2. The Dealer was incorporated and registered with the Companies Branch of the Ministry of Consumer and Commercial Relations on July 7, 2000 and remains registered.
3. Osayande was registered as an Officer and Director of the Dealer on July 7, 2000, remains so registered at all material times hereto and is the controlling mind of the Dealer.
4. Seyed was registered on September 5, 2002 as a Director of the Dealer and remained so registered at all material times.
5. The Dealer, therein represented by Osayande, agreed to be registered as such subject to certain terms and conditions imposed upon the Dealer under a document signed by the Dealer on June 17, 2002.
6. Osayande was registered as a motor vehicle salesperson under the Act in or about April 1998 and remains so registered.
7. The Dealer, when it purchased a certain Toyota motor vehicle on September 17, 2002 at an auction conducted by Impact, was notified by Impact that the Toyota

vehicle's true distance travelled was unknown, but may be in excess of which was recorded at that date of auction and that vehicle was branded as salvage.

8. The Dealer, therein represented by Osayande, sold the aforesaid Toyota motor vehicle to Consumer #2 under a bill of sale dated October 25, 2002 and such latter bill of sale recorded that the distance travelled by that Toyota vehicle as at October 25, 2002 was 71,828 kilometers.
9. The Dealer therein represented by Osayande and Seyed failed at any time to disclose to Consumer #2 whether in writing or verbally and in particular on the bill of sale signed by the Dealer and Consumer #2 that the true distance travelled by the aforesaid Toyota vehicle was unknown, and that it may have been in excess of which was recorded when the Dealer sold the Toyota vehicle.
10. The Dealer failed in its legal obligation under the Act as well as under paragraph 13 of the Terms and Conditions it signed on June 17, 2002, to disclose material facts and/or information to Consumer #2 regarding the distance travelled by the aforesaid Toyota vehicle.
11. The Dealer when it purchased a certain Mazda motor vehicle on October 10, 2002 at an auction conducted by Toronto Auto Auctions was notified that the Mazda vehicle's odometer disclosed a reading of 292,485 kilometers.
12. The Dealer therein represented by Osayande sold the aforesaid Mazda vehicle to Consumer #1B under a bill of sale dated November 5, 2002 and such bill of sale recorded that the distance travelled by that Mazda vehicle as at November 5, 2002 was 196,569 kilometers.
13. The Dealer therein represented by Osayande failed to disclose to Consumer #1B that the Mazda vehicle had travelled a distance of at least 292,485 kilometers when it was sold to Consumer #1B nor did the Dealer disclose that the vehicles odometer cluster had been replaced by the Dealer nor did the Dealer comply with sections 19.(1) or 19.(2) of Regulation 801 to the Act.
14. The deposits paid by Consumer #2 and Consumer #1B to Kevin under bills of sale in respect of the Toyota and Mazda respectively were handed by Kevin to the Dealer and were credited by the Dealer as and by way of deposits to the accounts of Consumer #2 and Consumer #1B.
15. Kevin was the name used by Seyed, and Kevin was in fact Seyed, in all his dealings on behalf of the Dealer when he negotiated the sales of the Toyota and Mazda motor vehicles with Consumer #2 and Consumer #1B respectively.

THE LAW:

In the *Motor Vehicle Dealers Act*, R.S.O. 1990 Chapter M.42 states:

5(1) An applicant is entitled to registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Regulation 801 to the above Act states:

19.(1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance travelled by the motor vehicle.

(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the reading in miles or kilometres that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

REASONS FOR DECISION:

The onus of proof rests upon the Registrar to establish on a balance of probabilities that the Dealer and Osayande contravened the Act and regulations made under the Act.

The Tribunal has considered the issues that have arisen in this matter and its finding and conclusions are set out hereunder.

First Issue – Was Mostafa Seyed using an alias of Kevin or Kevin Raheem

The Tribunal finds that Kevin, in his dealings with both Consumer #1 and Consumer #2 was acting as salesperson for and on behalf of the Dealer with the full knowledge of the Dealer. The Tribunal also finds that in his dealings with both the above consumers, Kevin was an alias used by Mostafa Seyed, who was at all material times a motor vehicle salesperson registered under the Act as salesperson of the Dealer.

The above findings are based upon the fact that in both transactions involving Consumers #1B and #2 the deposits paid by those two consumers to Kevin were received by the Dealer and credited by the Dealer to those consumers in their respective bills of sale. There was no denial or contestation by the Dealer that the deposits paid by the two consumers to Kevin were credited to the Dealer in the two bills of sale. Further, the evidence clearly shows that Kevin had the keys to the Dealer's premises, as it was Kevin who unlocked the premises in order to admit Consumer #1B's spouse so as to show him the Mazda vehicle and to demonstrate that vehicle in a test drive.

Second Issue – Was Osayande the controlling mind of the Dealer and did he represent the Dealer in the transactions with both consumers

The Tribunal finds that Osayande was at all material times the first Director and the President of the Dealer and was the controlling mind of the Dealer. The records of the Companies Branch, not disputed by Osayande, reflect his directorship and presidency of the Dealer. It was Osayande who signed the two bills of sale when the Dealer sold the Mazda and Toyota vehicles to Consumers #1B and #2. At no time were these aspects denied by Osayande in his testimony. The Tribunal also finds that Osayande was perfectly aware of the necessity of disclosing to purchasers all material facts relating to vehicles sold by the Dealer for he signed Terms and Conditions at the time of the Dealer being registered under the Act. Paragraph 13 of those terms and conditions is clear and unambiguous. Despite his knowledge of the importance of making full and material disclosure on all bills of sale he failed to make disclosure on the Toyota vehicle's bill of sale to Consumer #2 that the true distance travelled was unknown and may be in excess of which was recorded. Osayande in his testimony conceded that it is both important and material in assessing the value of a vehicle to know the distance travelled by that vehicle. Despite this knowledge, he failed to disclose these facts to the consumer.

Third Issue – Credibility of various witnesses

The Tribunal had the opportunity of observing Osayande during his testimony and found him to be neither credible nor reliable. He contradicted himself when he tried to explain the various differences in his testimony and in his signed statement to Bayley. He was unable to produce an invoice regarding repairs he claimed were done to the Mazda vehicle at the Dealer's cost. He was unable to produce an invoice to show that the vehicle's odometer cluster had been replaced as required by section 19 of Regulation 801 to the Act. He also failed to report the alleged theft of the vehicle's odometer cluster to the police. The Tribunal has no difficulty in concluding that the testimony of Consumers #1A and #1B and the testimony of Consumer #2 was more credible and acceptable to the testimony of Osayande.

Fourth Issue – Toyota Transaction

The Tribunal accepts that the actual bill of sale that was concluded between the Dealer and Consumer #1B (Exhibit 5, tab 8B, third page) contained no disclosure by the Dealer that the true distance travelled was unknown and may be in excess of which is recorded. The Tribunal finds that Osayande gave to OMVIC as part of the Dealer's records a false and untrue bill of sale (Exhibit 5, tab 8A, second page) well knowing that the latter document was false as it differed from the actual true bill of sale signed by the parties (Exhibit 5, tab 8B, third page). Not only did the Dealer fail to make material disclosure to Consumer #2 but, in order to attempt to cover up this non-disclosure, the Dealer deliberately and with intent to mislead OMVIC in its investigation falsified the copy of the bill of sale it handed over to OMVIC. This act of falsification in and of itself reflects adversely on the honesty and integrity of the Dealer and of Osayande.

Fifth Issue – Mazda Transaction

Insofar as the Mazda transaction was concerned there is no doubt that when that vehicle was purchased at auction by the Dealer, represented by Osayande, the bill of sale disclosed that the vehicle had 292,485 kilometres registered on its odometer. Osayande attended the auction for and on behalf of the Dealer and in his testimony he conceded that when purchasing a motor vehicle the odometer reading is an important factor in determining the vehicle's value. However, when selling the vehicle to Consumer #1B the distance travelled by the vehicle was shown as 196,569 kilometres. The latter figure was false and totally misleading. Consumer #1B's spouse who negotiated the purchase of the vehicle gave evidence that had he known that the vehicle had travelled over 290,000 kilometres the purchase would not have been proceeded with. When the vehicle was sold by the Dealer to Consumer #1B the Dealer was represented by Osayande who knew or ought to have known of the distance travelled by the vehicle as he attended at the auction to purchase the vehicle and had the auction bill of sale in his possession.

The clearly false disclosure by the Dealer regarding the distance travelled by the vehicle when selling the vehicle to the consumer is indicative of the lack of honesty and integrity of the Dealer and Osayande and coupled with the other evidence introduced at the hearing affords reasonable grounds for belief that neither the Dealer nor Osayande will carry on business with honesty and integrity and in accordance with the law.

The Tribunal places no credence in Osayande's testimony that the original bill of sale regarding the Mazda was lost. The Tribunal also finds that the actual true bill of sale was that found at Exhibit 5, tab 9A, second page and that the copy bill of sale found at Exhibit 5, tab 9B, third page is not a true or accurate copy of the bill of sale entered into between the Dealer and Consumer #1B. The evidence of Consumer #1A contained no ambiguity whatsoever and that consumer was adamant that the bill of sale he and his spouse, Consumer #1B, were given by the Dealer is that found at Exhibit 5, tab 9A, second page.

That bill of sale did not contain the words "true kms unknown" that appear on the false bill of sale found at Exhibit 4, tab 9B, third page. The Tribunal has no hesitation in accepting the testimony of Consumer #1A and Consumer #1B and rejecting the testimony of Osayande in regard to what is dealt with above.

Sixth Issue – Terms and Conditions signed by Osayande

In June 2002 concerns of the Register surfaced when Osayande wished to change the dealership from a sole proprietorship to a corporation and Terms and Conditions were required by the Registrar before he would register the Corporation as Dealer. Quite clearly there had been previous issues of material non-disclosure by Osayande, hence the Terms and Conditions and particularly paragraph 13 thereof regarding material disclosure. Despite these recent terms the Dealer and Osayande have chosen to breach paragraph 13 thereof. There can be no grounds for mitigation having regard to the Terms and Conditions signed by Osayande and the testimony given at this hearing. In the opinion of the Tribunal Osayande is not capable of being governed and has shown himself to be a risk to both the industry and consumers.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated October 24, 2003 to revoke the registration of De-Ultimate Investment Inc. as a motor vehicle dealer under the *Motor Vehicle Dealers Act*, as amended and the registration of Johnbull Osayande as a motor vehicle salesperson under the said Act, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 30, 2004

FILE NAME: 1944.mvda.DeUltimate

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

1235114 ONTARIO LTD. o/a PHOENIX INVESTMENTS AND VINCENT LONSDALE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: VINCENT LONSDALE, appearing on his own behalf
and as Agent on behalf of 1235114 Ontario Ltd.

AVIVA HARARI, Counsel, appearing on behalf of the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: March 30, 2004

Toronto

ORDER

BACKGROUND:

Following attendances on March 30, 2004 at a prehearing before this Tribunal of Vincent Lonsdale representing himself and as Agent for 1235114 Ontario Ltd. (the "Applicants") and Aviva Harari, Counsel, representing the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on May 6, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicants and the Registrar.
2. The Parties recorded that there was no resolution of any of the issues in this matter.

3. The Applicants had no issue with the correctness of the allegations contained in paragraphs 1, 2 and 3 of the Registrar's Notice of Proposal dated January 8, 2004.
4. The Applicant Vincent Lonsdale conceded that criminal charges have been laid against 1235114 Ontario Inc. respecting the two allegations set forth in paragraph 4 of the Notice of Proposal.
5. Counsel for the Registrar advised Vincent Lonsdale that the Registrar will serve upon the Applicants a Notice of Further and Other Particulars setting forth additional grounds upon which the Registrar intends to rely at the hearing of the Notice of Proposal and which particulars will amplify the grounds upon which the Registrar intends to rely at the hearing.
6. In advance of the service of the Notice of Further and Other Particulars above referred to, the Registrar's Counsel advised Vincent Lonsdale that the following additional allegations will be contained in the Notice of Further and Other Particulars:
 - (i) criminal charges against Vincent Lonsdale concerning break and enter allegations.
 - (ii) allegations of certain charges and a conviction against Vincent Lonsdale under the *Highway Traffic Act* R.S.O.
 - (iii) certain allegations that the Applicants wrongly and unlawfully failed to refund to one Max Brosseau certain monies.
 - (iv) allegations of a criminal charge of theft against Vincent Lonsdale.
 - (v) allegations of a criminal charge of possession of stolen property against Vincent Lonsdale including possession of a stolen white Monte Carlo motor vehicle bearing VIN 2G1W1ZX259135553.
 - (vi) allegation of a charge of contravening the *Highway Traffic Act* insofar as the Applicants' failure to notify the police of the Applicants' possession of a motor vehicle.
 - (vii) allegations that the Applicants permitted persons to drive motor vehicles without valid plates being affixed to those vehicles.
 - (viii) allegations that there are or were certain motor vehicles on the Applicants' premises that the Applicant had failed to register within the 6 day time period required under the *Highway Traffic Act*.
 - (ix) allegation that Vincent Lonsdale committed fraud by uttering forged documents regarding the unauthorized transfer of a motor vehicle.
7. As soon as feasible after the service of the Notice of Further and Other Particulars upon the Applicants they shall file and serve upon the Registrar and the Tribunal written reasons, if any, for disputing the allegations contained in the Notice of Further and Other Particulars.

8. The Applicant Vincent Lonsdale was reminded by the Tribunal that the attention of his counsel must be drawn to the Rules of Practice of the Tribunal of November 3, 2003 and in particular to the "Practice Direction on Adjournments" contained therein and what is set forth in that Direction concerning the "Convenience of Counsel" and a party's responsibility to ensure that retained counsel is available on the scheduled hearing date or dates.
9. Both parties shall fully comply with the applicable requirements of Disclosure as set forth in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

RELEASED: April 7, 2004

FILE NAME: 2163.mvda.Phoenix Investments & Vincent Lonsdale.doc



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

IN THE MATTER OF
JONATHON ALLEN GAGNON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 21, 2004

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

JONATHON ALLEN GAGNON

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jonathon Allen Gagnon, 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 23, 2004

SCHEDULE 'A'

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
800-789 Don Mills Road
Toronto, ON M3C 1T5

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

FROM: Jonathon Allen Gagnon
458 Gascon Street
Hawkesbury, ON K6A 1M5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Jonathon Gagnon (the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees, if he is criminally charged in the future, he will immediately notify his sponsoring dealer, in writing of the charges against him and provide a copy of the notification signed by his sponsoring dealer to the Registrar.
2. The Applicant agrees to provide full and complete disclosure on all future application and discussions with the Registrar regardless of whether or not disclosure has been made previously to the Registrar.
3. The Applicant confirms that the particulars and circumstances of his charges are substantially as disclosed to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
4. The Applicant agrees to surrender his registration if he is found guilty of a criminal offence, other than his current pending charge for assault causing bodily harm, or an industry specific offence.
5. The Applicant agrees not to be a partner, shareholder, officer, director or controlling mind of a dealer.
6. The Applicant agrees not to be the final signatory on any sales or lease contracts on behalf of the dealer.
7. The Applicant agrees not to transfer his registration as a salesperson under the Act to another Registrant without having first obtained the prior written consent of the Registrar. The Registrar shall advise the Applicant within thirty days of their decision on the proposed transfer and the Registrar shall not unreasonably withhold their consent to the proposed transfer.
8. The Applicant understands that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Applicant in support of the Applicant's application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the Applicant has given full answer to all questions and requests made by the Registrar in connection with the Registrants application.

9. The Applicant acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____ 2004.

(Signature) Jonathon Gagnon

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

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*



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

IN THE MATTER OF
COSTADINOS SPANOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE A REGISTRATION
- Proposal dated: January 21, 2004

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

COSTADINOS SPANOS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Costadinos Spanos, 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 21, 2004

FILE NAME: 2180.mvda.spanos.consent.doc

“SCHEDULE A”

TO: The Registrar
 Motor Vehicle Dealers Act
 Ontario Motor Vehicle Industry Council
 800-789 Don Mills Road
 Toronto, ON M3C 1T5

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

FROM: Costadinos Spanos
 58 Manhattan Drive
 Scarborough, ON M1R 5J6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the “Act”) the parties to the proceeding, Costadinos Spanos (the “Applicant”), and the Registrar, *Motor Vehicle Dealers Act* (the “Registrar”) waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (the “Consent Order”) based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees, if he is criminally charged in the future, he will immediately notify his sponsoring dealer, in writing of the charges against him and provide a copy of the notification signed by his sponsoring dealer to the Registrar.
2. The Applicant agrees to provide full and complete disclosure on all future application and discussions with the Registrar regardless of whether or not disclosure has been made previously to the Registrar.
3. The Applicant confirms that the particulars and circumstances of his charges are substantially as disclosed to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
4. The Applicant agrees to provide written notice, to the Registrar, of the final disposition of his pending charges for assault causing bodily harm within five days of said disposition having been made.
5. The Applicant agrees to surrender his registration if he is found guilty of a criminal offence, other than his current pending charge for assault causing bodily harm, or an industry specific offence.
6. The Applicant agrees not to be a partner, shareholder, officer, director or controlling mind of a dealer.
7. The Applicant agrees not to be the final signatory on any sales or lease contracts on behalf of the dealer.
8. The Applicant agrees not to transfer his registration as a salesperson under the Act to another Registrant without having first obtained the prior written consent of the Registrar. The Registrar shall advise the Applicant within thirty days of their decision on the proposed transfer and the Registrar shall not unreasonably withhold their consent to the proposed transfer.

9. The Applicant understands that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Applicant in support of the Applicant's application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Applicant's knowledge and belief and that the
10. Applicant has given full answer to all questions and requests made by the Registrar in connection with the Registrants application.
11. The Applicant understands that his registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Applicant's application.
12. The Applicant acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
13. The Applicant will provide a copy of this order to his employer forthwith.
14. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
15. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
16. The Applicant acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____ 2004.

(Signature) Costadinos Spanos

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

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*



Licence Appeal Tribunal

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Decisions under Ontario New Home Warranties Plan Act

Fiscal Year 2004 - 2005

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

>> [RICHARD AND SHYLA RODERICKS](#)



>> [ALEXANDER AND POLINA KOSOVSKY](#)



>> [ONTARIO NEW HOME WARRANTIES PLAN ACT](#)



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RICHARD AND SHYLA RODERICKS

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

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM H. McINTOSH, Vice Chair, Presiding

APPEARANCES: ALY SHERIF, Agent, representing Richard and Shyla
Rodericks (the "Applicants")

MARIO C. GRAVEL, Counsel, representing the Ontario New Home
Warranty Program (the "Respondent" or the "Program")

ALISON HARDING, Agent, representing the Added Party, 1120919
Ontario Inc. c.o.b. as Phoenix Homes (the "Added Party")

DATES OF
HEARING: January 12-16, 2004 and March 1 and 2, 2004 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal is brought from a decision of the Ontario New Home Warranty Program (the "Program") dated July 2, 2003 denying the Applicants' claim for compensation from the guarantee fund established under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 as amended (the "Act"). The subject property was identified as Lot 13 Eliza Crescent, Stittsville, Ontario. It was purchased by the Applicants from the Added Party under an Agreement of Purchase and Sale (APS) dated February 10, 2001 and signed as accepted by the Added Party on February 13, 2001.

ISSUES:

The position of the Applicants is that the complaints filed with the Program are valid under the Act and that the Program's Warranty Representative Paul Rochon erred in denying the claims. Mr. Rodericks testified for the Applicants.

The Program takes the position that some of the matters claimed were beyond the jurisdiction of the Tribunal and that others were not covered by the warranty provisions of the Act. Mr. Rochon testified on behalf of the Program.

The position of the Added Party coincided with that taken by the Program. Mr. John Stokes, a site supervisor, and Mr. John Feres, construction manager, testified for Phoenix Homes.

THE EVIDENCE:

The Decision Letter from which the appeal is taken was refined by a Pre-Hearing Order released November 21, 2003. The Pre-Hearing Order listed the following items of dispute as still subject to the present hearing.

Item 1: Request for refund of \$5,575.00 for the cost of the stone front.

The position of the Program was that the stone veneer was offered, selected and installed without any shortfall in workmanship or defect in materials. There being no claim before the Tribunal founded upon a cause of action for breach of warranty as required by the Act the claim, as presented, is beyond the jurisdiction of the Tribunal.

Further, this complaint is in fact for a refund of an alleged overpayment for stone work done on the house. This may found a claim for set off but in any event is a claim, which sounds in contract. As such it is justiciable in the courts not before the Tribunal.

The Agreement of Purchase and Sale (APS) eventually put before the Tribunal as Exhibit #33 contained the original agreement, and a series of amendments as upgrades were agreed upon and priced. The original dated February 10, 2001 and accepted February 13, 2001, indicated a purchase price of \$286,900.00.

Then on March 14, 2001 an amendment to the APS was executed incorporating a series of upgrades the total cost of which increased the purchase price to \$290,293.00. One of these upgrades was form 04002 an item of which was an agreement between the parties that, "front elevation to be stone instead of brick and vinyl". This had an agreed price of \$5,575.00.

A further amendment to the APS is dated March 28, 2001. The series of upgrades incorporated into the APS by this amendment brought the purchase price to \$325,602.00. One of these upgrades number 00442 had an item which stated:

install 'Ariscraft' stone in lieu of standard stone. Price: \$7,495.00.

It was the position of the Applicants that there should be a deduction of the \$5,575.00 cost of the "standard stone" which was to be installed pursuant to the preceding upgrade as that choice had been supplanted by the 'Ariscraft' selection. Instead the increase in the purchase price for the 'Ariscraft' upgrade (00442) was simply added to the price quoted for the "standard" stone choice (04002) with no accounting for the amount already priced for the "standard" stone.

From the APS placed before the Tribunal there was an increase in the purchase price for the choice of stone work of \$13,070.00 being the total of \$5,575.00 and \$7,495.00 the original and the "Ariscraft" respectively.

There was evidence of quotations received from masons and suppliers, which went into the pricing but no writing that was reduced to a constituent part of the APS.

The evidence as presented was consistent with that which would be put forward in a claim in set off.

Item 7: Refund of \$283.00 for not completing installation of gas line to stove.

The position of the Program was that the owner installed the line after closing, thereby not giving the builder the opportunity to do so. There was no defect in materials or workmanship led in evidence. It was submitted that design or work done by the owner is excluded from warranty coverage. Mr. Rochon explained that the APS did not contain an obligation on the builder to do the work claimed. As the Applicants were installing their own appliances, it was incumbent upon them to complete the fittings. They did at a cost of \$283.00.

Item 8: A refund of \$2,770.00 for the external window upgrade not given. The color was supposed to be "sandstone" not "almond".

The position of the Program is again that this is a claim in contract as it is for a refund. There was no claim that the windows were installed improperly or that they were made of defective or inferior materials. They were the windows bargained for but for their color. Therefore, there is no sustainable claim under the Act.

As stated the APS introduced and marked consisted of the initial agreement and subsequent amendments. The original or basic APS is dated February 10, 2001, and the acceptance is dated February 13, 2001. Relevant to this item of claim is item 4 of purchaser upgrade 04033, which states "all windows to be almond".

This upgrade was incorporated along with several others into the APS by reference in the amendment to the APS dated March 27, 2001 and accepted March 28, 2001. The agreed value of all of these incorporated upgrades resulted in an increase in the purchase price from \$290,293.00 to \$325,602.00.

This same amendment also incorporated upgrade 00824 which under item 7 states "Desert Sand colour for front door & garage door", priced at \$250.00.

Mr. Feres, called on behalf of the Added Party, testified on the subject of "purchaser upgrades". The system in place at Phoenix was to allow the purchaser to request desired changes to the APS to the sales representative who would describe the upgrades on a purchaser upgrade form, which consisted of a series of various coloured carbon copies, one for each participant in the upgrade. The sales agent, in this case a Mr. Cantwell, would then forward the form to Mr. Feres' department. Mr. Feres would then price the upgrades and return that quote to the purchaser. If accepted by the purchaser, the upgrade request would go back to Mr. Feres. If everything was all right, Mr. Feres would sign over the words "Construction Approval" in the upgrade form. At that point the upgrades could be commenced. Until that time, according to Mr. Feres, they could not.

It was the position of Feres that the "almond" color selection for windows became finalized by upgrade 04033 incorporated into the APS under the amendment of March 28, 2001. The windows were ordered from Winnipeg on that basis and were delivered. The requested change made in May was not approved as it was too late. The refusal is evidenced by the lack of a "Construction Approval" signature of Mr. Feres.

Mr. Sherif in his submission stated that the "almond" in the March upgrade was a mistake as it made the doors and windows different colours. Upgrade 04135 item 2 corrects this on April 15, 2001 which says in relation to the garage doors "color to match sandstone windows". That is, there is a reference to "sandstone". A letter from Mr. Cantwell the sales agent of May 23, 2001 speaks to there remaining to the Applicants an opportunity for a change in colours. That is, there is a document signed on behalf of Phoenix upon which the Applicants claim they are entitled to rely despite the position taken by Mr. Feres that the document did not bind the builder until his signature was affixed over the words "Construction Approval". There also appeared to be some confusion over whose signatures actually appeared on the upgrade forms.

Simply put, the question is whether the evidence is consistent with a purchaser knowingly ordering windows of a different colour from the doors and windows. If not, the Applicants want a refund of the price of \$2,770.00 for what Mr. Sherif states is an obvious error. Counter to this is the position that payment was received for the "almond" colour amendment and the windows were ordered on that basis. Any subsequent change was too late and not approved in any event.

As evidence, that at the end of the day there was an acceptance by the Applicants of the almond colour was the fact that of a signed Inspection Report. That Inspection Report was dated May 3, 2001 and contains what appears to be an attestation of the acceptance of almond windows by the Applicants.

Whether the May 3 Inspection Report constitutes a successful defence to the claim of mistake or whether there was proper offer and acceptance would all be issues in a claim sounding in contract.

Item 9: The roof flashing installed is the wrong size and color.

The position of the Program was that there was no color or size specified in the APS. There was also no claim in warranty as there had been no defect in workmanship or materials. Similarly there was no breach of the Ontario Building Code.

Mr. Stokes, called on behalf of the Added Party, testified that the purpose of the flashing is to shed water away from the cladding. It therefore has to have a width sufficient to prevent water from getting behind the installed stonework and forming ice dams. The flashing was wider than it would have been with the standard cladding of brick and vinyl to accommodate the dimension of the agreed upon stonework. The neighbouring houses, which have the standard cladding, have narrower flashings. As well the Added Party offered to paint the flashing as a “good will” gesture but the offer was refused. The Tribunal was given photographs to assess the competing positions.

The Applicants stood by their position that the flashing was out of proportion and stated that there was an ulterior motive behind the width of the flashing, namely to cover improper or non existent stonework. This was viva voce evidence only.

Item 10: There is a section of the fence at the rear of the property that requires installation.

The position of the Program was that the fence was a part of the subdivision agreement in the APS and is not within the scope of the Act. The fence installed at the rear of the property in fact belongs to the neighbour.

Originally the authority over the subdivision was held under a different municipal authority than Ottawa. The subdivision agreements were incorporated and are agreements between builders and the municipality. For obvious land use reasons, municipalities will require the builder to service subdivision properties in certain ways. One of these requirements is often the construction of fences. Here there was an agreement to build fences between subdivisions. The permission to build the chain link fence was given to the builder by the City of Ottawa sometime in July 2002. When it came to the Applicants’ rear property line it was discovered that there was an existing chain link fence, which was just onto the rear neighbour’s property line and had been constructed as a safety requirement for the neighbour’s pool.

The Added Party had constructed the fencing up to the existing fence of the neighbour but there remained a gap of approximately eight inches. The Applicants want this gap closed or an entire new section of fence built. Their appeal to the City of Ottawa was dealt with in a rather bureaucratic manner, essentially telling the Applicants that it would be unreasonable to force the builder to essentially duplicate an existing fence.

The Applicants' demand is that the closing of the gap would be contingent upon receiving the neighbour's approval as the fence is inside of the neighbour's property. Approval has not been sought. Although the other lot owner abutting the Applicants' property does not have a problem with the gap, the Applicants do.

Item 14: The flow rate and water pressure to the children's bathroom is inadequate.

The position of the Program was that while there was a drop in water pressure when more than one tap was opened there was no warrantable defect in materials or workmanship.

The Applicants produced the "Purchaser Upgrade Form" which stated:

upgraded water pipe will have a $\frac{3}{4}$ " diameter main line.

As well Mr. Rodericks produced photographs showing the $\frac{3}{4}$ " main coming into the house and being stepped down to a $\frac{1}{2}$ " line and the branch plumbing to the rooms being attached to this $\frac{1}{2}$ " line and not to the $\frac{3}{4}$ " main. It was the contention of Mr. Rodericks that attaching the feeders properly to the main would have resulted in a better flow throughout the house. The cost of a fix was put at \$160.00. This cost was not substantively challenged.

The Program maintained that as there was no breach of the OBC and despite the APS stipulation there was no relief available to the Applicants.

There was no satisfactory evidence as to differential flow rates that may have resulted from the installation as the Applicants stated should have conformed to the agreed wording in the APS. The Tribunal was left to ascribe a meaning to the use of the word "main" as it relates in the ordinary sense to a plumbing installation, and draw inferences there from. As well there remained the question of who has the onus of proving which of the contending positions is correct.

Item 17: There is a distinct rattling in the hot air ducting.

The position of the Program was that the claim was not substantiated, nor was there a defect in workmanship or materials or a violation of the OBC.

Mr. Rochon inspected the home on June 26, 2003. He stated that he was informed of the visit by a mechanical contractor to look at the ducting system the following day. The contractor's work order for that day, June 27 does not refer to rattling in the ducts. He further stated that he heard nothing more regarding the ductwork until this hearing. Indeed there was a work order produced showing an indication of rattling in the ducts dated January 15, 2003 with the notation "fixed noise in duct work". Mr. Rochon did not hear the ductwork noise referred to in the item of complaint.

The Applicants maintained that the sound persists.

Item 19: The toilet tank in the master ensuite is incorrectly placed.

Mr. Rodericks produced photographs showing the distance of three inches from the wall. The APS is silent on the positioning of the seat. It was his contention that originally the gap between the tank and the wall was seven inches and that the installation of a larger tank resulted in that gap being reduced to three inches.

There was no evidence that the toilet was of inferior materials or that its installation was improper. There was nothing apparently wrong with the functioning of the toilet neither was the Tribunal offered any evidence of a design or construction convention that was offended by the positioning of the toilet.

Item 24: To reinstall the property pins delineating the property bounds.

The position of the Program was that no such requirement was contained in the APS nor was there a warrantable claim in workmanship or materials to support a claim in warranty under the Act.

The Applicants insisted that the replacement of the pins was essential to their having effective means of defending the legal boundaries of their property.

The pins in question site the properties and allow for proper delineation between subdivision lots during construction. The Added Party stated that these disappear during construction. The owners are in any event provided a survey, which is available to defend any challenge as to the proper dimensions of their property.

No OBC violation was quoted to the Tribunal.

Item 25: Revised drawing submitted June 3, 2003.

The original drawings according to Mr. Feres were submitted to the Township of Goldbourne prior to the amalgamation with Ottawa. Ottawa required new drawings, which were submitted July 3, 2003. This fulfilled the requirement by Ottawa. There was a final sign off by Ottawa January 7, 2004 and an occupancy permit was issued. According to Mr. Rochon, most of the time temporary occupancy permits are given and the Certificate of Completion is issued by the Program.

In any event in the submission of the Program, bureaucratic delays or other handling of the building process are not contemplated by the Act.

The position of the Program was that this is beyond the scope of the coverage provided by the Act.

Item 26: Verification that there was a footing installed under one of the supporting pillars or teleposts in the basement.

The position of the Program was that as the claim was not substantiated, it was not within the coverage of the Act. Mr. Rochon stated that it was incumbent upon the owner to convince him that there was a viable claim under the Act. Upon the evidence provided by the owner he, as warranty representative, would make a decision as to coverage. In this case, Mr. Rochon was not convinced.

Mr. Rodericks testified that he observed the construction of the basement over a period of time. He substantiated this with a series of photographs. He became concerned that during the process he could not confirm that the required concrete footing had been put under one of the basement support teleposts as required by the OBC. The photographs convinced Mr. Rodericks that the construction sequence shown by the photos did not allow for the placement of the post in question.

Mr. Rochon stated that as there was no deformation or buckling of the telepost in question, there was no evidence of the lack of a support footing. The fix would be to have a hole drilled through the floor near the post to see if there is the required concrete footing.

The Added Party was in accord with the testimony of Mr. Rochon.

LAW:

The following sections of the Act were consulted:

13. (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in materials,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.
16. (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

APPLICATION OF LAW TO FACTS:

The Tribunal derives its jurisdiction solely from legislative enactment. It has no inherent jurisdiction.

The matters it can decide and the remedies available to the parties before it must be contained in the statute under which the process is established or they do not exist. For the Tribunal to rule on a matter not so circumscribed would mean the Tribunal had acted ultra vires of its authority and any such ruling would be of no legal effect. Not even the parties before it can bestow a jurisdiction upon the Tribunal by agreement.

The *Ontario New Home Warranties Plan Act* sets out the role of the Tribunal in Section 16. For the Tribunal to entertain a matter, it must first be satisfied that the parties to the dispute, the subject matter of the dispute and the relief sought are contemplated under the governing legislation.

The legislative intent as set out in the Act is to ensure that purchasers of new homes in Ontario will be protected against poor construction practices and irresponsible builders. To that end the regulator established to administer the Act, the Program, has set out both polices governing those engaged in the building of homes and, relevant to the present case, procedures to enforce the warranties imposed upon builders to new home buyers. Specifically as set out in section 13 above, there are warranties that the house is constructed in a workmanlike manner and is free from defects in material, it is fit for habitation and is constructed in accordance with the Ontario Building Code. Exceptions to these warranties are listed in section 13(2).

Where an owner can demonstrate that a cause of action exists for a breach of the specified warranties, he/she is entitled to relief from the guarantee fund established under the Act for the cost of remedial work.

Item 1: As outlined above, the claim is for a refund of monies under the APS. As such it is not a claim available for consideration by the Tribunal pursuant to the wording of the Act. It well may be that there was a refund owing but that would have to be decided by a court of competent jurisdiction.

Item 7: The Applicants supplied their own appliances. They would accordingly have to show an obligation on the part of the builder in the APS to carry out this work. They did not. This is not a claim for defect in workmanship or materials and therefore does not give rise to the requisite cause of action in breach of warranty under section 14 of the Act.

Item 8: This complaint was for a refund for the installation of the wrong colour of windows. The issue here is what was the final obligation of the builder regarding the colour of windows to be installed - the 'almond' ones that were in fact installed or 'sandstone' as shown on a change request. There was evidence of an agreement as to 'almond' on March 28, 2001 and evidence of a later document submitted to Phoenix by its sales representative but not approved by its construction department. Therefore, in the position of the builder the submission did not represent a valid change to the APS. Whether there was a failure of the internal protocols within Phoenix sufficient to void what were the expectations of the purchasers as represented by their agent is the question. The evidence illuminated the competing positions well enough, but unfortunately rendering a decision as between them is not within the competency of the Tribunal.

For this Tribunal to be successfully seized of this item of complaint would require a claim contemplated by the Act to be brought before it. This is not such a claim.

Item 9: The Applicants claim the roof flashing is the wrong colour and is too large for the premises. The flashing is black.

There is nothing in the APS regarding what colour the flashing was to be or of its width. This does not mean the Tribunal would be estopped from preventing the builder from installing a flashing of say chartruese left over from some previous job or of some dimension inconsistent with the purpose of installation. In such cases it falls to the trier of fact to impose a basis of what common sense would dictate when it comes to the installation of flashing on a residential property of the type under consideration. That would include both a finding of what if anything was ad idem on the subject between the contracting parties and what would constitute in any event an appropriate flashing installation. This exercise should come down to the question of whether the flashing as installed offends the appearance of the house or compromises the effectiveness of the intended use of the flashing.

The Tribunal accepts the evidence that the width of the flashing is appropriate to its intended function. In construction when there is a choice between function and aesthetics function, for obvious reasons, must take precedence. However, and in no way taking the builder's offer to paint the flashing a colour to match the window trim as an admission against interest, it is the Tribunal's finding that on reviewing the photographs one half of its criteria has been left unfulfilled. The flashing should be painted on a one time basis, a colour to match the window trim as requested by the Applicants.

Item 10 (The gap in the rear lot line fence): The position of the Program is that there is no obligation to build a fence and there is no violation of the OBC. The purchaser wants the gap closed or compensation of \$1,500.00 to have it closed. The evidence supports the position that the fence was an agreement between the municipality and the builder. The extent of the Applicants' legal status, at least on the evidence presented, would be that of a third party beneficiary.

Nevertheless there was consultation with the property owners and there was work undertaken. An attempt at least should be made to close the six to eight inch gap in the fence line.

Item 14 - Inadequate water pressure to children's washroom due to improper plumbing in breach of the agreed diameter of copper piping: Essentially as outlined, it was argued that the builder improperly stepped down the $\frac{3}{4}$ inch agreed upon "main" line to $\frac{1}{2}$ inch and branched off the interior piping from this $\frac{1}{2}$ inch source instead of joining the $\frac{1}{2}$ inch diameter piping directly on to the $\frac{3}{4}$ inch "main". There is an agreement in the APS to install the $\frac{3}{4}$ inch "main". The Program argued the water pressure would not have been affected by the $\frac{1}{2}$ inch being joined to the stepped down $\frac{1}{2}$ inch pipe and that there was no breach of the OBC in any event. The cost of a fix was estimated to be \$160.00.

This item really involves a question of onus. If there is a contractual obligation it must be presumed by the trier of fact that it made sense to the contracting parties. The use of the term "main" in the contract must be given a meaning. The word "main" to the Tribunal in the context of the document and of the testimony given can only mean a line to which feeders are joined. To aver to the contrary or to posit without convincing evidence that there would be no difference resulting from an installation contrary to the ordinary sense of that agreed upon puts the party avering in the position that consideration was given for nothing. The Tribunal is not aware of such a position of a contracting party being sustained or indeed sustainable. Whether phrased in the language of warranty or breach of contract the owner did not receive that to which he was entitled under the APS. The use of the $\frac{1}{2}$ inch pipe was an improper substitution.

Item 17 - Rattling in the hot air ducting: There was a dispute between Mr. Rochon and Mr. Rodericks that even after a clean out there was rattling. There were attempts made at rectification as witnessed by the work orders and the testimony of Mr. Rochon. The Tribunal cannot foresee a remedy that given the acrimony between the parties could result in a practical solution. The Tribunal feels that where the evidence is stalemated in the limbo of he said vs. he said, with no realistic way to verify the opposing versions, it must decide based upon practical steps taken. In this case, the Program seems to have done its job.

Item 19 - Toilet tank in the master ensuite incorrectly placed: As in other areas of this dispute, there is silence in the APS on the space between the toilet tank and the bathroom wall. The Tribunal cannot envisage an APS, which would have specified a particular distance between tank and wall save in the case of a special need. Again, the Tribunal to make a finding as to a breach of warranty must find a construction convention that was offended by the placement of the tank in this instance. It can find none.

Item 24 - Claim to have the property pins replaced in their position at time of survey: The Applicants' thrust here was that they should be able to demark their property accurately and this requires the replacement of the pins. The Program's position is that a survey comes with the property and this is what is on file as the official bounds of the property. Even if the now buried pins could be recovered, there would be no guarantee that they would be in their surveyed spot. The Applicants have a survey, which demonstrates the bounds of the property to anyone challenging. There is no breach of warranty or of the Ontario Building Code available to the Applicants.

Item 25 - Revised drawing: No submissions were advanced on this point. This came down to an issue between the builder and the city. There was no damage to the occupant that the Tribunal saw in reality and certainly none which would give rise to a claim under the Act.

Item 26 - Foundation pad or footing under one of the basement supporting teleposts:

The Applicant, Mr. Rodericks, offered testimony and photographic evidence to show that it could not be established with reasonable certainty that a concrete footing pad was placed under one of the supporting teleposts. The Program took the position that the evidence adduced by the Applicant was not sufficient to allow the Tribunal to draw the conclusion that the builder had failed to put the required footing beneath the post. To the contrary, the Program offered in opposition that there was evidence in support of the position that a footing had been installed properly to wit a lack of buckling or deformation in the subject post, which would have been present in the absence of a footing. The task of the Tribunal is to determine whether the Program properly weighed the evidence before it, before deciding on the necessity of remedial action. The Tribunal here must consider both the weight of the two competing versions of the evidence and also the consequences if the Applicant's version of events is correct. As well the Tribunal should consider the cost of verification yea or nay of the competing versions. The Tribunal finds that the Applicant has put forth sufficient evidence to warrant the small cost of a test hole to see whether a footing was in fact installed.

DECISION:

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs as follows:

Item 1: The Applicants claim is not within the jurisdiction of the Tribunal.

Item 7: The Applicants' claim is not allowed.

Item 8: The Applicants' claim is beyond the jurisdiction of the Tribunal.

Item 9: The Tribunal orders that the flashing be painted on a one time basis the colour to match the trim.

Item 10: The Tribunal directs that an attempt be made to close the gap in the chain link fence. While true that the issue is between the city and the builder, there has been an operation by the builder that has affected the Applicants' property. If permission cannot be obtained from the neighbour, the city should be contacted by the builder to seek an override. Failing these remedies, the Applicants must seek their redress in the courts.

Item 14: This claim is allowed and the Tribunal orders the Program to ensure the connections to the interior plumbing are taken off of the $\frac{3}{4}$ inch "main" as described.

Item 17: This claim is not allowed.

Item 19: This claim is not allowed.

Item 24: This claim is not allowed.

Item 25: This item is not covered by the provision of the Act and in any event appears mooted by the fact that no relevant submissions were heard.

Item 26: This claim is allowed and the Tribunal directs the Program to ensure that a test hole is drilled into the basement floor to verify the placement of a concrete footing.

LICENCE APPEAL TRIBUNAL

William H. McIntosh
Vice-Chair, Presiding

RELEASED: April 21, 2004

FILE NAME: 1857.onhwp.Rodericks.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.



ALEXANDER AND POLINA KOSOVSKY

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

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM MCINTOSH
Presiding Member

APPEARANCES: ALEXANDER AND POLINA KOSOVSKY
unrepresented

P. BALASUBRAMANIAN , Counsel, representing the Ontario New
Home Warranty Program

BILL MERONYK, Representative, Ontario New Home Warranty
Program

HECTOR HUTCHON, representing the Added Party
Great Land Homes and Properties Inc.

SANDRO DI PEDE, representing the Added Party
Great Land Homes and Properties Inc.

DATE OF
HEARING: March 18, 2004

Toronto

DECISION

BACKGROUND:

This Appeal is brought by Notice of Appeal dated November 15, 2003 to the Tribunal from a decision of the Ontario New Home Warranty Program ("the Program") contained in a decision letter dated November 12, 2003 and delivered to the Applicants.

The letter was in response to complaints forwarded to the Program under the *Ontario New Home Warranties Plan Act* R.S.O.1990 c. 0.31 ("the Act") regarding the Applicants' home located at 10 Altamont Road Toronto. The closing date of the transaction was May 31, 2002.

A pre-hearing was held resulting in a reduction in the number of items on appeal from five to two, namely compensation in the amount of the replacement cost of the damaged basement floor and the installation of upper kitchen cabinets over the sink.

ISSUES:

The position of the Applicants is that the items of claim on appeal were incorrectly assessed by the Program's warranty representative as falling outside of the warranty provisions of the Act and therefore they should receive the relief accorded by the Act.

The position of the Program is that while there was a warrantable claim the Applicants took the matter out of the coverage provided by the provisions of the Act due to their intervening act. As they replaced the floor themselves their claim from that point became a claim in contract over which the Tribunal has no jurisdiction. As for the claim regarding the upper kitchen cabinet the Program asserts that there is no evidence in support of such cabinets being included in the construction of the home.

THE EVIDENCE:

Mr. Kosovsky took the stand on behalf of the Applicants. He produced the Agreement of Purchase and Sale (APS) showing a closing date of February 15, 2002, later May 31, 2002. He went on to explain that as a result of water damage resulting from a faulty hook up by the Third Party the basement floor suffered water damage and had to be replaced. The floor that suffered the damage was parquet.

The builder was deemed responsible for the damage by the Program and was ordered to effect repairs. The extent of the damage was approximately 400 square feet. When it came time to replace the flooring a disagreement arose between Mr. Kosovsky and the Third Party builder. The root of that disagreement Mr. Kosovsky insisted arose from the wording of the APS schedule "N". He pointed out that in the APS by schedule "N" there was the following statement: "the builder agrees to install strip hardwood floors throughout the townhouse".

The actual flooring installed was parquet and according to the Applicant he was coerced into accepting something other than strip hardwood "under duress". The builder had told him that strip hardwood was an inappropriate basement flooring as it too easily suffered water damage. In fact the parquet was itself a compromise after an agreement to have carpet installed dated January 21, 2002.

The builder according to Mr. Kosovsky was only agreeable to replacing the parquet as directed by and if the owner wanted tile and carpet there would be a surcharge of \$600.00. Mr. Kosovsky rejected this and proceeded to complete the floor replacement on his own. Mr. Kosovsky stated in cross examination that he has been dealing in properties and has familiarity with the rights and responsibilities of parties to an APS.

Mr. Kosovsky submitted estimates and invoices showing the area replaced to have been 394 square feet and the cost to be in the order of \$2,166.00.

As for the upper kitchen cabinets he maintained that the design of the house called for them and that a portion of them were not installed as required. He described from the brochure of the house layout the area where in his opinion there should have been upper cabinets namely above the sink. It can be seen from the document produced that there are upper cabinets extending on either side of the sink but not over the sink itself, the area in question.

The items and reason for denial are laid out in the November 12 Decision Letter as follows:

Claim 1: The builder has refused to repair floor by installing strip hardwood floor as per agreement of purchase and sale.

Reason: Section 14(7) of the Act provides that: The corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

The Corporation ONWHP had full agreement from Great Land Homes and Properties to complete all warranted work as outlined in the Conciliation Report dated May 30, 2003.

You would not allow the builder to replace the basement parquet floor as it was originally installed.

As you denied Great Land Homes and Properties access to undertake repairs as per section 14(7) of the Act, your claim is considered at an end. ONWHP cannot assist further in this matter.

Further since you have replaced the flooring we can no longer direct the builder to complete the repairs as they have already been completed.

Claim 5: Kitchen design (Kitchen) lack of cabinets in the corner that sharply out of one with design (sic)

Reason: The upper kitchen cabinets were installed as shown in the brochure. Although the brochure is not referenced in the Agreement of Purchase and Sale it is the only document that indicates kitchen cabinet layout.

This complaint does not fall within the statutory warranties provided by the *Ontario New Home Warranties Plan Act*. This complaint may be covered by contractual warranties in your purchase agreement. You may therefore have recourse for this complaint under your purchase agreement.

As in the normal course upon receipt of complaints the Program dispatched a warranty representative to ascertain both the validity of the claims and the chance of compromise between the owner and the builder.

The warranty representative, Mr. Meronyk was called to give his version of events. Mr. Meronyk stated that his qualifications to make the assessments called for by his

employment with the Program stem from being in the home construction industry for many years.

He stated that there was never any question as to the obligation of the builder to replace the water damaged basement floor. The sequence as he interpreted them was that while the APS stated strip hardwood “throughout the townhouse” this obligation was changed in writing to carpet by a written amendment dated January 21, 2002 then changed to parquet verbally prior to completion of the home.

The Program placed the obligation upon the Third Party to replace the parquet floor but Mr. Kosovsky kept insisting on strip hardwood or compensation for any substitute. The Program ceased involvement in any mediation process once Mr. Kosovsky went ahead with his own replacement. At that point the Program took the position that the dispute is now in contract between the parties and outside of the scope of the Act. There is a court action ongoing.

Mr. Hutchon a supervisor employed by the Third Party was called. In his experience of many years in the home building industry he could not see anyone recommending strip hardwood as basement flooring due to its vulnerability to water damage. He stated that on this premise the words “throughout the townhouse” in the APS meant on the first and second floors.

THE LAW:

Section 13 (1) of the Act reads:

Every vendor of a home warrants to the owner,

(a) that the home,

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

APPLICATION OF LAW TO FACTS:

The evidence before the Tribunal was consistent with there having been a irreconcilable dispute between the Applicant and the builder resulting in the owner taking it upon himself to effect the replacement of the water damaged basement floor.

The evidence is also consistent with the disagreement having its foundation in Mr. Kosovsky’s insistence upon an interpretation of the APS which would obligate the Third Party to install strip hardwood floors in the water damaged areas or give a set off of some kind for a variance.

The builder was insistent that his obligation was to reinstall the damaged parquet floor both on the decision of the Program that this was his obligation from their investigation and on the basis that subsequent to the APS and amendments there was an agreement, albeit verbal, to install the parquet floor that was damaged. A proposition

put by the builder that tile and carpet would be installed in lieu of the parquet for a charge of \$600.00 was declined by Mr. Kosovsky.

Mr. Kosovsky while accepting the parquet floor and closing the transaction said that he did so under duress. The evidentiary parameters as to what amounts to duress such that a contract is voidable were explored by Finlayson J.A. in *Stott v Merit Investments* (1968), 63 O.R. (2nd), 545.

The term economic distress as used in recent cases, particularly in England, is no more than a recognition that in our modern life the individual is subject to societal pressures which can be every bit as effective, if improperly used as flowing from threats of physical abuse. It is an expansion in kind but not class of practices that the law already recognizes as unacceptable such as those resulting from undue influence of persons in authority. But not all pressure, economic or otherwise, is recognized as constituting duress. It must be a pressure which the law does not recognize as legitimate and it must be applied to such a degree as to amount to a 'coercion of the will', to use the expression found in English authorities, or it must place the party to whom the pressure is directed in a position where he has no 'realistic alternative' but to submit to it, to adopt the suggestion of Professor Waddams (S.M. Waddams, *The Law of Contract*, 2nd ed. (1984) at p. 376 et seq.). Duress has the effect of vitiating consent and an agreement obtained through duress is voidable at the instance of the party subjected to the duress unless by other agreement express or implied, he affirms the impugned contract at a time when he is no longer the victim of the duress.

In this case the realistic alternative of Mr. Kovosky was to reject any alteration to the APS and sue for damages. The evidence is not consistent with unconscionable coercion. In fact there is a parallel court proceeding in contract in this matter ongoing.

In the event the Applicant removed the capacity of the Program to effect a solution to the complaints as lodged consistent with the Act.

On the issue of the incomplete upper kitchen cabinets the Tribunal accepts the evidence that there were no cabinets called for above the kitchen sink and that the required cabinets were installed.

DECISION:

In accordance with the power vested in it by section 16 of the *Ontario New Home Warranties Plan Act* the Tribunal orders that the appeal of the Applicant be dismissed.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Presiding Member

RELEASED: April 27, 2004

FILE NAME: 2074.onhwp.Alexander & Polina Kosovsky.doc

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ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter O.31

IN THE MATTER OF a CLAIM by
JUDITH SCHREIER

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)

JUDITH SCHREIER

Applicant

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

- and -

POLYGRAND DEVELOPMENTS INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on April 13 and 14, 2004;

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 5, 2004 and continue at 9:30 a.m. on Tuesday, July 6, 2004, if necessary.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 15, 2004



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ST. GEORGE COLLEGE OF BUSINESS AND LANGUAGE LTD.

IN THE MATTER OF AN APPEAL FROM AN
IMMEDIATE SUSPENSION AND PROPOSAL TO
REVOKE REGISTRATION BY THE SUPERINTENDENT
UNDER THE *PRIVATE CAREER COLLEGES ACT*

DATE OF PROPOSAL AUGUST 17, 2004

TRIBUNAL: MARJORIE HILEY, Vice Chair

APPEARANCES: PAUL E GIL LYU, Agent, representing
St. George College of Business & Language Ltd.

IMANTS ABOLS, Counsel, representing the Superintendent
under the *Private Career Colleges Act*

DATE OF
HEARING: DECEMBER 21, 2004

Written Hearing

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by a proposal dated August 17, 2004 issued by the Superintendent, Private Career Colleges under the *Private Career Colleges Act* of Ontario. The Superintendent immediately suspended the Applicant operating as a registered private career college as of August 17, 2004. As well the Superintendent gave notice of her intention to revoke the registration of the Applicant as a private career college.

The Applicant responded with a Notice of Appeal to have a hearing before this Tribunal. That notice was dated August 31, 2004. In that notice the Applicant stated that they were unaware that certain courses offered by the college constituted vocational programs; that they were attempting to refund tuition fees; that there would be no new admissions until the refunds were cleared; and that they had made changes to their web site to remove the courses that required registration.

A telephone prehearing conference was held on October 22, 2004, and an order was released on October 28, 2004. At that time the parties agreed to a written hearing as provided by the rules of Procedure of the Tribunal. That order provided dates for disclosure of documents and the provision of written argument.

Materials were provided by the Superintendent in affidavit and document form in accordance with the time line stated in the Prehearing Order. The Applicant provided some materials, three days later than the date so stated in the Prehearing Order. This Tribunal is prepared to accept those materials, which were a list of students requiring refunds, those students to whom refunds had been sent and the financial statements for the period ended February 28, 2003.

No Statement of Agreed Facts was provided by the parties. Correspondence from Counsel for the Superintendent indicates that the Superintendent was attempting to provide such a statement of agreed facts. On page 16 of Exhibit 6 by a letter of December 10, 2004 the Counsel for the Superintendent attached a revised version of the Agreed Statement of Facts that incorporated changes suggested by the Applicant. The Applicant was to sign it and forward it to Counsel so they could file it with the Tribunal. There is no Statement of Agreed Facts filed as an exhibit with this Tribunal.

Counsel for the Superintendent submitted written argument by fax on December 17, 2004 in accordance with the Prehearing order. No such written argument was provided by the Applicant.

The List of Exhibits before this Tribunal are as follows:

1. Notice of Proposal dated August 17, 2004 from the Superintendent.
2. Notice of Appeal from the Applicant with a one-page attachment. Dated August 31, 2004.
3. Bound book of documents containing affidavit and documentary materials with letter dated November 5, 2004. There are 33 tabs.
4. Prehearing order by Vice Chair, Kenneth Jepson dated October 28, 2004.
5. 13 pages of documents from the Applicant with covering letter dated November 22, 2004.
6. Motion documents of the Superintendent including affidavit of George Chong and attachments dated December 16, 2004.
7. Written arguments by Counsel for the Superintendent dated December 17, 2004.

PRELIMINARY MATTER:

Counsel for the Superintendent filed Exhibit 6 on December 16, 2004 requesting a motion to declare that the appeal of the Applicant be dismissed on the grounds that it is frivolous, vexatious and commenced in bad faith and that by the Applicant not complying with the prehearing order it had abandoned the proceedings. Counsel also requested that the time frames as set out in 2.10 of the Rules of Procedure of the Tribunal be waived.

The Tribunal is not prepared to waive the time requirements for notice and the opportunity to make submissions regarding the dismissal of the proceeding. Such authority should be utilized only in exceptional circumstances. While the Tribunal is cognizant that the Applicant has not complied with all requirements as set out in the prehearing Order its actions are not such as to preclude the Tribunal from making an informed decision on this matter. If the Applicant had failed to provide the materials outlined in Exhibit #5 then the Tribunal would have had to seriously consider that the Applicant has abandoned the appeal. But there are stated actions of the Applicant such as the filing of Exhibit #5 and the discussions regarding the Agreed Statement of Facts which indicate that the Applicant continues to have an interest in these proceedings.

While the actions or lack thereof by the Applicant are not deemed sufficient to dismiss the hearing they do have an impact on the results of this hearing. The Tribunal is disturbed that the Applicant failed to provide the 2003-2004 financial statements after stating that they would do so. Also it would have been helpful to have a written submission from the Applicant addressing the concerns outlined in the written submission by Counsel for the Superintendent. A written hearing obviously depends on the materials provided by the parties. That was the reason for the prehearing order outlining the process for disclosure. The Tribunal does not have the same opportunities to address gaps in the evidence when conducting a written hearing. The Tribunal must consider the very serious issue of whether or not the Superintendent acted reasonably in proposing the revocation of the registration of the Applicant. It would have been in the best interests of the Applicant to have complied with the prehearing order and provided all the materials that could be relevant to that decision.

ISSUE:

Did the Superintendent act reasonably in holding that the Applicant was not to be expected to be financially responsible in the conduct of the private career college?

THE EVIDENCE:

The Applicant has been registered under the *Business Corporations Act* since March 12, 1999. The Applicant has been registered under the *Private Career Colleges Act* since 2003. Both in 2003 and 2004 the Applicant has had two courses registered by the Superintendent: office administration; web site design.

The Applicant advertised for several courses that had not been registered with the Superintendent: international business; hotel management; and travel and tourism. On its application form it had listed international business as a three month or one year course.

The National Occupational Classification 2001, which lists occupational descriptions, is the prescribed document under section 26 of Regulation 939 to determine what is a vocation under section 1 of the Act. Occupations listed under the NOC include middle and other management occupations (011 to 072), sales and service occupations (major group 62 and 64), accommodation service managers (0632), and travel counselors (6431) and tour and travel guides (6441).

The Applicant agrees that refunds are owing to a number of students who either did not get visas to study in Canada or did attend at the college and were not happy with its courses and instructors. While there is no agreement on precisely what is owed the Applicant has stated in its materials found in Exhibit 5 that it owes \$88,750.00 to a number of students. The Applicant claims to have refunded a number of other students in the amount of \$56,550.00. There are no receipts or letters or other evidence to verify those refunds.

The Superintendent has provided a number of complaints from students who mainly reside in India who state they have not received their tuition refunds despite many attempts by telephone and letter to the Applicant. In most cases the refunds have been owed for over a year. In most cases the students were denied study visas to come to Canada. Under the terms of their agreement with the Applicant they would get their tuition refunded except for a three hundred dollar administration fee. But in several instances the complainants are stating that the Applicant deducted four hundred dollars as the administration fee. Several complainants spoke of additional charges to them because of bank fees when the Applicant's cheque was refused for insufficient funds.

The Applicant is not denying that it has been slow in making the tuition refunds but it is stating that the refunds are happening and they will not permit new admissions until the refunds are completed.

The latest financial statement, which ends February 28, 2003, shows that the Applicant was operating at a loss of \$8,700.00 after revenue was taken from expenses.

The Applicant has stated that it did remove the objectionable courses from its web site. The Applicant stated that it did not know the courses of international business, hotel management and travel and tourism would be considered as vocational courses under the Regulations.

The Superintendent provided the particulars on those complaints made by international student or their agents. The amounts involved often exceeded \$10,000.00. Many complaints had letters attached explaining the efforts that had been taken to recoup their tuition costs. Several spoke of bounced refund cheques and additional bank charges incurred for the NSF cheques. Many spoke of how Canada had a good reputation in their country and how they hoped something could be done to assist them, as they required that money in order to look elsewhere for their education.

THE LAW:

Private Career Colleges Act

Section 4(1)

No person shall conduct or operate a private career college unless the person is registered by the Superintendent under this Act.

Section 5

An applicant is entitled to registration or renewal of registration by the Superintendent to conduct or operate a private career college and to be issued a certificate of registration except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the private career college;
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the private career college in accordance with law and with integrity and honesty;
- (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 the private career college, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that the private career college will not be carried on in accordance with law and with integrity and honesty

Section 6

- (2) Subject to section 7, the Superintendent may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 4

4.1(1) A private career college shall not offer a course of instruction unless, when the last Application for registration or renewal of registration was made by the person who conducts or operates the career college, a fee was paid in respect of the course under paragraph 2 of subsection 4(2) or paragraph 1 of subsection 4(4)

(2) Subsection (1) does not apply if the course of instruction is approved by the Superintendent.

4.2(1) The Superintendent may require a private career college to submit to the Superintendent a report evaluating a course of instruction or proposed course of instruction at the career college

(2) The report shall be prepared at the career college's expense by a person approved by the Superintendent.

Section 1

"Vocation" means any vocation prescribed by the regulations.

Regulation 939

Section 26

Each occupation included in the document entitled "National Occupational Classification 2001- Occupational Descriptions" published by Human Resources Development Canada is prescribed as a vocation for the purpose of the definition of "vocation" in section 1 of the Act.

Analysis:

The Superintendent wishes to revoke the registration of the Applicant based on its inability to be financially responsible in the operation of its business as a private career college. As well the Superintendent is concerned about the ability of the Applicant to act in accordance with law and with integrity and honesty. This Tribunal agrees with the analysis of the Superintendent and finds that the Superintendent acted reasonably in suspending the operations of the Applicant and wishing to revoke its registration.

The Applicant has not provided sufficient information to convince this Tribunal that it has the financial means to meet its obligations as a private career college. The latest financial statement ending February 28, 2003 shows the Applicant operating at a loss. That is prior to the current substantial financial claims for tuition refunds. The Applicant has had the opportunity to provide more recent and possibly more favourable financial data but it has failed to do so. The Superintendent is quite right to be concerned as to the financial responsibility of the Applicant. Despite having several meetings with staff of the Superintendent the Applicant has only marginally improved its deficit position on tuition refunds. And that improvement is not corroborated with other documentation to show that those refund cheques have not been returned for insufficient funds. Many of those creditors of the Applicant have been waiting over a year for refunds. Even those who received a refund either had the cheque bounce or got less than anticipated as the Applicant held back higher

fees than was set out in the contract with the students. The Applicant took advantage of overseas students who have limited or non-existent access to the procedures to enforce their claim against the college. These actions show a lack of financial responsibility on the part of the Applicant. The financial statements submitted show a lack of financial resources on the part of the Applicant to meet these obligations.

As well the Applicant ignored the restrictions under which it must operate as a private career college and advertised at least three courses, which had not been registered with the Superintendent. The registration certificates for 2003 and 2004 did not show these courses on them. It is patently obvious that a course on hotel management or a course on travel and tourism involves vocational occupations. The Applicant has a responsibility to both know what are the rules in its industry and to comply with those rules. It is incredulous that the Applicant can say it did not think the courses involved were vocational courses. Even when told of its error the Applicant delayed in correcting the matter and it took considerable prompting from officials from the Superintendent's office to even get the web site amended. This web site would be particularly important as an advertising tool for the Applicant in the overseas market. The Applicant did not act in accordance with the law.

The Applicant did not act with integrity and honesty when it delayed sending the refund cheques and then had several of them rejected for insufficient funds. As well a number of the complainants spoke of having the telephone banged down on them when they telephoned from their homeland to request swifter action on the refund of the tuition funds. It would appear that the Applicant was delaying the payment of the refund cheques due to financial issues. As well the Applicant did not abide by its own contractual obligations. It had stated to clients that if their visa to study in Canada was not approved there would be an administrative fee of \$300.00 deducted from the refund of their tuition fees. Instead the Applicant sent refund cheques (some of which there is proof that they bounced for lack of funds) in which they deducted \$400.00. This was a complaint of a number of the students who contacted the Superintendent's office. The Applicant did not act with integrity and honesty in its dealings with these complainants.

Based on the written materials before it the Tribunal has reached the conclusion that the Superintendent acted in a responsible manner when she acted to suspend the Applicant's operations and then to revoke its registration. The conduct of the officers of the Applicant shows that they did not act with integrity or honesty. As well the information supplied by the Applicant shows that it does not have the financial means to pay its debt to these students who wish the return of their tuition fees. It is to be hoped that the Superintendent will be able to assist these students through the forfeiture of the bond provided by the Applicant and whatever other legal avenues that are open to her in such a matter.

The registration of the Applicant is revoked.

ORDER:

Accordingly with the authority provided to the Tribunal under section 7(4) of the *Private Career Colleges Act* the Tribunal directs the Superintendent to carry out its proposal dated August 17, 2004 to revoke the registration of St. George College of Language and Business Ltd. as a private career college.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice Chair

RELEASED: January 19, 2005

File name: 2586.pcca.St. George

PRE-HEARING

ST. GEORGE COLLEGE OF BUSINESS & LANGUAGE LTD.

APPEAL FROM AN IMMEDIATE SUSPENSION AND PROPOSAL
TO REVOKE REGISTRATION OF THE SUPERINTENDENT
UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: KENNETH S. JEPSON, Vice-Chair

APPEARANCES: PAUL LYU AND STEVE SINGH, Agents, representing St. George
College of Business & Language Ltd.

IMANTS ABOLS, Counsel, representing the Superintendent under
the *Private Career Colleges Act* and DAWN GREENWOOD,
Ministry of Training, Colleges and Universities

DATE OF
PRE-HEARING: October 22, 2004 *by teleconference*

ORDER

Following participation by the parties listed above in a telephone conference pre-hearing on October 22, 2004, the Tribunal makes the following Order:

1. Given that the Applicant St. George College of Business & Language Ltd. ("St. George") has indicated it does not intend to call oral evidence in this matter, and that both St. George and the Superintendent under the *Private Career Colleges Act* (the "Superintendent") have consented to a hearing in writing, the Tribunal orders that the hearing of this matter shall proceed in writing.

2. By no later than November 5, 2004 the Superintendent shall deliver to St. George, and file with the Tribunal, all documentary evidence and affidavit evidence upon which it intends to rely in the hearing of this matter. By the same date, the Superintendent shall deliver to St. George a particularized request itemizing any documents it requests be disclosed for the purposes of the hearing.
3. By no later than November 19, 2004, St. George shall deliver to the Superintendent and file with the Tribunal, all documentary evidence and affidavit evidence upon which it intends to rely in the hearing of this matter.
4. The Parties shall determine which relevant facts are not in dispute, and shall by no later than November 30, 2004 file with the Tribunal a Statement of Agreed Facts setting out such undisputed facts.
5. By no later than December 10, 2004, St. George shall deliver to the Superintendent and file with the Tribunal its written argument for the appeal.
6. By no later than December 17, 2004, the Superintendent shall deliver to St. George and file with the Tribunal its written argument for the appeal.
7. By no later than December 20, 2004, St. George shall deliver to the Superintendent and file with the Tribunal responding written argument, if any.
8. The hearing date for this written appeal is designated as December 21, 2004.

LICENCE APPEAL TRIBUNAL

Kenneth S. Jepson
Vice-Chair

RELEASED: October 28, 2004

FILE NAME: 2586.pcca.St George College.prehrg.order.doc



PRIVATE CAREER COLLEGES ACT
Revised Statutes of Ontario 1990, Chapter P.26

1026972 ONTARIO INC.
O/A NATIVE EDUCATION & TRAINING COLLEGE

IN THE MATTER OF
1026972 ONTARIO INC.
O/A NATIVE EDUCATION & TRAINING COLLEGE

AND IN THE MATTER of the PROPOSAL
by the Superintendent under the
Private Career Colleges Act
TO SUSPEND AND REVOKE REGISTRATION
- Proposal dated: July 12, 2004

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

1026972 ONTARIO INC. O/A NATIVE EDUCATION & TRAINING COLLEGE

Applicant

- and -

SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1026972 Ontario Inc. o/a Native Education & Training College, Applicant, and the Superintendent under the *Private Career Colleges 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 Superintendent under the *Private Career Colleges 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 4, 2004



PRE-HEARING

1026972 ONTARIO INC. O/A NATIVE EDUCATION & TRAINING COLLEGE

APPEAL FROM A SUSPENSION AND PROPOSAL TO REVOKE
OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER
COLLEGES ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: WILLIAM SANGSTER, Counsel, representing 1026972 Ontario
Inc. o/a Native Education & Training College

IMANTS ABOLS, Counsel, representing the Superintendent,
Private Career Colleges Act

DATE OF
PRE-HEARING: September 14, 2004 *by teleconference*

ORDER

At a pre-hearing before this Tribunal by teleconference heard this day, William Sangster, Counsel, appeared on behalf of 1026972 Ontario Inc. operating as Native Education & Training College (the "Applicant") and Imants Abols, Counsel, appeared on behalf of the Superintendent, *Private Career Colleges Act* (the "Respondent");

The Tribunal makes the following order:

1. The hearing of the Applicant's appeal shall be conducted as a written hearing in terms of the provisions of the *Private Career Colleges Act* and the Rules of Practice of this Tribunal.
2. The Parties to the hearing are the Applicant and the Respondent.
3. At the pre-hearing held in this matter on September 14, 2004 it was agreed as follows by the Parties and the Tribunal orders as follows:

- (a) The Parties are presently attempting to resolve all issues in this matter with a view to avoiding further litigation and the hearing.
 - (b) In the event of the Parties arriving at a resolution of this matter they agree that by no later than September 29, 2004 they shall jointly enter into and execute a written agreement relating to the terms and conditions of the settlement at which they have arrived.
 - (c) A true copy of the duly executed written terms and conditions shall be filed with the Tribunal by no later than October 6, 2004, in which event, and subject to the Tribunal's acceptance of the terms and conditions, the Tribunal shall issue a Consent Order without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S.22.
 - (d) Upon compliance with subparagraphs (b) and (c) above the proceedings in this matter will be considered as disposed of by the Tribunal on the basis of the terms and conditions executed by the Parties and agreed to by the Tribunal.
 - (e) In the event of the Parties not resolving the issues in this matter and/or not complying with subparagraphs (b) and (c) above then:
 - (i) by no later than October 20, 2004 the Parties shall jointly file with the Tribunal a duly executed written statement of facts upon which the Parties have agreed.
 - (ii) by no later than November 15, 2004 the Applicant's Counsel shall serve the Applicant's written submissions upon the Respondent's Counsel and shall file a copy of such submissions with the Tribunal.
 - (iii) by no later than November 22, 2004 the Respondent's Counsel shall serve upon the Applicant's Counsel the Respondent's written submissions in reply and file a copy of such submissions with the Tribunal.
 - (iv) by no later than November 29, 2004 the Applicant's Counsel may, if necessary, serve upon the Respondent's Counsel and file with the Tribunal, the Applicant's response to the Respondent's submissions.
4. The Tribunal will, pursuant to its receipt of the aforementioned documents, issue its written decision together with reasons.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 21, 2004

FILE NAME: 2499.pcca.Native Education & Training College.prehrg.order.doc



Licence Appeal Tribunal

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PRE-HEARING

CHIARA AFFRONTI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: CHIARA AFFRONTI was neither present nor was she
represented

ROBERT A. MAXWELL, Counsel, represented the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: March 18, 2005

Toronto

ORDER

WHEREAS, Chiara Affrunti (the "Applicant") appealed the Notice of Proposal to Refuse issued by the Registrar under the *Real Estate and Business Brokers Act*,

AND WHEREAS, the hearing of the Applicant's appeal has been set down for hearing before the Tribunal on Monday, May 9, 2005 at 9:30 a.m.,

AND WHEREAS, at the request of the Applicant a pre-hearing conference in terms of Rule 9 of the Rules of Practice of the Tribunal was set down to be held at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto at 9:30 a.m. on Friday, March 18, 2005,

AND WHEREAS, Robert A. Maxwell, Counsel representing the Registrar was in attendance at the Tribunal's Chambers at 9:30 a.m. on March 18, 2005 but the Applicant was not in attendance nor was she represented, having advised the Registrar on March 17, 2005 that she would not be attending the prehearing conference to be

held on March 18, 2005 nor would she be in attendance on May 9, 2005 at the Tribunal's Chambers.

THE TRIBUNAL MAKES THE FOLLOWING ORDER:

1. The pre-hearing conference is hereby adjourned sine die.
2. The hearing of the Applicant's appeal shall proceed to be heard by the Tribunal as scheduled on Monday, May 9, 2005 at 9:30 a.m. at the Tribunal's aforesaid premises despite the absence on that date of the Applicant or her representative.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 21, 2005

File name: 2753.rebba.affrunti.prehrg.order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



JAYANT THAKUR

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O.
1990, CHAPTER R.4 AS AMENDED,

TO REVOKE REGISTRATION

TRIBUNAL: MARJORIE HILEY, Vice Chair

APPEARANCES: AMAR PREET SINGH, Counsel, representing the Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATES OF
HEARING:

February 14, and 15, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by the Proposal of the Registrar dated October 1, 2004. The Registrar held that the past conduct of the Registrant affords reasonable grounds for belief that Jayant Thakur would not carry on business in accordance with law and with integrity and honesty. The Registrar, in his Proposal, alleged that three properties had been “flipped”, that is the purchase price inflated to obtain mortgage financing that could be more than 100% of the original purchase price. As well the Registrar alleged that Jayant Thakur was not cooperative in the investigation of these transactions by officials at RECO (Real Estate Council of Ontario).

The Registrant, Jayant Thakur, filed a Notice of Appeal dated October 18, 2004 and requested a hearing before the Licence Appeal Tribunal. In that Notice of Appeal the Registrant denied “doctoring” any MLS data information sheets, denied providing documentation to the bank, and denied having any role in the changes to the transfer deeds. The Registrant stated that he had prepared information sheets and did not receive any payment or consideration for doing so.

A prehearing was held on December 13, 2004. There was no resolution of the issues. The prehearing order required that the parties disclose to each other by February 7,

2005 information on witnesses to be called at the hearing. As well the parties were to make full disclosure of all documents in accordance with Rule 6 of the Rules of Practice of the Tribunal.

The hearing commenced on February 14, 2005 and continued on February 15, 2005. The Registrant was present for all of February 14th and the morning of February 15th. Prior to the lunch break on February 15th the Registrant, through his Counsel, provided the Tribunal with a handwritten notice of withdrawal of his appeal. The Registrant was not in attendance when this document was tendered into evidence as the final exhibit for the hearing. Counsel for the Registrant withdrew at that time, as he had no instructions from his client. At this point the Registrant had completed his examination in chief and cross-examination by Counsel for the Registrar was to commence. After the lunch break Counsel for the Registrar gave his closing statement and the hearing was concluded.

ISSUE:

Did the Registrar have reasonable grounds for his belief that the Registrant would not act in accordance with the law and with honesty and integrity?

EVIDENCE:

Opening Statements:

Counsel for the Registrar stated that the Proposal deals with three transactions that are fraudulent or attempted fraud.

The first deal was with 256 John Garland Blvd. It was listed at \$112,000.00 on a power of sale. It was sold for \$107,000.00 to Ms Rath. The closing date was July 31, 2001. But ultimately the buyer was S. Thakur not Ms Rath. Ms Rath was never registered on title. The purchase price was \$139,000.00. There was a CIBC mortgage granted to Mr. Thakur.

The second deal was with 15 Heatherside Court. It was a power of sale and was listed for \$139,000.00. It was sold to Ms Rath for \$137,000.00 on May 22, 2001. Then on July 4, 2001 there was a mortgage application to CIBC showing a listing price of \$170,000.00 and a selling price of \$170,000.00. The property was transferred to a Mr. Saneer. Ms Rath was not registered on title.

The third deal was with 475 Bramalea. It was a power of sale and was listed for \$115,000.00. It was sold to Ms Rath for \$112,000.00. The mortgage application showed M. Thakur to be the purchaser at a price of \$145,000.00 as reflected on the transfer deed. There was a mortgage obtained for \$133,762.50.

All these properties had Jaysons Realty as the listed broker. The Registrant is the owner of Jaysons Realty. Counsel stated that attempts were made to get explanations from the Registrant but Mr. Thakur was not cooperative. Mr. Thakur stated to the investigator that he does not do listings but only represents buyers. Counsel stated that Mr. Thakur had done open houses despite this statement. Mr. Thakur stated to the investigator that he did not prepare the mortgages. A teleconference had been scheduled by officials from RECO with the Registrant but the Registrant was not available at the agreed upon time.

Counsel for the Registrar stated that the Registrant was not fit to be in the industry and there was a pattern of his conduct in inflating the prices of homes.

Counsel for the Applicant stated that he acted as the buyer's realtor and represented Ms Rath who was an investor. Counsel stated that the listing agreement stated that people could assign their interest in agreements. Counsel stated that the Registrant had not doctored MLS sheets. It was a property information sheet not a MLS sheet. It was prepared by the Registrant for a sale between two private parties.

It was stated by Counsel for the Registrant that Mr. Thakur had dealt with the CIBC mortgage representative for fifteen years. As well there had not been any complaints against Mr. Thakur in his twenty-two years in the real estate business. Counsel stated that altering of land transfer documents was the responsibility of the solicitor. Counsel stated that there would be three character witnesses for Mr. Thakur.

Testimony of Chris Georgious:

Ms Georgious has been employed with CIBC for 27 years. Recently she started a new position as Director of Policy and Fraud Strategy. Prior to that she had been the Credit Risk Manager for nine years. She would investigate suspicious transactions and examine mortgage transactions.

Ms Georgious testified that she had sent a fax to Brian Schlozhauer of RECO on October 30, 2001. She sent the fax as she thought there was a questionable trend in some transactions dealing with Mr. Thakur. There were MLS documents without MLS transaction numbers but showing the name of the realtor on them.

Regarding 15 Heatherside Court she stated there was no MLS transaction number though it listed Jaysons Real Estate Ltd. on the document. The vendor was Sameer Kulkarni and it was listed at \$175,900.00. There was an agreement of Purchase and Sale with the vendor being Sameer Kulkarni and the purchaser being Roger Gao in the amount of \$170,000.00. The CIBC could not validate the income for Mr. Gao and had false information as to the bank account for Roger Gao. Money was advanced but returned to the bank as the CIBC stopped the closing. She stated that documents obtained by the bank showed that this property had been listed in May 2001 at \$139,900.00 and it sold on July 12, 2001 at \$137,000.00. Sale prices on the same

street at this time were going from a low of \$125,000.00 to a high of \$133,000.00. The contact person for the appraisal is listed as J. Thakur.

Regarding 34 Greypoint Drive there was again incomplete information on the MLS listing. There was no MLS transaction number but it listed Jaysons Real Estate Ltd. on the document.

Regarding 256 John Garland Boulevard there was a MLS listing with no transaction number or date as to when the property was placed on the market. The appraisal contact was J. Thakur. On July 7, 2001 there was an agreement of purchase and sale for Sameer Thakur to purchase from P. Rath with a closing date of July 26, 2001. The balance on closing of \$135,300.00 is in trust to Gowlings. But there is a transfer deed from Royal Bank to Sameer Thakur dated July 17, 2001 showing a purchase price of \$107,000.00. There was an assignment by P. Rath to Sameer Thakur but the MLS listing shows P. Rath. Ms Georgiou testified that the CIBC did finance the property, as they were not aware of the other documents. If they had been aware that the property had flipped prior to the closing they would have wanted to see the assignment document and would have wanted to know how the property inflated in price in just over a day. Another appraisal of the property would have been done by the CIBC. Ms Georgiou stated that if the CIBC had known of the flip at the date of closing it is likely they would have pulled the transaction.

Ms Georgiou testified that the statement of adjustments showed the CIBC in for a mortgage of \$124,684.80, the borrower for \$7,798.84 and paid to the vendor \$130,593.00 after land transfer fees and legal fees. She stated that Gowlings had complained to the solicitor for the Thakur that the transfer/deed of land had been altered by changing the consideration from \$107,000.00 to \$139,000.00. Mr. Mathers had responded stating that the deed had indeed been altered to reflect the ultimate purchase price.

Under cross-examination Ms Georgiou stated that the document prepared by S. Thakur was 99% similar to that of a MLS listing. She felt it should have been stated on the document that it was a property description. She stated it was a private offer using a MLS type of form. The bank relies upon the realtor who prepares such documents.

Ms Georgiou stated that the insured loan is payable to CMHC and therefore CMHC needs to value the property not CIBC.

Ms Georgiou stated that CIBC had no knowledge of the first transaction between the Royal Bank and Ms Rath. The solicitor did not inform CIBC of the flip of the property.

Testimony of Maureen McDaniels:

Ms McDaniels is an inspector with RECO since May 1998. Prior to that time she had worked in office administration with a real estate broker for twenty years. It is her job to

visit the brokers and insure that they are in compliance with the legislation. She does inspect their books.

Ms McDaniels testified that there was a complaint received and on the basis of that complaint she went out to inspect Jaysons Real Estate Ltd. She was aware of the complaint by CIBC prior to attending at the offices of Jaysons Real Estate Ltd. An initial meeting of November 27, 2001 was rescheduled to December 2001 at the request of Mr. Thakar. At the time of the inspection she obtained a number of documents from Mr. Thakur including his Trade Record sheets on transactions.

Regarding 256 John Garland Boulevard the vendor was Royal Bank on a power of sale with a list price of \$112,000.00. It sold to P. Rath on July 11, 2001 at a price of \$107,000.00 with one thousand dollars as a deposit. The closing date was July 31, 2001. This information was on the trade record sheet details of transaction that was signed by the broker, J. Thakur.

Ms McDaniels stated that she also obtained documentation regarding 15 Heatherside Court. That property was being sold by Laurentian Bank under a power of sale and was listed for \$139,900.00. It sold on May 22, 2001 for \$137,000.00 to P. Rath. The closing date of the sale was July 20, 2001, which was amended to June 29, 2001. This information was on the trade record sheet that was signed by the broker, J. Thakur.

She also obtained documentation from Jaysons regarding 475 Bramalea Road. The MLS listing had it being sold by Scotia Mortgage Corp. for \$115,500.00. It was sold on July 13, 2001 to P. Rath for \$112,000.00 with a closing date of August 28, 2001. There was no reference in the trade record sheet signed by J. Thakur of the \$4,000.00 deposit that is mentioned in the Agreement of Purchase and Sale.

Ms McDaniels stated that she showed J. Thakur the complaint from the CIBC. He told her that he was a buyer broker. When she showed him the MLS listings which had gone to the CIBC Mr. Thakur stated the documents were for informational purposes only. When she asked him who prepared these documents Mr. Thakur did not answer. He did state that once the purchases closed and then were resold the new purchasers dealt with the CIBC and not with him.

Ms McDaniels testified that she located the Real Estate News for November 30, 2001. Under the open houses it had Jayant Thakur listed for the open house at 14 Moselle Drive. Though sometimes sales representatives will do open houses for other sales representatives this document would seem to indicate that Mr. Thakur was marketing this property.

Regarding the 34 Greypoint Drive property Ms McDaniels stated that she could find no information on that property during her inspection. Mr. Thakur stated he had no involvement with that property but he did not explain why Jaysons Real Estate Ltd. was listed as the broker on its MLS listing.

Under cross-examination Ms McDaniels stated that she composed an internal office memo on the same day that she conducted her inspection at Jaysons Real Estate Ltd. As she had refreshed her memory with this memo Counsel for Mr. Thakur examined that memo which was not introduced into evidence.

Ms McDaniels stated that the Trade Record Sheet is the details of a transaction kept by the real estate agent. She reiterated that there was nothing to indicate that a deposit had been made on the 475 Bramalea property.

Ms McDaniels agreed that a real estate broker can represent vendors and also represent purchasers.

Testimony of Jo Ann Swain:

Ms Swain has been an investigator for RECO for three years. Prior to that time she had been an inspector for over three years. Her job responsibilities include conducting investigations as to the fitness of registrants.

She testified that she had the CIBC complaint and the findings from Ms McDaniels' inspection. She did an affidavit to request an investigation order, which was issued on May 6, 2002. She then obtained documents from the Land Registry office.

Ms Swain testified that she obtained the transfer/deed of land for 256 John Garland Blvd unit 117. The amount of the purchase price was amended from \$107,000.00 to \$139,000.00. The transferor was the Royal Bank and the transferee was P. Rath, which was then changed to Sameer Thakur. The deed was registered on August 1, 2001. The parcel registrar does not show P. Rath on title.

Ms Swain also obtained the transfer/deed of land for 15 Heatherside Court. The transferor was Laurentian Bank. Originally the transferee was P. Rath but that was changed to Sameer Kulkarni. The date of completion changed from July 20, 2001 to June 29, 2001. The deed was registered on July 3, 2001 with consideration being \$137,000.00. The charge on the land registered on July 3, 2001 is for \$102,750.00. There is an agreement of purchase and sale from Sameer Kulkarni to Roger Gaio dated July 4, 2001, which has a purchase price of \$170,000.00.

She obtained the transfer/deed of land for 475 Bramalea. It was registered on August 30, 2001. There is a change from a purchase price of \$118,000.00 to a purchase price of \$145,000.00. The transferor is Montreal Trust. There is a change in the transferee from P. Rath to Mahesh Thakur. The charge on the property dated August 28, 2001 is with Mahesh Thakur for \$133,762.00. There is no transfer to P. Rath on title.

Ms Swain stated that she determined that Sameer Thakur, son of Jayant Thakur, was a registered mortgage agent. Sameer Thakur had the same date of birth as the Sameer Thakur in the transfer deed for 256 John Garland Blvd. The address for Sameer Thakur is the same as where Jayant Thakur resides and carries on his real estate business.

Ms Swain testified that she had an interview with Ms Dhanani, the mortgage representative at CIBC. Ms Dhanani stated that she knew Jayant Thakur and his sons Sameer and Mahesh and that she had done the mortgage documents at CIBC.

Ms Swain testified that she arranged a meeting with Jayant Thakur on December 13, 2002. At that meeting Mr. Thakur stated that he had prepared the MLS information sheets as a favour for his client, P. Rath. Ms Rath was known to Jayant Thakur. He would not give any further information about her and cited client confidentiality issues. He would not disclose his business connection with her, citing trade secrets. The interview then ended after that statement.

Ms Swain stated that the Trade Record sheets of Jayant Thakur do not provide an address or telephone number for Ms Rath and her first name is spelt differently on some of the documents.

Under cross-examination Ms Swain stated that she used her handwritten notes to compose her memo on her investigation. She was uncertain as to the whereabouts of her handwritten notes. She used the memo to refresh her memory. Counsel for the Registrant reviewed her typewritten notes, which were not filed as an exhibit. Ms Swain stated that she got a verbal statement from Ms Dhanani. She stated that she was not aware of any previous complaints concerning Jayant Thakur.

Testimony of Yvonne Nandalall:

Ms Nandalall is a registration officer with RECO and has had that position for the past seven years. Prior to that she was a registration officer for eight years with the Ministry. She deals with the more complex files that have issues of financial responsibility and second occupations.

Ms Nandalall testified that in December 2002 she was asked by Ms Swain to be an observer in an interview that Ms Swain was having with Mr. Thakur. She was told that Ms Swain wished to question Mr. Thakur regarding three properties that had been listed as power of sale where there had been an original purchaser and then a secondary purchaser at an inflated price. She did not take notes at that interview. Mr. Thakur had stated to Ms Swain that he only represented Ms Rath. He filled out the information statement sheets that were presented to the banks. He would not provide Ms Swain with information on Ms Rath except to say that she was a female. The interview then ended.

She was then involved with the file in June 2003. She discussed the file with Mr. Schlotzhauer. He asked her to set up a meeting with Mr. Thakur. She made telephone calls to Mr. Thakur but got no response. Finally she was able to set up a meeting for August 7, 2003 to discuss the findings of the RECO investigation. Mr. Thakur stated at that August 7th meeting that he was not aware of the purpose of the meeting and was not prepared for it. A letter was sent by Ms Nandalall to Mr. Thakur dated August 7,

2003 outlining the concerns of the Registrar and requesting his response. By letter dated August 20, 2003 Mr. Thakur stated he had nothing to do with the resale of the properties. As this was not suitable Mr. Schlotzhauer requested that she set up a teleconference with Mr. Thakur. Ms Nandalall stated that she spoke to Mr. Thakur and he agreed to have a teleconference on September 17, 2003. She called Mr. Thakur on September 16th and reminded him of the teleconference for September 17th. At the time agreed upon on September 17th Mr. Thakur did not answer the telephone.

Following that Ms Nandalall sent a letter to Mr. Thakur on September 18th, 2003 stating that the Registrar would be issuing a Proposal to revoke his registration as a real estate broker.

Under cross-examination Ms Nandalall stated that she did not know of any further complaints following the CIBC complaint.

Testimony of Brian Schlotzhauer:

Mr. Schlotzhauer has been the assistant registrar at RECO for the past five years. Prior to that time he was the head of admissions at George Brown College. He is responsible for the registration process. He administers the requirements under the legislation and looks after complaints. Mr. Schlotzhauer stated that the purpose of the *Real Estate and Business Brokers Act* is to protect consumers and financial institutions and ensure that registrants are conducting themselves appropriately.

Mr. Schlotzhauer stated that it was the past conduct of Jayant Thakur as determined from the investigation of the CIBC complaint that forms the basis of this Proposal. Initially the CIBC complained to him. He then initiated an inspection of the Jaysons Real Estate Ltd. as to its record keeping and from that initiated an investigation.

Mr. Schlotzhauer stated that there was the same purchaser who never closed a transaction. It would be closed with another person paying a higher purchase price. These other purchasers had close connections with Jayant Thakur. Mr. Thakur did not provide explanations for these transactions.

Mr. Schlotzhauer stated that the prices for the properties in question were inappropriately high. Those high prices would then be used by other real estate salesperson in doing their appraisals.

Mr. Schlotzhauer stated that his efforts to obtain information from Mr. Thakur were unsuccessful. Though on one hand Mr. Thakur stated he could not talk about these properties without preparation, on the other hand he spoke of suing the CIBC. The written response by Mr. Thakur did not explain the concerns raised by RECO concerning these transactions. When Mr. Thakur was not available for the teleconference Mr. Schlotzhauer realized that he would not get any further information. He met with the Registrar and a decision was made to do the Proposal.

Mr. Schlotzhauer stated that Mr. Thakur could not abide with the regulations. These types of transactions could go unnoticed and would be impossible to detect. This was not a case for terms and conditions to be imposed on the registration of Jayant Thakur. Though Mr. Thakur was now an associate broker, that would not safeguard the public. There were no safeguards that could be put in place by the principal broker.

Mr. Schlotzhauer stated that the transactions had the same approach of an initial buyer and then a second buyer at a higher price. It was impossible for RECO to identify P. Rath. Two of the purchasers were sons of the broker. By having higher purchase prices there would be higher mortgages and the surplus funds could be reinvested in other properties.

Testimony of Jayant Thakur:

Mr. Thakur stated he is 63 years of age. He agreed with paragraphs 1 through 6 that dealt with his real estate career. He came to Canada in September 1975 from Madras State, India. He did some engineering courses, quality control courses and real estate courses. He is married with two sons, Sameer Thakur and Mahesh Thakur. He is a volunteer at his place of religion. There he has helped with social services issues dealing with new immigrants as well as religious services. In the early 1990's he was a trustee and director of a social services cultural organization.

Mr. Thakur stated that in the last few years he does about 8 to 10 transactions per year. Prior to his illness, in the years between 1985 and 1990 he would do 4 or 5 transactions per month.

Mr. Thakur testified that he knows Ms Rath as he did a prior transaction with her family two years ago. He showed the property at 256 John Garland Blvd to Ms Rath in June 2001 and she put in an offer. He was the cooperating broker on her Agreement of Purchase and Sale. But Ms Rath resold the property. He had no involvement with the resale of this property. He testified that he prepared a data information sheet for Ms Rath, as she wanted to provide it to prospective tenants for the unit. He did not list the property for her. She was marketing it through word of mouth.

Mr. Thakur stated that Ms Rath was an investor who would put properties into a livable condition and then would sell them at a profit. Ms Rath sold this property directly to his son Sameer Thakur. Sameer knew Ms Rath as the real estate office is in the family home and Sameer lived there. Mr. Thakur stated that he did not prepare the agreement of purchase and sale between Ms Rath and his son Sameer and he did not forward this transaction to the CIBC for a mortgage. He stated that he did not make any changes on the transfer/deed of land nor was he involved in the affidavit of execution. He stated that the solicitor for this transaction for Ms Rath was Mr. William Mathers who he knew for approximately 5 years. Mr. Thakur did not know who was the solicitor for his son Sameer. He recognized the signature of Sameer on the charge/mortgage document.

Mr. Thakur testified that Sameer did not come to him for advice on the purchase of this property. He stated that Sameer still owns the property. Mr. Thakur thought that this was a property transaction dealing with return on investment issues. He stated that Sameer and himself are not on the same wavelength. Sameer is into e-commerce and does not ask his father for advice.

Mr. Thakur stated that he knew there had been improvements made to the property as Ms Rath had verbally told him about them. He had no receipts from Ms Rath concerning these improvements. The Tribunal stated that it would hear no further evidence from Mr. Thakur on the improvements as Mr. Thakur had not seen the improvements and had no collaborating evidence to prove there were such improvements.

Regarding 15 Heatherside Court Mr. Thakur stated he was the cooperating broker. He had showed it to Ms Rath in May 2001. It sold for \$137,000.00. Ms Rath assigned the offer to Sameer Kulkarni. Mr. Thakur stated that he had no involvement with this assignment. He did prepare a data information sheet for Mr. Kulkarni. He had no listing agreement for the property and had no involvement in the agreement of purchase and sale between Mr. Kulkarni and Roger Gaio. He knew that Mr. Gaio was a tenant in that property. He had no involvement with its sale or financing and did not present the mortgage application to CIBC.

Regarding 475 Bramalea Road Mr. Thakur stated he was the cooperating broker. It was a townhouse that he showed to Ms Rath in May 2001. He assisted Ms Rath with remarketing of the property. Ms Rath sold it to his son Mahesh Thakur. Mr. Thakur had no involvement with that sale and Mahesh did not ask him for advice on its purchase. Mahesh Thakur still owns the property.

Mr. Thakur stated that he disputed paragraph 47 of the Proposal. It was not a MLS listing but a data information form. He was not involved with the second transaction on the property nor did he submit anything for that second transaction. Mr. Thakur stated that he dealt with several banks in his real estate career and Ms Dhanandi was someone he knew at CIBC. She knew his sons. He did not submit the mortgage applications to CIBC.

At this point the Tribunal made it clear that it would be important to have the testimony of Ms Rath. Counsel for the Registrar stated that he had not subpoenaed Ms Rath, as he did not know how to contact her. The Tribunal asked Mr. Thakur if he had requested Ms Rath to testify at the hearing. Mr. Thakur stated that he had not made such a request of Ms Rath. Ms Rath had told him that she valued her privacy and she would not come as a witness to the hearing.

Mr. Thakur testified that he got a commission for the first transaction but nothing for the second transaction of the properties. He did not receive any funds from CIBC.

Mr. Thakur stated that at the August 7, 2003 meeting he asked that the questions from RECO be in writing. Then he would answer them. He recognized the letter dated August 7, 2003 from Ms Nandalall. He recognized his response, which is dated August 20, 2003, to Ms Nandalall. Mr. Thakur did not know what happened with the conference call. He never received the call nor did he get a message about it.

Mr. Thakur stated that he had open heart surgery on June 15, 2004. He was not able to work in real estate after that operation and went on welfare. Since 1991 he has been involved in five different car accidents. He has no other source of income except what he earns as a real estate broker. He needs to work in real estate to make his living. He lives his job in real estate. Most of his clients are from referrals. Mr. Thakur stated that he did not do anything wrong and was trying to do the best for his client, Ms Rath.

At the conclusion of his examination in chief the Tribunal made it clear that the Tribunal wished to issue a summons for the attendance of Ms Rath. The Tribunal stated that her evidence was relevant to the issues at hand and would be helpful to the Tribunal. The Tribunal asked Mr. Thakur, who was still in the witness box, for information on the whereabouts of Ms Rath so a summons could be issued. Mr. Thakur told the Tribunal that he did not know the whereabouts of Ms Rath and had not communicated with her in four years. The Tribunal found this statement to be at odds with his previous verbal testimony in which this matter of coming as a witness to the hearing had been discussed with Ms Rath who stated that she valued her privacy. That discussion had to have happened since the issuance of the Notice of Appeal by Mr. Thakur dated October 18, 2004 in which he had requested a hearing before the Tribunal. The Tribunal again asked Mr. Thakur for the requested contact information. Mr. Thakur did not provide it. The Tribunal granted a short adjournment in order that Mr. Thakur could discuss the request of the Tribunal with his Counsel. At the conclusion of the adjournment Counsel for Mr. Thakur appeared, but not with his client. Counsel provided the Tribunal with the written instructions of his client, which were marked as the final exhibit in the proceeding. Those instructions, which were dated February 15, 2004, stated, "I Jayant Thakur hereby withdraw my appeal before the Licence Appeal Tribunal." Counsel for Mr. Thakur with the permission of the Tribunal then withdrew from the hearing. After a short break for lunch the Tribunal heard the closing argument from Counsel for the Registrar.

Closing Argument:

Counsel for the Registrar stated that the details in the Proposal speak for themselves. Mr. Thakur stated he sold the property to his client Ms Rath. But Ms Rath was never on title and therefore she never had the authority to do repairs to the properties prior to selling them to the second purchaser.

Counsel stated that there are doubts as to whether or not Ms Rath actually exists. Mr. Thakur never explained why she could not be a witness.

Counsel pointed to inconsistencies in the evidence of Mr. Thakur. Roger Gaio was known to Mr. Thakur as a tenant at the Heatherside property. If so why was he listed as the purchaser on another agreement of purchase and sale the next day after Mr. Kulkarni purchased the property from Ms Rath?

Counsel requested costs in the amount of \$2000.00. Notice of costs was included in the Proposal that had been served upon Mr. Thakur.

Counsel referred to two cases:

Ahmad v Registrar of Real Estate and Business Brokers, February 1, 2005 and *Jakobs v Registrar of Real Estate and Business Brokers, 1987 Vol.16 C.R.A.T. 223.*

The *Ahmad* case dealt with the conduct of a real estate salesperson who intentionally inflated the prices for properties and obtained mortgage financing based on the inflated price. The Tribunal held on page 16:

There is clearly a public interest involved in this matter as opposed to Ahmad's interest. The Registrar has both the duty and the obligation to protect the public interest and this duty and obligation is seen from the relief he seeks in his proposal to revoke Ahmad's registration. The interests of the Registrar and the interests of Ahmad require weighing and balancing and in so doing, the Tribunal finds that the interest of the Registrar outweigh Ahmad's interests. The Tribunal finds that the recent conduct of Ahmad coupled with the serious nature of his actions in actively associating himself with dishonesty and deception, in not one isolated incident but in five incidents, stand in contradiction to the opinion of Mr. Quek that Ahmad will not repeat his misconduct. The only mitigating factor in favour of Ahmad is the fact that he voluntarily confessed to three then undiscovered frauds. However this mitigating factor is in the Tribunal's opinion not sufficient for it to arrive at a finding permitting Ahmad's registration to remain in effect. The Tribunal finds that the Registrar's proposal is well founded and sees no reason to disturb the Registrar's findings. The Tribunal further finds that terms and conditions are not appropriate in this matter.

The *Jakobs* case dealt with a criminal record by the applicant. The Tribunal held on page 226:

An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

LEGISLATION:

Real Estate and Business Brokers Act

Section 6

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officer or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 8

- (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.
- (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 9

- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 11

- (1) Where the Registrar receives a complaint in respect of a broker and so requests in writing, the broker shall furnish the Registrar with such information respecting the matter complained of as the Registrar requires.
- (2) The request under subsection (1) shall indicate the nature of the inquiry involved

- (3) For the purposes of subsection (1) the Registrar or any persons designated in writing by him or her may at any reasonable time enter upon the business premises of the registrant to make an inspection in relation to the complaint.

Section 12

- (1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts and the regulation of trades are being complied with.

Section 15

- (1) Where, upon a statement made under oath, the Director believes on reasonable and probable grounds that any person has,

- (a) contravened any of the provisions of this Act or the regulations; or
- (b) committed an offence under the *Criminal Code* (Canada) or under the law of any jurisdiction that is relevant to the person's fitness for registration under this Act,

the Director may by order appoint one or more persons to make an investigation to ascertain whether such a contravention of the Act or regulation or the commission of such an offence has occurred, and the person appointed shall report the result of the investigation to the Director.

Section 19

- (1) Every broker shall keep a trade record sheet in the prescribed form and proper books and accounts with respect to the broker's trades and shall enter therein in the case of each trade,
- (a) the nature of the trade;
 - (b) a description of the real estate involved sufficient to identify it;
 - (c) the true consideration for the trade;
 - (d) the names of all parties to the trade;
 - (e) the amount of deposit received and a record of the disbursement thereof; and
 - (f) the amount of the broker's commission or other remuneration and the name of the party paying it.

RULES OF PRACTICE, LICENCE APPEAL TRIBUNAL:

Rule 2

- 2.2 The Tribunal may exercise any of its powers under these Rules on its own initiative or at the request of a party.
- 2.4 In any matter not provided for in these Rules, the practice of the Tribunal will be determined by referring to these Rules and to the *Statutory Powers Procedures Act*, R.S.O. 1990, c.S.22 as amended
- 2.12 The Tribunal may proceed in a party's absence where a party defaults by failing to attend before the Tribunal, or leaves prior to the conclusion of the hearing. The defaulting party will not be entitled to any further notice of the proceedings and the Tribunal may treat the party's hearing as abandoned and subject to Rule 2.10 (2) dismiss the matter and impose costs as provided by Rule 14.

Rule 4

- 4.1 A summons issued by the Tribunal to require a person to give evidence on oath or affirmation or to produce in evidence documents and things at an oral or electronic hearing shall be served personally on the person summoned. It is the responsibility of the party requesting the summons to ensure that it is served and filed and that the fees are paid to the witness. The fees or allowances paid for attending a Tribunal hearing are the same as are paid to a person summoned to attend before the Ontario Superior Court of Justice.

Rule 14

- 14.1 Where a party believes that another party in the proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
- 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:
- (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
 - (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
 - (c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
 - (d) knowingly presenting false or misleading evidence.
- 14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
- 14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.3,
- (1) The Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, and the conduct of the party requesting costs; and
 - (2) The amount of costs shall not exceed,
 - (a) where the Tribunal has not commenced a hearing, the sum of \$400.00; or
 - (b) where the Tribunal has commenced a hearing, the sum of \$800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

ANALYSIS:

The Registrar in his proposal wishes to revoke the registration of Jayant Thakur as a salesperson under the *Real Estate and Business Brokers Act*. The particulars outlined in the Proposal are detailed and are concerned with the conduct of the Registrant, which led to the complaint by CIBC to RECO. The Registrar has provided details on three specific real estate transactions in which the Registrant was the broker for a specific purchaser, Prathiba Rath. In all three of these transactions Ms Rath initiated the purchase at one price but the ultimate purchaser was another person and the purchase price was significantly higher than the original purchase price. These were all power of sale properties listed by banks. Ms Rath would sign an agreement of purchase and sale with a modest deposit and with no conditions as to financing.

In the case of the sale of 256 John Garland Boulevard unit, #117, Ms Rath never takes title of the property. There is a Direction re Title in which Ms Rath directs that Sameer Thakur's name be put on the deed. But the original purchase price of \$107,000.00 is crossed out and another price, being \$139,000.00 is written on the deed. This is done without the knowledge of the solicitors for the vendor, Royal Bank. Sameer Thakur is the son of Jayant Thakur. He obtained a mortgage for \$128,227.00 from CIBC. That mortgage amount is higher than the original purchase price on the Agreement of Purchase and Sale between Ms Rath and the Royal Bank.

In the case of 475 Bramalea Road, unit 205, Ms Rath never takes title of the property. On the transfer deed Ms Rath's name is crossed out and Mahesh Thakur is written in its place. Mahesh Thakur is the son of Jayant Thakur. On the transfer deed the original purchase price of \$112,000.00 is crossed out and another price, being \$145,000.00 is written on the deed. Mahesh Thakur obtained a mortgage for \$133,762.00 from Scotia Mortgage Company. That mortgage amount is higher than the original purchase price on the Agreement of Purchase and Sale between Ms Rath and Scotia Mortgage Company.

In regards to the third property, that being 15 Heatherside Court, Ms Rath never takes title of the property. On the transfer deed Ms Rath's name is crossed out and Sameer Vishwanath Kulkarni's name is written in its place. The purchase price is \$137,000.00 and there is a mortgage from CIBC for \$102,750. The transfer/deed and mortgage/charge are registered on July 3, 2001. On July 4 there is an agreement of purchase and sale signed between Sameer Kulkarni and Roger Gaio in the amount of \$170,000.00. This second sale was aborted by CIBC when it obtained incorrect financial information on the prospective purchaser, Roger Gaio.

CIBC brought to the attention of RECO that on the 15 Heatherside Court and 256 John Gardland Boulevard properties plus a third property of 34 Greypoint Drive they had received documentation for applications for mortgages in which there was incomplete information provided on the MLS listing agreements. The so-called MLS listing agreements all had Jaysons Real Estate Ltd. (controlled by Jayant Thakur) as the real estate agent for the documents though the documents purport to be a private contract

between a vendor and purchaser with no agency involvement. No MLS number is provided on these documents.

The explanations provided by the Registrant, Jayant Thakur, to the Registrar prior to the issuing of the Proposal were lacking in specifics. The explanations provided by the Registrant, Jayant Thakur, to the Tribunal during the course of the hearing were vague and unsatisfactory. Indeed the Tribunal is still uncertain if there is an actual person known as Prathiba Rath or if this is a figment of Mr. Thakur's imagination. Despite the urgings of the Tribunal Mr. Jayant Thakur did not provide information to allow the Tribunal to summons Ms Rath to the hearing. Mr. Thakur had refused to provide identifying information on Ms Rath to the Registrar during the investigation of the transactions prior to the issuing of the proposal. He left the hearing rather than provide the requested information on her whereabouts. As well Mr. Thakur provided inconsistent information at the hearing on his last encounter with Ms Rath. When pressed for her address and telephone number Mr. Thakur stated he did not know it and his last contact with her was four years ago. Yet during his examination in chief Mr. Thakur had stated that he discussed with Ms Rath her views on attending at a witness at the hearing and she had indicated she valued her privacy and did not wish to attend the hearing. Such discussions had to have happened after the filing of his Notice of Appeal dated October 18th, 2004.

Mr. Thakur stated that he had been a real estate agent for over twenty years. He stated that two of the purchasers of the suspect transactions were his sons. He had stated that his sons did not ask him for advice prior to buying these properties at substantially higher prices from his own client, Ms Rath. When pressed as to why his sons would pay more for such properties rather than looking for their own power of sale properties all Mr. Thakur could state was that they were interested in their return on investment and they never listened to him. Mahesh Thakur paid \$33,000.00 more for 475 Bramalea Road than was the original purchase price in the agreement of purchase and sale between Ms Rath and Scotia Mortgage Corporation. Sameer Thakur paid \$32,000.00 for 256 John Garland Boulevard than was the original purchase price in the agreement of purchase and sale between Ms Rath and the Royal Bank. Mr. Jayant Thakur's explanations are not credible. The Tribunal does not believe that he as an experienced real estate representative would allow his own sons to pay such high premiums on these two properties. Instead the Tribunal agrees with the Registrar that this was a scheme to inflate the price of the properties in order to obtain higher mortgage financing.

Mr. Thakur spoke of Ms Rath improving the properties and that led to the increase in value. But there was no evidence provided to prove that such improvements had ever happened. Indeed, how could Ms Rath do any improvements on these properties when she did not have title to them?

As well Mr. Thakur spoke of Roger Gaio being the tenant at 15 Heatherside Court and that is why he entered into the purchase agreement with Mr. Kulkarni. But it is not feasible that a tenant who is interested in purchasing the property that they are renting

would wait until it was sold and then agree to a purchase price one day later that was \$33,000.00 higher. Instead the evidence points to the property being flipped for an inflated purchase price to obtain higher mortgage financing.

The Tribunal found the evidence of Ms Georgiou from the CIBC to be both relevant and extremely credible. She stated that the so-called data sheets prepared by Jayant Thakur were 99% similar to MLS listing forms. As well she indicated that where the mortgage loan is insured by CMHC it is the responsibility of CMHC to do the appraisal of the property not CIBC that provides the mortgage financing. If it had not been for the incorrect financial information on Roger Gaio, CIBC might still not be aware of how they were providing mortgage financing that exceeded the realistic appraised value of the real estate.

Mr. Thakur did not cooperate with RECO in his verbal responses to their questions at the August 7, 2003 meeting or in his written response to their questions in his letter of August 20, 2003. He has no satisfactory explanation why he missed the telephone conference scheduled for September 27th, 2003.

The Tribunal finds that the past conduct of the Registrant affords the Registrar reasonable grounds for his belief that the Registrant will not carry on business in accordance with law and with integrity and honesty.

Counsel for the Registrar in his closing argument requested costs in the amount of \$2000.00. Notice had been provided to all parties on page 13 of the Proposal dated October 1st, 2004, which states:

D. Notice of Motion for Costs

If a hearing is requested as described in Section C and, at any time during the course of proceedings arising from this request, the Registrar believes that the Registrant has acted unreasonably, frivolously, vexatiously or in bad faith, the Registrar will make a request for an award of costs from the Tribunal, such costs to be paid by the Registrant.

The Tribunal has seriously considered this request but is denying it. The maximum amount of costs that the Tribunal could award in this proceeding is \$1600.00 for the two days of hearing. But the Tribunal notes that the Registrant did participate in the pre-hearing conference and did attend for both days of trial until after his examination in chief. As well the Registrant did have Counsel in attendance for both the pre-hearing and the two days of the hearing. It was surprising that the Registrant decided to terminate his involvement in the hearing with his written notice of withdrawal to the Tribunal at the conclusion of his examination in chief. It did deprive the Registrar of the opportunity to cross-examine him. It no doubt was inspired by the statement made by the Tribunal that the Tribunal wished to summons Ms Rath as a witness. This is a matter that could have been resolved at the pre-hearing conference. If the Registrar had felt the evidence of Ms Rath was essential than a request could have been made to the Tribunal regarding that matter at the pre-hearing. There is no order arising from the pre-hearing regarding any problems with the summoning of witnesses. The Registrant

should not be penalized that the matter was only raised at the conclusion of his examination in chief.

In conclusion the Tribunal is not convinced that the Registrant acted in an unreasonable, frivolous or vexatious manner or in bad faith. The request for costs is denied.

ORDER:

For the reasons above and pursuant to the authority vested in it by section 9(4) of the Act, the Tribunal directs that the Registrar carry out his proposal to revoke the registration of Jayant Thakur as a salesperson under the *Real Estate and Business Brokers Act*.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: March 31, 2005

File: 2653.rebba.Thakur

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.



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

PARAM SAINI - Adjournment

IN THE MATTER OF
PARAM SAINI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE TO REINSTATE REGISTRATION
- Proposal dated: October 15, 2004

AND IN THE MATTER of the hearing of a motion respecting the said Proposal

PARAM SAINI

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a teleconference hearing of a motion in the above matter on March 18, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing of the motion *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 Wednesday, April 6, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 3, 2005

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



FRANK COLATOSTI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN, Q.C., VICE-CHAIR

APPEARANCES: R. DONALD ROLLO, Counsel representing the Applicant, did not
appear

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
HEARING: March 8, 2005 Toronto

ORDER

WHEREAS the Registrar, *Real Estate and Business Brokers Act* (the "Respondent") issued a Proposal dated August 24, 2004 (the "Proposal") to revoke the registration of Frank Colatosti (the "Applicant") as a real estate salesperson pursuant to Section 8 of the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal this Proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence on March 8, 2005 and continue, if necessary, on March 9 and 10, 2005;

AND WHEREAS when the hearing of the appeal commenced before the Tribunal on March 8, 2005 the appeal was dismissed as the Applicant did not appear and abandoned his appeal. Counsel for the Respondent informed the Tribunal that the Applicant had resigned as a licenced realtor;

NOW THEREFORE this Tribunal orders that these proceedings before the Licence Appeal Tribunal are dismissed as abandoned.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C., Vice-Chair

Released: March 8, 2005

File name: 2593.rebba.Colatosti.order.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.

FRANK COLATOSTI

MOTION TO CONSIDER AN ADJOURNMENT OF A HEARING TO
BE HELD BEFORE THE LICENCE APPEAL TRIBUNAL

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

R. DONALD ROLLO, Counsel, representing Frank Colatosti

ROBERT MAXWELL, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATES OF

HEARING: March 2, 2005

By Teleconference

RULING

Frank Colatosti (the "Applicant") brings a motion to this Tribunal in which he seeks an adjournment of the hearing that is due to be heard before this Tribunal on March 8, 9 and 10, 2005.

The Registrar under the *Real Estate and Business Brokers Act* (the "Registrar") issued a Notice of Proposal (the "Proposal") dated August 24, 2004 in which Proposal he seeks to revoke the registration of the Applicant on the basis that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty. In his Proposal, the Registrar alleges that the Applicant was short of meeting his trust liability by \$500,000.00 pursuant to the Applicant on March 17, 2003 executing the transfer of \$500,000.00 from the Trust Account to the General Account, due to the latter account being overdrawn. The hearing into the Registrar's allegations is to deal with the Applicant's appeal to the Proposal (Exhibit 4).

By Notice of Motion dated February 22, 2005 the Applicant seeks an adjournment of the hearing on March 8, 9 and 10, 2005. The basis for the Applicant's motion for adjournment is that the Applicant has been charged under the Provincial Offences Act and such

charges involve the same transactions that form the subject matter of the appeal herein. The Applicant further submits as follows:

1. The Applicant has simultaneously been charged under the Provincial Offences Act. These charges involve the same transactions that form the subject matter herein. The Applicant submits that the POA trial should be heard before the Licence Appeals Tribunal hearing. The Applicant submits that it would be unfair and prejudicial if his LAT testimony were used against him in the POA proceedings should he choose not to testify.
2. The above noted scenario would breach the Applicant's right under s. 13 of the Charter of Rights and Freedoms.
3. If the LAT hearing is heard before the POA trial, the Applicant submits that there would be a greater chance of the two proceedings producing inconsistent findings.
4. The Applicant has not yet received full disclosure from the Crown with respect to the POA proceedings. This outstanding information may be relevant to the LAT proceedings.
5. The Applicant submits that the LAT hearing could be significantly shortened depending on the results of the POA trial. For this reason, it is prudent to hold the POA trial before the LAT hearing in order to save time and expense.
6. The Applicant submits that his right to a fair trial in the POA proceedings would be severely prejudiced by the prior hearing of the LAT hearings.
7. The granting of the adjournment would not prejudice the REBBA Registrar.
8. There are no compelling consumer interests to be protected that outweigh the substantial prejudice that would be suffered by the Applicant if the adjournment were not granted.

Counsel for the Applicant informed the Tribunal that the hearing in the Provincial Offences Court will not take place until January 2006.

Counsel for the Applicant contends that the Applicant in the hearing before the Tribunal will have to testify before the Tribunal and in so doing, his evidence would be used to incriminate the Applicant in relation to the charges brought in the Provincial Offences Court and that the Tribunal hearing set down for March 2005 should be adjourned until the charges in Provincial Offences Court have been dealt with in January 2006. Counsel for the Applicant contends further that there is no prejudice that the Registrar will suffer as the Applicant is providing the Registrar with monthly financial statements that are sufficient to protect the public interest.

The Tribunal has discretion whether or not to accede to a request for an adjournment and while cognizant that a full and proper inquiry be held the Tribunal must also ensure that the statutory duty to hold an inquiry is fulfilled. However as was stated in *Minister of Employment and Immigration v. Lundgren* [1993] I.F.C. 187:

Above all, there is a need to proceed expeditiously, and adjournments should not be viewed as a method to interminably delay the inquiry.

The learned Judge in the Lundgren case stated further:

I know of no general principle in Canada that the existence of civil and criminal proceedings in court at the same time involving the same persons and the same facts is automatically a valid reason justifying the adjournment of the civil proceedings. The weight of the authorities is rather that only extraordinary circumstances, in which the civil proceedings might cause some damage to the accused's defence to the criminal charge, would justify adjourning the civil action. The burden of proof is on the party applying for the adjournment to conclusively demonstrate the existence of such harm: a mere allegation will not suffice.

In the matter of *Robinson v. Ontario Securities Commission* 110 DLR (4th) 166, the Applicants applied for a stay of a hearing before the Securities Commission pending criminal trial because of prejudice to the Applicants under s. 11 of the Charter of Rights. It was held in this case that s.11 of the Charter does not apply to administrative proceedings because those proceedings do not deprive a person of life, liberty or security. The proceedings before this Tribunal clearly will not deprive any of the Applicants to life, liberty or security. In its conclusions, the Court held that arguments relevant to the Charter can be considered and dealt with if, as and when they arise in the course of criminal proceedings.

In the matter of *Seth v. Canada (Minister of Employment and Immigration)* (1993) 105 DLR (4th) 365, it was held that a refugee claimant who was charged with criminal offences after his arrival in Canada and, who sought an adjournment of his refugee claim hearing pending determination of the criminal charges, claiming disclosure of evidence at the refugee claim hearing would violate principles of fundamental justice was not entitled to an adjournment. It was further held that if the claimant testified at his refugee hearing, he would be protected in subsequent criminal proceedings by s.13 of the Charter which states that any witness who testifies in any proceedings had the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings except in a prosecution for perjury or for giving contradictory evidence. This clearly is the case in the present matter to be heard by the Tribunal.

In addition, s. 9(2) of the *Evidence Act*, R.S.O 1990, chap. E23, states:

9(2) ...although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or any proceeding under any Act of the Legislature.

There is without question an issue of public interest that must be considered in this matter. A balance must be struck between the interest of the Applicant and the public interest. The Tribunal is dealing with consumer legislation and it is alive to the very reason for the passing of consumer legislation, namely for protection of the public interest. There is not doubt that the Applicant has an interest in this matter and an unfavourable outcome may well result in economic hardship upon him. However, when the Tribunal considers and weighs the interests of the Applicant and the public interest there is no doubt that the public interest must have precedence. For as was stated in *R.J.R. MacDonald Inc. v.*

Canada (Attorney-General):

In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

It is the duty of the Tribunal in this matter to hold a hearing. Section 8(4) of the *Real Estate and Business Brokers Act* reads as follows:

8(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The *Act* is designed as consumer protection legislation with mechanisms to resolve issues expeditiously. An adjournment, as requested, would unnecessarily delay the resolution of the issues to be adjudicated by this Tribunal.

Accordingly, for all of the reasons enunciated above, the motion for adjournment is refused and the hearing of this matter shall proceed at **9:30 a.m. on Tuesday, March 8, 2005** and *thereafter on March 9 and March 10, 2005* at the Tribunal's Chambers, 1 St. Clair Avenue W., 12th floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Presiding

Released: March 3, 2005

Filename: 2593.rebba.Colatosti.motion.adj.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.



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

2752-REBBA-ADJ-Adjournment

IN THE MATTER OF
MARIA CASALE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: December 13, 2004

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

MARIA CASALE

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on March 18, 2005;

AND WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 26 and 27, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing to commence at the Tribunal's Chamber, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, April 11, 2005;

AND TAKE NOTICE, upon consent of the parties, the Tribunal will set hearing dates at the above-mentioned pre-hearing.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: February 3, 2005

FILE NAME: 2752.rebba.Casale.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



JOHN A. PATRICK

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O. 1990,
CHAPTER R.4 AS AMENDED, TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES: JOHN A. PATRICK, representing himself

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
HEARING: November 29, 2004

Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar by his Proposal of July 23, 2004 refused the registration of the Applicant as a real estate agent. The Registrar based his refusal on the conviction of the Applicant in 1999 for sexual assault with a weapon and sexual assault causing bodily harm. As well the Registrar stated that the Applicant had not provided full disclosure of the convictions in his application for registration dated December 9, 2003.

The Applicant by his Notice of Appeal dated August 4, 2004 disputed that he could not carry on business in accordance with law and with integrity and honesty.

There was a prehearing held by teleconference on October 25, 2004. The parties were urged to file an agreed statement of facts but that did not occur. The hearing was held at Kingston on November 29, 2004.

ISSUE:

Has the Registrar shown reasonable grounds for his belief that the Applicant will not carry

on business in accordance with law and with integrity and honesty?

EVIDENCE:

In its opening argument Counsel for the Registrar stated that the lack of full disclosure on the application was not in itself grounds to refuse the registration. What was important was that the charges occurred when the Applicant was working in a regulated industry. The Applicant was involved in after hours drinking and did not disclose this violation.

The Applicant stated in his opening statement that the disclosure was not misleading and he knew that the Registrar would research his conviction.

Testimony of Brian Schlotzhauer:

Mr. Schlotzhauer is the Assistant Registrar at the Real Estate Council of Ontario and has held that position for the past five years. Prior to that time he worked as the Admissions Registrar for George Brown College. It is his responsibility to manage the registration process and ensure compliance with the requirements of the legislation.

He stated that RECO or the Real Estate Council of Ontario was founded in 1997. It administers the *Real Estate and Business Brokers Act*. That Act ensures the protection of consumers and that all those registered under it comply with its rules and guidelines. The key section of the Act is section 6 which speaks of acting in accordance with law, with honesty and integrity and having financial responsibility.

Mr. Schlotzhauer stated that he examines the applications and their disclosures. There are over forty thousand applications per year and external checks are done if the applicants answer yes to criminal convictions or financial problems.

He stated that he was familiar with the application for registration of the Applicant. In his opinion the past conduct did not warrant granting of the registration. He looked at the convictions which took place while the Applicant was working in another regulated industry. He stated that there were a number of people drinking after hours and the intoxication led to the incidents of assault.

Mr. Schlotzhauer stated that real estate agents deal independently with clients and consumers and are not under direct supervision. He was unable to ignore inappropriate conduct in a similar regulated industry. As well he had asked for full particulars and had received general comments from the Applicant. The Court made the decision to convict the Applicant and the Registrar cannot go behind that conviction. He had reviewed the Judge's reasons and felt the situation was one inappropriate for someone working in a regulated industry.

Mr. Schlotzhauer testified that he had read the many letters of reference. Some of them were done prior to the Applicant's conviction and others were done for the pre sentencing. Though he reviewed these references he did not give them great weight. Many of the

letters also spoke of appreciation for support of community events.

There had been a consideration by the Registrar as to terms and conditions. It was felt they were not appropriate.

Mr. Schlotzhauer stated that he met with Mr. Patrick on March 15, 2004. At that time it was disclosed by Mr. Patrick that his daughter now owned the business. As well Mr. Patrick stated that the courts would disclose the conviction to the Liquor Board. Mr. Schlotzhauer felt Mr. Patrick did not show remorse for his actions.

Though there has been a passage of time since the conviction, Mr. Schlotzhauer did not feel that in itself was crucial as the matter had taken place in another regulated industry. He did not see that there was anything to show trust had been established in a regulated environment. He was not certain whether the Liquor and Gaming Commission were aware of the convictions. He was unclear why the business had been transferred to the daughter but Mr. Patrick had control of the assets.

Mr. Schlotzhauer stated that though the Applicant had said he had to accept the court outcome and move on, the Judge in her reasons on sentencing had stated that the Applicant had not shown remorse.

Testimony of Greg Kells:

Mr. Kells had met Mr. Patrick through friends such as Mr. South, Member of Provincial Parliament. He helped Mr. Patrick to sell his business the Iron Horse which had revenues of over one million dollars. Mr. Kells noticed that Mr. Patrick was well liked and respected by his staff. Mr. Kells like Mr. Patrick's attention to details. Mr. Kells stated that the buyer, Bob Kelly, was warned of the impact of the pending legislation forbidding smoking in bars. Mr. Patrick was truthful when he was selling the business. When Mr. Kelly declared bankruptcy in the summer of 2004 Mr. Patrick took over the business again. This was done on terms as fair as was possible in the circumstances.

Mr. Kells stated that he encouraged Mr. Patrick to get involved in the real estate business as he was impressed with Mr. Patrick's acts of kindness and generosity. Mr. Patrick passed his real estate courses. Mr. Kells was surprised when the registration of Mr. Patrick was refused.

Mr. Kells stated that he served as the Chair of the Canadian Institute for Conflict Resolution. He had run for the Ontario Liberal party leadership. He felt Mr. Patrick should appeal the refusal. While Mr. Kells appreciated that the Registrar was trying to protect consumers, Mr. Kells felt the Registrar did not know Mr. Patrick.

Mr. Kells testified that Mr. Patrick had told him of the incident which led to his conviction. Mr. Kells felt that Mr. Patrick should not be tainted with it for the rest of his life as he had served his time, done his penance and was active in the community again.

Under cross examination, Mr. Kells stated that though he lived in Ottawa he had good friends in the Kingston area and his friends had told him about Mr. Patrick. Mr. Kells stated that he had met Mr. Patrick about twenty times. Mr. Kells stated that in the course of doing due diligence as a business broker, you get to know people very well and you get to know their reputation in the community. He had seen Mr. Patrick deal with intoxicated patrons. Mr. Kells stated that he had never seen Mr. Patrick take a drink.

Mr. Kells clarified that he is not a broker but president of Sunbelt Business brokers. He does not own the business. He is the shareholder of a brokerage in Quebec. Mr. Kells sells businesses and lectures on that and trains others to do that. He is not knowledgeable about residential realty. Mr. Patrick was looking at doing business brokerage. The broker who sponsored Mr. Patrick was Jerry Browsky of Sunbelt Business Brokers-Browsky Realty.

Testimony of Ken Gilpin:

Mr. Gilpin stated that he has known Mr. Patrick for a number of years. Mr. Gilpin is active with the Kingston Fall Fair. He was President of it for 1998 and again in 2000. Both times when he took on the responsibilities the Kingston Fall Fair was in a deficit position. Mr. Patrick had assisted with fundraising events for the fair. Mr. Patrick is well liked in the community and has done tremendous work for community events. Though Mr. Patrick has a high profile in the community, he is also known for his kindness.

Mr. Patrick had received an award from the Ontario Agricultural Society for his outstanding support for the Kingston Fall Fair.

Mr. Gilpin testified that he is a bylaw enforcement officer as well as a trustee for the School Board. He deals with the public every day. He has been at the Iron Horse for a number of events. He knows two former employees of this business. Mr. Gilpin stated he was not concerned about the actions of Mr. Patrick with women. Mr. Gilpin has no problem with the honesty and integrity of Mr. Patrick. Mr. Gilpin felt that Mr. Patrick was a very efficient person who did things in an appropriate manner.

Under cross-examination Mr. Gilpin stated that he knew Mr. Patrick was convicted in 1999. He knew of it from the newspaper and had been surprised by the conviction. He did not know the circumstances of the conviction. Since the conviction Mr. Gilpin stated that he had not seen Mr. Patrick consume any alcohol. He felt Mr. Patrick was good at dealing with the stress of having a large staff. Mr. Gilpin felt Mr. Patrick was now more laid back and responds in a more positive way to events.

Evidence of Linda Patrick:

Ms Patrick stated that she had been married to Mr. Patrick for eighteen years and they had four children whose ages now range from 20 to 26 years of age. They have been

separated for ten years now. She has known Mr. Patrick for thirty years.

Ms Patrick stated that the children work with their father and he helps her financially. The second oldest daughter and the son both work at the Iron Horse. In her opinion Mr. Patrick helps those less fortunate. She has never seen him act in a physical manner towards a woman.

Under cross-examination Ms Patrick stated that she does not believe Mr. Patrick is capable of forcing a women. She felt the incident was one of mutual agreement.

She works full time herself so his financial support is not a matter of her sole livelihood.

Ms Patrick testified that Mr. Patrick had not had a drink since the incident. Their oldest daughter lives in the same house with her father and the children have close contact with him. Mr. Patrick's oldest friend is with AA and Mr. Patrick sought counseling there.

Evidence of John Patrick:

Mr. Patrick testified that he accepts responsibility for the incident. He was law abiding before that incident and has been since that incident. There was no probation. Mr. Patrick accepts the court's decision. It was an alcohol related incident. He has not had a drink since 1999. Though he continues to work in the bar industry, he has water or diet coke. Mr. Patrick stated it has been eight years since the incident and his behaviour has changed significantly.

Mr. Patrick stated that he is involved in the community and with a lot of charities. He helps with the Children's Hospital and with the Kingston Fall Fair. He has built up a reputation and does deals on a handshake. He has reference letters from people speaking of his honesty and his treatment of people. He is active with fundraising committees and does not just send in a cheque.

Mr. Patrick stated that he has been successful in the bar industry. The Iron Horse was three times the top country bar. That award is based also on how you treat people.

Mr. Patrick stated that he is putting the incident behind him as he has dealt with adversity. He has remorse. He made a bad decision. He would not purposely hurt a woman. He is 54 years of age and a long time resident of Kingston. He still plays hockey in a team with police officers and correctional officers. As well some police officers play in a band at the Iron Horse. They would not come near him if they thought he was a person lacking in honesty and integrity.

Under cross-examination Mr. Patrick stated that when the incident occurred there was no after hours sales of alcohol. He accepts responsibility for the incident. They both were drinking too much. He did not report the incident to the Alcohol and Gaming Commission as he did not feel it was his obligation to do so and the courts would do that.

The Tribunal did not permit Counsel for the Registrar to introduce the application forms for the Alcohol and Gaming Commission. Counsel knew the rules for disclosure at the Tribunal. These documents were not being introduced in cross-examination to refute statements made in examination in chief. Their introduction without disclosure was prejudicial to the Applicant.

Mr. Patrick stated that he accepts responsibility. The judge had two different opinions to choose from and made the decision against him. He wished the complainant had not been put through this situation. He felt that once a mistake is made own up to it and move on and do not cause further harm.

Closing Statements:

Counsel for the Registrar stated that the past conduct of the Applicant in regards to his criminal conviction and that the incident occurred in a regulated industry were the main concerns leading to the refusal to register the Applicant under the Act.

Counsel referred to a number of authorities:

Brenner V Ontario (Registrar of Motor Vehicle Dealers and Salesmen) [1983] O.J. No. 1017 sets out the test as follows: “the proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the 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.”

Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda [1994] O.J. No. 954 reiterates the test set out in Brenner and states “In the circumstances of this case, we have the concern that the Tribunal appears not to have made the requisite qualitative assessment of the respondent’s conduct in light of all the evidence placed before it and the standards of “integrity” and “honesty” as well as “law” imposed by s.6(1)(b).

Giovanni Gianini v Registrar of Real Estate and Business Brokers 1985 Vpl.14 C.R.A.T. vol.179 states “The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.”

Grunberg v. The Registrar of Real Estate and Business Brokers 1990 Vol. 20 C.R.A.T. 466 wherein it is stated “In this appeal, the Registrar has decided to deny to Mr. Grunberg registration as a real estate salesman because of the conviction of rape, the fact of some violence having occurred, and the public perception of the duty of the Registrar to protect the public interest as well as the public concerns which could be expected to arise by the registering of such a convicted person. The matter of public perception through the

registration of an individual has been considered by this Tribunal on several occasions. As set out in the appeal of Ronald W. Northover (91984) 13 CRAT 292 "...the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations."

Lee (Re) [1998] O.C.R.A.T.D. No. 39 the Tribunal stated "By ignoring the mitigating factors, the assessment of Dr. Federoff, and the requirement to remain within the bounds of legislated authority insofar as "public interest" and "public perception" are concerned, it is the finding of the Tribunal that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. In the words of Vallancourt J., the Applicant's conduct was deplorable. But as was stated in Chopra and in Griese, the Tribunal must consider the cumulative effect of the Applicant's past conduct."

Madsen (Re) [1997] O.C.R.A.T.D. no. 119 the Tribunal stated "In other words, the Tribunal is not entitled to simply substitute its discretion for that of the Registrar, but is to determine whether there are reasonable grounds to support the decision of the Registrar."

Miles v The Registrar of Real Estate and Business Brokers 1991 Vol. 21 C.R.A.T. 282 relied on Grunberg as regards the issue of public perception. The Applicant was under probation at the time of the hearing.

McFadden v. The Registrar of Real Estate and Business Brokers, February 2001

The Tribunal stated "If the question to be decided, therefore, is the likelihood or belief of future unlawful business behaviour on the part of the Appellant based upon this single unfortunate incident of past conduct and the resulting conviction of the Appellant upon his guilty plea, this Tribunal is of the contrary opinion from that reached by the Registrar as stated in the Proposal. The test set out in Brenner v. Registrar of Motor Vehicles, Dealers and Salesmen (1083) 19 CRAT 58 is unless the Tribunal can find that the past conduct of the Appellant does not afford reasonable grounds for belief that the Appellant will not carry on business in accordance with the law and with integrity and honesty, the Tribunal should not order the Registrar to refrain from carrying out the Proposal. This Tribunal finds, however, that on the facts in this particular case, the past conduct of the Appellant does not afford such reasonable grounds and that, with respect, the decision reached by the Registrar was in error for the reasons stated above. The other cases cited by both counsel support the conclusions reached by the Tribunal in this matter. In all of such other cases, the decisions relied upon the number and severity of the criminal convictions or otherwise depended upon the course of conduct of the accused both before and after the conviction and the propensity of any reoccurrence of unlawful conduct on the part of the registrant. The Appellant in this case, given the miscalculation of the signals or intentions of the Complainant, acted honourably throughout even as stated by the Complainant. The Senior Registration Officer of the Registrar and all character witnesses gave assertive

testimony that the conduct of the Appellant did not give any such reasonable grounds for such belief of the future misconduct. Indeed, there was no evidence at the hearing which supported the decision of the Registrar as proposed in the Proposal.”

Gilford Garage Service Limited and Theodore Ambury v. Registrar, CRAT September 1982 where the Tribunal stated “The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts – all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.”

Roadsport Automotive Inc. (Re) [1998] O.C.R.A.T.D. no. 138 where the Tribunal stated “There is no evidence before the Tribunal to facilitate a conclusion that questionable personal ethics, that reflect on one’s integrity, honesty, and propensity to obey the law, can be compartmentalized into either of one’s personal or business domains and not into the other. OMVIC has therefore made no error in concluding that the Applicant’s past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.”

Counsel for the Registrar stated that the criminal conviction speaks for itself and that there was no clear acceptance of responsibility. Counsel stated that complete and full disclosure is important in the application process. As well the location of the offence is important as it happened in a bar which is a regulated industry. As a salesman in the real estate business there is no supervision as the salesmen work independently. Counsel urged that the Tribunal put no weight on the fact that there has been no other complaints. As well many of the reference letters are either some years old or were done for the sentencing hearing. The Applicant has not demonstrated that he is under some program for his alcoholism. Though he speaks about doing business real estate once he is registered he can sell both homes and businesses.

Counsel stated that you cannot compartmentalize business ethics from personal ethics. Past conduct in either sphere relates to the other one.

The Applicant stated that it does not necessarily follow that past conduct will lead to similar conduct in the future. When disclosing the conviction on his application the Applicant stated he knew there would be further investigation of it. He stated that he had made a serious error of judgment for which he was remorseful for the damage he had done to all concerned. It was an isolated incident. He had worked without problems for sixteen years in the bar industry. Since the incident he had conducted himself in a law-bidding manner for eight years.

The Applicant referred to the case of Jessiman v Registrar, Real Estate and Business Brokers Act LAT September 2003 whereby the totality of the past conduct and the evidence failed to establish that the Registrar had reasonable grounds to revoke the real estate registration of Mr. Jessiman.

The Applicant stated that he had shown responsibility for his behaviour. Since that time he took over the lease on the business when the purchaser of his business could not continue in business. He has not consumed alcohol since that time.

LEGISLATION:

Real Estate and Business Brokers Act

Section 6

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officer or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 8

- (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

Section 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.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

ANALYSIS:

This is a case where the Registrar, *Real Estate and Business Brokers Act*, wishes to refuse to registrar Mr. Patrick due to his criminal conviction and the conduct surrounding that conviction. Counsel for the Registrar had frankly stated that though the disclosure on the application was not as detailed as would have been preferred by the Registrar, its deficiencies do not warrant the refusal to register the Applicant. The Tribunal agrees with that conclusion. The disclosure could have been more detailed and the Applicant did not provide the transcript of the sentencing hearing. But the Applicant did provide the most important factor, the conviction. The Applicant has stated that he did not think he needed to provide more details as he knew he would be investigated. The Tribunal does not believe the Applicant was hiding his conduct. He was convicted of an offence involving sexual assault and violence to a woman. He was convicted in a smaller community, Kingston. It is assumed that there was publicity surrounding the charge and conviction of the owner of a large drinking establishment in that area. It would have been difficult for the Applicant to hide the details of his conviction but in any event the Tribunal finds that he did not attempt to do that.

The main issue then centres around the conviction itself and the conduct of the Applicant which led to that conviction. It was a grievous incident of physical violence and degradation to a woman. The Applicant was convicted and served some months of jail time. He was not put on probation nor were there any terms or conditions upon his release from jail. He has a criminal record. The incident occurred in 1996 and he was convicted and served his sentence in 1999. There are no other criminal convictions against Mr. Patrick. He continued to own the Iron Horse until some point in the early 2000's when it was sold to Mr. Kelly. The business went bankrupt and Mr. Patrick became involved with it again as a shareholder though a daughter of Mr. Patrick now owns the business. His family has been active as workers in the business in the past. Mr. Patrick continues to live and work in the Kingston area despite the publicity surrounding his trial and conviction. He continues to perform charity work with a number of events such as the Kingston Fall Fair. He is involved actively with a number of other charities. He had done similar type charity work prior to the incident in 1996 as attested to by the reference letters either submitted during his trial or at the sentencing hearing. Mr. Patrick disputed the account of the incident as portrayed by the complainant. There was a full trial. The Judge disbelieved Mr. Patrick and accepted the evidence of the complainant.

This Tribunal cannot go behind the conviction. The criminal court has made its decision. The Judge was critical of the actions of Mr. Patrick. He was convicted of serious and violent offences. This past conduct must be considered when determining whether or not he should be permitted to work in the regulated industry of real estate and business brokers. The Judge in the sentencing report found that Mr. Patrick had a lack of remorse and was not realistic as to what had happened in that incident.

The Registrar, as does this Tribunal, has an obligation under the *Real Estate and Business Brokers Act* to ensure that those working in this industry obey the law, have

financial responsibility and act with integrity and honesty. The Registrar through his Counsel and Assistant Registrar has stressed several times during the hearing that this offence occurred while Mr. Patrick was working in another regulated industry, being the owner and operator of a licensed drinking establishment, the Iron Horse. It is not disputed that the incident occurred at the location of the Iron Horse. It is not disputed that a number of people were drinking after hours though it is not evident that there was payment for the alcoholic drinks that were distributed to those at the Iron Horse. The Applicant acknowledges that this happened and says there were no after hours sales. It is not clear from the evidence whether or not the Applicant had an obligation then or at some later time to report either the after hours drinking or the criminal conviction to the appropriate authorities. Counsel for the Registrar wished to submit during his cross-examination of Mr. Patrick the application forms used by the Alcohol and Gaming Commission. This was not allowed as it was not proper disclosure with notice to the Applicant, it was not done as a cross-examination tool to discredit evidence in chief and it was not readily apparent how these application forms had any relevance. If the Registrar wished to make the argument that the Applicant had misled the Alcohol and Gaming Commission by not providing appropriate disclosure on forms filed with that Commission, then the Registrar needed to prove that assertion through proper document disclosure and witness testimony. That did not happen. Accordingly, the Tribunal finds that the Registrar did not provide the evidentiary foundation to give relevance to its claim that the Applicant had been in breach of rules or regulations or conduct in another regulated industry.

There still remains the core issue of the criminal conviction of the Applicant and his conduct during that incident. The remarks by the Judge as to lack of remorse were troubling to this Tribunal. The Applicant though did state at the hearing that he was remorseful. He accepted responsibility for his actions. He stated that the Judge believed the complainant over him and he must accept that and move forward. He provided documents, mainly reference letters, plus the testimony of three witnesses to demonstrate that this incident was not indicative of the majority of time of his past conduct. He had many incident free years running a very busy drinking establishment. There was no evidence of any troubles or concerns by authorities with his conduct prior to the incident. He testified that his conduct has been without controversy since the incident and particularly since his release from jail in 1999. He provided over fifteen letters dated after 1999 that speak of his involvement in his community and with individuals in a very positive sense.

It was stated in Kevin Mark Baldwin a decision of CRAT quoted in the Roadsport Automotive Inc. (Re) supra : “As was stated in Chopra (1993) 25 CRAT 514 and Griese (1993) 25 CRAT 765, both cases under the *Real Estate and Business Brokers Act*, the Tribunal must consider the cumulative effect of the Applicant’s past conduct. The emphasis must be on “past conduct”. The Tribunal must consider all of the past conduct of the Applicant, including the past conduct which forms part of the 1996 incident which led to the 1999 conviction. When reviewing the past conduct the Tribunal finds that this conviction is indeed an isolated incident – a serious and grave

incident – but nevertheless it does not form a pattern of behaviour for this Applicant. Mr. Brian Schlotzhauer stated in his testimony that he reviewed the written references of the Applicant but did not give them great weight. He stated many spoke of support of community events and there were done for the trial or sentencing hearing after the trial. Mr. Schlotzhauer did not address whether he reviewed the references provided by the Applicant for this hearing. Most of those references date after the release of Mr. Patrick from jail and speak of his conduct in the community from donating prizes to helping with auctions and seeing an elderly gentleman in the hospital. These references are of importance in the consideration of the past conduct of Mr. Patrick as well as the ones reviewed by Mr. Schlotzhauer. The totality of the conduct and its cumulative effect must be considered when determining how to judge the past conduct of an applicant.

The Tribunal gave weight to the testimony of Mr. Kells who is a high profile businessman who has met Mr. Patrick since the conviction. Mr. Kells spoke of the integrity and honesty that Mr. Patrick showed to Mr. Kelly when Mr. Kelly first purchased the Iron Horse and when he after some years went bankrupt. This conduct does show honesty and integrity. As well Mr. Kells stated that he knew of Mr. Patrick's reputation in the community and that he had never seen Mr. Patrick have an alcoholic beverage. Mr. Kells knew of the conviction and that did not deter him from recommending that Mr. Patrick should be permitted to be a real estate salesperson.

Mr. Gilpin is a bylaw enforcement officer. He is active with his community as shown by his work with the Kingston Fall Fair. He is also a school trustee. Though he did not know the circumstances, he did know via the newspaper that Mr. Patrick had been convicted of the sexual assault offences. He was impressed with Mr. Patrick's integrity and honesty. He had not seen Mr. Patrick take an alcoholic beverage since the conviction. He had known Mr. Patrick for approximately ten years.

The estranged wife, Linda Patrick, also testified. The Tribunal was impressed with her testimony. It was honest and credible. She acknowledged that Mr. Patrick helped her financially but also stated she worked full time as well. She has known him for thirty years and felt the incident that led to his conviction was out of character with the man that she knew. She spoke of his close relationship with his grown children. She stated that Mr. Patrick had not drunk alcohol since the incident and that she would know if he did as he lives in the same house with his oldest daughter. She stated that Mr. Patrick did ask for help from a friend who is active with AA.

It was evident from the demeanor of these witnesses that they respected Mr. Patrick and felt that his past conduct had contained many positives. Mr. Gilpin stated that he thought the conviction and the circumstances surrounding it had changed Mr. Patrick and made him respond in a more positive way to events.

In this case the Registrar is very concerned about the public perception of these very serious convictions involving sexual assault with a weapon and sexual assault causing

bodily harm. They are indeed two very serious offences. But it is the opinion of this Tribunal that the Registrar put too much emphasis on the element of public perception and did not adequately consider the totality of the past conduct and whether or not in these particular circumstances it was likely that this Applicant would re offend. The witnesses including his estranged wife say that this incident was out of character for Mr. Patrick. There is no evidence that Mr. Patrick is likely to assault another woman. There is evidence from three witnesses plus Mr. Patrick that he stopped drinking after the incident. It is obvious that alcohol was a factor in this incident as indicated by the Trial Judge. The positive conduct that Mr. Patrick has not been seen drinking alcohol beverages by his family and friends lends credence to the argument that there is little threat of Mr. Patrick conducting himself in such a grievous fashion in the future. The Registrar did not present arguments as to the risk of re offending when making his arguments concerning public perception.

In conclusion the Tribunal, based on the above analysis, finds that the Registrar did not have reasonable grounds for his belief that Mr. Patrick will not carry on business in accordance with law and with integrity and honesty.

ORDER:

Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the *Real Estate and Business Brokers Act*, directs the Registrar to refrain from carrying out the Proposal to refuse to register John Arthur Patrick as a real estate salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: February 14, 2005

File: 2537.rebba.Patrick

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



EVA YEE-WA TAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES: JACK F. FITCH, Counsel representing the Applicant,

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
HEARING: February 2, 2005 Toronto

ORDER

WHEREAS the Registrar, *Real Estate and Business Brokers Act* (the "Respondent") issued a Proposal dated June 18, 2004 (the "Proposal") to revoke the registration of Eva Yee-Wa Tam (the "Applicant") as a real estate salesperson pursuant to Section 8 of the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal this Proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence on February 2, 2005 and continue, if necessary, on February 3, 2005;

AND WHEREAS when the hearing of the appeal commenced before the Tribunal on February 2, 2005 the Respondent withdrew the Proposal dated June 18, 2004 and the Applicant withdrew the Notice of Appeal requesting a hearing before the Tribunal, dated June 30, 2004;

NOW THEREFORE this Tribunal orders that these proceedings before the Licence Appeal Tribunal are concluded.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Released: February 2, 2005

File name: 2462.rebba.Tam.withdrawal

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.



NAJEEB AHMAD

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS
BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: CRAIG J. PENNEY, Counsel, representing Najeeb Ahmad

ROBERT MAXWELL, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATES OF
HEARING: November 24, 2004 and January 24, 2005 *Toronto*

REASONS FOR DECISION AND ORDER

BACKGROUND:

The hearing arises out of a written Notice of Proposal (the "Proposal") dated June 18, 2004 issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar" and the "Act" respectively) to revoke the registration of Najeeb Ahmad ("Ahmad") as a salesperson under the Act.

The Registrar bases his proposal under section 8.(2) of the Act as read with section 6.(1)(b) and section 9 of the Act. The reasons given by the Registrar in his proposal for not granting Ahmad registration as a salesperson are:

1. 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.
2. In summary form, it is alleged that the Registrant has participated in fraudulent activity while registered pursuant to the Act and therefore ought not to be a registrant pursuant to the Act. In particular, it is alleged that the Registrant, as a salesperson intentionally inflated the stipulated prices for properties on information supplied to

financial institutions and thereby, to procure mortgage financing based on this false information and knowingly did so.

(Exhibit 4, tab 1, page 2)

The Registrar furnished in the proposal full and detailed particulars of Ahmad's participation in activities while registered under the Act. The Registrar claimed that the activities of Ahmad affords him reasonable grounds for belief that Ahmad will not carry on business in accordance with law and with integrity and honesty. The detailed particulars provided by the Registrar in his proposal are contained in fifty-one paragraphs in the proposal. (Exhibit 4, tab 1, page 2 through 10).

At the commencement of the hearing, the respective Counsel for the Registrar and Ahmad handed in a "Agreed Statement of Facts" which was entered by the Tribunal as Exhibit 5 and are contained in this decision under the heading "FACTS FOUND PROVEN".

THE EVIDENCE:

The evidence presented at the hearing by the Registrar consisted of the testimony of the Assistant Registrar under the Act, Mr. Brian Schlotzhauer. The evidence presented by Ahmad consisted of his testimony and the testimony of Timothy Quek, a psychotherapist and counsellor. In addition to the above persons testimonies, the Registrar relied on documents as disclosed in his Book of Documents (Exhibit 4). Ahmad relied on the written report of Timothy Quek.

A summary of the various persons' testimonies follow.

Brian Schlotzhauer

Schlotzhauer testified that he is the Assistant Registrar under the Act and has held that position for the past four to five years. In his capacity as Assistant Registrar he manages and oversees the registration process of applicants and registrants. He became familiar with the five allegations that were being made against Ahmad and how his past conduct could best be dealt with. He stated that he reviewed the allegations made against Ahmad and considered options available to the Registrar including the possibility of imposing terms and conditions on Ahmad's registration. After consideration it was determined that terms and conditions were not appropriate to the situation. The overriding problem as Schlotzhauer saw it was that certain five property transactions handled by Ahmad were fraudulent in that Ahmad had falsely inflated the five properties' selling prices. The impact of this fraud would be upon other real estate agents and how the fraudulently inflated prices would influence those agents in determining the true selling price and value of properties in the vicinity. Furthermore, consumers would be misled as to the true asking price or value of properties in the vicinity of those five properties and the true and actual price paid for nearby properties. The overall result was that the fraud being committed by Ahmad would impact on

decisions to be made by other agents and property owners as to the true and accurate values of properties in the vicinity of these five properties. Of equal concern to Schlottzhauer was how the fraudulent conduct of Ahmad impacted on various Mortgagees who advanced money in excess of the true selling price of the properties and whose security had been seriously and adversely affected by the dishonest conduct of Ahmad. Schlottzhauer went on to explain to the Tribunal that Ahmad convinced the sellers of the five properties who had listed their properties for sale – and which properties were not selling despite the fact that their sale price had been reduced – to remove their properties from the market and to immediately thereafter substantially increase the selling price and to sell at this increased price to a purchasers who Ahmad then produced. Upon execution of the agreements of purchase and sale the sellers and purchasers at the instigation of Ahmad signed a “mutual agreement” in terms whereof the sellers agreed to redirect money back to the purchasers upon completion of the transaction. These mutual or side agreements were not disclosed to the Mortgagees who advanced monies on inflated and untrue selling prices. The monies redirected back to the sellers was then distributed amongst various persons who were involved in the dishonest transactions.

Under cross examination Schlottzhauer stated that once an investigator confronted Ahmad with the fact that the Registrar’s office was investigating two sale transactions handled by Ahmad he was forthcoming with information and cooperated in the Registrar’s investigation. In fact, Ahmad brought to the attention of the investigator certain three transactions that were not then known to or being investigated by the Registrar and of which three transactions two were aborted prior to completion. These three transactions upon investigation were shown to be fraudulent and followed the same pattern of dishonesty as the two transactions being investigated by the Registrar’s office.

Timothy Quek

Quek testified on behalf of Ahmad and stated that he has a PhD in Psychology from York University, Toronto and presently practices as a psychotherapist and counsellor in Toronto. Ahmad had been referred to him by Ahmad’s Counsel with a view to conducting an assessment of Ahmad so as to establish the basis of Ahmad’s offences to detect his psychological status and to recommend a course of treatment, if necessary.

Quek interviewed Ahmad on January 7, 2004 and issued a clinical assessment report on October 12, 2004 (Exhibit 6). He obtained the following background information from Ahmad.

Ahmad obtained a Chemical Engineering degree in Pakistan and together with his wife, a practicing medical doctor in Pakistan, immigrated to Canada with their young daughter in 1998. Ahmad and his wife found no employment in Canada in their respective professions. Ahmad therefore decides to train to become a Real Estate agent in Toronto and upon his obtaining his licence he commenced to work for a Real

Estate broker. He had few contacts. However a fellow individual from Pakistan was introduced to him. This person told Ahmad “he had many clients looking for homes”.

Quek briefly described to the Tribunal the five transactions in which Ahmad became involved and which are more fully referred to in the “Agreed Statement of Facts” (Exhibit 5). Quek summarized his assessment of Ahmad as suffering from moderate to severe major depressive disorder. Ahmad was deeply regretful of his actions and his wife had indicated to Quek that the behaviour and actions of Ahmad was uncharacteristic of her husband. Quek’s recommendation, based on his assessment of Ahmad and interviews, was that Ahmad “is unlikely to repeat his offence”. This opinion was based on four reasons, namely:

- (i) Ahmad’s awareness of his actions and determination to correct his behaviour.
- (ii) Ahmad’s remorse regarding his actions and his cooperation with the investigation.
- (iii) Ahmad’s willingness to continue with counselling and his openness to supervision by his employing broker.
- (iv) The support Ahmad has received from his wife, and his concern for his family, indicate a strong emotional basis to enable him to cope with the stresses that he experiences.

Under cross-examination Quek stated that he cannot be certain that Ahmad will not repeat “what he has done” and that Ahmad’s past conduct does possibly indicate his future propensity to be involved in unethical conduct. Quek also stated that Ahmad’s Counsel referred Ahmad to him after his Counsel has consulted with Ahmad.

Najeeb Ahmad

Ahmad testified that he commenced to take the Real Estate course of instruction offered by the Ontario Real Estate Association in 2002 at which time he decided on a career in Real Estate. He commenced his first position as salesperson in 2003. He described how he was approached by the individual who offered to introduce to him many willing buyers of residential real estate. Ahmad then went on to describe the five transactions referred to in the “Agreed Statement of Facts” namely the transactions involving the two Melita Avenue properties, the Silverado Drive property, as well as the Miller Street and Dufferin Street properties. His testimony accorded in all essential aspects with the “Agreed Statement of Facts” and does not need repeating. In his testimony, under cross-examination, he conceded that in relation to one Melita Avenue transaction he only furnished his employing broker with the Agreement of Purchase and Sale (Exhibit 4, Tab 9B) but did not give his broker the “Mutual Agreement” whereby the seller agreed to give the buyer on closing \$33,900.00 “as cost to buy new fridge, new stove, new washer, new dryer, new blinds, new broadloom, central vacuum and the renovation cost to convert the basement into an in-law basement apartment.” (Exhibit 5, Tab 9C). He

conceded that he knew that document was false. He also conceded that all the “Mutual Agreements” were to be secret and were not disclosed to the Mortgagees – and in those transactions that closed the “Mutual Agreements” were not disclosed to the Mortgagees. He also conceded that the same false position pertains to the sale transaction of the other Melita Avenue property. He also conceded that his contact who introduced the deals to him was to receive \$5,405.50 through payment to that party’s company from the “kickbacks”. (Exhibit 4, Tab 9D). In so far as the sale transaction relating to the Miller Street property was concerned he knew that purchaser of that property would receive back from the sellers, on closing, the sum of \$38,288.00 under a “mutual agreement” (Exhibit 4, Tab 9F). Ahmad also conceded that the same situation of fraud and falsehood existed in all five transactions in which he was involved and that, through the Real Estate instruction course he took in order to obtain registration, he knew that what he was doing “was wrong”. He also conceded that the seller’s lawyer in the first Melita Avenue transaction thought the deal was “inappropriate” and advised his client against proceeding with such transaction. Finally, he conceded that the Mortgagees would be interested in the “mutual agreements” as would persons who checked the M.L.S. system such as neighbouring property owners who could be affected. He further conceded that when he started working for his present employer he did not advise her of his involvement in the five transactions that had been fraudulently structured.

FACTS FOUND PROVEN:

At the outset of this hearing, Counsel for the parties handed in an “Agreed Statement of Facts” which became Exhibit 5 in the proceedings. The “Agreed Statement of Facts” are reproduced hereunder – with relevant deletions and/or anonymizations in order to comply with the *Freedom of Information and Protection of Privacy Act* and are considered facts found proven by this Tribunal.

1. Najeeb Ahmad (the “Registrant”) was originally registered as a salesperson under the *Act* on or about July 4, 2003.
2. At all relevant times between July 4, 2003 to January 7, 2004 the Registrant’s registration was with HomeLife/Vision Realty Inc., a registered broker under the *Act*. On or about January 7, 2004, the Registrant’s registration with HomeLife/Vision Realty Inc. was terminated. The Registrant transferred his registration to HomeLife/New Star Real Estate Ltd., which is registered as a broker under the *Act*. The Registrant’s registration remains with this broker.
 - 2.1 In mid-September 2003, the Registrant came into contact with “S.H.” through a mutual friend. The Registrant was new to real estate and did not have a client base. S.H. told him that he had some clients who were looking to buy properties.

- 2.2 When the Registrant met S.H., he understood that S.H. was a mortgage broker with a pool of clients. At the time, the Registrant saw this as a tremendous opportunity. It was later understood by the Registrant that S.H. was acting as a middleman, bringing the clients to the Registrant.

Deceptive Information in Respect of Real Estate Transactions

3. Between October 31, 2003 and December 12, 2003, the Registrant participated in or concurred with furnishing false or deceptive information in respect of five real estate transactions. Two of these transactions were discovered as a result of a complaint made to RECO. The final three transactions were discovered as a result of the Registrant's cooperation and voluntary disclosure. The particulars of these five transactions are set out below.

- 3.1 Prior to the five transactions that are the subject of this hearing, the Registrant had only participated in two real estate transactions.

000 Melita Avenue, residence

4. Ms. T is a salesperson under the *Act* and was at all relevant times employed by the broker Re/Max Realtron Realty Inc. Ms. T was first registered as a sales representative in January 1998.
5. On August 12, 2003, Ms. T procured a listing to sell property known as 000 Melita Avenue, Toronto ("000 Melita Ave.") from Mr. P.K. Ms. T advertised 000 Melita Ave. for sale on the Toronto Real Estate Board Multiple Listing Service (the "000 Melita Ave. MLS Listing"), which Listing included an asking price of \$274,900.00. The asking price for the 000 Melita Ave. was reduced to \$269,900 on August 21, 2003.
- 5.1 In October 2003, S.H. introduced the Registrant to Ms. D.G. Ms. D.G. was in need of a home, and the Registrant had shown her approximately 20 properties. She liked the one on 000 Melita Ave., Toronto. The Registrant told Ms. D.G. that she would need 6.5-7% down to cover the down payment and legal costs.
6. On or about October 31, 2003, the Registrant presented an offer to purchase 000 Melita Ave. for \$245,000.00 on behalf of Ms. D.G. On the second page of this offer, the name "D.G." is signed in the space provided for the buyer's signature, which signature is dated "10/31/03". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.

7. Ms. T faxed the offer to purchase to Mr. P.K., the seller of 000 Melita Ave. Mr. P.K. signed the offer to purchase back at \$261,178.00. The Registrant negotiated with Ms. T respecting the possible sale of 000 Melita Ave.
 - 7.1 S.H. then contacted the Registrant to say that the property would have to be purchased in a different way. S.H. advised that Ms. D.G. had no money and that the only way the deal would work is if they were to inflate the price and have money come back. S.H. also advised the Registrant that the legal services of XYZ would have to be retained by the seller and buyer. The Registrant then advised Ms. T of the plan.
8. On or about November 4, 2003, the Registrant made a new offer to purchase 000 Melita Ave. for \$288,500.00. On the second page of this offer, the name "D. G." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 4/2003". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature. The Registrant advised Ms. T that the offer to purchase would require a Mutual Agreement whereby the seller agreed to give the buyer \$26,500.00 on completion and the lawyer was instructed to pay this sum directly from the proceeds of the sale prior to payment to the seller on completion. The name "D. G." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 4/2003". The name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature. Ms. T faxed the offer to purchase to Mr. P.K.
9. Mr. P.K. inquired of Ms. T if this practice was legal, and was told by Ms. T that it was. Mr. P.K. consulted with his own solicitor, M.C., on November 5, 2003. Mr. P.K. subsequently advised Ms. T that he was unable to accept this offer as presented and signed it back at \$261,178.00. The Registrant ceased negotiations with Ms. T in respect of 000 Melita Ave.
 - 9.1 Afterwards, Mr. P.K. received a voice mail from Ms. T which indicated, in part, the following: "received your fax ... what D.G. wants is 000 Melita with a cash back ... explained to you regarding the cashback ... disappointed ... it may not be fair, but this is what is happening in the marketplace ... not sure what your concern is ... you're getting your money from the sale ... \$288, 500 with cashback ... not at \$261,178."
 - 9.2 On November 17, 2003, Mr. P.K. complained to RECO about the transaction that had been proposed by the Registrant and Ms. T.

999 Melita Avenue residence (October 5, 2003 – November 26, 2003)

10. Ms. T is a salesperson under the *Act* and was at all relevant times employed by the broker Re/Max Realtron Realty Inc.

11. On October 5, 2003, Ms. T procured a listing to sell property known as 999 Melita Avenue, Toronto ("999 Melita Ave."). Ms. T advertised 999 Melita Ave. for sale on the Toronto Real Estate Board Multiple Listing Service (the "999 Melita Ave. MLS Listing"), which Listing included an asking price of \$264,900.00. The asking price for the 999 Melita Ave. MLS Listing was reduced to \$254,900.00 on October 19, 2003.
12. The Registrant negotiated with Ms. T respecting the possible sale of 999 Melita Ave. Ms. T provided for the Price Change Agreement. On or about November 5, 2003, the asking price for the 999 Melita Ave. MLS Listing was increased to \$284,900.
13. On or about November 6, 2003, the Registrant presented an offer to purchase 999 Melita Ave. for \$284,500.00 on behalf of his client Ms. D.G. On the second page of this offer, the name "D.G." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 6/2003". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.
14. The Registrant advised Ms. T that the offer to purchase would require a Mutual Agreement whereby the seller agreed to give the buyer \$33,900.00 on completion and the lawyer was instructed to pay this sum directly from the proceeds of the sale prior to payment to the seller on completion. The name "D.G." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 6/03". The name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.
15. The Registrant advised Ms. T that the legal services of XYZ would have to be retained by seller and buyer to complete the conveyance of title.
16. The sellers, E.S. and A.S. accepted this offer and an agreement of purchase and sale was executed on November 6, 2003. This agreement provided for a completion date of November 19, 2003 and a deposit of \$10,000.00 to be held by "Lawyer in Trust". On the second page of this offer, the name "Ms. T" is signed in the space provided for the witness signature to the seller's signatures.
17. Pursuant to Instrument No. registered in the Land Registry Office (No. 66) Toronto, on November 26, 2003, title to 999 Melita Ave. was transferred from E.S. and A.S. to D.G. for \$284,500.00. The Transfer receipted as Instrument No. was signed by XYZ acting for Transferors and acting for Transferee. The Transfer was submitted by XYZ Law Office.
18. Pursuant to Instrument No. registered in the Land Registry Office (No. 66) Toronto, on November 26, 2003, a mortgage was registered to 999 Melita Ave. in favour of the Royal Bank of Canada with the principal amount of mortgage being \$279,058.94. The Charge/Mortgage receipted as Instrument No.

..... was signed by XYZ acting for Chargor. The Charge/Mortgage was submitted by XYZ Law Office.

- 18.1 On November 26, 2003, Ms. T left an envelope in Mr. P.K.'s mailbox. Enclosed was a typical typed marketing letter on which Ms. T had written that the property at 999 Melita Ave. had just sold for \$284,500. Mr. P.K. brought this information to RECO's attention as he was aware that 999 Melita Ave. was listed by Ms. T for \$254,900. He was highly suspicious that it might involve the same purchaser and the Registrant.

THE RECO INVESTIGATION

- 18.2 As a result of the information received from Mr. P.K., a Director's Investigation Order was issued on November 27, 2003. The investigation was assigned to Ms Jo Ann Swain ("Investigator Swain") to further investigate.
- 18.3 On January 6, 2004, Investigator Swain interviewed the Registrant. The Registrant cooperated with Investigator Swain both in terms of scheduling the meeting and in terms of providing information and documentation to assist Investigator Swain with her investigation. The Registrant provided details regarding all five transactions, and even provided a diagram to help explain S.H.'s role.
- 18.4 During the meeting with Investigator Swain, the Registrant accepted full responsibility for his actions and his role in these transactions. At no time did the Registrant attempt to minimize his own responsibility or to shift the blame for his own actions.
- 18.5 During the meeting, the Registrant identified three other improper transactions that RECO was not aware of at that time. It was a result of the Registrant's voluntary disclosure that these transactions were discovered.
- 18.6 The Registrant reported to Inspector Swain that he had met with his broker in December 2003 to discuss what to do regarding the two transactions which had not been completed. The Registrant and his broker agreed that the transactions had to be halted. The Registrant then took action that resulted in the termination of the two transactions regarding Silverado Drive and Dufferin Street.

Silverado Drive, Mississauga (November 22, 2003 – February 19, 2004)

19. Ms. T is a salesperson under the Act and was at all relevant times employed by the broker Re/Max Realtron Realty Inc.

20. On November 22, 2003, Ms. T procured a listing to sell property known as Silverado Drive ("Silverado Dr."). Ms. T advertised Silverado Dr. for sale on the Toronto Real Estate Board Multiple Listing Service (the "Silverado Dr. MLS Listing"), which Listing included an asking price of \$229,900.00.
 - 20.1 Mr. K.R. ("K.R.") was referred to the Registrant by S.H. From the outset, S.H. instructed the Registrant on how the deal would proceed. K.R.'s objective was to buy properties with no money down, rent the places out, and get some money from the excess mortgage funds. K.R. was also the purchaser identified in the deal on Dufferin Street, Toronto (see below).
21. On behalf of K.R., the Registrant negotiated with Ms. T respecting the possible sale of Silverado Dr. On or about December 5, 2003, the asking price for the Silverado Dr. MLS Listing was increased to \$279,000.00.
22. On or about December 4, 2003, the Registrant presented an offer to purchase Silverado Dr. for \$272,000.00 on behalf of his client K.R. On the second page of this offer, the name "K.R." is signed in the space provided for the buyer's signature, which signature is dated "Dec. 4/03". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.
23. The Registrant advised Ms. T that the offer to purchase would require a Mutual Agreement whereby the seller agreed to give the buyer \$52,300.00 on completion and the lawyer was instructed to pay this sum directly from the proceeds of the sale prior to payment to the seller on completion. Ms. T provided for the Price Change Agreement, increasing the list price from \$229,900 to \$279,000 on December 5, 2003. The Agreement of Purchase and Sale was then prepared at an inflated price of \$272,000. The name "K.R." is signed in the space provided for the buyer's signature, which signature is dated "Dec. 4/03". The name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature. The name "Ms. T" is signed in the space provided for the witness signature to sellers, LTND and LTTM dated "Dec. 4/03".
24. The Registrant advised Ms. T that the legal services of XYZ would have to be retained by seller and buyer to complete the conveyance of title.
25. The sellers, L.T.N.D. and L.T.T.M. accepted this offer and an agreement of purchase and sale was executed on December 5, 2003. This agreement provided for a completion date of December 12, 2003 and a deposit of \$10,000.00 to be held by "Lawyer in Trust". On the second page of this offer, the name "Ms. T" is signed in the space provided for the witness signature to the seller's signatures.
26. K.R. waived the condition to arrange satisfactory financing included in the agreement of purchase and sale. This waiver was signed December 10, 2003.

27. An Amendment to Agreement extending the completion date to December 19, 2003 was signed by the buyer on December 12, 2003 and by the sellers on December 15, 2003.
 - 27.1 Before the closing date, the Registrant voluntarily disclosed to his broker the circumstances of this transaction and sought his broker's advice regarding what to do. As a result of these discussions, the Registrant took action that resulted in a Mutual Release being signed on December 18, 2003.
28. The asking price for the Silverado. Dr. MLS Listing was reduced to \$229,000.00 on December 16, 2003.
29. On January 10, 2004, the sellers, L.T.N.D. and L.T.T.M. accepted an offer to purchase made by Pro Sonic Realty Inc., a broker registered under the *Act*. The agreement of purchase and sale was for \$220,000.00 and provided for a completion date of February 19, 2004. A deposit of \$1,000.00 to be held by "Re/Max Realtron Realty Inc". On the second page of this offer, the name "Ms. T" is signed in the space provided for the witness signature to the seller's signatures.

Miller Street, Toronto (10 November 2003 – 4 December 2003)

30. The Registrant was introduced to Mr. L.A. ("Mr. A") by S.H. From the outset, S.H. instructed the Registrant on how this deal would proceed. On November 10, 2003, the Registrant procured a listing from Mr. A to sell the property known as Miller Street, Toronto ("Miller St."). The Registrant advertised Miller St. for sale on the Toronto Real Estate Board Multiple Listing Service (the "Miller St. MLS Listing"), which Listing included an asking price of \$229,900.00.
31. On or about November 10, 2003, the Registrant presented an offer to purchase Miller St. for \$225,000.00 on behalf of his client "L.A.". On the second page of this offer, the name "L.A." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 10/2003". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.
32. The Registrant provided for a Mutual Agreement whereby the seller agreed to give the buyer \$38,288.00 on completion and the lawyer was instructed to pay this sum directly from the proceeds of the sale prior to payment to the seller on completion. The name "L.A." is signed in the space provided for the buyer's signature, which signature is dated "Nov. 10/03". The name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature. The names "D.F." and "R.F." are signed in the space provided for the seller's signature, which signatures are dated "Nov. 10/03". The name "Najeeb Ahmad"

is signed in the space provided for the witness signature to the seller's signatures.

33. The sellers, R.F. and D.F. accepted this offer and an agreement of purchase and sale was executed on November 10, 2003. This agreement provided for a completion date of December 1, 2003 and no deposit. On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the seller's signatures dated "Nov. 10/03".
34. Pursuant to Instrument No. registered in the Land Registry Office (No. 66) Toronto, on December 4, 2003, title to Miller St. was transferred from D.F. and R.F. to Mr. A for \$225,000.00. The Transfer registered as Instrument No. AT was signed by XYZ acting for Transferors and acting for Transferee. The Transfer was submitted by XYZ Law Office.
35. Pursuant to Instrument No. registered in the Land Registry Office (No. 66) Toronto, on December 4, 2003, a mortgage was registered to Miller St. in favour of the Royal Bank of Canada with the principal amount of mortgage being \$220,697.00.

The Charge/Mortgage receipted as Instrument No. was signed by XYZ acting for Chargor. The Charge/Mortgage was submitted by XYZ Law Office.

Dufferin Street, Toronto (September 15, 2003 – January 20, 2004)

36. Ms. E.Y.T. is a salesperson under the *Act* and was at all relevant times employed by the broker Tradeworld Realty Inc. E.Y.T. was first registered as a sales representative in November 1999.
37. On September 15, 2003, E.Y.T. procured a listing to sell property known as Dufferin Street, Toronto ("Dufferin St."). E.Y.T. advertised Dufferin St. for sale on the Toronto Real Estate Board Multiple Listing Service (the "Dufferin St. MLS Listing"), which Listing included an asking price of \$299,000.00.00. The asking price for the Dufferin St. MLS Listing was reduced to \$289,000.00 on November 3, 2003. The Dufferin St. MLS Listing was terminated on November 12, 2003.
38. On November 13, 2003, E.Y.T. listed Dufferin St. for sale. E.Y.T. advertised Dufferin St. for sale on the Toronto Real Estate Board Multiple Listing Service at an asking price of \$324,900.00.
39. On behalf of K.R., the Registrant negotiated with E.Y.T. respecting the possible sale of Dufferin St.
40. On or about December 4, 2003, the Registrant presented an offer to purchase Dufferin St. for \$322,500.00 on behalf of K.R. On the second page of this offer, the name "K.R." is signed in the space provided for the buyer's signature, which

signature is dated "Dec. 4/03". On the second page of this offer, the name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature.

41. The Registrant advised E.Y.T. that the offer to purchase would require a Mutual Agreement whereby the seller agreed to give the buyer \$40,681.00 on completion and the lawyer was instructed to pay this sum directly from the proceeds of the sale prior to payment to the seller on completion. The name "K.R." is signed in the space provided for the buyer's signature, which signature is dated "Dec. 4/03". The name "Najeeb Ahmad" is signed in the space provided for the witness signature to the buyer's signature. E.Y.T. signed in the space provided for the witness signature to seller, MDL dated "Dec. 4/03".
42. The Registrant advised E.Y.T. that the legal services of XYZ would have to be retained by seller and buyer to complete the conveyance of title.
43. The seller, MDL accepted this offer and an agreement of purchase and sale was executed on December 4, 2003. This agreement provided for a completion date of December 12, 2003 and a deposit of \$20,000.00 to be held by "Lawyer in Trust". On the second page of this offer, E.Y.T. signed in the space provided for the witness signature to the seller's signature.
44. K.R. waived the conditions of arranging satisfactory financing and property inspection included in the agreement of purchase and sale. Said waiver was signed December 10, 2003.
45. An Amendment to Agreement extending the completion date to December 17, 2003 was signed by the buyer on December 12, 2003.
46. Before the closing date, the Registrant voluntarily disclosed to his broker the circumstances of this transaction and sought his broker's advice regarding what to do. As a result of these discussions, the Registrant took action that resulted in a Mutual Release being signed on December 31, 2003. The seller signed the Release on January 7, 2004.
47. On January 7, 2004, Ms. E.Y.T. listed Dufferin St. for sale. E.Y.T. advertised Dufferin St. for sale on the Toronto Real Estate Board Multiple Listing Service at an asking price of \$289,000.00
48. On January 20, 2004, the seller, M.D.L. accepted an offer to purchase made by Homelife/5 Star Realty Ltd., a broker registered under the *Act*. The agreement of purchase and sale was for \$280,000.00 and provided for a completion date of February 27, 2004. A deposit of \$5,000.00 to be held by Tradeworld Realty Inc. On the second page of this offer, E.Y.T. signed in the space provided for the witness signature to the seller's signature.

THE LAW:

The *Real Estate and Business Brokers Act* states as follows:

- 3. (1) No person shall,
 - (b) trade in real estate as a salesperson unless he or she is registered as a salesperson of a registered broker;
- 6. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;
- 8. (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.
- 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.
- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

REASONS FOR DECISION:

The onus of proof in this matter rests upon the Registrar to show that revocation of Ahmad's registration as a salesperson under the Act is justified based upon section 8. (2) of the Act as read with section 6. (1) of the Act.

An analysis of the facts and issues follows.

First Transaction – 000 Melita Avenue

The facts relating to this property are not in dispute. Briefly stated the facts show that the proposed purchaser of this property did not have the funds to finance the purchase of the property. Accordingly, Ahmad actively and knowingly took part in a scheme to inflate the purchase consideration of the property and an agreement of purchase and sale of the property was prepared at an inflated purchase price. A secret side deal which was titled a "Mutual Agreement" was drawn up, but was not to be disclosed to the

proposed Mortgagee. This latter agreement provided for a rebate of \$26,500.00 being passed to the seller upon title passing to the purchaser. The seller would then share the \$26,500.00 with third parties. However, the seller, upon the advice of his legal adviser, refused to partake of this scheme and the transaction was aborted. The fraudulent scheme was aided and abetted by Ahmad and had the transaction been completed the proposed Mortgagee would have suffered a serious and potential loss.

The inflation of the purchase price was a scheme so as to ensure that mortgage financing would cover the full purchase price. In the proposed scheme, there was potential harm to the proposed Mortgagee in that the true value of the property would not adequately cover the mortgage based on the inflated purchase price. The proposed "Mutual Agreement" was based upon deceit and this deceit was encouraged and furthered by Ahmad as an active and willing participant in this fraudulent scheme. Potential purchasers of properties in the vicinity of this particular property would also be at risk of financial harm due to potential price inflation caused by this type of deal. Furthermore, the MLS system would be potentially distorted with adverse effects on potential purchasers in so far as other homes in the immediate area of this property are concerned.

Ahmad, during his own testimony, stated while under cross examination that he knew what he was participating in was wrong and yet this conduct was perpetuated by Ahmad in four further transactions. During his testimony he admitted that he had taken the real estate course and that he appreciated the harm or potential harm due to his actions. He knew that the transaction involving 000 Melita Avenue was considered inappropriate by the seller's legal advisor, yet he did nothing to distance himself from actively associating himself with a further four transactions that he well knew were based on fraud and deceit. While it is evident that Ahmad voluntarily disclosed to an investigator certain three then undiscovered fraudulent transactions in which Ahmad was directly and actively involved, the Tribunal is of the opinion and finds that he only disclosed such transgressions when he believed and feared that the investigation then being conducted into certain other transactions would inevitably lead to the discovery of the three further fraudulent transactions to which Ahmad had volunteered information.

The conduct of Ahmad did not relate to an isolated transaction. His conduct was repeated and ongoing and it was only when he became a source of interest to the Director's office that he decided to admit to his misconduct. Until then he was content to continue with his dishonest and discreditable conduct. Had his involvement in the first two fraudulent transactions not been discovered, the Tribunal believes he would not have admitted to his participation in the other three fraudulent transactions.

The deceit, deception and dishonesty of Ahmad becomes transparent from the Agreed Statement of Facts and the admissions made by Ahmad in his evidence and need no repeating. The Tribunal finds that the recent course of ongoing misconduct does not leave the Tribunal with a sense of confidence that Ahmad will not repeat his conduct in the future.

The Tribunal is cognizant of decisions of the Divisional Court in the matters of *Brenner v. Registrar of Motor Vehicle Dealers and Salesmen* [1983] O.J. No. 1017, *Faccenda* [1994] O.J. No. 954 and *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales* released on February 19, 2003.

In the *Brenner* decision Southy J. stated:

The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the 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.

In the *Faccenda* decision Adams J. stated that it is the totality of past conduct, considered in the light of more current circumstances, which form the basis for the relief.

In the *Shine Car Sales* decision Lane J. stated:

In our view, properly read, this Court in the subsequent case of *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda* [1994] O.J. No. 954 did not import into the *Brenner* test a further test of error on the part of the Registrar. That case reiterated the *Brenner* test and did not add any element of deference to the Registrar. It should be clearly understood that the Tribunal owes no deference to the Registrar's opinion. The registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference.

Mr. Quek who testified for Ahmad was being forthright when he testified that he could not be certain in his mind that Ahmad would not repeat "what he has done". Whilst there is no certainty in life, the recent and repeated dishonest conduct of Ahmad stands in contradiction to the notion that his future actions will not be representative of his past conduct. There is clearly a public interest involved in this matter as opposed to Ahmad's interest. The Registrar has both the duty and the obligation to protect the public interest and this duty and obligation is seen from the relief he seeks in his proposal to revoke Ahmad's registration. The interests of the Registrar and the interests of Ahmad require weighing and balancing and in so doing, the Tribunal finds that the interest of the Registrar outweigh Ahmad's interests. The Tribunal finds that the recent conduct of Ahmad coupled with the serious nature of his actions in actively associating himself with dishonesty and deception, in not one isolated incident but in five incidents, stand in contradiction to the opinion of Mr. Quek that Ahmad will not

repeat his misconduct. The only mitigating factor in favour of Ahmad is the fact that he voluntarily confessed to three then undiscovered frauds. However this mitigating factor is in the Tribunal's opinion not sufficient for it to arrive at a finding permitting Ahmad's registration to remain in effect. The Tribunal finds that the Registrar's proposal is well founded and sees no reason to disturb the Registrar's findings. The Tribunal further finds that terms and conditions are not appropriate in this matter.

DECISION:

For the reasons above and pursuant to the authority vested in it by section 9 (4) of the Act, the Tribunal directs that the Registrar carry out his proposal to revoke the registration of Najeeb Ahmad as a salesperson under the *Real Estate and Business Brokers Act*.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 1, 2005

FILE NAME: 2456.rebba.ahmad.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.



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

2464-REBBA-ADJ-Adjournment

IN THE MATTER OF
JAMES ROGER KENNY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 18, 2004

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

JAMES ROGER KENNY

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 31 and February 1, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m. on Thursday, April 7, 2005 and continue at 9:30 a.m. on Friday, April 8, 2005, if necessary

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: January 25, 2005

FILE NAME: 2464.rebba.Kenny.adj.2.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



JAMES R. GATRALL

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O. 1990,
CHAPTER R.4 AS AMENDED, TO REFUSE REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN Q.C., VICE CHAIR

APPEARANCES: JAMES R. GATRALL, appearing on his own behalf

ANITA A. JOHN, Counsel, representing the Registrar, *Real Estate
and Business Brokers Act* and BRIAN SCHLOTZHAUER, agent for
the Registrar, *Real Estate and Business Brokers Act*

DATES OF
HEARING:

November 9 and 10, 2004

Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND

James R. Gatrall (the Applicant) applied to the Registrar, *Real Estate and Business Brokers Act* (the Act) for registration as a salesperson in November 2003. The Registrar opined that the Applicant was not entitled to be registered under Section 6 of the Act because (a) having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business and (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.

By Notice of Proposal To Refuse Registration (the Proposal) dated July 29, 2004 the Registrar, acting under Section 8 of the Act, proposed to refuse to grant the application for registration made by the Applicant for the following reasons:

- The Applicant made an Assignment for the General Benefit of Creditors dated January 10, 2003. He was discharged from bankruptcy on October 15, 2003.
- The Applicant was a practicing family physician whose Certificate of Registration was revoked by the College of Physicians and Surgeons of Ontario (the College) on August 12, 2002 by reason of professional misconduct. The Discipline Committee of

the College ordered the Applicant to pay costs in the amount of \$2500 and to pay to the College the sum of \$10,000 to be held by the College in trust to guarantee the payment of any amount the College may pay to CJ for therapy and counseling under section 85.2 of the *Health Professions Procedural Code*.

- The Applicant prescribed the narcotic medication “Percoset” to a female person, (the complainant) in exchange for sex and without medical justification and without regard for her welfare. The prescribing of narcotics to the complainant in large doses over a prolonged period of time was completely unwarranted and was unsupported by the clinical records.
- The Applicant made false entries on the complainant’s medical charts.
- The complainant sued the Applicant in the Ontario Superior Court alleging sexual abuse and the over-prescribing of drugs. The lawsuit was settled. Minutes of Settlement were filed under which the Applicant agreed to pay the complainant the sum of \$130,000 plus costs in the amount of \$1000.
- The Applicant defaulted in his obligation to the complainant who, by Court order dated December 12, 2002, obtained judgment against the Applicant for \$53,254.79 inclusive of Pre-judgment interest. Costs were assessed at \$1000.
- The complainant was an unsecured creditor in the Applicant’s bankruptcy.
- The Applicant has no criminal record.
- The Registrar’s office received several “laudatory letters” that were submitted in support of the Applicant’s application.

The Proposal also includes the following paragraph:

15. On or about March 17, 2004, Fran Maika (“Maika”) and the Assistant Registrar, Brian Schlotzhauer (“Assistant Registrar”) met with the Applicant to discuss subsections 6 (1)(a) and 6 (1) (b) of the Act with related (sic) to the “November 10, 2003 Application.” It was during this discussion that the Assistant Registrar (sic) highlighted a concern with respect to the judgment and then applying for bankruptcy. The Applicant responded by stating that “debts were already piling up, made bad real estate investments over \$250,000 and interest. Finally paid the debt off and then this action happened and I had no choice as all the bills were piling up: lawyers fees, fines to the College, fines to the complainant, there was nothing to survive on. It was my own mess and bad decision.” In addition the Applicant disclosed that he had two escorts as patients. He hired them for sex. He acknowledged that this was bad judgment on his part. The Applicant stated that he was found guilty on sex abuse on a second patient and not the first patient as the College of Physicians and Surgeons did not believe the first lady’s story. The Applicant indicated that he have a chaperone if needed under terms and conditions. The Applicant indicated that the had to employ nurse (sic) to be in attendance for any female patients for the last three months of being in practice.

Upon receipt of the Proposal, the Applicant availed himself of the opportunity to a hearing before the Licence Appeal Tribunal given to him under subsection 9(2) of the Act.

A PRELIMINARY MATTER

At the commencement of the hearing the Applicant referred to the fact that the Decision and Reasons for Decision of the Discipline Committee of the College had been filed as an exhibit at this hearing. The Decision was made under a publication ban. The Applicant entered a plea of no contest to the allegations of professional misconduct as outlined in the Statement of Facts, Findings Requested and Proposed Disposition. The Applicant submitted that the agreed statement of facts were not proven at the Discipline Committee hearing and that they were not given under oath. He wanted that evidence excluded from the hearing.

Ms. John, counsel for the Respondent submitted that the Decision and Reasons for Decision of the Discipline Committee were public documents under section 29 of the *Evidence Act* and as such were admissible in evidence under subsection 15(1) of the *Statutory Powers Procedure Act*. This subsection provides that a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, any document of thing relevant to the subject-matter of the proceeding and may act upon such evidence. The Decision and Reason for Decision provided clear and cogent evidence of the facts relied upon by the Registrar in his Proposal disentiitling the Applicant to registration.

The Tribunal accepted the Respondent's submissions as being correct law and permitted the Decision and Reasons for Decision to be received in evidence.

THE EVIDENCE

Brian Schlotzhauer

Brian Schlotzhauer, the Assistant Registrar of the Real Estate Council of Ontario, who is familiar with the Applicant's application, gave evidence on behalf of the Registrar.

Mr. Schlotzhauer stated the Act is consumer protection legislation designed to assure that persons trading in real estate conduct themselves in the manner prescribed in the Act so as to assure a level playing field. The registration process involves standards of education and financial responsibility that are designed to help assure that real estate agents conduct their affairs in accordance with law and with honesty and with integrity.

In forming a reasonable belief under paragraph 6 (1)(b) of the Act, the Registrar reviews the applicant's background and considers several factors including a consideration if the applicant has been bankrupt, whether there are unsatisfied judgments against the applicant, the outcomes of prior registrations with other regulatory bodies and whether the

applicant has a criminal record. An applicant's non-industry conduct gives the Registrar an understanding how the applicant has conducted himself in the past. An applicant's past conduct is not restricted to matters involving real estate.

Mr. Schlotzhauer referred to the Notice of Proposal and the reasons given for refusing the Applicant's registration. He referred to the Applicant's bankruptcy and the circumstances leading to the revocation of the Applicant's license to practice medicine. The Registrar was concerned with the Applicant's past professional conduct and with the nature and amount of the Applicant's debt and his inability to satisfy that debt. The Applicant owed his creditors \$266,000. His creditors included the complainant, several credit card companies, banks and the Canada Customs and Revenue Agency. Mr. Schlotzhauer was particularly concerned with the Applicant's inability to live up to his legal obligations to the complainant including the fact that the complainant had an unsatisfied judgment against him. It is noted that the complainant obtained a writ of execution against the Applicant that was filed several days after the Applicant went bankrupt.

While noting that the Applicant apologized to the College for his professional misconduct, Mr. Schlotzhauer referred to the particulars of the Applicant's misconduct, which disclosed a breach of trust, dishonesty as well as a lack of integrity. Real estate salespersons often deal with unsophisticated clients who may purchase or sell real estate infrequently and who rely on the real estate professional for guidance. Real estate agents carry on their business without supervision. The Applicant had not acted honestly and with integrity. He also concealed his misconduct for a considerable period of time. The Registrar had considered imposing terms and conditions on the Applicant's registration but concluded that this was inappropriate having regard to the facts of this case and because conditions would be difficult to monitor.

During cross-examination Mr. Schlotzhauer was questioned about the meeting that he and Registration Officer Fran Maika had with the Applicant on March 17, 2004. He stated that there was no statutory requirement that such a meeting be held. The meeting was called for the Applicant's benefit. The meeting afforded the Applicant the opportunity of explaining and expanding upon the information found in his application for registration. Mr. Schlotzhauer said: "words on a page do not often tell the story". The minutes of the meeting, which form part of the evidence, are not verbatim transcriptions of what was said at the meeting. They highlight that which was discussed at the meeting. The Applicant answered all questions asked of him at this meeting. His demeanour was forthcoming.

Mr. Schlotzhauer stated that he told the Applicant that terms and conditions could be imposed upon an applicant's license to sell real estate but that unblanketed registration was not an option in this case. He also discussed the appeal process with the Applicant.

The Applicant

James Gatrall is a 58-year-old former physician who received his medical degree in 1971. Dr. Gatrall served as a medical officer with the Canadian Armed Forces from 1972 until 1975. He thereafter practiced family medicine in Windsor until 2002 when he was no longer permitted to practice. He built a large practice and had an annual professional income of between \$125,000 and \$150,000.

The Applicant has been active in his community. He was a Little League coach and umpire, a wolf cub pack leader and has been extensively involved with his church where he was treasurer and a Sunday school teacher. The Applicant was widowed in 1990 and remarried in 1992. He is now separated from his wife. He has 3 grown children and several grandchildren.

The Applicant admitted to having a sexual relationship with the complainant before she became his patient. He referred to the fact that it has been 9 years since he had a sexual relationship with her and that 8 years have lapsed since he had sex with another unrelated female person. This person did not complain about the Applicant's conduct for five years. The Applicant has had no contact with these women in over four years. There have been no complaints made against him in his 30 years of medical practice notwithstanding the fact that the incidents that gave rise to the revocation of his license to practice medicine received considerable publicity in the local media. The College Discipline Committee did not find the evidence of the second complainant credible.

The Applicant stated that he was unable to pay his bills, including his obligation to the complainant, when he could no longer practice medicine. He made agreed upon monthly payments to the complainant for 2 months. He borrowed money on his credit card to make the \$50,000 payment due her on November 21, 2001.

During the late 1980's the Applicant made several unsuccessful investments in real estate. He lost about \$250,000. He spent the next decade paying off his real estate losses. The final debt was paid in 2001 at a date prior to his bankruptcy.

The Applicant owed his unsecured creditors the sum of \$266,000 at the time of his bankruptcy of which \$196,000 was proven in the bankruptcy. The debts were incurred for legal fees, litigation expenses, leasehold improvements for his office, personal and family needs. The Applicant was discharged from bankruptcy on October 15, 2003. The discharge was unopposed. He stated that he complied with the bankruptcy laws and that he did not go bankrupt to avoid his monetary obligations to the complaint. Any payments that he would have made to the complainant subsequent to his bankruptcy would have constituted an unlawful preference.

The Applicant has been living modestly since he became bankrupt. He stated that he has benefited from the financial counseling that he has received. He has delivered flowers, had a newspaper rural delivery run and is now working as a bookkeeper. He stated that he sent out hundreds of resumes in an attempt to secure employment.

The Applicant had been named as the sole executor in a will of a former patient. This, he stated, showed that the testatrix had imposed a trust in him. He successfully discharged his duty as executor of his former patient's modest estate. He did not charge an executor's fee.

A solicitor, who knew of the loss of the Applicant's medical license, retained the Applicant to do some medical research for him.

The Applicant stated that he has a capacity to change. He referred to the "active steps" that he has taken toward rehabilitation. He mentioned the help that he has received from his family and from his faith community. The Applicant received psychotherapeutic treatment from a psychologist on 37 occasions. He has been receiving therapy sessions from Steven J. Kerr, a family counselor since May 1999. The Applicant stated that he benefited from voluntarily attending a two-day course entitled "Focus on the Prescribing of Addictive and Psychoactive Drugs". The course was held under the auspices of the Office of Continuing Education, Faculty of Medicine, University of Toronto and the College. A month earlier, the Applicant attended a 9.5 hour professional development workshop entitled "Understanding Boundaries and Preventing Boundary Violations in the Doctor-Patient Relationship". This course was given by the Faculty of Medicine and Dentistry of the University of Western Ontario. The Applicant's participation in this workshop was evaluated. The unnamed evaluator stated that: "Jim was an active participant. He responded well to others and provided them with good feedback. He was able to build on the suggestions of others. He displays a capacity to change."

Several of the Applicant's friends and former patients provided letters of support to the College, to the Registrar and to this Tribunal.

The Applicant apologized in writing to the College for his professional misconduct. He described the efforts he took in winding down his practice, which he stated, was done with honesty and integrity. He did not want to see his patients stranded without medical attention. He remained in his office for some time after losing his license so as to help his patients find new medical assistance.

Stan Dann, Manager and Broker, who is affiliated with Buckingham Realty (Windsor) Ltd. Realtor, wrote a letter stating that his firm is willing to hire the Applicant as a real estate salesperson. Mr. Dann referred to his numerous meetings that he had with the Applicant and his knowledge of the Applicant's background. He stated that he specifically discussed two issues with the Applicant namely, handling customer deposits and dealing with female customers. He stated that his company values its reputation in the community very highly and it would not want this reputation tarnished by having one of its salespersons failing to discharge his responsibilities in a proper fashion. Mr. Dann stated that with thorough supervision of Mr. Gatrall's activities as a real estate salesperson; his company can protect its reputation and the public interest.

During his cross-examination, the Applicant acknowledged that he had a fiduciary duty towards the two complainants. He referred to the fact that he deposited the sum of \$10,000

with the College for the benefit of counseling services for the complainant which sum, to his knowledge, had not been drawn upon by the complainant.

The Applicant was asked about the evaluator's stating that he has a tendency to "rescue" his patients. He stated that if a patient had difficult problems, a physician could go too far in trying to help the patient. This may make the patient think that he is in a special relationship with the physician that can create a boundary issue. He admitted the particulars of his misconduct. He gave the complainant a prescription for Tylenol 3 for her broken arm when she was not his patient. He stated that he was still practicing medicine when he entered into the Minutes of Settlement. He stated that his wife was badly hurt by his misconduct and that he now has an excellent relationship with his children.

Since the Applicant has been discharged from bankruptcy, one of his former creditors, a credit card company, issued a new credit card to the Applicant who had to post security to make use of the card. The line of credit available to the Applicant is modest. The Applicant has used his new credit card on occasion. He has paid his credit card bill when due.

The Applicant filed many letters of support from many former patients some of whom gave character evidence at the hearing. Some of these letters were sent by the former patients to the College in support of the Applicant during the currency of the disciplinary hearing. A former professional colleague submitted a letter of support.

In a letter dated October 28, 2003 Dr. G.A. Fellbaum, psychologist, wrote that he treated the Applicant on 37 occasions from February 1999 until October 2002 during which time the Applicant appeared open, candid and sincere in resolving the underlying issues that provoked his difficulties. Dr. Fellbaum was supportive on the Applicant's attempt to enter the real estate profession.

Loretta Kotevich

Loretta Kotevich is a public health nurse who also works as a real estate agent for Buckingham Realty. Ms Kotevich and her mother were former long-time patients of the Applicant. She spoke highly of the Applicant's professionalism, caring demeanour and abilities.

Ms Kotevich stated that she discussed with the Applicant the career choices available to him following the loss of his medical licence. She suggested that the Applicant pursue a career as a real estate salesperson, which involves meeting and helping people, which is what the Applicant did as a practicing physician. Ms. Kotevich introduced the Applicant to her manager, Stan Dunn. She offered to help train and mentor the Applicant and to share listings with him.

In cross-examination, Ms. Kotevich stated that she saw the Applicant professionally every three months over a 30-year period. During the period 1995 to 1998, (which was the period of time in which the Applicant engaged in unprofessional behaviour) she could not discern any changes in the Applicant's behaviour, nor was she aware of any personal problems that he may have then been experiencing. She stated that to her knowledge there were no previous or subsequent incidents of professional misconduct. She repeated her willingness to work with the Applicant. She stated that the Applicant has paid a price for his unprofessional conduct. She did not think that Mr. Dann would support the Applicant's application for registration if he believed that the Applicant would damage his company's reputation in any way.

Steven J. Kerr

Stephen J. Kerr is an experienced social worker whose is a marriage and private practice. He qualified as an expert witness. Mr. Kerr has seen the Applicant professionally 180 times since 1999. He has also met with the Applicant's wife on occasion. Mr. Kerr is familiar with the Applicant's professional and family problems. He stated that Applicant has been engaged in an ongoing process of dealing with his problems and that he has acknowledged his misconduct.

When his incidents of professional misconduct became public, the Applicant appeared frightened. His marriage broke down and his children were devastated. Since then the Applicant's relationship with his children has improved. He is seeking reconciliation with his wife. The Applicant was reluctant to go bankrupt. He did not take his decision to go bankrupt frivolously. He decided to face up to the consequences of his conduct and to remain in Windsor. Mr. Kerr called the Applicant's recovery process admirable. The Applicant remained in treatment with Mr. Kerr notwithstanding the cost of this treatment and his small income. He refused to receive free treatment from Mr. Kerr who kindly tried to accommodate the Applicant financially in his trying times.

The Applicant has remained in Windsor, tried to make amends for his misconduct and has taken full responsibility for his acts. The Applicant had expressed a desire to live a healthy and functional lifestyle and to earn a living. In Mr. Kerr's professional opinion, it is reasonably expected that the Applicant should be able to go about his business with integrity. He stated that in his opinion, the Applicant was a moderate to low risk to re-offend.

Mr. Kerr stated that the Applicant should continue seeking professional help. He faces a life long challenge in rebuilding his life. He has received moral support from his church, his friends, former patients and family. He still has a long way to go to rebuild his life to the point where he once was.

Mr. Kerr also stated that to his knowledge, the Applicant was never hospitalized nor did he resort to drugs during stressful times.

SEVEN CHARACTER WITNESSES

D. M. H., G. H., G. A., D. B., J. Z. and S. S. were the Applicant's former patients for many years. P. M. has known the Applicant through her involvement in the Applicant's church for 25 years. These witnesses held the Applicant in high regard when he was their physician. Each was supportive of his attempt to be registered as a real estate salesperson. They were aware of his past difficulties, which they learned about through the local media. They

were unaware of any change in the Applicant's behaviour in the period from 1995 to 1998 when the incidents of professional misconduct arose.

J. Z., a self-employed businessman, retained the Applicant to act for him as his agent in Small Claims Court to try and collect a debt that the Applicant was able to collect. The Applicant received the debtor's money directly. He then forwarded the money to J. Z. who stated that the Applicant had acted in his best interest.

W. H.

W. H. is a detective with the Windsor Police Service financial crimes unit. He has been a police officer for 24 years. He was the Applicant's patient for over 20 years. He, too, was a satisfied former patient.

W. H. learned of the Applicant's problems through the Internet. The Applicant subsequently told W. H. about his bankruptcy. He stated that he had no concerns with the Applicant's honesty and integrity. He acknowledged that the Applicant had made a great error in judgment that caused great hurt to those who loved him. The Applicant has stood up to his mistakes. He did not hide from them. He stated that it is now time for the Applicant to move on with his life. The Applicant did not want to be a burden on the community.

W. H. stated that he would be comfortable with the Applicant working as a realtor. His trust in the Applicant has not changed. The Applicant had dealt with his problems in an honourable and dignified way.

In cross-examination W. H. stated that he did not learn of the Applicant's professional misconduct at the time it occurred. He saw nothing in the Applicant's behaviour at that time to make him aware of this misconduct. He acknowledged that the trading of sex for drugs and the falsification of records are serious and alarming matters. W. H. believes that the incidents of professional misconduct are isolated incidents 'in this man's otherwise fine career.'

The Reverend Paul Anderson

The Reverend Paul Anderson has been the Applicant's pastor for the past 16 years. He was the Applicant's patient for the last two years the Applicant was permitted to practice medicine. He praised the professional care he received from the Applicant.

Pastor Anderson referred to a letter of support he provided the Applicant in which he referred to the fact that the Applicant had acted as the church treasurer and auditor for several years during which times the Applicant handled cash deposits and banking matters. He had no concerns about the Applicant's financial integrity.

Pastor Anderson stated that he has met with the Applicant either weekly or bi-weekly for several years at which time he learned of the Applicant's professional, financial and personal problems. He stated that the members of his church hold the Applicant in high regard. Pastor Anderson stated that he would be confident with the Applicant acting as a real estate salesperson.

Pastor Anderson did not learn of the events giving rise to the Applicant losing his medical licence until the year 2000. He acknowledged that the Applicant acted as church treasurer and auditor prior to his bankruptcy.

APPLICATION OF LAW TO FACTS:

The test to be applied in this case is whether the Applicant's past conduct affords reasonable grounds for belief that he will not carry on business as a real estate salesperson in accordance with law, with integrity and honesty. If, upon careful consideration, the Tribunal finds that the Applicant cannot carry on his business in this manner that is prescribed by statute, then the Tribunal should not order the Registrar from carrying out his proposal. The Registrar does not have to be shown to be wrong in proposing that the Applicant will not carry on business appropriately. The Tribunal approaches each matter anew uninhibited by the Registrar's view. The Tribunal owes no deference to the Registrar's view. The Registrar is an investigator and is not a trier of fact whose opinion is based upon the receipt of admissible evidence given at a hearing and thus entitled to deference. *Brenner v. Ontario (Registrar of Motor Vehicles and Salesmen)* [1983] O.R. No. 1017 (Ont. Div.Ct.); *Ontario (Registrar of Motor Vehicles Dealers Act) v. Shine Car Sales* (2003), 40 M.V.R. (4th) 6 (Ont. Div.Ct); *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda* [1994] O.J. No. 954 (Ont. Div. Ct.) The Tribunal must look at all aspects of the Applicant's past conduct and not just his past misconduct.

The Registrar also proposed denying the Applicant registrar because, having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business. This statutory prohibition must be assessed objectively because of the importation of the qualification of reasonableness within the prescribed prohibition. Responsibility, by definition, connotes accountability for one's actions. (The Oxford Dictionary of Current English)(Second Revised Edition) If it is found that the Applicant cannot reasonably be financially accountable or responsible to all those persons who may be affected by his conduct as a real estate salesperson then the Tribunal, acting under subsection 9(4) of the Act, must direct the Registrar to refuse registration.

The Registrar proposed to refuse the Applicant registration as a real estate salesperson on two grounds. The first ground stemmed from the Registrar being of the opinion that the Applicant will not carry on business in accordance with the high standards expressed in paragraph 6(1) (b) of the Act. The Registrar's opinion was based upon the fact that the

Applicant, who practiced medicine for 30 years, had his certificate of registration revoked by the College in August 2002 for professional misconduct. The Applicant prescribed drugs for sex with a woman who initially was not his patient, but who subsequently became his patient. He prescribed the narcotic medication Percocet for his patient in large doses over a prolonged period of time that was medically unwarranted.

The Applicant's misconduct was worthy of censure by his peers. It reflected poorly on his integrity and honesty. It did not conform to law. The Applicant took advantage of his position as a member of a distinguished and learned profession to the detriment of his patient. He violated the fiduciary relationship that he had with that patient. *Norberg v Wynberg* [1992] 2 S.C.R. 226

The incidents that gave rise to the revocation of the Applicant's certificate of registration in August 2002 occurred during the period 1995 to 1998. They appear to be the only blot on his record as a physician that encompassed thirty years. He has complied with the provisions of the Order of the College revoking his certificate of registration. He has no criminal record. The effluxion of time since any misconduct occurred is an important factor for the Tribunal to consider. It is however not the only factor the Tribunal must consider. It does not give rise to a presumption of rehabilitation or that the will comply with the provisions found in paragraph 6(1) ((b) of the Act. The Tribunal is mandated to do "a qualitative assessment of the entire conduct of an Applicant to determine whether past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty." *Ontario (Registrar of Real Estate and Business Broker) v. Faccenda* [1994] O.J. No. 954.

The Applicant acknowledged his misconduct. He kept on going in the face of many personal challenges including the fact that his case received media coverage. He did not hide from his past conduct. He pleaded "no contest" at his discipline hearing. He provided the College with a written apology in which he expressed his sorrow to his patients, the health professionals with whom he worked, his church family, his friends, his children and his wife. He entered into a settlement with the complainant by agreeing to pay her the sum of \$130,000 by way of installment payments. He paid \$75,000 to the complainant before going bankrupt.

In anticipation of his having to close his office, the Applicant remained cognizant of his responsibilities to his patients. He sent his patients a letter advising them of his ceasing to practice medicine and of their need to obtain a new physician. He kept his telephone number listed in the local telephone directory. He made his patients aware of their right to receive their medical records. He has provided his former patients with their records upon request. He remained in his office for two and one-half weeks after he ceased practicing so as to be of assistance to his former patients on non-medical matters.

The Applicant has made reasonable efforts to seek and maintain employment. He stated that he sent his resume to many proposed employers. He has been employed as a flower store delivery driver, a newspaper delivery driver and as a bookkeeper.

The Applicant has taken significant attempts at rehabilitation. He has acknowledged his misconduct and apologized for it. He attended the professional workshops on Boundary Violations and Prescribing Addictive and Psychoactive Drugs. He entered into a treatment program with his psychologist who he saw on thirty-seven occasions. He has received counseling from his pastor on a regular basis. He has seen his social worker for counseling on 180 occasions. He presents a moderate to low risk of engaging in inappropriate behaviour. He fulfilled the obligations entrusted to him as an executor of a small estate, as a Small Claims Court agent and as a former church treasurer.

Several friends and former patients submitted letters of support on the Applicant's behalf to the College and/or to the Tribunal. The witnesses who gave oral evidence on behalf of the Applicant at the hearing did not know of his misconduct at the time it occurred. They discerned no noticeable changes in the Applicant's behaviour during that time period. Nonetheless, these witnesses, who include the Applicant's pastor and social worker, supported his attempt to be registered as a real estate salesperson.

The Tribunal also notes the Applicant's past involvement with his church and in other community affairs.

The Applicant passed his real estate examinations with a 90 percent average. Loretta Kotevich, a successful salesperson who has known the Applicant in a professional capacity for many years, is aware of his misconduct. Ms. Kotevich works for Buckingham Realty where Stan Dunn is manager. She encouraged the Applicant to seek a career in real estate and stated that she would be willing to work with the Applicant and act as his mentor if he were registered. Stan Dunn provided a letter to the effect that he would be willing to employ the Applicant as a salesperson at his real estate office were the Applicant permitted registration. Limited weight can be given to this letter because Mr. Dunn was unable to attend the hearing and could not therefore be subject to cross-examination.

Mr. Schlotzhauser admitted that the Applicant was forthcoming in providing information to the Registrar's office. The Applicant candidly admitted his misconduct at the hearing. He gave evidence in a credible manner. He answered the questions put to him directly. He did not embellish his evidence.

In his statement of particulars that accompanied his proposal, the Registrar incorrectly stated that the Applicant was fined the sum of \$10,000 by the College. The Applicant was ordered to provide the College with \$10,000, which it holds in trust for the benefit of the Applicant's former patient for purposes of therapy and counseling.

The second ground for refusing registration is found in paragraph 6 (1) (a) of the Act and is predicated upon the Registrar opining that having regard to the Applicant's financial position, he could not reasonably be expected to be financially responsible in the conduct of business. The Applicant's bankruptcy and inability satisfy the judgment held against him by his former patient in the Superior Court formed the basis of this belief. The Applicant owed his unsecured creditors over a quarter of a million dollars at the time of his

bankruptcy. There is no evidence of their being any preferred creditors. There were nominal assets available to satisfy the creditors, one of whom was the Applicant's former patient who presented a proven claim in the amount of \$55,000. The cause of the bankruptcy was stated as follows:

“Substantial costs of legal defence regarding litigation. Division of assets under family law. Loss of licence to practice medicine.”

The Applicant's discharge from bankruptcy was unopposed by his creditors. Steven Kerr, the Applicant's social worker and councilor, stated that the Applicant reluctantly went bankrupt following his inability to practice medicine. There is no evidence that the Applicant abused the provisions of the bankruptcy laws.

The Applicant earned upwards of \$150,000 annually from the practice of medicine. He lost \$250,000 on bad real estate investments in the late 1980's and 1990's. He was able to repay his real estate losses over time. There is no evidence that the Applicant incurred debts frivolously or that he was financially imprudent. He borrowed money on his credit cards in order to partially repay his obligation to his former patient. He incurred significant legal expenses as a consequence of his marriage breaking up, discipline proceedings being brought against him and his being sued by the former patient. He was forced to spend time away from his practice attending to these matters. The Applicant was unable to meet his financial obligations when his income stream dried up. He was no longer permitted to earn a living from the practice of medicine. His subsequent sources of income are not significant.

The debt owing the former patient (and other proven creditors) has been wiped out by reason of the Applicant's bankruptcy. There are no unsatisfied judgments levied against the Applicant. There is no evidence of subsequent debt, prior bankruptcies or unsatisfied judgments. Since his discharge from bankruptcy the Applicant has secured a modest line of credit from a credit card company. He pays his debt to this company when it becomes due. He stated that he has taken to heart the information he has received as a consequence of his taking credit counseling. The Applicant has met other his financial obligations since he was discharged from bankruptcy. He has not abused the few occasions when he was placed in positions of trust.

The Tribunal finds that the Applicant has made reasonable efforts at rehabilitation. He has taken the necessary and proper steps to get his life in order. He knows what is expected of him. Although he is the cause of his own misfortune, the Applicant has faced adversity without pity and with resoluteness to continue in a new and proper manner. He is deserved of a second chance.

ORDER

The Tribunal, acting under subsection 9(4) of the Act, directs the Registrar to register the Applicant as a salesperson subject to terms and conditions. It shall be a term and condition of the Applicant's registration that the Applicant shall at all times work in the presence of a licensed salesperson.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C., Vice-Chair

Released: January 6, 2005

File: 2539.rebba.Gatrall

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

JAYANT THAKUR

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF THE *REAL ESTATE AND BUSINESS
BROKERS ACT* (THE "ACT")

TO REVOKE THE REGISTRATION OF AS A BROKER
UNDER THE ACT

TRIBUNAL: IRVIN SHERMAN, Q.C., VICE-CHAIR

APPEARANCES: AMAR PREET SINGH, Counsel, representing Jayant Thakur ("the
Applicant")

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act* (the "Respondent")

DATE OF
PRE-HEARING: December 13, 2004

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on December 13, 2004 of Counsel for the Applicant and Counsel for the Respondent,

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicant and the Respondent.
2. The parties present at the prehearing recorded that there was no resolution of the issues in this matter and the parties have agreed to dates for the hearing of this matter to commence at 9:30 a.m. on Monday, February 14, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, and to

continue, if necessary, at 9:30 a.m. on Tuesday, February 15, 2005.

3. Each party shall provide to the other party the names, addresses and telephone numbers of all witnesses to be called at the hearing by such party by February 7, 2005.
4. All parties to the hearing shall make full disclosure of all documents to be introduced as evidence in this appeal in accordance with Rule 6 of the Rules of Practice of the Tribunal

LICENCE APPEAL TRIBUNAL

Irvin Sherman, Q.C.
Vice-Chair

Released: January 7, 2005

File name: 2653.rebba.Thakur.pre



PREHEARING

SORAYA SHIELA EMAMI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *REAL ESTATE AND BUSINESS BROKERS
ACT* R.S.O. 1990, CHAPTER R.4 AS AMENDED TO
REFUSE TO GRANT REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: JOHN LEGGE, Counsel, representing the Applicant and
SORAYA SHEILA EMAMI, the Applicant.

GEORGE DRAMETU, Counsel, representing the
Registrar, *Real Estate and Business Brokers Act* and
Brian Schlotzhauer, Assistant Registrar.

DATE
OF PREHEARING: January 6, 2005

Toronto

ORDER

Following attendances on January 6, 2005, at a prehearing before this Tribunal of John Legge, Counsel for Soraya Sheila Emami (the "Applicant") and George Drametu, Counsel for 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 Monday, May 16, 2005, and thereafter, if necessary, to continue at 9:30 a.m. on Tuesday, May 17, 2005, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. Mr. Legge, Counsel for the Applicant, advised that the June 15, 2004 convictions of the Applicant on two counts of trading in real estate without the benefit of registration were being appealed.
2. The parties therefore recorded that there had been no resolution of any of the issues in this matter and in the absence of an outcome of the appeal, the parties agreed to proceed to a hearing.
3. Therefore, the parties to the hearing are the Applicant and the Registrar.

4. The Applicant proposes to call 7 persons to testify at the hearing of this matter.
5. The Registrar proposes to call 5 witnesses who will testify at the hearing of this matter.
6. Both parties to the hearing shall comply with Rule 6.3 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, both parties undertake at this time to disclose every document and thing now in their possession or under their control and that they will refer to or tender in evidence at the hearing, and to deliver a copy of such document to the other party.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: January 7, 2005
File: 2680.rebba.emami.prehrg

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CHAN GURPRASAD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE HILEY, Vice-Chair

APPEARANCES: MICHAEL DeRUBEIS, Counsel, representing the Applicant

ANITA JOHN, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act*

DATE OF
HEARING: December 3, 2004

Toronto

ADJOURNMENT ORDER

PURSUANT to the provision of the *Real Estate and Business Brokers Act* RSO 1990 Chapter R.4 as amended, Chan Gurprasad (the "Applicant") appealed a proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar") set out in a Notice of Proposal dated July 7, 2004;

AND WHEREAS the Tribunal appointed November 10, 2004 as the date of hearing;

AND WHEREAS the November 10, 2004 hearing date was adjourned on consent of parties to December 3, 2004;

AND WHEREAS Counsel for the Applicant and Counsel for the Respondent appeared at the Tribunal on December 3, 2004 but the Applicant was unable to attend due to circumstances beyond his control;

AND WHEREAS Counsel for the Applicant and Counsel for the Respondent were agreeable to an adjournment in order to allow the Applicant to make the necessary arrangement to facilitate his attendance at a hearing before the Tribunal;

TAKE NOTICE upon consent of both parties, the Tribunal Orders:

1. The hearing is adjourned to Monday, the 18th day of April 2005 to commence at 9:30 a.m. at the Tribunal's Chamber, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. Notice of Hearing for the Applicant will be sent to the offices of his Counsel who will then inform the Applicant of the date of hearing.
3. If there continues to be problems with the ability of the Applicant to attend at this set date of hearing of April 18, 2005, Counsel for the Applicant will inform the Respondent and the Tribunal at the earliest opportunity.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice-Chair

RELEASED: December 9, 2004

FILE NAME: 2505.rebba.Gurprasad.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
Matière de permis

PREHEARING

DAVID ABAYOMI DAVIDSON

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF THE *REAL ESTATE AND BUSINESS
BROKERS ACT* (THE "ACT")

TO REVOKE THE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: KENNETH G. HUGHES, Counsel, representing David Abayomi
Davidson (the "Applicant")

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act* (the "Respondent")

DATE OF
PREHEARING: November 30, 2004

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on November 30, 2004, of the Applicant, Counsel for the Applicant and Counsel for the Respondent,

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 and the parties have agreed to dates for the hearing of this matter to commence at 9:30 a.m. on Tuesday, April 26, Wednesday, April 27, Thursday, April 28 and, Friday, April 29, 2005, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

2. Counsel for the Respondent shall use his best efforts to locate the originals of the documents appearing in the Respondent's book of documents at tabs 9(B), (C) and (D) together with copies of the appraisals of Metrowide and CMI Mortgages and to provide Counsel for the Applicant with an opportunity to inspect the originals, if located, by March 18, 2005.
3. Counsel for the Applicant shall advise Counsel for the Respondent as to which documents in the Respondent's book of documents are illegible and Counsel for the Respondent shall use his best efforts to provide to Counsel for the Applicant legible copies of such documents by March 18, 2005.
4. Counsel for the Applicant shall provide to Counsel for the Respondent copies of all the documents that Counsel for the Applicant intends to rely on at the hearing of this matter which are not contained in the Respondent's book of documents by March 18, 2005.
5. The parties shall make full disclosure of all documents to be introduced by the party as evidence in this appeal in accordance with the Rules of this Tribunal by March 18, 2005.
6. The parties shall provide the names, addresses and telephone numbers of all witnesses to be called by such party at the hearing by March 18, 2005.
7. Counsel for the Applicant shall advise Counsel for the Respondent as to the status or disposition of the criminal charges filed against the Applicant as soon as possible and in any event no later than March 18, 2005.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: December 9, 2004

File: 2551.rebba.Davidson.prehrg



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

JOSEPH TELFORD

IN THE MATTER OF
JOSEPH TELFORD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: September 15, 2004

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

JOSEPH TELFORD

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 11 and 12, 2005;

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 Thursday and Friday, May 5, and 6, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: December 6, 2004



PRE-HEARING

PHIL HAHN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MAXWELL L. ROTSTEIN, Vice-Chair

APPEARANCES: LAURA B. STEWART, Counsel, representing the Applicant

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
PRE-HEARING: September 23, 2004 *by teleconference*

ORDER

Following attendances by teleconference on September 23, 2004 from 9:30 a.m. to 11:00 a.m. at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Laura B. Stewart, Counsel, who appeared on behalf of Phil Hahn (the "Applicant") and Robert A. Maxwell, Counsel, who appeared on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, January 26, 2005 at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario and to continue, if necessary, at 9:30 a.m. on Thursday, January 27, 2005 and Friday, January 28, 2005 at the above address:

1. The Parties to the hearing are the Applicant and the Respondent.
2. The Parties reported that there was no present resolution of this matter and that none was anticipated.

3. The Parties' Counsel agreed to continue discussions in order to attempt to resolve the issues raised in the Respondent's proposal and thereby dispose with a hearing if possible.
4. Both Counsels acknowledged familiarity with the Rules of Practice of the Tribunal and in particular the disclosure requirements of Rule 6.

LICENCE APPEAL TRIBUNAL

Maxwell L. Rotstein, Vice-Chair

RELEASED: November 24, 2004

FILE NAME: 2498.rebba.Hahn.prehrg.order.doc

PREHEARING

MICHAEL DESMOND BISTANY AND MICHAEL D. BISTANY REALTY LTD.

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF THE *REAL ESTATE AND BUSINESS
BROKERS ACT* (THE "ACT")

TO REVOKE THE REGISTRATION OF MICHAEL
DESMOND BISTANY AS A BROKER UNDER THE
ACT

AND

TO REFUSE TO RENEW THE REGISTRATION OF
MICHAEL D. BISTANY REALTY LTD. AS A BROKER
UNDER THE ACT

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES: KENNETH S. MARLEY, Counsel, representing Michael Desmond
Bistany and Michael D. Bistany Realty Ltd. (the "Applicants")

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act* (the "Respondent")

DATE OF
PREHEARING: November 23, 2004 *by teleconference*

ORDER

Following the teleconference attendance before the Licence Appeal Tribunal (the
"Tribunal") on November 23, 2004 of Counsel for the Applicants and Counsel for the
Respondent,

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 and the parties have agreed to dates for the hearing of this matter to commence at 9:30 a.m. on Tuesday, March 29, Wednesday, March 30 and Thursday, March 31, 2005 at the Holiday Inn Select, 1855 Huron Church Road, St. Clair Room "A", Windsor, Ontario.
2. Each party shall provide to the other party the names, addresses and telephone numbers of all witnesses to be called at the hearing by such party by February 28, 2005
3. The parties shall make full disclosure of all documents to be introduced as evidence in this appeal in accordance with the Rules of this Tribunal by February 28, 2005.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: November 30, 2004

File name: 2504.rebba.Bistany.pre

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



**ELECTRONIC
PREHEARING**

JOHN A. PATRICK

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O. 1990,
CHAPTER R.4 AS AMENDED, TO REFUSE REGISTRATION

TRIBUNAL: KENNETH JEPSON, Vice-Chair

APPEARANCES: JOHN A. PATRICK, the Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *REAL
ESTATE AND BUSINESS BROKERS ACT*

DATE OF
PREHEARING: October 25, 2004 at Toronto (by teleconference)

Also participating to provide support to the Applicant was Mr. Greg Kells, of Sunbelt Business Brokers Inc. Mr. Kells confirmed that he is not acting as representative or agent for Mr. Patrick. Mr. Brain Schlotzhauer, Assistant Registrar under the *Real Estate and Business Brokers Act* also participated.

ORDER

Following the telephone participation of all the above-noted individuals in a telephone pre-hearing conference, the Tribunal makes the following Order:

1. No issues are resolved. The issue in dispute remains: whether the Registrar was correct in refusing registration of the Applicant for the reasons outlined in the Notice of Proposal and accompanying Particulars.
2. The Parties to the hearing are John A. Patrick and the Registrar under the *Real Estate and Business Brokers Act*.

3. Each party shall, no later than November 19, 2004, provide to the other party and file with the Tribunal:
 - a. any further documentary evidence upon which they intend to rely in the hearing of this matter; and
 - b. a list of witness they intend to call; and
 - c. for each witness on the party's witness list, a brief will-say statement outlining in summary form the anticipated issues and facts to which the witness will testify.
4. The parties shall confer to determine which relevant facts are undisputed and shall, no later than November 10, 2004, file with the Tribunal an Agreed Statement of Facts stating all relevant facts which both parties agree shall be admitted without the necessity of any further proof at the hearing of this matter.

LICENCE APPEAL TRIBUNAL

Kenneth Jepson
Vice-Chair

RELEASED: October 26, 2004

File name: 2537.rebba.Patrick.prehrg.doc



PREHEARING

FRANK COLATOSTI

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O. 1990,
CHAPTER R.4 AS AMENDED, TO REVOKE REGISTRATION

TRIBUNAL: MARJORIE HILEY, Vice-Chair

APPEARANCES: R. DONALD ROLLO, Counsel, representing the Applicant

ANITA JOHN, Counsel, representing the Registrar, *REAL ESTATE
AND BUSINESS BROKERS ACT*

BRIAN SCHLOTZHAUER, Assistant Registrar, *REAL ESTATE AND
BUSINESS BROKERS ACT*

DATE OF
PREHEARING: October 28, 2004

Toronto

ORDER

Following attendances on October 28, 2004 at a pre-hearing before this Tribunal of R. Donald Rollo, Counsel for Frank Colatosti (the "Applicant") and Anita John, Counsel for the Registrar, *Real Estate and Business Brokers Act* (the "Registrar") and Brian Schlotzhauer, Assistant Registrar; the Tribunal makes the following Order:

1. The Parties to the hearing are the Applicant and the Registrar.
2. Applicant's Counsel confirmed to the Tribunal at the pre-hearing that the Applicant admits the allegation made in paragraphs:
 - Number 1
 - Number 2
 - Number 3
 - Number 6 only that the Applicant has these three accounts at the TD

Canada Trust

- Number 7 only that there was a transfer of \$500,000.00 from the Statutory Real Estate Trust Account to the General Account on March 17, 2003.
- Number 8 only that there was a transfer of \$500,000.00 from the General Account to the statutory Real Estate Trust Account on October 31, 2003.
- Number 11
- Number 12
- Number 16
- Number 17

in the Registrar's Notice of Proposal dated August 24, 2004 to revoke the registration of the Applicant.

3. The Applicant does not admit the allegations made in paragraphs:

- Number 4
- Number 5
- Number 6 (except as previously noted)
- Number 7 (except as previously noted)
- Number 8 (except as previously noted)
- Number 9
- Number 10
- Number 13
- Number 14
- Number 15
- Number 18
- Number 19
- Number 20
- Number 21
- Number 22
- Number 23
- Number 24

in the Registrar's Notice of Proposal dated August 24, 2004 to revoke the registration of the Applicant and puts the Registrar to the proof thereof.

4. Regarding paragraph 15 the Applicant states that proof is required to ensure that the search warrant complies with the requirements of the Act and its Regulations.
5. Regarding paragraph 19 both parties agree that they will compile a list of the documents that was removed from the office of the Applicant by agents on behalf of the Registrar. That list will be entered as an exhibit at the

commencement of the hearing.

6. The Registrar proposes to call 5 witnesses: Maureen McDaniels, Inspector, RECO; Jo Ann Swain, Investigator, RECO; Brian Schlotzhauer, Assistant Registrar, RECO; Yvonne Nandalall, Registration Officer, RECO; Bee Teoh, bookkeeper. Any changes in the list will be provided to the Applicant at least 10 days prior to the hearing.
7. The Applicant proposes to call a number of witnesses: Frank Colatosti; Leo Kurz; official of TD Trust; possible character witnesses. The Applicant will provide his list of witness to the Registrar at least 10 days prior to the hearing.
8. All parties to the hearing shall fully comply with the requirements of disclosure as set out in Rule 6 of the Rules of Practice of the Tribunal.
9. The hearing is expected to take 3 days. The original Notice of Hearing sent to the parties scheduled the matter for December 1, 2004. That date, on consent of all parties, is cancelled. The new hearing dates scheduled on consent of all parties are March 8, 2005, March 9, 2005 and March 10, 2005. The hearing will be held at the Tribunal's Chamber, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m. on March 8, 2005 and continuing on March 9, 2005 and March 10, 2005, if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair

RELEASED: October 29, 2004

File name: 2593.rebba.Colatosti.prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



NAJEEB AHMAD-ADJ-Adjournment

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
NAJEEB AHMAD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 18, 2004

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

NAJEEB AHMAD

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, Najeeb Ahmad (the "Applicant") appealed a Proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), set out in a Notice of Proposal dated June 18, 2004;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 26, 2004;

AND WHEREAS the Respondent requested an adjournment of the hearing in order to allow the Respondent to file documentation;

TAKE NOTICE, upon consent of both parties, the Tribunal orders:

- (1) the Agreed Statement of Facts is due October 21, 2004;
- (2) the exchange of Case Law is due October 28, 2004;
- (3) the service of the Applicant's materials is due October 28, 2004;
- (4) this matter is adjourned, *peremptory against both parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, November 24, 2004

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: October 19, 2004

FILE NAME: 2456.rebba.Ahmad.adj.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

MICHAEL DESMOND BISTANY AND MICHAEL D. BISTANY REALTY LTD. -
Adjournment

IN THE MATTER OF
MICHAEL DESMOND BISTANY AND MICHAEL D. BISTANY REALTY
LTD.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 8, 2004

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

MICHAEL DESMOND BISTANY AND MICHAEL D. BISTANY REALTY LTD.

Applicants

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a teleconference pre-hearing in the above matter on October 7, 2004;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against all parties* to commence, by teleconference, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m. on Tuesday, November 23, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: October 7, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



**ELECTRONIC
PREHEARING**

JAMES R. GATRALL

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O. 1990,
CHAPTER R.4 AS AMENDED, TO REFUSE REGISTRATION

TRIBUNAL: G. MAURICE POWER; Presiding Member
JIM KENNELLY, Member (as observer)

APPEARANCES: JAMES R. GATRALL

ANITA A. JOHN, Counsel, representing the Registrar, *REAL ESTATE
AND BUSINESS BROKERS ACT*

DATE OF
PREHEARING: October 5, 2004 at Toronto (by teleconference)

ORDER

Following the telephone attendances on October 5, 2004 at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of James R. Gatrall, ("the Applicant"), and Anita A. John, Counsel representing the Registrar under the *Real Estate and Business Brokers Act* (the "Respondent" and "the Act");

Whereas there was no resolution of the issues between the parties.

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, November 9, 2004, at the a place to be appointed in the City of Windsor, Ontario, and to continue if necessary on Thursday, November 10, 2004:

1. The parties to the hearing are the Applicant and the Respondent.
2. The issues for the hearing shall be whether the Respondent should refuse registration to the Applicant because:

- a. under Section 6 (1) (b) of the Act, 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 in the alternative,
 - b. under section 6 (1) (a) of the Act, having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business, or both.
3. The documents for the hearing are the Respondent's Proposal, the Applicant's Notice of Appeal and the documents delivered with it, the Applicant's binder of documents filed, the Respondent's Book of Documents, and, subject to the further terms of this Order such other documents as the parties may be advised to tender and the Tribunal may permit at the hearing.
4. Except as noted in this Order, both parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.
5. The Applicant is to provide the Respondent with copies of any further documents he wishes to refer to and rely on at the hearing regarding the Judgement obtained against him by a former patient, and regarding bad real estate investments which he has previously disclosed to the Respondent, as set out in the Respondent's Book of Documents for the hearing, and in particular with regard to the time when the debts incurred from such investments were paid off and what relation, if any, such debts had with respect to his subsequent bankruptcy. Any such documentation is to be provided to the Respondent as soon as possible and in any case 10 days prior to the hearing. After reviewing any such documentation, the Respondent is to be in a position to advise the Tribunal at the commencement of the hearing whether the bad real estate investments will be a fact in issue with respect to either ground (a) or ground (b) for refusal, as set out in paragraph 2 of this Order.
6. The Applicant is to deliver to both the Respondent and the Tribunal a Statement of Qualification of Expert for his witness, Mr. Kerr. This is to be delivered as soon as possible and in any case at least 10 days before the hearing, and may be in the form of a letter or curriculum vitae. Subject to complying with this term, the Applicant may rely on such Statement and the letter from Mr. Kerr in his documents already filed as complying with the requirements in the Tribunal's Rules of Practice for delivery of an expert's report for Mr. Kerr, should the Applicant wish to attempt to have Mr. Kerr qualified by the Tribunal at the hearing as an expert witness for the purpose of giving opinion evidence.
7. Each party is to deliver to the other at least 10 days before the commencement of the hearing a list of the witnesses they intend to call at the hearing. If either party is so advised, they are to request from the Tribunal subpoenas as soon as

possible, and sufficiently ahead of the hearing to permit such subpoenas to be issued by the Tribunal and properly served by the party requesting them.

LICENCE APPEAL TRIBUNAL

G. Maurice Power
Presiding Member

RELEASED: October 15, 2004

File name: 2539.rebba.Gatrall.prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

EVA YEE-WA TAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN Q.C., VICE-CHAIR

APPEARANCES: JACK F. FITCH, Counsel representing the Applicant,

ROBERT A. MAXWELL, Counsel, and BRIAN SCHLOTZHAUER,
Manager of Investigation and Assistant Registrar representing the
Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: September 27, 2004 Toronto

ORDER

Following attendances on September 27, 2004 at a pre-hearing before this Tribunal of Jack F. Fitch, Counsel appearing on behalf of Eva Yee-Wa Tam (the "Applicant"), and Robert A. Maxwell, Counsel appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

1. It is ordered that the hearing of this appeal be scheduled for February 2, 2005 and February 3, 2005.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C.,
Vice-Chair

Released: September 30, 2004

File name: 2462.rebba.Tam.prehrg.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

DAVID DAVIDSON-ADJ-Adjournment

IN THE MATTER OF
DAVID DAVIDSON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: Jul 29, 2004

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

DAVID DAVIDSON

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on October 7, 2004;

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, November 30, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: September 21, 2004

FILE NAME: 2551.rebba.Davidson.adj.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

2462-REBBA-ADJ-Adjournment

IN THE MATTER OF
EVA YEE-WA TAM

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 18, 2004

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

EVA YEE-WA TAM

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on August 20, 2004;

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 Monday, September 27, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 18, 2004

FILE NAME: 2462.rebba.Tam.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
NAJEEB AHMAD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 18, 2004

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

NAJEEB AHMAD

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, Najeeb Ahmad (the "Applicant") appealed a Proposal of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar"), set out in a Notice of Proposal dated June 18, 2004;

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on August 20, 2004;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 12, 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 Thursday, September 9, 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 Tuesday, October 26, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 11, 2004

FILE NAME: 2456.rebba.Ahmad.adj.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

2464-REBBA-ADJ-Adjournment

IN THE MATTER OF
JAMES ROGER KENNY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 18, 2004

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

JAMES ROGER KENNY

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a teleconference pre-hearing in the above matter on September 20, 2004;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-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 Thursday, September 30, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 6, 2004

FILE NAME: 2464.rebba.Kenny.adj.doc



BRUCE HAHN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS
BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHN E. ORT, Member

APPEARANCES: JOSEPH L. BLOOMENFELD, Counsel, representing Bruce Hahn
(the "Applicant")

GEORGE P. DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act
(the "Respondent" or the "Registrar")

DATE OF
HEARING: May 6, 2004

Toronto

ORDER

WHEREAS the Registrar, *Real Estate and Business Brokers Act* (the "Registrar") issued a Notice of Proposal (the "Proposal") to refuse the registration of Bruce Hahn (the "Applicant") pursuant to Section 9 of the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal the Proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to be held on May 6, 2004;

AND WHEREAS after preliminary discussions at the commencement of the hearing, Counsel for the Applicant and Counsel for the Registrar informed the Tribunal that Minutes of Settlement had been arrived at on consent of the Applicant and the Registrar;

AND WHEREAS Counsel for the Applicant and Counsel for the Registrar confirmed that the Minutes of Settlement arrived at on consent of all parties had been reduced to writing and signed by them and that such Minutes of Settlement are those now attached to this Order and marked "Schedule A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that these proceedings are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

John E. Ort, Member

RELEASED: May 20, 2004

FILE NAME: 1951.rebba.Hahn.order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
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PREHEARING

NAJEEB AHMAD

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: IRVIN H. SHERMAN Q.C., VICE-CHAIR

APPEARANCES: CRAIG PENNEY, Counsel representing the Applicant,

ROBERT A. MAXWELL, Counsel, BRIAN SCHLOTZHAUER,
Manager of Investigation and Assistant Registrar and JO-ANN
SWAIN, Investigator, all representing the Registrar, *Real Estate
and Business Brokers Act*

DATE OF
PRE-HEARING: SEPTEMBER 3, 2004 Toronto

ORDER

Following attendances on September 3, 2004 at a pre-hearing before this Tribunal of Craig Penney, Counsel appearing on behalf of the Najeeb Ahmad (the "Applicant"), and Robert A. Maxwell, 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, October 26, 2004 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. An agreed statement of fact shall be filed with the Tribunal on or before October

12, 2004.

3. A copy of the original notes made by Jo-Ann Swain, investigator, with respect to relevant matters relating to this hearing shall be sent by Counsel for the Registrar to Counsel for the Applicant on or before September 24, 2004.
4. Counsel for the Applicant shall send to Counsel for the Respondent copies of general reference letters, a letter from the Applicant's current broker, a report from a psychotherapist and a certificate certifying the fact that the Applicant has complete a course on ethics on or before October 19, 2004.
5. Case law shall be exchanged by each counsel on or before October 19, 2004.
6. The expected length of hearing is one day.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C.,
Vice-Chair

Released: September 13, 2004

File name: 2456.rebba.Ahmad.prehrg.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

KATHLEEN TRAN-ADJ-Adjournment

IN THE MATTER OF
KATHLEEN TRAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 18, 2004

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

KATHLEEN TRAN

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 27 and 28, 2004;

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 Tuesday and Wednesday, November 16 and 17, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: September 20, 2004

FILE NAME: 2487.rebba.Tran.adj.doc



Licence Appeal Tribunal

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>>	SUSAN AND WILLIAM (BILL) SOLOMON o/a UNIGLOBE SOLOMON TRAVEL	
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PRE-HEARING

OVATION TRAVEL EXPERIENCES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.19

TO REVOKE REGISTRATION

TRIBUNAL JIM KENNELLY, MEMBER

APPEARANCES: DAVID C. FINLAY, President, Ovation Travel Experiences Inc.

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: March 14, 2005 By Teleconference

ORDER

Following the telephone attendances on March 14, 2005, at a pre-hearing before this Tribunal, of David C. Finlay who appeared as Agent for Ovation Travel Experiences Inc. (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, the 29th day of April, 2005 at Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston Ontario.

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant is in general agreement with the Travel Registrar's list of Particulars as stated in the Proposal To Revoke Registration dated December 15, 2004.

3. The Applicant noted that Ovation Travel Experiences Inc. is not a typical travel agency in this province as it is an Entertainment Travel Agency.
4. The Applicant agreed and undertook to courier by March 18, 2005, to the Travel Registrar, the "Review of Engagement" accompanied by the report of the financial statements ending April 30, 2004 of Ovation Travel Experiences Inc. These documents are to be signed by the Applicant and a Licensed Public Accountant.
5. The Applicant also agreed by March 28, 2005 to provide to the Travel Registrar a written statement showing that Ovation Experiences Travel Inc. has entered into a contract with a Licensed Public Accountant to review the financial statements of the company for the fiscal year ending April 30, 2005.
6. If both of the requirements in these orders are met, the Registrar will consent to the withdrawal of the Proposal to Revoke. As a result, there will be no need for the hearing scheduled for April 29, 2005. The Registrar will inform the Tribunal by April 1, 2005 if the requirements have been met. By the same date, if the requirements have not been met to the Registrar's satisfaction, the Tribunal will be asked to proceed with the hearing.
7. Should the Applicant fail to fully comply with the requirements the hearing will proceed on April 29, 2005 and the Applicant shall fully comply with the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice, a copy of which the Applicant acknowledged having received from the Tribunal.
8. The Applicant was also informed by the Registrar that costs would be sought should the hearing need to proceed.
9. The Tribunal records that the Registrar has served upon the Applicant, and filed with the Tribunal, a Book of Documents upon which the Registrar intends to rely if the matter proceeds to a hearing.

LICENCE APPEAL TRIBUNAL

Jim Kennelly, Member

Released: March 16, 2005



PRE-HEARING

1175926 ONTARIO LTD. O/A GILL'S TRAVEL

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: JEAN GILL-WYATT, Agent, appearing on behalf of 1175926 Ontario
Ltd. o/a Gill's Travel

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act*

DATE OF
PRE-HEARING: February 16, 2005 *by teleconference*

ORDER

Following attendances by teleconference on February 16, 2005, at a pre-hearing before this Tribunal of Jean Gill-Wyatt who appeared as Agent for 1175926 Ontario Ltd. o/a Gill's Travel (the "Applicant") and Maria Abate, Counsel, on behalf of 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 Thursday, April 21, 2005 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 Applicant acknowledged and agreed that each and every statement and/or allegation contained in the Registrar's Notice of Proposal dated October 21, 2004 is both true and correct.

3. The Applicant shall by no later than the close of business on March 15, 2005 file with the Registrar the Applicant's annual financial statements for the year ended April 30, 2004 together with a review engagement report by a public accountant licenced under the *Public Accountancy Act*.
4. In the event of the Applicant failing to comply with the requirements of this Order and paragraph 3 above the matter shall proceed, as scheduled, to hearing on April 21, 2005.
5. Both parties shall fully comply with the disclosure requirements set forth in the Tribunal's Rules of Practice under Rule 6 a copy of which Rules the Applicant acknowledged being in the possession of the Applicant. The Parties shall accordingly not less than 10 days prior to the hearing serve on the other party and file with the Tribunal a Book of Documents upon which each party intends to rely.
6. Counsel for the Registrar gave the Applicant's Agent notice during the prehearing that in the event of the Applicant's failure to comply with this Order and this matter proceeding to hearing, the Registrar will move for an Order for costs in terms of Rule 14 of the Rules of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: February 21, 2005

FILE NAME: 2683.tia. gill's travel.pre.order.doc

Licence
Appeal
Tribunal

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PRE-HEARING

MICHAEL SHYU AND FORNG SHYU O/A GLOBAL EXPRESS TRAVEL AGENCY

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: SIMON DANN, Member

APPEARANCES: MICHAEL SHYU, Applicant, representing himself and the Applicant,
FORNG SHYU

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: December 7, 2004 Toronto

ORDER

WHEREAS pursuant to the *Travel Industry Act*, R.S.O. 1990, Chapter T. 19, Michael Shyu and Forng Shyu o/a Global Express Travel (the 'Applicant'), appealed to the Licence Appeal Tribunal (the "Tribunal") a Notice of Proposal by the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar") dated August 23, 2004, to revoke the registration of the Applicant;

AND WHEREAS the Applicant filed a Notice of Appeal form dated September 8, 2004, received by the Tribunal on September 13, 2004, requesting a hearing;

AND WHEREAS the Tribunal scheduled a pre-hearing of this matter to commence at 9:30 a.m. on December 7, 2004;

AND WHEREAS during the pre-hearing the Parties agreed the matter has been settled as the Applicant has filed the required financial statements with the Registrar;

NOW THEREFORE, this Tribunal Orders that the proceedings in this matter are hereby settled and the scheduled hearing for January 19, 2005 in Toronto is cancelled and this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

RELEASED: December 24, 2004

FILE NAME: 2597.tia.global.pre.final.order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
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PRE-HEARING

MESA TRAVEL AGENCY INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.19

TO REVOKE REGISTRATION

TRIBUNAL TERENCE A. WARDROP, Q.C., VICE CHAIR

APPEARANCES: SON HUNG NGUYEN, Agent, appearing on behalf of Mesa Travel
Agency Inc. (the "Applicant")

MARIA L. ABATE, Counsel, appearing on behalf of the Registrar,
Travel Industry Act (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: December 16, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Pursuant to Sections 6(1) and 7 of the Travel Industry Act, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a Notice of Proposal dated September 1, 2004, (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of **Mesa Travel Agency Inc.**, (the "Applicant") as a travel agent (Registration Number 50011627R).

The Applicant, by a Notice of Appeal dated September 24, 2004 (the "Appeal"), and filed at the offices of the Licence Appeal Tribunal (the "Tribunal") on September 24,

2004, requires a hearing by the Tribunal in respect of the Proposal. In the Appeal the Applicant requested a pre-hearing in order “to save time of hearing and tribunal”, and an **Appointment For and Notice of Pre-hearing** dated October 21, 2004 was sent by the Registrar of the Tribunal to both parties by way of facsimile.

Participation in the Pre-hearing was set down for a conference on November 5, 2004, (the “First Pre-hearing Conference”) in accordance with the Rules of Practice of the Tribunal. At the First Pre-hearing Conference, only the Registrar was represented and in no one appeared for the Applicant.

This Tribunal made an oral decision at the time of the First Pre-hearing Conference as to the continuation of the Appeal and the conduct of these proceedings, subject to confirmation by a written Decision and Order. The Tribunal thence issued an Order dated November 17, 2004.

The Applicant did request the Registrar of the Tribunal in writing on November 17, 2004, to continue the Appeal and the Registrar of the Tribunal confirmed by way of facsimile that a new date for a pre-hearing in this matter was set for 2:30 p.m. on Thursday, December 16, 2004 (the “Second Pre-hearing Conference”).

The Second Pre-hearing Conference, was conducted pursuant to the Rules of Practice of the Tribunal, and no testimony of witnesses was heard by the Tribunal at this 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 this conference, submissions were received from each Party and heard by the Tribunal as to the issues in dispute and the manner in which this matter should proceed in an orderly and expeditious way. This Tribunal was content with the discovery process, which took place at the conference.

DECISION:

It was apparent from both Pre-hearing Conferences that the issue involved in the Proposal and the Appeal was simple and straight forward and involved only a determination of the compliance by the Applicant of the law under the Act.

The Applicant, in the Notice of Appeal states by way of an admission that financial statements for the year ended December 31, 2003, have not been filed by the Applicant as required by the Act and requested by the Registrar. The Notice of Appeal further suggests that the required statements would be ready in "3 to 4 weeks" from late August of 2004, yet even at the time of the Second Pre-hearing Conference the Agent for the Applicant acknowledged that such statements were still not in preparation.

The Applicant further admits in the Notice of Appeal that the Applicant had insufficient knowledge or awareness to maintain a trust account, and as such was in default of the Act and Regulations in the calendar year 2003.

It became apparent to this Tribunal by the submissions of the Agent acting for the Applicant without any sworn testimony, but rather from the filed record of the proceedings, that both the Applicant and the Agent acting for the Applicant had no idea of the requirements of a regulated business in this jurisdiction and the duties placed upon the Registrar. This Tribunal therefore finds as a fact **from the filed record** that the Applicant is currently in default of filing the required financial statements under the Act and, therefore, the proceedings may continue to the date of the Hearing but all activity of the business undertaking of the Applicant shall be suspended until the date of the Hearing and the further Order of the Tribunal.

In effect, therefore, the Registrar may proceed with the Proposal effective December 16, 2004, subject only to the Hearing of the Appeal and the Order of the Tribunal at that time.

ORDER:

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

1. Insofar as the business of the Applicant is currently not being conducted in accordance with the law, the Applicant shall suspend all the business activity of Mesa Travel Agency Inc. effective December 16, 2004, subject only to the Order of the Tribunal at the time of the Hearing or other disposition of the Appeal by the Parties;

2. In accordance with the stated objective of the Appeal “to save time of hearing and tribunal”, in the event that the Applicant wishes to continue its Appeal, the Hearing shall take place on Thursday, January 20, 2005, in accordance with the Notice of Hearing issued by the Registrar of the Tribunal dated the 21st day of October, 2004.

LICENCE APPEAL TRIBUNAL

Terrence Wardrop, Q.C.,
Vice Chair

RELEASED: December 23, 2004

File no. 2602.tia.mesa travel.pre

Licence
Appeal
Tribunal

Tribunal
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PRE-HEARING

SUSAN AND WILLIAM (BILL) SOLOMON o/a UNIGLOBE SOLOMON TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, R.S.O. 1990, CHAPTER T.19

TO REVOKE REGISTRATION

TRIBUNAL JIM KENNELLY, MEMBER

APPEARANCES: SUSAN SOLOMON, Agent, appearing on behalf of Susan and
William (Bill) Solomon, Uniglobe Solomon Travel (the "Applicant")

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: December 7, 2004 *by teleconference*

ORDER

Following the telephone attendances on December 7, 2004, at a pre-hearing before this Tribunal of Susan Solomon who appeared as Agent for Solomon Uniglobe Travel (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, February 18, 2005 at the Howard Johnson Plaza Hotel, Suite 34, 50 Brady Street, Sudbury, Ontario

1. The Parties to the hearing are the Applicant and the Registrar.

2. The Applicant agreed and undertook to file with the Registrar by no later than noon on December 23, 2004 by fax to Mary-Ann Harrison c/o the Registrar, *Travel Industry Act* at fax number 905.624.8631 all financial papers for Solomon Uniglobe Travel that had originally been required to be filed by March 31, 2004. A Licenced Public Accountant will have reviewed these papers.
3. The Applicant further agreed and undertook to file with the Registrar in the same fax of December 23, 2004 an agreement for a "Review Engagement" of the financial statements of Uniglobe Solomon Travel signed by the Applicant and a Licensed Public Accountant for the fiscal periods ending December 31, 2004, which are required to be filed by March 31, 2005.
4. The Registrar also noted that the normal payment to the Travel Compensation Fund had not been paid by the expected end of June 2004 deadline. The Applicant agreed to provide that payment and fax proof of cheque to the Registrar by the next day (December 8, 2004). If the payment to the Compensation Fund is not paid promptly the Registrar will amend the proposal to revoke and inform all parties of this amendment by January 6, 2005.
5. Subject to the Applicant complying fully and in a timely fashion with what is stated in paragraph 2, 3 and 4 above the Registrar will consent to the withdrawal of the proposal dated November 22, 2004 and the matter will then not proceed to hearing on February 18, 2005.
6. Should the Applicant fail to fully comply with the requirements of paragraphs 2, 3 and 4 above, the hearing will proceed on February 18, 2005 and the Applicant shall fully comply with the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice, a copy of which the Applicant's Agent acknowledged having received from the Tribunal.
7. If the hearing proceeds it is expected to be a half-day hearing with Ms. Abate acting for the Registrar. Ms. Solomon and Ms. Solomon's accountant are expected to be witnesses for the Applicant.
8. The Registrar will amend the proposal to revoke by January 6, 2005 if the compensation fee has not been paid. Subject to the Applicant complying fully and in a timely fashion with what is stated in paragraph 2, 3 and 4 the planned hearing on the proposal to revoke will be withdrawn by the Registrar by January 6, 2005.
9. In addition to what is contained in paragraph six above the Applicant shall not less than ten (10) days prior to the hearing serve on the Registrar and file with the Tribunal a Book of Documents upon which the Applicant intends to rely at the hearing.

10. The Tribunal records that the Registrar has served upon the Applicant and filed with the Tribunal a Book of Documents upon which the Registrar intends to rely if the matter proceeds to a hearing.

LICENCE APPEAL TRIBUNAL

Jim Kennelly, Member

RELEASED: December 15, 2004

File no. 2658.tia.uniglobe.pre

BRONTE TOURS AND TRAVEL (ONTARIO) INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: There was no appearance by BRONTE TOURS AND TRAVEL
(ONTARIO) INC. nor was it represented at the hearing.

MARIA L. ABATE, Counsel represented the Registrar, *Travel
Industry Act*.

DATE
OF HEARING: November 10, 2004 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the “proposal”) dated August 5, 2004 issued by the Registrar under the *Travel Industry Act* (the “Registrar” and the “Act” respectively) to revoke the registration as a travel agent of Bronte Tours and Travel (Ontario) Inc. (“Bronte”).

The Registrar bases his Proposal under section 6 of the Act as read with section 4. (1)(c)(ii) and (iii) and (d) and section 5.(2) of the Act.

The Registrar, by way of Further and Other Particulars dated October 26, 2004, amplified his proposal when further information came to his attention and accordingly the Registrar relied on the allegations in the proposal (Exhibit 1) and the Further and Other Particulars (Exhibit 4).

At the commencement of the hearing the Tribunal was advised by the Registrar’s Counsel that the Applicant’s Counsel had withdrawn and was no longer appearing for the Applicant. The Applicant was not present at the hearing and after the Tribunal had satisfied itself that the Applicant had been duly served with the Notice of Hearing for

November 10, 2004, and had been subsequently orally informed by a staff member of the Tribunal that the matter was due to be heard on the latter date, the matter proceeded in the Applicant's absence.

THE EVIDENCE:

The evidence of the Registrar consisted of the testimony of various persons, whose testimony is summarized hereunder, as well as documentary evidence.

The evidence of Ian Nichol:

Nichol testified he is a detective constable with the Ontario Provincial Police and during the course of his duties investigated a certain Social Insurance Number that appeared on a Notice of Business Change Form filed by one Marcia Kayser with the Registrar. The said Kayser had executed the document and had entered on that document a Social Insurance Number that she claimed was her number. (Exhibit 4 tab 5, page 4). This number was ascertained by Nichol to not be Kayser's number but the Social Insurance Number of an entirely different party. This information was obtained by Nichol from the R.C.M.P. and a continuing investigation is now proceeding in that regard.

The Testimony of Mary-Ann Elizabeth Harrison:

Ms. Harrison testified that she is acting deputy Registrar as well as the Director of Operations with the Travel Industry Council of Ontario ("TICO"). She is a chartered accountant by profession.

Harrison further stated that Yogesh Birla was the President and Director of Bronte and had resigned as such on February 21, 2004 when Marcia Kayser became the sole shareholder of Bronte as well its Director. Bronte was required to file its fiscal year financial statements with the Registrar within 90 days of its fiscal year end. This is a requirement under section 24 of Regulation 806/93 to the Act. The year end of Bronte was March 31, 2003 with financial statements due by June 30, 2003. Bronte failed to file by June 30, 2003 and on July 22, 2003, TICO ascertained that Bronte "has been sold and was under new management". Bronte's fiscal year end was then changed to October 31 and its financial statements were due January 31, 2004. Despite reminders to Bronte from the Registrar no financial statements were received from Bronte as required under section 24 of Regulation 806/93. Promises continued to be made to the Registrar regarding the filing of the overdue financial statement but the statements were not received. In the interim Marcia Kayser's application for change of ownership had not been approved by the Registrar and on August 5, 2004 the Registrar caused a proposal to be issued. The Registrar had been obliged to proceed with the proposal as no steps had been taken to rectify the non-filing by Bronte of its financial statements that were by then considerably overdue.

The Registrar's concerns, according to Harrison's testimony, were that he was not able to determine the financial position of Bronte due to the non-filing; that Marcia Kayser

was never available or accessible to speak with representatives of the Registrar; that complaints were surfacing from other registrants in the industry concerning their dealing with Bronte; and that various complaints were being received by the Registrar from registrants in the industry that Bronte was not honouring numerous cheques issued by it in the course of its business. As a consequence of all these concerns the Registrar was of the view that consumers were at risk.

The Testimony of Frederick James Angus:

Angus testified that he has been an inspector with TICO since 1971. His duties include making site inspections on registrants and reviewing their books and records.

Angus reviewed his report concerning his various inspections and investigations of Bronte (Exhibit 4, tab 7). During the period September, 2003 and October, 2004 he had conducted nine inspections. Some seven subsequent visits to the premises of Bronte were made which seven visits spanned the period October 29, 2004 to November 5, 2004. On each and every occasion of these seven visits to Bronte's office premises he was never able to speak with nor did he observe Marcia Kayser who was manager of Bronte.

On all 7 occasions that Angus went to Bronte's premises its office was locked and unattended during daytime hours. Accordingly, he was not able to inspect the books of account of Bronte or its records. In all his nine inspections prior to October 29, 2004 he only managed, on occasions, to speak with the sole employee who was unable to produce records for his inspections as she had no control of or knew where the records were.

The Testimony of Franca Antenucci:

Antenucci testified that she is employed in accounts payable at Conquest Vacations.

She stated that Conquest Vacations received an N.S.F. cheque dated September 28, 2004 from Bronte (Exhibit 4, tab 9). This cheque was for the sum of \$1,453.53 and related to certain bookings that Bronte made with Conquest Vacations. Furthermore, the name of the individual that signed the cheque for Bronte was a certain E. Johnson who Antenucci recognised as the owner of Ella's Travel Inc., another travel agent.

Antenucci contended that TICO "has never received notice of any relationship between Ella's Travel Inc. and Bronte". The N.S.F. cheque has not been made good by Bronte.

The Testimony of Pamela Joan Grundie:

Ms. Grundie testified that she is ticketing and accounts receivable supervisor with Air Canada Vacations.

Grundie stated that Air Canada Vacations received a N.S.F. cheque from Bronte dated July 30, 2004 for \$4,569.89. This cheque bore the signature of E. Johnson (Exhibit. 4, tab 11). When this cheque was returned marked N.S.F. by the bank to Air

Canada Vacations, Grundie called Bronte and spoke with its employee by name Valda and demanded a replacement cheque. She was not able to speak with Marcia Kayser with whom she wished to speak. She called to speak with Kayser on a number of occasions, after speaking with Valda, but was never able to speak with Kayser. Furthermore Bronte has not made payment to Air Canada Vacations regarding this N.S.F. cheque and remains out of pocket for three tickets issued by it to Bronte's customers and utilized by those customers.

Grundie further stated that Ella's Travel Inc. is "blacklisted" by Air Canada Vacations, as is Bronte. This means that no further bookings are accepted from either agency which presently owes it for travel services.

The Testimony of Margo Wallace:

Ms. Wallace testified that she is the coordinator of accounts receivable for Air Transat Holidays and its sister company World of Vacations.

Wallace went on to state that World of Vacations received a cheque from Bronte dated September 23, 2004 for the sum of \$675.00 in payment of travel services (Exhibit 4, tab 9). This cheque was returned to World of Vacations by its bank marked N.S.F. The request for travel services, for which this cheque was received, was made by Marcia Kayser on behalf of Bronte. When the cheque was returned to World of Vacations marked N.S.F. Wallace attempted to speak with Kayser but she was unavailable and Wallace spoke with Valda at Bronte and demanded a replacement money order. This replacement money order was received on October 2, 2004 after consumers had already travelled. The N.S.F. cheque issued by Bronte was signed by E. Johnson on behalf of Bronte. Ella's Travel Inc. is "blacklisted" by Air Transat Holidays and World of Vacations due to previous problems with N.S.F. cheques as well as credit card "charge backs". The latter phrase means that credit card charges have been reversed when the credit card holders disputed the validity of the charge.

Air Transat Holidays are owed \$1,266.86 in respect of another N.S.F. cheque dated September 23, 2004 issued by Bronte (Exhibit 4, tab 10). This NSF cheque has not been replaced.

When Wallace spoke with Ella Johnson at Ella's Travel Inc. to discuss the cheques issued by Bronte and apparently signed by Johnson on behalf of Bronte, Johnson denied her signature on the N.S.F. cheques and denied there was a connection between Ella's Travel Inc. and Bronte. Johnson is now "blacklisted" by Air Transat Holidays.

Wallace also made reference to two consumers namely consumer "A" and consumer "B" who had booked a cruise package with Ella's Travel Inc. through Air Transat Holidays and who had complained that they had not received their tickets for which they had paid by way of credit card. When the consumers complained to TICO that they had not received their cruise tickets TICO instituted an investigation and ascertained that consumer "A" and consumer "B" had booked their cruise with Air Transat Holidays through Ella's Travel Inc. and that the salesperson was Ms. Johnson. The full purchase

price of \$4,734.00 was paid by credit card to Ella's Travel Inc. However Air Transat Holidays contended they had not received payment for the cruise. It was discovered, pursuant to the investigations of Air Transat Holidays, that it had received payment from the two above consumers, not from Ella's Travel Inc., but from Bronte with whom the two consumers had had no dealings whatsoever. Such payment had been used for travel services for three other consumers whose travel services had been booked by Marcia Kayser of Bronte with credit cards of consumers "A and B" obtained from Ella's Travel Inc. When TICO contacted consumers "A" and "B" they confirmed to TICO that they had had no dealings with Bronte nor with Marcia Kayser but only with Ella's Travel Inc. and had not authorized that their credit card be used for the purposes of other persons travel.

The Testimony of Consumer "B":

Consumer "B" confirmed in her testimony that she booked a cruise for herself and consumer "A" through Ella's Travel Inc. She dealt with one Ella who is the owner of that agency. She had never dealt with Bronte nor had she heard of Bronte and at no time did either consumer "B" or her companion on the cruise, namely consumer "A", authorize Bronte to use their credit cards for purposes other than for payment of their cruise.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal.

1. Bronte was registered as a travel agency under the Act on June 1, 1990.
2. Regulation 24 under Ontario Regulations 806/93 required Bronte to file with the Registrar its fiscal year end financial statements within 3 months of its fiscal year end.
3. Bronte's financial statements for the fiscal year ending March 23, 2003 and due to be submitted to the Registrar by no later than June 30, 2003 were not submitted, despite demand.
4. Bronte, on August 21, 2003, changed its fiscal year end to October 31, 2003 and its financial statement were due by January 31, 2004.
5. Despite demands Bronte has at no time submitted its financial statements due either by June 30, 2003 or its financial statements due by January 31, 2004.
6. The Notice of Business Change Form regarding Bronte dated February 21, 2004 signed by Marcia Kayser contains a Social Insurance Number that is not Marcia Kayser's true Social Insurance Number.
7. Marcia Kayser submitted the aforesaid Notice to the Registrar.
8. Marcia Kayser is the sole director, shareholder and the President of Bronte.

9. Between September 13, 2003 and October 13, 2004 a duly authorized inspector of TICO visited Bronte's business premises on some nine occasions to inspect the books and records of Bronte. On each such occasion Marcia Kayser was not present at the premises of Bronte nor was the inspector given access to the books and records so as to inspect them.
10. Bronte has issued numerous cheques to other registrants within the travel industry and which cheques were returned to such registrants marked N.S.F. and have not been replaced by Bronte.
11. Bronte is "blacklisted" by numerous registrants within the industry which registrants refuse to do business with Bronte due to its failing to meet its financial and business obligations to such registrants.

THE LAW

The *Travel Industry Act* states as follows:

4(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

(c) the applicant is a corporation and

- (i) is incorporated without share capital, or
- (ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
- (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carry 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.

5.(2) Subject to section 6, 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 4, if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration.

Regulation 806/93 states as follows:

20. (1) A travel agent shall ensure that each office operated by the travel agent is managed and supervised during the hours of operation of the office by an individual who has, in the Registrar's opinion, sufficient experience with and knowledge of the business of selling travel services to ensure that the office is managed in compliance with the Act and its regulations.

24 (1) Every registrant shall file with the Registrar financial statements required by this section for each financial year.

(2) If the registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file, within three months of the end of the fiscal year,

- (a) annual financial statements with a review engagement report by a public accountant under the *Public Accountancy Act*, or
- (b) annual financial statements with an audit opinion from a public accountant, if the registrant is required to obtain annual financial statements with an audit opinion under the *Business Corporations Act*.

REASONS FOR DECISION:

The onus of proof rests upon the Registrar to establish on a balance of probabilities that Bronte contravened the Act and the regulations under the Act.

The Tribunal has considered the issues that have arisen in this matter and its findings and conclusions are set forth hereunder.

A major issue to consider relates to Bronte's financial position and whether it can reasonably be expected to be financially responsible in the conduct of its business.

The evidence, which was in no way contested by Bronte, indicated that the latter issued numerous cheques in the recent past to various parties and which cheques have been dishonored by non-payment. Little or no effort was made by Bronte to rectify the position and to ensure that the various payees of the cheques were compensated. The monies that it owes are directly related to the very industry of which Bronte is a member. The further issue, also undisputed by Bronte, is that it has failed to file its fiscal year end statements with the Registrar. These statements were due to be filed as far back as March 31, 2003 and despite repeated and strenuous efforts by the Registrar's staff these financial statements have not to date been filed. The Registrar is clearly entitled to these statements by virtue of section 24 of regulation 806/93 to the Act. The Registrar has both a duty and an obligation to ensure that consumers and registrants are not in jeopardy in their dealings with travel agents such as Bronte. The furnishing of the fiscal year-end financial statements are a corner stone of ensuring the financial viability of a registrant and the failure by Bronte to furnish this information to the Registrar, couple with what has been stated above regarding Bronte's issuance of numerous dishonored cheques in the course of its business, gives ample reason to the Registrar to be seriously concerned with Bronte's financial position and reasonably justifies the Registrar's expectation that Bronte cannot be expected to be financially responsible in the conduct of its business. Accordingly in terms of sections 4(1)(c)(ii) and (iii) the Registrar has met the onus upon him and is clearly justified in revoking Bronte's registration.

Apart from what is stated above, there arises the issue of the past and ongoing conduct of the officers and directors of Bronte. The evidence indicates that Bronte's director's conduct, specifically that of Marcia Kayser, affords the Registrar with reasonable grounds for belief that Bronte's business will not be carried on the accordance with law and with integrity and honesty thereby entitling the Registrar to seek revocation of Bronte's registration in terms of section 4. (1)(c) (iii) of the Act. Marcia Kayser's is clearly derelict in her duty as director in failing to ensure that Bronte is conducting its business with honesty and integrity. She is seldom, if ever, present in the agency according to the uncontraverted evidence of TICO's inspector, whose evidence the

Tribunal accepts without reservation. She is a somewhat shadowy figure in the background whose very identity has been questioned by the police in that the Social Insurance Number given by her to the Registrar in an important document under her signature is alleged not to belong to her but to another individual. The unsatisfactory situation at Bronte and its association with another blacklisted agency as evidenced by the testimony in this matter, certainly raises justifiable concerns in the mind of the Registrar. Furthermore, Marcia Kayser has been and continues to be derelict in her duties as director of Bronte and in terms of the Act. She is by her very conduct of persistent non-attendance at Bronte's offices and not ensuring that it is properly staffed and open for business, as required by the Act and its regulations, in breach of her obligations and duties.

DECISION:

Accordingly, pursuant to the authority vested in it by subsection 6(4) of the *Travel Industry Act*, the Tribunal directs the Registrar to carry out his proposal dated August 5, 2004 to revoke the registration of Bronte Tours and Travel (Ontario) Inc. as a travel agent under the above Act, as amended.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: November 23, 2004

FILE NAME: 2565.tia.bronte.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.



PRE-HEARING

DANIEL B. RIBEIRO O/A CANADA TRAVEL

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: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: DANIEL RIBEIRO, Applicant

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: October 28, 2004

Toronto

ORDER

Following attendances on October 28, 2004, at a pre-hearing before this Tribunal of Daniel Ribeiro (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, the 30th day of November, 2004 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 financial statement for the Applicant relating to the fiscal year ending December 31, 2003 was provided to the Registrar at the prehearing.
3. The parties are engaged in settlement discussions. If a settlement is confirmed the parties agree to file the Minutes of Settlement with the Tribunal. Then the

Registrar will consent to the withdrawal of the proposal dated August 24, 2004 and the matter will then not proceed to hearing on November 30, 2004.

4. Should the parties not agree to Minutes of Settlement the hearing will proceed on November 30, 2004 and both parties shall comply with the applicable requirements of disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice-Chair

RELEASED: November 2, 2004

FILE NAME: 2592.tia.canada travel.pre.order.doc



GLOBAL EXPRESS TRAVEL-ADJ-Adjournment

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

IN THE MATTER of the REGISTRATION of
MICHAEL SHYU AND FORNG SHYU O/A GLOBAL EXPRESS TRAVEL
AGENCY
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: August 23, 2004

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

MICHAEL SHYU AND FORNG SHYU O/A GLOBAL EXPRESS TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on November 9, 2004;

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 7, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 5, 2004

file name: 2597.tia.Global.pre.adj

PRE-HEARING

MESA TRAVEL AGENCY 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: TERENCE A. WARDROP, Q.C.
Vice-Chair

APPEARANCES: NO ONE appearing for Mesa Travel Agency Inc., (the "Applicant")

MARIA L. ABATE, Counsel, appearing on behalf of the Registrar,
Travel Industry Act (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: November 5, 2004 Toronto

REASONS FOR DECISION AND ORDER

Background:

Pursuant to Sections 6(1) and 7 of the *Travel Industry Act*, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a Notice of Proposal dated September 1, 2004, (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of Mesa Travel Agency Inc., (the "Applicant") as a travel agent (Registration Number 50011627R).

The Applicant, by a Notice of Appeal dated September 24, 2004 (the "Appeal"), and filed at the offices of the Licence Appeal Tribunal (the "Tribunal") on September 24, 2004, requires a hearing by the Tribunal in respect of the Proposal. In the Appeal the Applicant requested a pre-hearing in order "to save time of hearing and Tribunal", and an Appointment For and Notice of Pre-hearing dated October 21, 2004 was sent by the Registrar of the Tribunal to both parties by way of facsimile.

Participation in the Pre-hearing was set down for a conference on November 5, 2004, in accordance with the Rules of Practice of the Tribunal. At the Pre-hearing Conference, only the Registrar was represented and in no one appeared for the Applicant.

In addition to the Appointment For and Notice of Pre-hearing sent by facsimile as aforesaid, a telephone message was left on the telephone of the Applicant on November 4, 2004 and again on November 5, 2004 in order to remind the Applicant of the scheduled pre-hearing conference.

Due to the non-appearance of the Applicant at the scheduled pre-hearing conference, the Respondent requested costs of its appearance and the wasted time the said non-appearance caused.

Decision:

Upon reading the Appeal, the Tribunal determined that the issues involved in the Proposal and the Appeal were simple and straight forward involving only the severity of the decision by the Registrar to terminate the registration since the Applicant does not in its appeal dispute any of the facts alleged in the Proposal. It also became apparent that the Applicant has either abandoned the Appeal or has little or no regard for the proceedings of the Tribunal and had, therefore, no intention to attend the pre-hearing conference despite having requested it. Counsel for the Respondent likewise was unable to make contact with the Applicant.

The Rules of Practice of the Tribunal require that a Pre-hearing conference be held if a Party requests such so that the issues might be clarified and understood by all parties to the proceedings and such a conference takes the place of pleadings and the discovery process thereby facilitating the hearing.

Order:

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

1. The Tribunal awards the Respondent its costs of attending the Pre-hearing Conference, to be paid by the Applicant and fixes the amount thereof at one hundred (\$100.00) dollars payable by certified funds to the Registrar and forwarded to the Tribunal forthwith;
2. In the event that the Applicant wishes to continue its Appeal, the Applicant shall request the Registrar of the Tribunal in writing on or before the close of business on Friday, November 26, 2004, to fix a new date for a pre-hearing conference, otherwise the Tribunal deems on that date that the Applicant has abandoned its Appeal and the Registrar may proceed with the Proposal

LICENCE APPEAL TRIBUNAL

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

RELEASED: November 17, 2004

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

AGASZY TRAVEL LTD. O/A AIRWAVE TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: SAFIYA ADELMAN for the Applicant

MARIA ABATE, Counsel for the Registrar, *Travel Industry Act*

DATE OF
PRE-HEARING: NOVEMBER 3, 2004

Toronto

ORDER

WHEREAS a Notice of Proposal was issued by the Registrar under the *Travel Industry Act* dated September 1, 2004 to revoke the registration of Agaszy Travel Ltd. o/a Airwave Travel (the "Applicant") on the basis of failure to file financial statements as required by the Act;

AND WHEREAS the Applicant appealed the Notice of Proposal to the Tribunal;

AND WHEREAS the Applicant's appeal was set down for a pre-hearing on November 3, 2004 at the office of the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS the financial statements have yet to be filed;

NOW THEREFORE, this Tribunal Orders that:

1. The hearing of the appeal scheduled for January 20, 2005 shall proceed as scheduled.
2. The parties to the hearing shall be subject to all disclosure rules in effect.
3. The issues at the hearing will be those set forth in the Notice of Proposal.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

RELEASED: November 8, 2004

FILE NAME: 2605.tia.Agaszy Travel

Tribunal d'appel en matière de permis



PRE-HEARING

RAM PARKASH SHARMA

APPEAL FROM A DECISION OF THE BOARD OF THE TRAVEL
INDUSTRY COUNCIL OF ONTARIO UNDER THE *TRAVEL
INDUSTRY ACT*

TO DISALLOW A CLAIM

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

APPEARANCES: RAM PARKASH SHARMA, Applicant
(the "Applicant")

MARIA L. ABATE, Counsel, representing the Travel Industry Council of Ontario (the “Respondent”)

DATE OF
PRE-HEARING: September 15, 2004 Toronto

ORDER

WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal the Decision of the Board of the Travel Industry Council of Ontario dated June 16, 2004 (the "Decision") respecting the Applicant's claim against Globe Travels Inc. received by the Respondent on March 22, 2004;

AND WHEREAS the Parties requested the Tribunal to conduct a pre-hearing conference which was completed on September 15, 2004, and at the conclusion of which pre-hearing conference the Applicant withdrew his claim and his request for a hearing;

NOW THEREFORE this Tribunal Orders that the hearing scheduled for November 29, 2004 in Toronto is cancelled and that these proceedings are concluded before the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

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

RELEASED: October 28, 2004

FILE NAME: 2463.tia.Sharma.prehrg.order.doc

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

950976 ONTARIO LTD. o/a DEREK CANADIAN TRAVELS

IN THE MATTER of the REGISTRATION of
950976 ONTARIO LTD. o/a DEREK CANADIAN TRAVELS
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 21, 2004

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

950976 ONTARIO LTD. o/a DEREK CANADIAN TRAVELS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

TRIBUNAL: CARL DOMBEK, Chair

APPEARANCES: MARIA ABATE, Counsel, representing the Registrar, *Travel Industry Act*

SHANKER MAHENDREN, Agent representing the Applicant

DATE OF
HEARING: September 14, 2004

Toronto

CONSENT ORDER

Upon the commencement of the hearing of this matter on September 14, 2004 and upon the joint application of the Applicant and Counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal pursuant to a written settlement arrived at between the Applicant and the Registrar;

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 aforementioned parties, this Tribunal orders that the proceedings in this matter are disposed of on the basis of the terms set out in Schedule "A" attached hereto.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: October 6, 2004

FILE NAME: 2396.tia.Derek Canadian.consent.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1355173 ONTARIO LTD. O/A ONKAR TRAVELS

APPEAL FROM TWO DECISIONS OF THE BOARD OF
THE TRAVEL INDUSTRY COUNCIL OF ONTARIO UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW CLAIMS (CLAIM NOS. 103457 & 103458)

TRIBUNAL: CARL DOMBEK, Chair

APPEARANCES: ANIL GHAI, Agent representing 1355173 Ontario Ltd. o/a
Onkar Travels

MARIA ABATE, Counsel, representing the Travel
Industry Council of Ontario

DATE OF
HEARING: October 14, 2004 Toronto

ORDER

WHEREAS this is an appeal by 1355173 Ontario Ltd. o/a Onkar Travels, (the "Applicant"), to the Licence Appeal Tribunal (the "Tribunal") from two decisions dated June 9th, 2004 by the Board of the Travel Industry Council of Ontario denying a claim for compensation under the *Travel Industry Act* (the "Act").

AND WHEREAS the Applicant filed a Notice of Appeal form dated June 22, 2004, received by the Tribunal on June 23, 2004, requesting a hearing;

AND WHEREAS the Tribunal scheduled a hearing of this consolidated matter to commence at 9:30 a.m. on October 14, 2004 at the Tribunal;

AND WHEREAS there was agreement between the Parties that the Applicant filed his claim seven (7) weeks after the expiry of the date for which claims could be submitted;

AND WHEREAS Section 53 of Ontario Regulation 806/93 under the *Travel Industry Act* provides that a customer shall make a claim within six months after the event that gave rise to the claim;

AND WHEREAS the Licence Appeal Tribunal cannot grant any relief as Section 53 is mandatory;

NOW THEREFORE, this Tribunal Orders that the Applicant's appeal is dismissed without costs.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

RELEASED: October 15, 2004

FILE NAME: 2447-2448.tia.Onkar Travels\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.



ELLA'S TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: G. MAURICE POWER, Member

APPEARANCES: VISHNA N. SUKDEO, Counsel representing the Applicant

MARIA ABATE, Counsel representing the Registrar under the
Travel Industry Act

DATES OF
HEARING:

September 2 & 20, 2004

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the License Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Travel Industry Act* ("the Registrar" and "the Act" respectively). The Notice of Proposal dated May 12, 2004, proposed to revoke the registration of Ella's Travel Inc ("Ella") under the Act. Subsequent to the Notice of Proposal, the Registrar also issued an Order of Temporary Suspension (and Notice of Further and Other Particulars) on August 18, 2004, suspending the registrant's registration and right to carry on business under the Act for a period of 15 days from the date of the Order.

BACKGROUND

The Registrar under the Act proposed to revoke the registration of Ella. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The registrant is and has been carrying on activities that are in contravention of the Act and Regulations;
2. The registrant is in breach of the Terms and Conditions of its registration;
3. The past conduct of the registrant reasonable grounds for belief that it will not carry on business in accordance with law, and with integrity; and
4. Having regard to the registrant's financial position, the registrant cannot reasonably be expected to be financially responsible in the conduct of its business.

In the Notice of Proposal and the Notice of Further and Other Particulars, the Registrar set out in some detail the concerns that led to the issue of the Notice and Order. These may be summarized as follows:

1. The registrant was registered as a travel agent on March 30, 2000, with a fiscal year end of December 31.
2. Under the regulation, the registrant should have provided a copy of its financial statement for December 31, 2000, to the Registrar by March 31, 2001.
3. the financial statement was not submitted until May 29, 2001, and disclosed a working capital shortfall of \$2,627. Elorine Johnson (evidently the sole Officer and Director of the registrant Corporation) notified the Registrar on June 21, 2001, that she had made up the shortfall.
4. The registrant's financial statement for December 31, 2001, which was required by the Regulation to be provided to the Registrar by March 31, 2002, was not submitted until May 15, 2002, and disclosed a working capital shortfall of \$7,900.
5. The Registrar notified the registrant by letter of May 17, 2002, that it was required to make up the shortfall, and to produce evidence of having done so, by May 31, 2002. Elorine Johnson provided the necessary evidence that she had made up the shortfall by facsimile on that date.
6. The Registrar received complaints regarding the timeliness of payments by the registrant to other registrants. As a result, the Registrar conducted an inspection of the registrant's business operations on August 1, 2002. The Registrar's Inspector determined that the problem with timeliness of payments was due to the registrant's participation in a "Travel Now, Pay Later" plan which delayed payments for travel to the registrant by up to several months. As a result, the registrant was having difficulty maintaining adequate working capital.
7. As a result of the Inspection findings, the registrant was required to provide interim financial statements for the period of January 1 to July 31, 2002. The statements were required by August 31, 2002, and were submitted on September 3, 2002. The statements disclosed a working capital shortfall of \$7,228. The Registrar required the registrant to make up this shortfall and provide proof that it had done so by November 22, 2002. The registrant submitted the necessary proof on that date.
8. The registrant's financial statements for the year ending December 31, 2002, were required to be submitted to the Registrar by March 31, 2003. the statements were not received until May 5, 2003, and disclosed a working capital shortage of \$3,204. The statements also reflected \$15,000 in accounts payable being disputed with travel suppliers.

9. The Registrar notified the registrant by letter of June 2, 2003, that it was required to make up the shortfall and provide proof that it had done so by June 18, 2003. The registrant provided the necessary proof on that date.
10. On October 1, 2003, the Registrar again conducted an Inspection of the registrant's business, this time to ensure that the working capital put in to make up the shortfall by June 18, 2003, was still in place, and that there was no working capital shortfall. The Registrar's Inspector was unable to complete the Inspection, as he was informed that the registrant's financial books and records were not on the registrant's business premises, as required by the Regulation, but were with the registrant's accountant.
11. The registrant was asked to notice the Registrar when the books and records would be available for review, but did not do so. The registrant did however provide some banking records for October and November, 2003, to the Registrar.
12. By letter of December 18, 2003, the Registrar required the registrant to submit interim financial statement to November 30, 2003, no later than January 18, 2004. The letter was apparently sent as a result of the Registrar having received evidence from another registered travel supplier that it had received N.S.F. cheques from the registrant.
13. As a result of negotiations between the Registrar, the registrant, and the registrant's accountant, the Registrar eventually agreed in a letter of February 13, 2004 to accept instead financial statements for the year ending December 31, 2004, provided these were submitted by March 1, 2004, failing which further administrative action would be taken. The statements were submitted on March 3, 2004, and disclosed a working capital shortage of \$5,165.
14. By letter of March 11, 2004, the Registrar required that the registrant make up the working capital shortfall and provide proof of having done so by March 22, 2004. In addition the letter required that the registrant's accountant confirm that all amounts owing to travel suppliers had been included in the registrant's financial statements.
15. On March 25, 2004, the registrant submitted the necessary evidence that the working capital shortfall had been made up. By letter of the same date the registrant's accountant advised the Registrar that amounts owing to a particular supplier and totalling some \$5,730.28 were not included in the accounts payable in the registrant's financial statements for the year ended December 31, 2003.
16. By letter of March 26, 2004, the Registrar advised the registrant that it had grave concerns about the accuracy of the financial statements submitted as a result of the omission of the amounts payable from those statements, and asked the registrant to advise by April 5, 2004, when the outstanding amounts would be paid.

17. When no reply was received by that date, a further letter was sent warning the registrant that administrative action which could result in revocation of the registrant's registration would be taken if a reply was not received by May 4, 2004. On that date, a facsimile reply received by the Registrar. The reply indicated that the outstanding amounts had not been paid because the registrant was trying to collect back the amounts from customers who owed them to the registrant, but that the registrant intended to pay the amount outstanding by June 30, 2004. The reply also included a letter from a lawyer for Elorine Johnson giving the opinion that she would have not personal liability for the outstanding amounts.
18. The Registrar did not find either the explanation from the registrant nor the opinion letter from Ms. Johnson's lawyer to be a satisfactory reason why the liability on the registrant was not disclosed in the registrant's financial statements. The Registrar had grave concerns about the registrant's ability to operate in a financially sound manner, and with honesty and integrity. As a result, the Registrar issued the Notice of Proposal to Revoke Registration on May 12, 2004.
19. The Registrar states that subsequent to the issuance of that Proposal it continued to receive complaints from credit card processing companies and travel suppliers regarding the conduct of the registrant. On August 5, 2004, the Registrar was advised by the International Air Transport Association ("IATA") that Elorine Johnson had been charged by the Toronto Police Service Fraud Squad with nine counts of fraud relating to credit card data arising from dealings she had with a travel service provider. IATA also alleged that the registrant might be operating an additional, unregistered, travel business and conducting business under a number of aliases.
20. The Registrar investigated and determined that Elorine Johnson was indeed scheduled to appear in Court in August, 2004, on nine counts of fraud over \$5,000, and that the amount in issue was some \$100,000. In the light of this information and the previous dealings with the registrant, the Registrar considered it necessary to issue the Order of Suspension.

The Applicant Ella filed Notices of Appeal with the Tribunal with respect to both the Notice of Proposal and the Order of Suspension. The Respondent's position with respect to the Registrar's allegations as set out in the Notices of Appeal may be summarized as follows:

1. The working capital shortages were caused by were the result of three agents (employees) defrauding Ella, as disclosed in the financial statements provided to the Registrar, and were made up as requested by the Registrar.
2. The frauds against Ella, and the consequent shortage of working capital, are also responsible for the lateness of payments to some travel suppliers.

3. The Registrar was always aware of the registrant's participation in the Travel Now, Pay Later plan (and did not require the registrant to cease participation).
4. The one time when books and records were not on the premises during an inspection was when they were with the registrant's accountant for preparations of statements. The accountant was seriously ill and in hospital at the time so the Applicant was not able to retrieve the books and records for the inspector.
5. In the one case in which Ella has been sued by a supplier, the Sunwing matter, the claim is being disputed by Ella in Court, as it resulted from the failure of the supplier to process payments against credit card information provided to it by Ella on behalf of customers, until it was too late as the credit cards in question had expired.
6. Elorine Johnson and Ella absolutely deny committing any frauds, by means of credit card information or otherwise, and Elorine Johnson is defending the criminal charges against her with the assistance of a lawyer.

THE LAW

Section 3 of the *Travel Industry Act* (the 'Act'), provides in part,

(1) No person shall Act or hold himself, herself, or itself out as being available to act as a travel agent unless the person is registered as a travel agent by the Registrar.

(2) No person shall act or hold himself, herself or itself out as being available to act as a travel wholesaler unless the person is registered as a travel wholesaler by the Registrar.

Section 4 of the Act provides in part;

4(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

(a) having regard to he is, her or its financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his her or its business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he, she or it will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and

(i) is incorporated without share capital, or

(ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carry 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 5 of the Act provides in part;

- (1) Subject to s.6, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 4.
- (2) Subject to section 6, 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 4, if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 6 of the Act provides in part;

- (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, made by order direct the registrar to carry out his or her proposal or refrain from carrying out his or her proposal and to take such action as the Tribunal considers the registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
- (5) the Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 7 of the Act provides in part:

Where the Registrar proposes to suspend or revoke a registration, the Registrar may, where the Registrar considers it to be necessary in the public interest, by order temporarily suspend the registration and the order shall take effect immediately and where a hearing is required, the order expires fifteen days from the date of the notice requiring a hearing unless the hearing is commenced in which case the Tribunal holding the hearing may extend the time of expiration until the hearing is concluded.

Regulation 806/93 under the Act provides in part:

- 18. (2) a registrant who ceases to trade with another registrant by reason of the other registrant's apparent lack of financial responsibility shall promptly notify the Registrar in writing that trade has ceased and of the reasons therefore.
- 24 (1) Every registrant shall file with the Registrar financial statements required by this section for each financial year.
- (2) If the registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file, within three months of the end of the fiscal year,
 - (a) annual financial statements with a review engagement report by a public accountant under the *Public Accountancy Act*, or
 - (b) annual financial statements with an audit opinion from a public accountant, if the registrant is required to obtain annual financial statements with an audit opinion under the *Business Corporations Act*.

(7) If the Registrar has reason to believe that a registrant is in financial difficulty, the Registrar may require that the registrant provide a written statement of the registrant's current net working capital to the Registrar, and the registrant shall do so within the time specified by the Registrar.

52 (1) A travel wholesaler is entitled to be reimbursed for money paid by the travel wholesaler to reimburse a customer for travel services paid for but not provided or to provide the customer with travel services for which the travel wholesaler has not been paid if

(b) the travel agent has failed to pass all or part of the customer's money to the travel wholesaler;

(5) A travel wholesaler who receives a cheque from a travel agent for travel services that are provided is entitled to be reimbursed if

- (a) the cheque is received by the travel wholesaler within seven days before the commencement of the travel services;
- (b) the cheque is promptly deposited by the travel wholesaler in an account maintained in a financial institution mentioned in section 19;
- (c) the cheque is returned to the travel wholesaler by the financial institution by reason of insufficient funds; and
- (d) the travel wholesaler is otherwise entitled to be reimbursed.

(7) A travel wholesaler is not entitled to be reimbursed for any payment made by credit card if the travel agent or travel wholesaler did not obtain prior approval for the payment from the card issuer in accordance with the agreement between the card issuer and the registrant who processed the payment.

CASELAW

Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)[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 (Brenner, Applicant). The Applicant had a very serious criminal record, which he had disclosed in his application, but he had not disclosed three further convictions that 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 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 in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The principles set out in the *Brenner* case were considered and modified somewhat by the Court in two subsequent cases, *Shine* and *Shahidi*:

Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales and Omar Hassan Rahim (2003-02-11) Ontario Superior Court of Justice Divisional Court

This was an appeal by the Registrar from a decision of the Licence Appeal Tribunal ordering the Registrar not to carry out a proposal to revoke the registrations of Shine Car Sales Inc. as a dealer and Omar Hassan Rahim as a salesperson. The Tribunal found the Applicant Rahim had been found guilty on two charges of odometer tampering in 1999, and that he had lied under oath about a criminal record involving an assault charge in 1988 and a theft charge in 1997. But the Tribunal found that the 1988 charge was quite dated and that both that and the 1997 theft charge were not industry related, and that in three allegations of failing to properly disclose the insurance write off status of vehicles, and two of failing to properly state that the true mileage of a vehicle was unknown, the Applicant had disclosed or the purchasers had seen that the three insurance write-off vehicles were accident repaired, and the odometers on the other two vehicles were digital and had true mileage unknown written on the wholesale bills of sale because at the time of wholesale sale the battery of the vehicle was not connected and the odometer could not be read. The Tribunal found that in all five of these allegations there was no intent to deceive, and all but one of the purchasers of the vehicles who testified said they were not deceived (The other purchaser who testified was not found to be a credible witness by the Tribunal).

The Tribunal concluded that, taking into account efforts to reform their procedure subsequent to the Registrar's inspection in 2000, the past conduct of the Applicants did not give the Registrar reason to believe the Applicants would not carry on business in accordance with the law and with honesty and integrity, provided certain conditions were imposed. The Court denied the appeal from the Tribunal decision, holding in paragraph nine of the judgement that the Brenner test "does not establish a rule that the Registrar must be shown to be wrong in having concluded that there was reason to doubt that the registrant would carry on business appropriately". The Court observed in paragraph ten that "the Tribunal owes no deference to the Registrar's opinion. The Registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference. "

Ontario (Registrar, Motor Vehicle Dealers Act) v. Shahidi (2003-03-04) Ontario Superior Court of Justice Divisional Court

This was an appeal by the Registrar from a decision of the Licence Appeal Tribunal ordering the Registrar to grant registration with conditions. There were a number of cases in which the Applicant before the Tribunal was alleged to have failed to disclose to purchasers of vehicles that the odometer reading showing on the vehicle odometer was not correct and that the true mileage was in excess of 150,000 kilometres, which the Tribunal concluded was the highest mileage at which financing would be available for the purchase. In paragraph 28 of its decision, the Tribunal recited the *Brenner* test

as being the correct one to apply, but also stated “The Registrar’s obligation as set forth in Section 5 of the Act is to balance the entitlement to registration with the protection of the consumer.” The Tribunal concluded that the Registrar in this case had applied the ultimate sanction of revocation of registration, on the evidence of three breaches of the obligation to disclose, and ordered the Registrar to grant registration with specific conditions. The Court denied the appeal, stating in paragraph six of the judgement that the Tribunal applied the proper test when it quoted from the *Brenner* decision in paragraph 28 of its decision, but did not comment on the Tribunal’s added conclusion in that paragraph that the Registrar was required to balance the right to registration with consumer protection.

1221786 Ontario Inc. (c.o.b. Island Travel) (Re) This was a case in which the Tribunal upheld a Proposal by the Registrar to revoke registration. There were originally two shareholders of the corporate registrant, but one withdrew as a shareholder but remained as an employee manager of the travel agency prior to registration in July, 1999. The sole remaining shareholder, who had signed the Terms and Conditions for registration by the Registrar, then travelled extensively outside the country, leaving the manager on her own. The financial statements due to be submitted to the Registrar by June 30, 2000, were not submitted until October 26, 2000, and disclosed a working capital shortfall of \$13,425. The manager testified that the reason for the delay in submitting the statements was that the corporations bookkeeper failed to take the books to an accountant for preparation of the statements and the sole shareholder would not advise her who the corporations accountant was. She finally located an accountant on her own, and paid for the preparation of the statements out of her own pocket. She also testified that the sole shareholder, when advised of the requirement to maintain working capital in April, 2000, indicated he would not do so unless required, and that when she had notified him, following a demand by the Registrar in October, 2000, that he was required to deposit funds to make up the working capital shortfall, he had not done so, and had remained outside the country to the date of the hearing.

ISSUES

The legal issue in this case is whether the past conduct of the Registrant and the failure to comply with the requirements of the Act and the regulations to file financial statements in a timely manner, disentitled the Registrant to registration.

WITNESS FOR THE REGISTRAR

Evidence was called by the Registrar, and testimony was given by Mary-Ann Harrison.

The Registrar's witness Mary-Ann Harrison confirmed the Registrar’s position as set out in the materials filed for the hearing. She also drew the Tribunal’s attention to additional material filed, indicating among other things that Elorine Johnson had been the subject of two lawsuits against her personally, one of which had been settled, involving N.S.F.

cheques, and the other of which appeared to have resulted in a Small Claims Default Judgement.

On cross-examination, Ms. Harrison admitted that the Registrar does not get involved in disputes between registrants over payment, and does not tell registrants how to run their businesses.

WITNESS FOR THE APPLICANT

Evidence was called on behalf of Ella, and testimony was given by Elorine Johnson.

The Applicant's witness Elorine Johnson elaborated on the explanations given in her materials for the hearings in response to the Respondent's allegations against her and her travel business. Ella has not paid the amounts outstanding to one supplier, even though she has deposited funds into Ella to pay this supplier and indicated to the Registrar that she would do so by June 30, 2004, because the amounts were due to customer credit card payments which did not go through. She has provided the travel supplier in this case with copies of the credit card imprints, or signed authorizations form from the customer, which she duly obtained, and is pursuing the customers vigorously to recover these funds, to the extent that some customers have changed their phone numbers or moved to avoid her. Consequently, the travel provider in this case has held off suing her. The lawsuit against her personally which was settled was by her former employer. She had given a series of (post-dated) cheques to reimburse her employer for a computer, before discovering that the employer had already deducted (or set off, this was not clear) the cost of the computer otherwise. She advised the former employer she had stopped payment on the remaining cheques but they attempted to put them through anyway. The settlement must have been favourable to her, as she testified she used the money she got as part of funds to start the travel business.

She stated that she had never heard of the other lawsuit in Small Claims court until she received the Respondent's materials, and is looking into this with a view to getting the Judgement set aside, as she does not owe any money to the Judgement Creditor.

She vehemently denied any improper use of credit cards in her business. On the contrary, she normally takes an imprint of any credit card presented for payment before making the reservations. She will only make a reservation based on credit card information taken over the phone if space is limited for the travel, and the supplier will not hold the seat otherwise, and only if the customer has travelled with her before. Even then, she faxes an authorization form to the customer, which the customer is expected to return to her signed by the end of the day. She maintained it was impossible for her to 'force through' a false credit card authorization number as apparently alleged by the travel wholesaler in the criminal charges. The booking is done through a web site with the wholesaler putting through the credit card. She is not registered to put through credit cards herself.

In the past she has had problems with employees not following the rules, and in fact three employees have defrauded her. One, Ms. G-B, knew many of her customers and was accepting orders from them, making bookings herself, and then meeting the customer outside the travel business to collect payment, which she did not turn over to Ella nor, in many cases, forward part of to the travel service provider. She has sued this person to recover the loss.

On cross-examination, she admitted that she had not had Ms. G-B charged criminally, and in fact had not called the police regarding this matter. Ms. G-B is a single mother like herself, and had pleaded to be allowed to repay the money defrauded in a series of monthly payments. Ms. G-B actually made at least the initial payment, before disappearing. Ms. Johnson has only recently located her.

She conceded she does obtain extra income by selling small items and passport photographs out of her travel agency premises, but denied operating any other travel business or operating under any aliases. (In answer to a question from the Tribunal, Ms. Johnson indicated the income from these side sales is not part of the travel agency income in the Applicant's financial statements.) She denied the suggestion that bankruptcy is impending (or inevitable) for both herself and the Applicant, and stated that if necessary she could borrow from friends and family to make up any future shortfalls in working capital. She did admit she has given up her residence and is presently staying with family and friends, apparently as a result of the substantial legal expenses she has incurred, as she was not only represented by counsel for the hearing, but has also retained counsel to defend the civil lawsuit brought against her and Ella by the travel supplier, and another counsel to defend her on the criminal charges. And she is using the services of a paralegal to negotiate with another travel supplier, as well as suing her former employee, Ms. G-B.

She was unable to offer any explanation of an apparent discrepancy between her recollection of when Ms. G-B had worked for her, and recitals in her Statement of Claim in the lawsuit against G-B suggesting a much shorter period of employment and much earlier departure date, other than to suggest that the Statement of Claim was prepared and reviewed quickly. She conceded she might have made a mistake, and that Ms. G-B may have worked for her for a few months, only, in 2002, and not into the beginning of 2003 as she recalled.

FACTS FOUND PROVEN

The facts found by the Tribunal are that

1. The Applicant has been late filing copies of its annual financial statements by the date prescribed by the Regulation in each of the fiscal years of its operation since registration, but has filed the necessary statements within a couple of months at most after the prescribed date, and by any deadline dates for filing set by the

Registrar, with one exception, in which the statements were filed within two days of the deadline.

2. Similarly, the Applicant has had a working capital shortage in each fiscal year of operation, but this shortfall has been made up on or before the deadlines set for it to do so by the Registrar.
3. There has been one occasion on which two cheques sent to a travel provider has been returned N.S.F. This was due to the cheques being based on cheques received from customers and deposited into the Applicant's Trust Account which went N.S.F.
4. On one occasion in October, 2003, when the Registrar's inspector attempted to review the Applicant's books and records, they were not on the Applicant's premises as required by the Regulation. However, the books had been present during an earlier inspection, and the Tribunal accepts that Ms. Johnson had advised the inspector where the books were, and provided the address of the accountant, when the accountant's staff would not release the books and records back to her while the accountant was gravely ill and in hospital.
5. The Applicant and Elorine Johnson have been involved in disputes with several travel providers, as a result of which they are being sued by at least on such party, and it appears that criminal charges have been laid against Elorine Johnson as a result of another such situation. However, neither the police officer nor any representative of the travel wholesaler and credit card companies involved in those charges were called to testify as to the basis of the charges, and Elorine Johnson gave sworn testimony indicating that she is not guilty of any wrongdoing and is defending herself in court on the criminal charges, as well as defending herself and Ella in the civil court lawsuit.
6. Elorine Johnson has had difficulties in the operation and in maintaining the working capital of Ella as a result both of participating in the Travel Now Pay Later plan, which she testified was popular in raising business, but which delayed payments to her by months, and in her difficulties with past employees, one of which she is now suing. However, Ella is no longer participating in the travel plan and has not booked customers under the plan for some time, although it remained a member of the plan until recently in order to obtain the last of the payments owing to it from previous customers. And Elorine Johnson now has put in place procedures, including background reference and credit checks of prospective employees, to guard against continuation of her problems with employees.

APPLICATION OF LAW TO FACTS

The legal issues in this case are whether the Applicant will carry on business with integrity, honesty, in accordance with the law. In relation to the issue of integrity the Tribunal finds the following facts to be relevant past conduct

On the issues of honesty and integrity, the Tribunal finds the following facts to be relevant past conduct

While the Applicant's attitude concerning her obligations to travel service providers in the case of customer defaults in payments reflect ignorance of basic protocols of business conduct and etiquette, the Tribunal cannot find in that conduct the necessary reasonable grounds to conclude that she is not going to carry on business with honesty and integrity and in accordance with law. She has followed the correct procedure for legally disputing these claims, and has hired legal assistance where appropriate.

The existence of a current criminal record for the Applicant or Elorine Johnson would be another matter entirely. The Tribunal routinely draws an inference that such evidence dishonest behaviour demonstrates a continuation of the dishonest behaviour, in addition to the other past conduct can provides reasonable grounds to believe that there will be future behaviour which does not meet the statutory standard of acting with honesty, and integrity.

But in the face of Elorine Johnson's sworn denial of guilt, and in the absence of a single conviction or indeed any sworn testimony to establish guilt, the Tribunal cannot conclude at this time that the charges are anything more than an attempt by the creditors involved to use the criminal court as a collection device, an abuse of the court's process, of course. This is implied by a letter from one of the creditors in the Respondent's materials, in which a representative of the creditor advises the Registrar, after detailing attempt to collect including use of a credit collection agency, that they are not thinking of having charges laid. It was an unjustified speculative leap on the part of the Registrar to conclude from this dubious information that Elorine Johnson and Ella now represented a threat to the compensation fund, and to issue the Order of Suspension. Because of this, and because that Order was preventing a single mother from operating the business in which she has a tremendous investment and to which she looks for her livelihood at a financially difficult time for her, the Tribunal declined to continue the Order of Suspension pending the issue of this Decision.

While the Tribunal has some concerns regarding Elorine Johnson's attitude towards her legal obligation in this regulated industry, these concerns can readily be satisfied by imposing conditions on the Applicant's registration, rather than by the drastic remedy of revocation of that registration.

The other legal issue in this case is whether having regard to the financial position of the Applicant it can reasonably be expected that the Applicant will be financially responsible in the conduct of the business.

The Tribunal finds the following facts to be relevant to the issue of whether the Applicant can reasonably be expected to be financially responsible in the conduct of the business.

The Applicant's past history of working capital shortages and disputes with travel providers resulting in expensive legal services being required do call into question the business judgement of its Officer and Director, Elorine Johnson. But just as the Registrar's witness stated it is not the Registrar's role to tell registrant's how to run their business, so it is not the Tribunal's role either. And the Tribunal must look at the whole history of conduct in determining whether the Registrar had reasonable grounds to believe the Applicant will not be financially responsible. That history shows that the Applicant has made up each working capital shortfall as required, and has even set aside what may be termed a contingency fund in respect of one set of claims, despite the fact that it is attempting to recover funds from those claims from the customers who traveled, and the creditor is apparently accepting this as they have not sued in a great length of time the amounts have been outstanding.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was in error, and was premature.

DECISION

Therefore, by virtue of the authority vested in it under s. 6(4) of the *Travel Industry Act* the Tribunal directs the Registrar not to carry out the Proposal to revoke registration.

However, the under the authority also granted to it by the Act, the Tribunal directs the Registrar to continue registration for the Applicant only upon the following terms and conditions:

1. The Applicant is to advise the Registrar of the outcome of the criminal charges against Elorine Johnson, and if any further criminal charges are laid against the Applicant or Elorine Johnson, is to immediately advise the Registrar of the existence, and subsequently of the outcome of those charges. In the event that Elorine Johnson or the Applicant are convicted of any criminal charges, the Registrar is to immediately revoke the registration of the Applicant, without any further Proposal or right of appeal to this Tribunal, unless the Applicant satisfies the Registrar that Elorine Johnson has sold or will sell her interest in the Applicant corporation and the business forthwith, and will no longer be associated with the operations of the Applicant.

2. The Applicant corporation is at all times to file all financial statements required by the Regulation or the Registrar in a timely manner, and is to maintain the necessary working capital as required by the Regulation, presently \$5,000.
3. The Applicant is to fully disclose in its financial statements filed, all liabilities to creditors of the Applicant, particularly travel providers and wholesalers, although these may be disclosed as contingent liabilities in notes to its financial statements where this is advised by its accountant in accordance with Generally Accepted Accounting Principles.
4. Where advised by its accountant in accordance with Generally Accepted Accounting Principles to do so, the Applicant may be required to set aside a contingency fund, in addition to any other working capital requirements, to meet such contingent liabilities as they come due. The Registrar may require the Applicant to provide proof of such contingency funds, or a statement from the Applicant's accountant as to why it is not necessary in his or her opinion to set aside such funds, in respect of each contingent liability.

LICENCE APPEAL TRIBUNAL

G. Maurice Power, Member

Released: September 28, 2004

FILENAME: 2393.tia.EllasTravel.

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.



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

LARRY R. STANLEY AND FLOYD W. STANLEY O/A PARADISE TRAVEL

IN THE MATTER of the REGISTRATION of
LARRY R. STANLEY AND FLOYD W. STANLEY O/A PARADISE
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: April 1, 2004

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

LARRY R. STANLEY AND FLOYD W. STANLEY O/A PARADISE TRAVEL

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

AMENDED CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Larry R. Stanley and Floyd W. Stanley o/a Paradise Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of an Amended 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 amended 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 17, 2004

FILE NAME: 2336.tia.Paradise Travel.Amended.consent

SCHEDULE "A"

BETWEEN:

LARRY R. STANLEY AND FLOYD W. STANLEY
O/A PARADISE TRAVEL

Applicant

-and-

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

AMENDED 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. Larry R. Stanley and Floyd W. Stanley o/a Paradise Travel (*hereinafter* referred to as the "Registrant") were registered as travel agents (Registration no. 2018021/R) on September 15, 1982.
2. The Registrant has a fiscal year-end of October 31 of each year.
3. On May 26, 2000, the Registrar, *Travel Industry Act*, issued a Notice of Proposal to Revoke the Registration of the Registrant for its failure to file financial statements for the fiscal year-end of October 31, 1999. However, the financial statements for the fiscal year-end of October 31, 1999 were subsequently provided and the Proposal to Revoke Registration was subsequently withdrawn on July 26, 2000.
4. By letter dated September 19, 2003, the Travel Industry Council of Ontario (*hereinafter* referred to as "TICO") reminded the Registrant that their financial statements for the fiscal year-ending October 31, 2003 were due for submission on or before January 31, 2004.
5. By facsimile dated February 2, 2004, TICO received a letter from the Registrant's accountant, FBC Inc. requesting an extension for the submission of financial statements of the Registrant for the fiscal year-ending October 31, 2003. The facsimile stated that the financial statements would be forwarded to TICO no later than February 25, 2004.
6. By letter dated February 3, 2004, TICO reminded the Registrant a second time that their financial statements had not yet been filed for the fiscal year-ending October 31, 2003 and provided a deadline of February 18, 2004 for submission of the required statements.
7. By letter dated February 23, 2004 the Registrar sent a third reminder to the Registrant outlining their obligations to file financial statements for the fiscal year-ending October 31, 2003. This letter provided a final deadline of March 1, 2004 for submission of the financial statements.
8. On March 8, 2004, TICO telephoned the registrant to inquire about the status of the financial statements for the fiscal year-ending October 31, 2003. At this time, the Registrant informed TICO that that they would contact their accountant and, in turn, have their accountant contact TICO with a submission date.
9. On March 16, 2004, TICO contacted the Registrant by email to inform them that it had not yet heard from their accountant and were still in need of the financial statements for the fiscal year-ending October 31, 2003. TICO did not receive a response to its email.
10. On April 1, 2004, the Registrar issued a Notice of Proposal to Revoke the Registration of the

Registrant for failure to file its financial statements for the year-ending October 31, 2003. This was the second Proposal to Revoke Registration for failure to file financial statements issued against the record of the Registrant.

11. On April 20, 2004, the Registrant appealed the Proposal to Revoke Registration to the Licence Appeal Tribunal and a pre-hearing by teleconference was set for June 18, 2004 at 2:30 P.M.
12. By facsimile dated April 22, 2004, TICO received the financial statements for the year-ending October 31, 2003 from FBC Inc.
13. 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 Section 6(4) and Section 6(5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 1, 2004.
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 any such subsequent provision as may be in force from time to time for its fiscal year-ending October 31, 2004, no later than January 31, 2005; and
 - (b) the Registrant shall file financial statements as required by Section 24 of the Regulation or any such subsequent provision as may be in force from time to time for its fiscal year-ending October 31, 2005, no later than January 31, 2006.
 - (c) If either of 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 provide 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 any condition listed in paragraphs 2 (a), (b) or (c), 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. The failure of the Registrant to exercise their right to obtain independent legal advice with respect to this agreement shall not affect its validity or enforcement at any time hereafter.

Larry R. Stanley
I have the authority to bind the company

Dated this day in Kincardine, Ontario

Michael Pepper
Registrar, Travel Industry Act

Dated this day in Mississauga, Ontario

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



LEONARD DOUSE

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY
COUNCIL OF ONTARIO DENYING A CLAIM FOR
COMPENSATION UNDER THE *TRAVEL INDUSTRY ACT*

TRIBUNAL: CARL DOMBEK, Chair

APPEARANCES: LEONARD DOUSE, Applicant, representing himself

MARIA ABATE, Counsel, representing the Travel
Industry Council of Ontario

DATE OF
HEARING: August 5, 2004

Toronto

AMENDED ORDER

WHEREAS this is an appeal by Leonard Douse, (the "Applicant"), to the Licence Appeal Tribunal (the "Tribunal") from a decision dated May 6, 2004 by the Board of the Travel Industry Council of Ontario denying a claim for compensation under the *Travel Industry Act* (the "Act").

AND WHEREAS the Applicant filed a Notice of Appeal form dated May 11, 2004, received by the Tribunal on May 13, 2004, requesting a hearing;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on August 5, 2004 at the Tribunal;

AND WHEREAS there was agreement between the Parties that the Applicant filed his claim four (4) months after the expiry of the date for which claims could be submitted;

AND that the Travel Industry Council of Ontario (TICO) attempted to contact the Applicant on March 17, 2003 but as he had moved, Canada Post returned the letter to TICO as unclaimed;

AND WHEREAS Section 53 of Ontario Regulation 806/93 under the *Travel Industry Act* provides that a customer shall make a claim within six months after the event that gave rise to the claim;

AND WHEREAS the Licence Appeal Tribunal cannot grant any relief as Section 53 is mandatory;

NOW THEREFORE, this Tribunal Orders that the Applicant's appeal is dismissed without costs.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

RELEASED: August 11, 2004

FILE NAME: 2370.tia.Leonard Douse.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



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

2463-TIA-ADJ-Adjournment

IN THE MATTER OF a CLAIM by
RAM PARKASH SHARMA

AND IN THE MATTER OF the DECISION by the
Board of the Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: June 16, 2004

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

RAM PARKASH SHARMA

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 October 12, 2004;

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, November 29, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 30, 2004

FILE NAME: 2463.tia.claim.Sharma.adj.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

1359253 ONTARIO LTD. o/a SANTO DOMINGO TRAVEL SERVICES

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 DOMBEK, Chair

APPEARANCES: ANTONIO RAFAEL DIAZ, Agent, representing the Applicant

MICHAEL PEPPER, Counsel, representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: January 23, 2004 Toronto
(By Teleconference)

ORDER

Following a prehearing before the Licence Appeal Tribunal (the "Tribunal") by way of a teleconference at which hearing Antonio Rafael Diaz, Agent, represented 1359253 Ontario Ltd. o/a Santo Domingo Travel Services (the "Applicant") and Michael Pepper, 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 February 10, 2004 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Applicant will notify the Registrar's Counsel, Mr. Michael Pepper of the name and address of his Chartered Accountant who will conduct a financial audit by 4:00 p.m. on Tuesday, January 27, 2004.

2. The hearing will proceed as scheduled on Tuesday, February 10, 2004; however if the Chartered Accountant requires a short period of time (i.e. no more than two weeks) to finish the audit and advises the parties thereto, the Tribunal will consider a short adjournment.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

RELEASED: January 23, 2004

FILENAME: 2017.tia.Santo Domingo Travel Services.pre.order



DATOO INTERNATIONAL INC. O/A PRINCE TRAVEL AND TOURS

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

IN THE MATTER of the REGISTRATION of
DATOO INTERNATIONAL INC. O/A PRINCE 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: October 15, 2003

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

DATOO INTERNATIONAL INC. O/A PRINCE TRAVEL AND TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Dattoo International Inc. o/a Prince Travel and Tours, 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

Released: January 12, 2004

File name: 2035.tia.Dattoo.Consent.Ord.

LICENCE APPEAL TRIBUNAL

BETWEEN:

DATOO INTERNATIONAL INC. O/A PRINCE 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. Dattoo International Inc. o/a Prince Travel and Tours ("the Registrant") was registered as a travel agent (Registration No. 50010013/R) on November 22, 2001.
2. By letter dated August 21, 2003, the Registrant was advised that it had failed to file its Form 1 for the period ending June 30, 2003, and to make the required payment to the Council, and was requested to submit the required filing by September 4, 2003. A final request was sent to the registrant on September 4, 2003 providing the Registrant with a deadline to submit the required filing by September 18, 2003, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
3. To date, the Registrant has failed to submit its Form 1 or made payment to the Council for the period ending June 30, 2003.
4. 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 October 15, 2003;
2. The Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file its Form 1 payment for the period ending June 30, 2003 no later than January 31, 2004.
 - (b) The Registrant shall file its Form 1 payment for the period ending December 31, 2003 no later than February 15, 2004.
 - (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, 2003 no later than March 31, 2004.
 - (d) If the above-noted financial statements as filed are incomplete or reflect a working capital deficiency, 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 any condition listed in paragraphs (2) (a), (b), (c) or (d), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via courier 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 January, 2004

Mr. Abulhaq Amiree – Vice President
Dattoo International Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*



JACCO TOURS (ONTARIO) INC.

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

IN THE MATTER of the REGISTRATION of
JACCO TOURS (ONTARIO) 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: November 12, 2003

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

JACCO TOURS (ONTARIO) INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Jacco Tours (Ontario) Inc., 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

Released: January 21, 2004

File name: 2064.tia.jacco.Consent.Ord.

LICENCE APPEAL TRIBUNAL

BETWEEN:

JACCO TOURS (ONTARIO) 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. Jacco Tours (Ontario) Inc. ("the Registrant") was registered as a travel agent and travel wholesaler (Registration No. 50010393/R and 50010394/W) on March 8, 2002.
2. By letter dated November 21, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ending December 31, 2002 by March 31, 2003.
3. By letter dated April 3, 2003, the Registrant was issued a reminder by TICO to file its December 2002 financial statements, on or before April 17, 2003.
4. By letter dated April 22, 2003, the Registrant was issued a final due date by the Registrar, of April 30, 2003 to file its December 2002 financial statements, which were due March 31, 2003, failing which a Proposal to Revoke registration would be issued.
5. On April 24, 2003, the Registrant submitted a customer deposit listing and an accounts receivable listing.

6. On April 24, 2003, TICO telephoned the Registrant and spoke with Tony Leung. TICO advised Mr. Leung that the customer deposit list and the accounts receivable summary for an unspecified period does not fulfil the requirement to file financial statements, and that the final due date for financial statements for the Registrant for the fiscal year ending December 31, 2002 is April 30, 2003. Mr. Leung stated that he would contact the accountant.
7. On April 25, 2003 the Registrant's accountant telephoned TICO and advised that the financial statements for December 31, 2002 would be submitted by June 4, 2003.
8. On June 9, 2003, the Registrant filed its financial statements for the fiscal year ended December 31, 2002. The financial statements revealed a working capital shortfall of \$235,615, based on reported sales of \$6,358,518.
9. By letter dated June 11, 2003, the Registrant was advised by TICO that the working capital shortfall of \$235,615 reflected in the December 31, 2002 financial statements was to be corrected and evidence of correction submitted no later than June 27, 2003.
10. By letter dated July 2, 2003, the Registrant was issued a reminder by TICO that evidence of correction of its working capital shortfall of \$235,615, reflected in its December 31, 2002 financial statements, had not been received by TICO. The registrant was requested to file the information by July 10, 2003.
11. On July 3, 2003, the Registrant faxed evidence of shareholder injections totalling \$249,050. As at July 3, 2003, it appeared that the Registrant met the working capital requirements.
12. On August 14 and August 22, 2003, one of TICO's inspectors conducted a site inspection of the Registrant to ensure that the shareholder injections that were provided as evidence of correction of the working capital shortfall as of December 31, 2002 had not been removed. The inspector found that \$30,000 of the deposits made, subsequent to the year-end, appeared to be a VISA credit card payment and not a shareholder loan. The inspection also revealed that approximately \$100,000 had been paid back to the shareholder on July 9, 2003.
13. By letter dated September 12, 2003, the Registrant was advised by the Registrar that the August 2003 inspection revealed that some of the shareholder injections, totalling \$130,000, provided as evidence of correction of the working capital shortfall as at December 31, 2002 had been paid back to the shareholder. The Registrant was requested to replace the \$130,000 no later than September 24, 2003. The Registrant was also requested to provide an interim financial statement for the nine months ending September 30, 2003. The interim financial statement was required to be filed no later than October 31, 2003.

14. By letter dated October 17, 2003, TICO again requested that the Registrant provide evidence of correction of the \$130,000 shareholder injection. The Registrant was again asked to submit an interim financial statement to September 30, 2003 no later than October 31, 2003.
15. On November 12, 2003, the Registrant was issued a Proposal to Revoke its registration for failure to maintain sufficient working capital.
16. On November 28, 2003, the Registrant submitted interim financial statements for the period ending September 30, 2003. The financial statements revealed a working capital shortfall of \$55,077 as of September 30, 2003. The Registrant included with the financial statement evidence of correction of working capital of \$40,000.
17. On December 12, 2003, the Registrant submitted evidence of correction of working capital of \$15,500 on December 5, 2003.
18. It appears that the Registrant meets the working capital requirement as of September 30, 2003.
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 November 12, 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 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 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.
 - (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 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 any condition listed in paragraphs (2) (a), (b), (c) or (d), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via courier 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 January, 2004

Mr. Danny Li - President
Jacco Tours (Ontario) Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*



917403 ONTARIO LIMITED O/A JJ TRAVEL

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

IN THE MATTER of the REGISTRATION of
917403 ONTARIO LIMITED o/a JJ 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: November 7, 2003

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

917403 ONTARIO LIMITED o/a JJ TRAVEL

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on January 21, 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 11:00 a.m., on Wednesday, February 11, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: January 26, 2004

file name: 2069.tia.JJ Travel.adj

1359253 ONTARIO LTD. o/a SANTO DOMINGO TRAVEL SERVICES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*.

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

No one appeared for 1359253 Ontario Ltd., the Applicant

FRANK WILLIAMS, Counsel, representing the Registrar,
Travel Industry Act

HEARING: February 10, 2004 Toronto

CONSENT ORDER

Upon the application to the Tribunal by Counsel for the Registrar under the *Travel Industry Act*, no one appearing for 1359253 Ontario Ltd. operating as Santo Domingo Travel Services (the "Applicant") for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O.1990, chapter 8.22; and

Having reviewed the voluntary consent to cancellation signed by the Applicant of its registration under the *Travel Industry Act*, R.S.O. 1990;

And having listened to Counsel for the Registrar who informed the Tribunal that the Registrar no longer required a hearing before the Tribunal in regard to his proposal to revoke the Applicant's registration;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the voluntary cancellation of the registration signed by the Applicant and set out in Schedule "A" hereto attached.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 10, 2004

File name: 2017.tia.1359253 Ontario Ltd. Santo Domingo.consentorder



917403 ONTARIO LIMITED O/A JJ TRAVEL

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

IN THE MATTER of the REGISTRATION of
917403 ONTARIO LIMITED O/A JJ 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: November 7, 2003

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

917403 ONTARIO LIMITED O/A JJ TRAVEL

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 917403 Ontario Limited o/a JJ Travel, 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

Released: February 10, 2004

LICENCE APPEAL TRIBUNAL

BETWEEN:

917403 ONTARIO LIMITED O/A JJ 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. 917403 Ontario Limited o/a JJ Travel ("the Registrant") was registered as a travel agent (Registration No. 4006813/R) on July 16, 1991.
2. On March 11, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ended April 30, 2002, by July 30, 2002.
3. By letter dated July 9, 2002, the Registrant was requested to file its Form 1 for the six months ended April 30, 2002. The Form 1 had been due by June 14, 2002.
4. On August 12, 2002, the Registrant was issued a reminder to file its April 2003 financial statements.
5. On August 12, 2002, the Registrar issued a Proposal to Revoke the Registrant's registration for not filing Form 1 for the period ended April 30, 2002 which was due by June 14, 2002.
6. On August 13, 2002, the Registrant filed its Form 1 for the period ended April 30, 2002.
7. On August 26, 2002, the Registrant appealed the Proposal dated August 12, 2002, to the License Appeal Tribunal. The Proposal dated August 12, 2002 was not withdrawn at this time despite the fact that the Registrant had filed the Form 1, for the period ending April 30, 2002, because the financial statements for the same period were still outstanding.
8. On August 28, 2002, TICO telephoned the Registrant and left a message regarding

the non submission of the April 2002 financial statements.

9. On August 29, 2002, the Registrant advised TICO by fax that it required an additional two weeks to file its financial statements for the fiscal year ended April 30, 2002.
10. On September 16, 2002, the Registrant's accountant telephoned TICO and advised that he had been ill and unable to do the Registrant's financial statements for April 2002, and estimated a completion date of September 20, 2002.
11. On September 20, 2002, TICO received the financial statements for the Registrant for the fiscal year ended April 30, 2002, which were due by July 30, 2002. It appeared that working capital requirements were met as at April 30, 2002.
12. By letter dated November 25, 2002, the Registrar withdrew the Proposal dated August 12, 2002.
13. By letter dated March 13, 2003, the Registrant was requested by TICO to file its financial statements for the fiscal year ended April 30, 2003 by July 30, 2003.
14. By letter dated August 1, 2003, the Registrant was reminded by TICO to file its April 2003 financial statements, which were due by July 30, 2003, on or before August 15, 2003.
15. On August 7, 2003, TICO telephoned the Registrant regarding the non submission of the April 2003 financial statements and was informed by the Registrant that the financial statements would be submitted by August 15, 2003.
16. By letter dated August 22, 2003, the Registrant was requested by the Registrar to file its financial statements for the fiscal year ended April 30, 2003 no later than September 1, 2003, failing which administrative action including a Proposal to Revoke registration would be taken.
17. On September 3, 2003, TICO telephoned the Registrant and left a message to contact TICO regarding the non submission of its April 2003 financial statements.
18. On September 4, 2003, the Registrant telephoned TICO and advised that the April 2003 financial statements would be submitted by September 11 or September 12, 2003.
19. On October 15, 2003, the Registrar issued a Proposal to Revoke the Registrant's Registration for failing to file its April 2003 financial statements.
20. On October 20, 2003, the Registrant submitted its financial statements for the year ended April 30, 2003. The statements reflected a working capital shortfall of \$55,302.
21. On October 30, 2003, the Registrant was requested to correct its working capital shortfall of \$55,302 by November 12, 2003.

22. On November 6, 2003 the Registrant was served with a final notice for failing to appeal the Proposal dated October 15, 2003. The Registrant notified the Registrar that he had not received the Proposal as he had moved offices. The Registrar withdrew the Proposal with the acknowledgement of the Registrant that a new proposal would be issued.
23. On November 7, 2003, the Registrar issued a Proposal to Revoke the Registrant's registration, replacing the earlier Proposal dated October 15, 2003, for failure to file its financial statements for the year ended April 30, 2003 by the due date of July 30, 2003.
24. To date the Registrant has not corrected his working capital shortfall.
25. 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 November 7, 2003;
2. The Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall submit an interim financial statement for the year ended April 30, 2004, no later than May 31, 2004. If the interim financial statement reflects a working capital shortfall as of April 30, 2004, the Registrant will have 30 days from the date of the notice to correct the working capital shortfall. The notice of the working capital shortfall will be sent by registered mail.
 - (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, 2004, no later than July 31, 2004.
 - (c) If the above-noted financial statements as filed are incomplete or reflect a working capital deficiency, 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 any condition listed in paragraphs (2) (a), (b), or (c), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via courier 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 February, 2004

Mr. Yogesh Birla
917403 Ontario Ltd.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*



EXEC 1 TRAVEL CORP. O/A GOLIGER'S TRAVELPLUS

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

IN THE MATTER of the REGISTRATION of
EXEC 1 TRAVEL CORP. O/A GOLIGER'S TRAVELPLUS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 18, 2003

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

EXEC 1 TRAVEL CORP. O/A GOLIGER'S TRAVELPLUS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Exec 1 Travel Corp. o/a Goliger's Travelplus, 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

RELEASED: February 4, 2004

SCHEDULE 'A'

BETWEEN:

EXEC 1 TRAVEL CORP O/A GOLIGER'S TRAVELPLUS

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. Exec 1 Travel Corp o/a Goliger's Travelplus (the Registrant) was registered as a travel agent (Registration No. 3252675/R) on June 21, 1990.
2. On October 27, 1999, the Registrant was issued a Proposal to Revoke its registration for not filing its Form 1 for the period ended June 30, 1999.
3. On November 22, 1999, the Registrant's registration was revoked for not exercising its right to an appeal of the Proposal to Revoke registration dated October 27, 1999.
4. On November 25, 1999, the Registrant's registration was reinstated with specific Terms and Conditions that included an undertaking to file Form 1 within the prescribed time frames.
5. On November 30, 1999, the Registrant filed its Form 1 for the period ended June 30, 1999, which was due by August 15, 1999.
6. By letter dated November 21, 2002, the Registrant was requested by TICO to file its financial statements for the fiscal year ending December 31, 2002 by March 31, 2003.
7. By letter dated April 3, 2003, the Registrant was issued a reminder letter by TICO to file its December 31, 2002 financial statements, which were due by March 31, 2003, on or before April 21, 2003.
8. By letter dated April 22, 2003, the Registrant was issued a final due date by the Registrar, of April 30, 2003 to file its financial statements for the fiscal year ended December 31, 2002 which were due March 31, 2003, failing which a Proposal to Revoke registration would be issued,
9. On April 22, 2003, the Registrant filed its December 2002 financial statements. The financial statements reflected a working capital shortfall of \$9,097, based on reported sales of \$4,680,925.
10. By letter dated May 6, 2003, the Registrant was advised by TICO of the working capital shortfall of \$9,097 as of December 31, 2002, and given a due date of May 21, 2003 to provide evidence of correction.
11. By fax dated May 20, 2003, the Registrant provided evidence of an injection for \$9,907, which took place on May 15, 2003, identified as a shareholder advance. As at May 15, 2003, it appeared that the

Registrant met working capital requirements.

12. On September 11, 2003, TICO conducted a site inspection of the Registrant to ensure that working capital injection of \$9,907 on May 15, 2003 remained in the company. The Inspector found that the May 15, 2003 shareholder injection was deducted from the bank account as a returned item on May 20, 2003.
13. By letter dated October 15, 2003, the Registrant was notified by the Registrar that the inspection visit on September 11, 2003 revealed that the \$9,907 injection was a returned item by the bank, and was given to October 24, 2003 to replace the funds.
14. On November 18, 2003, the Registrar issued a Proposal to Revoke the Registrant's registration for failure to address the working capital deficiency.
15. On November 24, 2003, the Registrant faxed evidence to TICO of a \$10,000 correction of the working capital shortfall as of December 31, 2002.
16. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

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

1. The Registrar refrain from carrying out the Proposal to Revoke Registration dated November 18, 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 December 31, 2003 no later than April 30, 2004.
 - (b) If the above-noted financial statements as filed are incomplete or reflect a working capital deficiency, 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.
 - (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 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 any condition listed in paragraphs (2) (a), (b), (c) or (d), the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via courier 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 January, 2004

Mr. Gary McLeod
Exec 1 Travel Corp o/a Goliger's Travelplus
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

TRANSWORLD TRAVEL & TOURS INC.

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.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

AMENDED 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 an Amended 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 amended 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, 2004

SCHEDULE "A"



PRE-HEARING

1525011 ONTARIO LTD. o/a ASTOR TRAVEL SERVICES

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: SALMA BHATTI, Agent, appearing on behalf of 1525011 Ontario
Ltd. o/a Astor Travel Services (the "Applicant")

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: June 18, 2004

Toronto

ORDER

Following attendances on June 18, 2004, at a pre-hearing before this Tribunal of Salma Bhatti who appeared as Agent for 1525011 Ontario Ltd. o/a Astor Travel Services (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, July 29, 2004 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 Applicant agreed and undertook to file with the Registrar by no later than July 15, 2004 financial statements relative to the Applicant accompanied by a "Review Engagement" signed by a Licensed Public Accountant for the fiscal period ending December 31, 2003. The financial statements shall fully comply with the requirements of section 24 of Ontario Regulation 806/93.
3. The Applicant further agreed and undertook to file with the Registrar by no later than December 31, 2004 and December 31, 2005 financial statements relative to the Applicant together with a "Review Engagement" signed by a Licensed Public Accountant for the fiscal periods ending December 31, 2004 and December 31, 2005 respectively.
4. Subject to the Applicant complying fully and in a timely fashion with what is stated in paragraph two above the Registrar will consent to the withdrawal of the proposal dated April 1, 2004 and the matter will then not proceed to hearing on July 29, 2004.
5. Should the Applicant fail to fully and in a timely manner comply with the requirements of paragraph two above the hearing will proceed on July 29, 2004, and the Applicant shall fully comply with the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice, a copy of which the Applicant's Agent acknowledged having received from the Tribunal.
6. In addition to what is contained in paragraph five above the Applicant shall not less than ten (10) days prior to the hearing serve on the Registrar and file with the Tribunal a Book of Documents upon which the Applicant intends to rely at the hearing.
7. The Tribunal records that the Registrar has served upon the Applicant and filed with the Tribunal a Book of Documents upon which the Registrar intends to rely if the matter proceeds to a hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: June 24, 2004

FILE NAME: 2337.tia.Astor Travel Services.pre.order.doc



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

MAGDALENA LUQUEZ o/a INTI TOURS TRAVEL AGENCY

IN THE MATTER of the REGISTRATION of
MAGDALENA LUQUEZ o/a INTI TOURS TRAVEL AGENCY
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 7, 2003

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

MAGDALENA LUQUEZ o/a INTI TOURS TRAVEL AGENCY

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

AMENDED CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Magdalena Luquez o/a Inti Tours Travel Agency, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of an Amended 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 amended 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 6, 2004

SCHEDULE "A"

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

LARRY R. STANLEY AND FLOYD W. STANLEY
O/A PARADISE TRAVEL

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: TERENCE WARDROP, Q.C., Vice-Chair

APPEARANCES: LARRY R. STANLEY, Applicant, unrepresented
(the "Applicant")

MARIA L. ABATE, Counsel, representing the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: June 18, 2004 *by teleconference*

ORDER

WHEREAS pursuant to the *Travel Industry Act*, R.S.O. 1990, Chapter T.19, Larry R. Stanley and Floyd W. Stanley o/a Paradise Travel (the "Applicant"), appealed to the Licence Appeal Tribunal (the "Tribunal") a Notice of Proposal by the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar") dated April 1, 2004, to revoke the registration of the Applicant;

AND WHEREAS the Applicant filed a Notice of Appeal form dated April 19, 2004, received by the Tribunal on April 20, 2004, requesting a hearing;

AND WHEREAS the Tribunal scheduled a pre-hearing of this matter *by teleconference* to commence at 2:30 p.m. on June 18, 2004;

AND WHEREAS during the pre-hearing the Parties agreed to settle the matter on a Consent Order with terms and conditions;

NOW THEREFORE, this Tribunal Orders that:

- (1) the proceedings in this matter are hereby settled in accordance with the terms and conditions outlined in the attached Schedule "A";
- (2) the scheduled hearing for July 22, 2004 in Toronto is cancelled and this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Q.C.
Vice-Chair

RELEASED: July 21, 2004

FILE NAME: 2336.tia.Paradise Travel.pre.order.doc

SCHEDULE "A"

BETWEEN:

LARRY R. STANLEY AND FLOYD W. STANLEY
O/A PARADISE 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. Larry R. Stanley and Floyd W. Stanley o/a Paradise Travel (*hereinafter* referred to as the "Registrant") were registered as travel agents (Registration no. 2018021/R) on September 15, 1982.
2. The Registrant has a fiscal year-end of October 31 of each year.
3. On May 26, 2000, the Registrar, *Travel Industry Act*, issued a Notice of Proposal to Revoke the Registration of the Registrant for its failure to file financial statements for the fiscal year-end of October 31, 1999. However, the financial statements for the fiscal year-end of October 31, 1999 were subsequently provided and the Proposal to Revoke Registration was subsequently withdrawn on July 26, 2000.
4. By letter dated September 19, 2003, the Travel Industry Council of Ontario (*hereinafter* referred to as "TICO") reminded the Registrant that their financial statements for the fiscal year-ending October 31, 2003 were due for submission on or before January 31, 2004.
5. By facsimile dated February 2, 2004, TICO received a letter from the Registrant's accountant, FBC Inc. requesting an extension for the submission of financial statements of the Registrant for the fiscal year-ending October 31, 2003. The facsimile stated that the financial statements would be forwarded to TICO no later than February 25, 2004.
6. By letter dated February 3, 2004, TICO reminded the Registrant a second time that their financial statements had not yet been filed for the fiscal year-ending October 31, 2003 and provided a deadline of February 18, 2004 for submission of the required statements.
7. By letter dated February 23, 2004 the Registrar sent a third reminder to the Registrant outlining their obligations to file financial statements for the fiscal year-ending October 31, 2003. This letter provided a final deadline of March 1, 2004 for submission of the financial statements.

8. On March 8, 2004, TICO telephoned the registrant to inquire about the status of the financial statements for the fiscal year-ending October 31, 2003. At this time, the Registrant informed TICO that that they would contact their accountant and, in turn, have their accountant contact TICO with a submission date.
9. On March 16, 2004, TICO contacted the Registrant by email to inform them that it had not yet heard from their accountant and were still in need of the financial statements for the fiscal year-ending October 31, 2003. TICO did not receive a response to its email.
10. On April 1, 2004, the Registrar issued a Notice of Proposal to Revoke the Registration of the Registrant for failure to file its financial statements for the year-ending October 31, 2003. This was the second Proposal to Revoke Registration for failure to file financial statements issued against the record of the Registrant.
11. On April 20, 2004, the Registrant appealed the Proposal to Revoke Registration to the Licence Appeal Tribunal and a pre-hearing by teleconference was set for **July 18, 2004** at 2:30 P.M.
12. By facsimile dated April 22, 2004, TICO received the financial statements for the year-ending October 31, 2003 from FBC Inc.
13. 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 Section 6(4) and Section 6(5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 1, 2004.
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 any such subsequent provision as may be in force from time to time for its fiscal year-ending October 31, 2004, no later than January 31, 2005; and
 - (b) the Registrant shall file financial statements as required by Section 24 of the Regulation or any such subsequent provision as may be in force from time to time for its fiscal year-ending October 31, 2005, no later than January 31, **2005**.
 - (c) If either of 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 provide 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 any condition listed in paragraphs 2 (a), (b) or (c), 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. The failure of the Registrant to exercise their right to obtain independent legal advice with respect to this agreement shall not affect its validity or enforcement at any time hereafter.

Larry R. Stanley
I have the authority to bind the company

Dated this day in Kincardine, Ontario

Michael Pepper
Registrar, *Travel Industry Act*

Dated this day in Mississauga, Ontario

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

1525011 ONTARIO LTD. o/a ASTOR TRAVEL SERVICES

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: SALMA BHATTI, Agent, appearing on behalf of 1525011 Ontario
Ltd. o/a Astor Travel Services (the "Applicant")

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: June 18, 2004 Toronto

AMENDED ORDER

Following attendances on June 18, 2004, at a pre-hearing before this Tribunal of Salma Bhatti who appeared as Agent for 1525011 Ontario Ltd. o/a Astor Travel Services (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act* (the "Respondent" or the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, July 29, 2004 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 Applicant agreed and undertook to file with the Registrar by no later than July 15, 2004 financial statements relative to the Applicant accompanied by a "Review Engagement" signed by a Licensed Public Accountant for the fiscal period ending December 31, 2003. The financial statements shall fully comply with the requirements of section 24 of Ontario Regulation 806/93.
3. The Applicant further agreed and undertook to file with the Registrar by no later than March 31, 2005 and March 31, 2006 financial statements relative to the Applicant together with a "Review Engagement" signed by a Licensed Public Accountant for the fiscal periods ending December 31, 2004 and December 31, 2005 respectively.
4. Subject to the Applicant complying fully and in a timely fashion with what is stated in paragraph two above the Registrar will consent to the withdrawal of the proposal dated April 1, 2004 and the matter will then not proceed to hearing on July 29, 2004.
5. Should the Applicant fail to fully and in a timely manner comply with the requirements of paragraph two above the hearing will proceed on July 29, 2004, and the Applicant shall fully comply with the applicable requirements of Disclosure as set forth in terms of Rule 6 of the Tribunal's Rules of Practice, a copy of which the Applicant's Agent acknowledged having received from the Tribunal.
6. In addition to what is contained in paragraph five above the Applicant shall not less than ten (10) days prior to the hearing serve on the Registrar and file with the Tribunal a Book of Documents upon which the Applicant intends to rely at the hearing.
7. The Tribunal records that the Registrar has served upon the Applicant and filed with the Tribunal a Book of Documents upon which the Registrar intends to rely if the matter proceeds to a hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: July 8, 2004

FILE NAME: 2337.tia.Astor Travel Services.pre.order.doc



Pursuant to Sections 6(1) and 7 of the *Travel Industry Act*, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a Notice of Proposal dated May 21st, 2004, (the

“Proposal”) was issued by the Registrar under the Act (the “Registrar”) to revoke the registration of **950976 Ontario Ltd., carrying on business under the firm name and style as “Derek Canadian Travels”**, (the “Appellant”) as a travel retailer and wholesaler (Registrations Numbers 4066080 and 50007110) agent.

The Appellant by a Notice of Appeal dated May 28, 2004 (the “Appeal”), and filed at the offices of the Licence Appeal Tribunal (the “Tribunal”) on May 28, 2004, requires a hearing by the Tribunal in respect of the Proposal.

Participation in the Pre-hearing Conference was set down for a conference on August 6, 2004, in accordance with the Rules of Practice of the Tribunal. At the Pre-hearing Conference, both the Registrar and the Appellant were represented and in addition, Vvry Kandiah, a financial advisor to the Appellant, was also present and participated.

DECISION:

It became apparent at the Pre-hearing Conference that the issues involved in the Proposal and the Appeal were simple and straight forward and would involve a determination of the law under the Act respecting the responsibility of a registrant to control and manage employees and sub-agents operating under the name and authority of the registration of the Appellant, as referred to in paragraphs 9 and 10 of Section D “Particulars” of the Proposal on page 10 thereof, and as referred to in sections 2 and 3 of the attachment to the Appeal. The Parties at the Pre-hearing Conference generally conceded that there was little dispute concerning the known facts involved in the issues of this case and each undertook prior to the hearing to review (and mutually confer respecting) the **Document Brief** prepared by the Travel Industry Council of Ontario (“TICO”) and filed at the Pre-hearing Conference, but not marked as an exhibit thereto, in order to reach an agreement as to the facts relevant to the issues above set forth.

It was also clear at the Pre-hearing Conference that this issue was subordinate to the main issue of the Appellant’s ability or fitness to comply with the regulatory requirements of the Act as determined by the Registrar. It is and was not sufficient for the Appellant to attempt to explain away the enumerated items in the Proposal, but rather to ensure that such did not occur in the first place.

ORDER:

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

1. The hearing shall take place at the Tribunal’s Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Tuesday, September 14th, 2004 at 9:30 a.m.;

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

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Q.C.,
Vice-Chair

Jane Weary, Vice-Chair

RELEASED: September 2, 2004

FILE NAME: 2396.Derek Canadian Travels.pre.order.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

1355173 ONTARIO LTD. O/A ONKAR TRAVELS

APPEAL FROM A DECISION OF THE BOARD OF THE
TRAVEL INDUSTRY COUNCIL OF ONTARIO UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW CLAIMS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ANIL GHAI, Agent, representing 1355173 Ontario Ltd. o/a Onkar
Travels

MARIA L. ABATE, Counsel, representing the Travel Industry
Council of Ontario

DATE OF
PRE-HEARING: September 10, 2004

Toronto

ORDER

Following attendances on September 10, 2004 at a pre-hearing before this Tribunal of Anil Ghai, Agent on behalf of 1355173 Ontario Ltd. o/a Onkar Travels (the "Applicant") and Maria L. Abate, Counsel, on behalf of the Travel Industry Council of Ontario (the "Council") under the *Travel Industry Act*;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, October 14, 2004 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 Parties recorded that there is no resolution of the issue or issues in this matter.

- 3) By consent of the Applicant's Agent and the Council's Counsel, the hearing of the Applicant's appeal shall incorporate and deal with claim #103458 for \$5,361.00 and claim #103457 for \$1,229.00. The aforesaid claims which were appealed under separate Notices of Appeal shall accordingly be combined and joined in the hearing to be held on October 14, 2004.
- 4) The sole issue for determination by the Tribunal at the hearing shall be whether the Applicant's claims meets the requirements of section 53 of Regulation 806/93 amended by O. Reg. 428/01 under the *Travel Industry Act*.
- 5) The Applicant's Agent and the Council's Counsel shall fully comply with all applicable requirements of disclosure as set forth in Rule 6 of the Tribunal's Rules of Practice and shall in particular not less than ten (10) days prior to the hearing serve on the other Party and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 15, 2004

FILE NAME: 2447-2448.ticf.Onkar Travels.prehrg.order.doc



PRE-HEARING

IN THE MATTER OF THE TRAVEL INDUSTRY ACT, Revised
Statutes of Ontario, 1990, Chapter T.19

AND IN THE MATTER OF the Decision by the Board of the
TRAVEL INDUSTRY COUNCIL OF ONTARIO dated June 16,
2004, to disallow a claim by **RAM PARKASH SHARMA**

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

APPEARANCES: RAM PARKASH SHARMA, (the "Appellant")

MARIA ABATE, Counsel, for the Travel Industry Council of Ontario,
(the "Respondent")

DATE OF
PRE-HEARING: September 15, 2004, at Toronto.

REASONS FOR DECISION AND ORDER

BACKGROUND

WHEREAS the Appellant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal the Decision of the Board of the Travel Industry Council of Ontario dated June 16, 2004, (the "Decision") respecting the Appellant's claim against **Globe Travels Inc.**, received by the Respondent on March 22, 2004, which hearing was scheduled to take place at the Tribunal's Chambers in Toronto on Monday, November 29, 2004;

AND WHEREAS the Parties requested the Tribunal to conduct a Pre-hearing Conference which was completed on September 15, 2004, and at the conclusion of which Pre-hearing Conference the Appellant withdrew his claim and his request for a hearing;

NOW THEREFORE this Tribunal **ORDERS** that these proceedings are concluded before the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Q.C.,
Vice-Chair

RELEASED: September 15, 2004

FILE NAME Ram Parkash Sharma .pre.order.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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