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OMEGA HOUSE INC.

MOTION FOR AN ORDER REQUIRING THE CHILDREN'S AID
SOCIETY OF TORONTO TO PRODUCE RECORDS RELATING TO
CHILDREN IN THE CARE OF THE SOCIETY, UNDER SECTION 198
OF THE *CHILD AND FAMILY SERVICES ACT*

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

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

No one appeared on behalf of the Applicant

DATE OF
HEARING: March 2, 2006

Toronto

ORDER

Following attendance on March 2, 2006, at a hearing of a motion before this Tribunal of Katharine Renison, Counsel, representing the Director, under the *Child and Family Services Act* (the "Respondent"). No one appeared on behalf of Omega House Inc. (the "Applicant") as confirmed by Counsel representing the Applicant in a letter dated January 11, 2006 to the counsel representing the Respondent.

Where Counsel for the Applicant also confirmed, in the same letter, that his client will not oppose the motion, the Tribunal makes the following Order:

1. The Hastings Children's Aid Society is required to produce records relating to children in the care of the Society who resided at Omega House children's residence between June 12, 2001 and January 10, 2006.
2. 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 expert witnesses.
3. Nothing in this Order is to be construed to prevent reference in the Orders of the Tribunal to the existence of Children's Aid records or to the Tribunal's review of

records produced by the Children's Aid Society, but any such reference shall protect the privacy of children in care by the use of non-identifying information.

At the end of the hearing of this matter, or of any appeal, the Tribunal shall retain one copy of the records and Counsels shall share all others in their possession.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: March 9, 2006

File: 3334.cfsa.omega.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.

This decision will also be available on Quicklaw at a later date.

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EVAMOORE RESIDENTIAL SERVICES

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: CARL F. DOMBEK, Chair, presiding
JANE WEARY, Vice-Chair
DONALD BENNINGER, Member

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

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

DATES OF
HEARING: December 15 & 16, 2004; January 19, 2005;
February 1 & 2, 2005; April 5 & 6, 2005
and September 26, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

On October 18th, 2002 the Applicant was granted a licence under the *Child and Family Services Act* (the "Act") to operate a children's residence named Evamoore Residential Services ("Evamoore"). Located in Markham, Ontario, Evamoore was licensed to accommodate a maximum of six adolescent girls.

Initially, Evamoore received a standard six-month provisional licence valid to April 21, 2003. After a site investigation by the Ministry of Children and Youth Services (the "Ministry") staff, Evamoore was given a three-month conditional licence, which expired August 21, 2003. On November 17, 2003 a third conditional licence was granted expiring May 10, 2004. Since December 2004 there have been no children in the Residence. On the 16th day of July, 2004 the Director under the Act issued a Notice of Intention to refuse the renewal of Evamoore's licence. The Applicant filed a Notice of Appeal with the Tribunal.

The Hearing commenced in December 2004. It took eight days and involved twenty-two volumes of evidence (indexed as Tab 1 to Tab 318) filed by the Director. Ten witnesses were called to testify for the Director. The Applicant testified on her own behalf.

ISSUES:

Lengthy documentary evidence was presented in support of 31 pages of alleged contraventions contained in the Notice of Intention. However, the essential issues articulated by the Tribunal were as follows:

1. allegations of inadequate documentation;
2. concerns of insufficient Plans of Care;
3. allegations concerning management of the residents (health and safety);
4. inadequately trained staff managing the home; and
5. issues raised by Children's Aid Societies that placed children in the home.

EVIDENCE:

Mr. James McNamara, Director under the Act from 2001 through 2004, held authority for the licensing of homes such as Evamoore. He testified that, during the period in question, he was responsible for the review of approximately 145 licensed group and foster homes.

The Director advised that the most critical licensing requirements for operators concern the health, safety and security of the children in care. Those responsible for the children's wellbeing include: the local Children's Aid Societies (CAS), which place the children in a residence; the Ministry, responsible for the regulation of the residence; and the residence itself. Consequently, the reliability of (a) the residence's daily logs, (b) the care plans shared between the residence and the CAS responsible for any given child, and (c) the reporting records from the residence to the Ministry, are fundamental to ensure appropriate and necessary communication between these parties. It was the Director's position that much of this documentation from Evamoore was in fact unreliable as it was frequently inaccurate, such that it posed a significant risk to the children.

The Director's other prime concern with Evamoore was behaviour management of the children. This included issues such as inappropriate use of allowance, inadequate staffing and inappropriate interactions between staff and children.

Mr. McNamara described the normal process of licensing a group home such as Evamoore. Generally, a provisional licence is first granted a new Operator for six months in order to provide the operator time to come into compliance. In the case of Evamoore, however, the six-month Ministry review revealed numerous operational concerns, such that it was limited to a three-month renewal licence. This was abnormal, but the issues flagged by Ministry staff concerning Evamoore's operation and the related inadequacies in its documentation were significant. At the end of the three months another provisional licence was determined necessary. While this licence was granted for six months, numerous terms and conditions were attached arising out of specific concerns on the Residence's continuing non-compliance with Ministry standards.

Mr. McNamara testified that it was the policy of his department to provide Operators numerous opportunities to come into compliance because of the reality that many are highly committed to the children but, perhaps, unfamiliar with the strict regulatory requirements and operational standards required in running a group home. Both are, however, essential to the proper running of the facility.

Thus, although it is highly unusual for the Director to meet with a licensee, in January 2004 he agreed to meet with Ms Eva Eboh in order to satisfy himself that she understood the seriousness of the Ministry's on-going concerns.

Nevertheless, Ms Eboh's Residence remained a concern. Thus, shortly after the expiration of this third and final licence in May 2004, he issued the Notice of Intention. Mr. McNamara stated he knew of only two other instances where such Notices have been issued in his three years as Director, one of which was Reista's Place, a similar-model residence for which Ms Eboh had been largely responsible for preparing the background documentation on which the Ministry had relied in granting its licence in 2000.

The Director testified that his decision to issue the Notice was based on three main concerns: consistent non-compliance by the licensee; her apparent inability to take responsibility for non-compliance concerns; and her seeming inability to maintain adequate staffing. But what finally tipped the scale for the Director was Ms Eboh's unprofessional demeanour in her meeting with him in January 2004 when she became angry, verbally aggressive and accusatory.

He concluded that Ms Eboh is unable or unwilling to come into legislative compliance. He is also concerned with the results of York Region's Children's Aid Society (CAS) investigation into Evamoore of December 2003, which concluded that inappropriate discipline had been used by Ms Eboh in the home. Acknowledging that no charges were ever laid against Ms Eboh by York CAS, he testified that her attitude and approach during his meeting with her in January verified for him her propensity to act unprofessionally and inappropriately in situations of stress, situations that occur with some frequency when managing a group home.

Mr. McNamara stated he has no role in, or authority over, choices made by individual CAS agencies as to which operators they chose to contract for services.

1. Inadequate Documentation

General

The Director testified that the critical component in the regulation of licensed operators who, like Evamoore, use a “staff model” residence, is accurate knowledge transfer to all levels of care: from Plans of Care that placing CAS, residence staff, parents and children use to monitor the child’s needs and progress; to daily Logs, by which all staff shift workers are made aware of events and issues in the home and with the child; to Occurrence Reports, whereby the Ministry is appraised of any serious development or allegation of risk regarding any individual involved. All of these records are specifically legislated in the Regulations, which set out the minimum compliance standards required.

The Ministry Program Advisor’s role is to determine whether these minimum standards are being met and to report to the Director on recommendations for licensing as a result. The Ministry Program Advisor responsible for numerous facilities in the region, including that of Evamoore, was Ms Debby Van Noort. She testified as to the unusually extensive assistance she had provided Ms Eboh in preparing for her initial licence application to the Ministry. Ms Eboh, in her testimony, acknowledged she had over 50 discussions with Ministry staff in this preparation. However, she denied this was an unusually large number.

Licence application material requiring Ministry approval includes Program information upon which Children’s Aid Societies rely to determine which residence is best suited for which child. It also determines the per diem rate the Ministry pays a licensee for each child placed in the residential service. The evidence was that Ms Eboh received a \$207.00 per diem rate per child for her Residence, making for a total operational capacity of \$1,242.00 per day. This was a sum slightly smaller than she had requested but was in keeping with facilities seemingly providing similar professional programming and services for high-needs adolescents.

Ms Van Noort’s first site inspection visit of Evamoore occurred in April 2003. Ms Van Noort testified she concluded the Residence was “chaotic”. She stated she felt “overwhelmed” by her observations of non-compliance. Aware of communication problems between herself and the Applicant, she returned toward month’s end with another staff person, Ms Silvia Basedau. Their consequent Report (Volume 1, Tab 17) highlighted their finding of an “unusually high number” of operational violations. All were discussed with Ms Eboh, as evidenced by the Applicant’s signature on the Reports. Such infractions included:

- Agreements of Service between a child and the licensee, required on the child's admission to the facility, were not in all instances signed and in one case two different dates of admission were recorded;
- The only closed file had no documentation regarding the discharge/transfer of the child for follow-up;
- In all five children's files, Plans of Care were not completed at regular intervals nor did they indicate whether the children themselves were involved in their development;
- Not one of twenty-nine Absent Without Leave (AWOL) reports were later filed with the Ministry as Serious Incidents;
- Neither of two medical emergencies were so reported to the Ministry;
- An incident of alleged staff abuse was not reported as a Serious Occurrence;
- An allegation of resident-to-resident sexual abuse was not reported to the CAS or the Ministry;
- None of the children's files contained plans for recreational/athletic activity.

As a result of the contraventions, Ms Eboh was granted a second short-term licence, expiring August 21, 2003 (Tab 19). Ms Van Noort corroborated the earlier testimony of the Director that a limited second licence was abnormal, but was determined necessary in these circumstances.

A second site inspection took place on September 8th, 2003. Ms Van Noort testified she was "frightened" at the repetitive nature of many of the contraventions then apparent (Tab 22). For example, each child's Program Plan consisted of a calendar of weekly activities as opposed to a verified daily record of each child's participation in individualized recreational and counselling programs. This particular non-compliance was repeated at each inspection, whereupon the expectation was explained to Ms Eboh. Yet each time the Applicant responded to the concern by sending to the Ministry copies of the same inadequate program calendar.

Also, Evamoore documentation continued to illustrate inadequacies in Plans of Care. For example, the 90 day Plan of Care on file for Resident #6 failed to reference that she had three school suspensions, numerous AWOLs and a charge of property damage during the relevant period. Moreover, there was no indication as to why a parent did not attend the Plan of Care meeting, despite Ms Van Noort having reminded Ms Eboh back in April of the requirement that such be included. Finally, the goals as identified were unrelated to the identified need, meaningless, nor followed-up (Tab 24).

The Register of the Residence was still found to be incomplete with omissions as to resident's wardship status, name of individual placing child, and name of agency/individual to who the child is discharged. When asked, Ms Eboh explained that she could not fit all this information on the sheet (Tabs 22, 56). As with the "goals" above, this response by the Applicant led the witness to conclude that Ms Eboh simply did not comprehend the meaning and importance of such documentation.

The Residence's Daily Log appeared incomplete and inconsistent (Tab 22). The Communications Log, as well as individual children's files, continued to indicate contradictory and erratic consequences were being employed by the Residence for perceived improper behaviours. (Tab 22).

While a third provisional licence was nonetheless issued on November 17, 2003, it was subject to conditions aimed at correction of the above contraventions. These included the requirement that Plans of Care include procedures for determining and achieving children's articulated goals and attendance as well as again demanding submission by Ms Eboh of a clear description of the Residence's monthly programs (Tab 25).

Ms Van Noort advised she received a phone call from York Children's Aid on December 8th, 2003 advising the Ministry it was commencing an investigation into Evamoore based on a resident's complaint of drugs/alcohol, and a physical altercation with staff. All children were removed by the CAS the following day. One week later Ms Van Noort returned with York CAS and Simcoe CAS to further investigate. On January 19th, 2004 the meeting Ms Eboh requested with the Director took place.

In her response to the allegations concerning misleading, inaccurate or inadequate documentation, Ms Eboh testified that she had made efforts to improve upon the format of her Plans of Care documentation after the initial licence visit by Ms Van Noort. She noted, however, that she had never received complaints from any CAS worker regarding her Plans of Care, including the Plans' goals and attendees at meetings. She felt that she was left to work alone on improvements and, while acknowledging improvements were still required as a term and condition of her last licence in November, 2003, she had not believed there to be any problem until she received the Notice of Intention. She stated that, in many cases, perceived contradictions in Evamoore's records were simply staff recording errors.

Serious Occurrence Reports:

Ms Van Noort testified this was one of the Ministry's main areas of concern as it is through the submission of these reports by a group home that the regulatory authority is able to stay informed and act with timeliness if needed to intervene. It was the Director's position that the on-going absence of this requisite documentation resulted in Ms Eboh providing a service that could not be adequately monitored by the regulator.

Ms Van Noort testified she had expressly noted deficiencies with Evamoore's use of these essential reports in her original April meeting with Ms Eboh. Evamoore had failed to file any Serious Occurrence Reports despite there having been 29 Absent Without Leave (AWOL) occurrences in the Residence; 2 medical emergencies; 41 police contacts; 1 alleged staff abuse; and, one alleged sexual abuse, resident to resident. At this time both the legislative and policy requirements were explained to the Operator. Despite this, Ms Van Noort testified such contraventions in documentation continued when completing her licence review in September (Tab 56).

Such concerns were corroborated by CAS witness Lisa McGann of York Region. She confirmed that on seven separate occasions their placement Resident #6, residing at Evamoore from January through to October 2003, had been AWOL for over 24 hours, as had placement Resident #4, resident at Evamoore from January through June 2003, on three occasions. In no case had a Serious Occurrence Report been filed by Evamoore, although in a number of instances the matter had been communicated to the CAS by telephone from the Residence (Exhibit 7B).

In her evidence the Applicant testified that she knew, for example, allegations of staff or resident abuse must be reported to the pertinent CAS, which will then investigate the matter. She testified that on one occasion Resident #4, whom she described as a constant AWOLer, leading to many missed appointments, had simply left the Residence without permission. This, she argued, was a discipline concern rather than an AWOL requiring some form of reporting. As a discipline matter it was further her opinion that it need not be recorded in the daily shift log. However, Ms Eboh did acknowledge that, if it was an AWOL, it should be recorded so as to ensure all staff are made aware of who is and is not present in the Residence for safety concerns. She testified that generally it would be recorded on one document but perhaps not all. She stated that errors were made by staff from time-to-time.

Testimony was presented by Ms Van Noort detailing the December incidents that triggered the CAS's decision to remove the children from the Residence. Not one resulted in the filing of a Serious Incident Report with the Ministry. In each case conflicting documentation appears in the various logs and files kept by the Residence. In each case staff on duty contacted Ms Eboh before proceeding with any action. In each case no follow-up is noted. Each case provides troubling insight into the management of the home.

1. December 1, 2003: involving Residents #1 and #2 jumping out of a vehicle being driven by staff;
2. December 2, 2003: involving Resident #1 removing unused needles and medication from a physician's office and bringing them into the home
3. December 4, 2003: involving the allegation that Ms Eboh used force to physically remove Resident #3 from the office;
4. December 5, 2003: incident involving Resident #1 being hospitalized after placing a razor in her mouth.

As concerns December 1, an internal incident report leaves blank the sections on precipitating factors as well as follow-up. There is nothing in Resident #2's file concerning the incident. A handwritten note dated December 2 and signed by both the Resident and Ms Eboh states the Resident admits she was not slapped by staff and that Ms Eboh promises not to tell police the Resident has violated a court order, and that she will dismiss the staff member. The Resident's Daily Log for Resident #1 states: "<name of Resident #1 deleted> had a wonderful day adjusting very well to Evamoore

and well behaved. Following the staff's direction (sic)." Nonetheless, Daily Shift Logs maintained by Evamoore reference both the December 1 and December 2 incidents (Tab 280).

In her testimony Ms Eboh claimed that her review of the incident with staff and residents led her to conclude that no assault had occurred. She was of the opinion that staff had grabbed the child's wrist to prevent the child from leaving the vehicle. Thus, the Applicant concluded, contact was in the form of a safety restraint rather than any abuse and consequently no obligation to report the incident was triggered. Further, she had taken the child to Emergency to verify no harm had been done to her person. Ms Eboh acknowledged that she did not have a physical restraint policy in place because she did not use this as a form of discipline. She testified, however, that the incident with the child's wrist was not restraint but "moving a child who is out of control" – the same rationale is used by Ms Eboh in justifying her actions in removing Resident #3 from the office the night of December 4th (see below).

The second incident is disclosed on Resident #1's Daily Log as follows: "<name of Resident #1 deleted> had a dentist appointment. A staff (unknown) did a complete room search and found three clinic needles in her room." There is no internal incident report. The House Daily Log references Resident #1 is "consequenced Level dropped". There appears no reference in Resident #4's Daily Log or the House Daily Log to the fact that Resident #4 refused to steal the needles when asked by Resident #1 to do so, or to the fact that it was Resident #4 who advised staff of the incident.

Eva Eboh testified this incident was not viewed by her as requiring an incident report, as no one was harmed. The needles were removed from the child immediately, when staff knew they were in her possession, and the occurrence was a "normal" one for a high needs child such as Resident #1. She testified that she had advised the child's CAS worker that the doctor had decided not to lay charges against Resident #1 and she was therefore not treating the incident as a serious occurrence. Ms Eboh further stated Resident #1 later entered her office and grabbed the needle, which Ms Eboh was able to take back although she then had to call the hospital crisis unit because Resident #1 was "out of control."

The third incident involved two Residents arguing at 2:45 a.m.; loudly enough to wake up the others. Staff on duty, Staff #1, contacted Ms Eboh saying that she required assistance. On arrival, Ms Eboh entered the office. Resident #3 followed. Ms Eboh asked Resident #3 to leave and then allegedly physically pushed her out. Police were called. In Resident #3's file it is noted for that date: "Went to bed at 11:30 and slept through the night with no issues." (Tab 44) In the House Night Log there is no description of events, merely the words "Hard Shift". There is no reference to the incident on any of the four other Residents' files. An internal incident report was completed by Ms Eboh with follow-up noted: "Writer spoke with <name of Resident #3 deleted> about her behaviour and how she integrate others into a obstructive behaviour (sic)". (Tab 42) An incident report completed by Staff #1 notes under follow-up: "Police spoke to <name of Resident #3 deleted> for a while and later went to bed."

Significant testimony was heard concerning this incident. It became the central element in the York CAS December 2003 investigation into the Residence. York CAS concluded that the alleged push had taken place. Ms Eboh testified that it had not; rather, she had simply removed a telephone from Resident #3. Nonetheless, Resident #3 succeeded in calling the police who came to the Residence. Ms Eboh concluded that Resident #3 needed to be removed from the Residence, as she was becoming a “safety issue”. On requesting this removal by Simcoe CAS at 3:45 a.m., she was reminded of the 7-day notice period required for such removal in her Agreement with Simcoe CAS. On December 9th Resident #3 and Resident #5 were both removed by Simcoe CAS.

The final incident with Resident #1 is not referenced in Resident #1’s file notes, which only commence December 4th and are blank for December 5th. An internal incident report is completed by staff, Staff #2, at 4:26 pm. It advises Resident #1 had stolen a butter knife to remove a razor blade, which she needed to “cut herself”. In the description it is clear the police were called, and attended, and took Resident #1 to the hospital although the section on the form as to police involvement is left blank. Follow-up notes advise that Resident #1 was picked up from the hospital by staff and taken to a Narcotics Anonymous meeting. In the Residence’s Daily Log there is a notation that Resident #1 tried to cut herself and went to hospital and 911 was called. Resident #1 was again hospitalized on December 9th after tussling with Resident #3 and placing a needle in her mouth. On release from hospital the next day, Huron-Perth CAS arranged to have her removed from the Residence.

Ms Eboh testified that Resident #1 had demonstrated such severe problems such that Ms Eboh no longer wanted her in the Residence and had requested Huron-Perth CAS arrange for her removal. The Applicant testified that this culminating incident was the result of a stressful period for Resident #1; Ms Eboh had arranged for the child to reunite with her long-lost sister at a religious meeting the Applicant attended in her capacity as lay pastor. Sandra McNabb, Huron-Perth CAS worker, testified that the rendezvous had taken place without the knowledge and consent of the CAS and this was an issue for the Society who had communicated to Evamoore strict procedures concerning with whom the child should be free to associate while on placement there. Ms Eboh did not give any evidence why she determined this hospitalization incident did not trigger her obligation to file a Serious Occurrence Report.

On December 9th an internal incident report is filled out by a staff member, which notes Resident #1 has pushed her so hard that she hit her head and sustained some minor head injury. Ms Eboh is noted as being called; no one else is referenced. Again, no Serious Occurrence Report is noted. Ms Eboh also did not testify why this incident did not trigger her obligation to report to the Ministry.

Program Plans

The girls placed by CAS agencies at Evamoore required group home care. This type of facility is more controlled than a foster home, but less so than a detention centre. Ms

Spicker, Supervisor of Children's Placement for York Region, testified that children requiring this form of care are generally hard to place and have significant emotional and/or behavioural issues. Frances Charuk, Supervisor of Residential Services for Durham Region CAS, corroborated the hard-to-handle nature of children in group home settings. Evamoore was the only facility offering this type of residence in the Markham area and one of very few in the larger region, which is why York CAS was anxious to support Ms Eboh's application for registration in the fall of 2000 (Tab 187), and why CAS agencies from as far away as Simcoe, Oxford, and Huron-Perth chose to place girls in the home.

As a consequence of the severe needs of some of these children, a number require medication; others exhibit dysfunctional social behaviour, while still others act out against themselves or those in authority. Frequently, their placements into these residences occur in situations of urgency and trauma. Thus, the programs described by operators in their marketing and information literature must be accurate so placing CAS agencies can properly assess the suitability of a particular residence for a particular child.

In the case of Evamoore, finalized Program materials as approved by the Ministry, and upon which placing agencies relied, advised the facility provided:

... a safe, secure, nurturing environment where respect, positive reinforcement and personal growth is promoted. We strongly believe in personal involvement to truly assess the needs of each individual for effective programming. Programs such as: Life Skills, Anger Management, Recreational activities, Job Readiness and Self Esteem Workshop will be implemented on a weekly basis (Tab 190).

There was an explanation of the "treatment philosophy" of the Residence as being one of "formal family therapy" whereby family involvement in treatment would be undertaken whenever possible. Such would allow for the development of clear behavioural expectations predicated on "systematic assessment of the individual...(wherein) the resident's strengths and problems are identified within key areas of the child's life (Tab 190 p. 7). Also, part of the expressed framework included specialized clinical services such as behaviour therapy, communications therapy, sexuality and individual therapy (Tab 190.12).

Ms Spicker, Supervisor of Placement for York CAS, testified that a primary goal of the Society is to reunite families. As a result, other group homes regularly meet with families to discuss issues and concerns. It was her understanding from Evamoore Program materials that such involvement would be the norm. In fact, Ms Spicker testified, only one of York Region's children residing in the home, Resident #6, had frequent parental discussion with Evamoore, and this appeared more a response to personal involvement than any defined and/or structured program in place by Ms Eboh.

Program material also spoke of a "treatment classroom" provided by Evamoore within one of the local schools (Tab 190, p.8). Ms Spicker testified that the Society understood from the language employed that Evamoore supplied a specialized classroom for

residents in the home taught by trained Evamoore counsellors. Other group homes, which use this language, provide such services. She was, therefore, surprised to find that, in fact, what Evamoore actually provided was merely a school board program that Evamoore accessed by application to the board like any other community member and participation in the program was dependent on board approval only. In other words, there were no “Evamoore trained counsellors”.

Ms Van Noort also discovered on her first inspection of the group home in April 2003 that Evamoore failed to provide an in-house educational program to a resident suspended from attending the local public school contrary to its Operational Manual which stated:

On an on-going basis EvaMoore will provide an in-house educational program for residents who for any number of reasons are unable to attend school on a given day. This program is consistent with the educational curriculum devised by the regular classroom. (Tab 22)

As with other problems, this was flagged and discussed with Ms Eboh. Nonetheless, there was never any record that in-house educational programming was later offered to the residents despite numerous occasions of truancy, as determined from house logs.

A third area highlighted in Evamoore’s Program material appears on page 11 of Tab 190 and advises:

EvaMoore Residential Services is organized in three major service (sic): Program or Operational Service, Clinical Residential Services and Administrative Services. The three service clusters are led by Managers and Supervisors who work under the overall leadership of the Executive Director. The Executive Director is in charge of all operation (sic) of EvaMoore Residential Services and is accountable to a volunteer community-based Board of Governors.

All of this, Ms Spicker stated, led the Society to believe a number of qualified experts would be involved including therapists, psychologists and BSW graduates with specialized training, etc. This did not turn out to be the case.

Ms McGann, York CAS Placement Coordinator, noted that contrary to Evamoore’s material, there was never any indication the girls received any programming or counselling from the Home. At one point Ms Eboh advised Ms McGann she could not create a Residence lifeskills program due to the variations in areas of interest expressed by the girls.

Mr. McNamara testified that Evamoore’s Residential Programming materials suggested a quality far exceeding the activity sheets she repeatedly submitted when asked to provide evidence of her program plans for specific children in her care.

An employee of Durham Children’s Aid Society since 1974 and Supervisor of its Residential Services Team since 1991, Ms Frances Charuk, testified that two Durham Crown Wards, #1 and #2, placed with Evamoore in late November 2002, were both

removed within two days of placement. She corroborated the fundamental importance of a facility's Program materials to a CAS attempting to properly place a child in care. While, ideally, visits to the facility as well as word of mouth from other Children's Aid agencies can also play a role, in residences such as Evamoore, which specialize in hard-to-place girls, placement frequently takes place in urgent circumstances. In Durham's case, this had been the situation; the CAS had relied entirely on the Program materials of Evamoore.

Ms Charuk noted the written description provided by Evamoore of its service, including a reference to "Counseling Service" (Tab 312). She stated this usually implied individual counselling by a member of the residence's staff such that it would be reasonable to conclude staff had the appropriate qualifications. This was not the case with Evamoore. Moreover, Ms Charuk also stated Ms Eboh had verbally advised her there were both anger management and lifeskills training offered in the evenings to residents. As noted, the lifeskills program was not created and, in fact, the anger management counselling turned out to be another community resource accessed by the group home and not specific to Evamoore, nor run by staff trained under Ms Eboh's direction.

Dr. Ken Kwan of the Stouffville Markham Family Centre testified that in January 2003 Evamoore paid \$200.00 for four registrants to attend an 8-group session program on Teen Anger then being offered by the Centre. The cost included a three-group session for parents or caregivers. Dr. Kwan's testimony was that attendance was inconsistent from Evamoore children and that some of the children originally registered were exchanged for others part way through the program at the insistence of Evamoore's staff. He also testified that Evamoore advised at the outset that no staff would attend any of the parent sessions. Not one of the Evamoore residents completed the program; indeed the most sessions attended were four of the eight by Resident #5, Resident #6, and Resident #3.

The Applicant responded that community clinical services were accessed by her Residence because her initial per diem request to the Ministry was refused and she could not, therefore, afford to provide the clinical services her materials had envisioned. She testified that she herself had knowledge of clinical interventions and management, but, on review, admitted she had no childcare worker designation and no specialty for adolescent children. She had a certificate in pastoral counselling and a certificate in instruction for crisis prevention which, she believed, authorized her to train Evamoore staff in de-escalation interventions. Ms Eboh advised she could not understand why the Ministry and Societies questioned her absence of documentation for programming; she had provided Dr. Kwan's invoice and had also relied on her own, albeit unqualified, counselling.

In cross-examination, Ms Spicker noted that Resident #6, who had remained in the home for nine months and had serious issues with anger control such that at one point she was alleged to have caused some \$500.00 in property damage to Evamoore Residence, was only ever provided this incomplete and non-individualized counselling

in anger management. This despite her CAS worker articulating to Evamoore, on the child's admission, the child's need for anger management assistance.

2. Insufficient Plans of Care:

The Director testified that Plans of Care are the primary document whereby legal guardians, including the Operator, articulate with the CAS, the parent and the child the child's needs and goals and how these needs are best realized. Such Plans are mandated by legislation. Regulation 70 sets out their content in significant detail. It also mandates their on-going review at specified times.

Both Ms Van Noort and Mr. McNamara testified to unintelligible and inadequate Plans of Care which continued to be evident in the Residence despite numerous efforts by the Ministry to alert Ms Eboh to specific contraventions in their timeliness and content.

Lisa McGann, of York CAS, was responsible for two girls placed at Evamoore in early 2003: Resident #4 and Resident #6. Ms McGann testified that Resident #4 was resident at Evamoore from January through to May 2003. Evamoore's Plan of Care for her first thirty-day period was dated incorrectly as 2002, and makes reference to "this last seven day review period" (Tab 201, page 220). The witness testified she was confused by numerous contradictions within the Plan of Care Report as drafted. It stated, for example, that the child was "...adapting well to the atmosphere and routines at Evamoore", but later noted she "...struggles with directives from staff". It also reported: "...with the exception of a week excerpt of calm behaviour, (she) always presented herself to be in a state of crisis", and then concludes: "Overall, <name of Resident #4 deleted> is spending most time successfully abiding by set rules and activities..." This, in turn, is followed with: "<name of Resident #4 deleted> has not had sufficient independent community access throughout this review due to her constant running....".

As regards the goals to be set for the next review period, Ms McGann testified these should reflect the Society's goals for the child as articulated by the caseworker, but this did not occur with Evamoore, where the goals articulated were created by Evamoore without such consultation (Tab 201, pgs 225 and 47).

In cross-examination Ms McGann acknowledged that she had not read Evamoore's Reports on her children placed there due to time constraints and had, therefore, never advised Ms Eboh or other staff at the Residence of her concerns. She did report numerous concerns with the Residence and its ability to deal with York CAS children to her supervisor, Deb Spicker. Such led in March 2003 to the Society's first investigation into the home.

Debra Spicker, Supervisor of Placement for York CAS, corroborated Ms McGann's concerns with what she termed inadequately prepared and inexpertly composed Plans of Care. She referenced Resident #6's Plan of Care as including the Goal of "<name of Resident #6 deleted> to work on her misplacement of priority." And the relevant action being described as: "Residential staff will provide a guideline to always remind Resident

#6 of her duty to keep her priority straight and focused on goal.” The witness queried how a child could be expected to understand such a poorly articulated goal when she herself could not fathom its meaning, or expected process of resolution.

Ms Spicker also testified to the fact that the child’s primary goal, as stipulated by her Society caseworker, was anger management control. Nonetheless, not one of her Plans of Care at Evamoore (there were three) references this as a goal (Tab 195, Pages 40, et al.). Neither is there any reference in the Plans of Care to her taking such a course.

Other evidence presented regarding insufficient Plans of Care concerned Resident #3. Her Simcoe CAS caseworker, Mary-Anne Dickson, testified that Resident #3’s Plan of Care for the period February 18th, 2003 through June 18th, 2003 (Tab 100) contradicts her Plan of Care for the review period covering February 18th to March 17th, 2003 (Tab 100). Under the section dealing with peer relations the former document records: “Resident #3 is in a constant battle with other peers, because of lack of trust. Resident #3 does not get alone (sic) with any of the residents in the house. “ In the latter document, however, the same section records the following: “...she continues to respect others personal space and personal belongings. Although she has been accused by other residents for taking their stuff, but it has not been proven.” Under the section dealing with general behaviour there is a notation that Resident #3 is not to go out into the community alone. (However, the Night Log for February 28/March 1 notes that Resident #3 was out in the community and did not return until 1:55 a.m., with the police. There is no reference to any consequences. (Tab 110) Under the section headed Documentation List of Incidents there is a blank in the former Plan of Care; the latter has one reference and it is to March 15th where Resident #3 is noted as having had a verbal arguments with the other residents. There is no reference to the sexual abuse allegation of March 2nd made against Resident #3 by another resident (Tab 100). Ms Dickson testified that Resident #3’s Plan of Care in December 2003 (Tab 204, page 7) repeated Goals earlier stipulated despite the fact the Goals articulated were not goals which Resident #3 herself wanted.

As concerns Simcoe’s other resident, Resident #5, her Plan of Care in December 2003 repeated “stabilize in placement” as a goal articulated a year previously when first placed at Evamoore in December 2002. Ms Dickson noted that after such a significant passage of time the child should in fact be stabilized and the goal therefore, updated.

3. Allegations of Management concerns:

Ms Van Noort testified significant inconsistencies in documentation resulted in inadequate care and control of the children at Evamoore.

Documentation:

Evamoore program material documents filed at the hearing establish that the level system was one of the Residence's primary behaviour management techniques. Nonetheless there was ample evidence in documents filed to establish incoherence in their application by the Residence. Numerous examples are made clear, in the material, of situations where consequences are imposed but not followed by management. On March 21st, 2003, for example, Resident #3 is the subject of a Log notation that she has been rude and used a knife to unlock the office door. No apparent consequences appear to have been imposed upon her.

Ms Van Noort testified that her interviews with children revealed repeated allegations of no standard rules for discipline and that staff treated each resident differently.

An example of inconsistent follow-up occurred on March 2nd, 2003 where an internal incident report, completed by a staff member at 10:45 a.m., notes that Resident #4 has disclosed she has been raped by Resident #3. On being questioned a third resident advises staff that Resident #3 had admitted to sexual activity with S. Under the section "Action Taken and Therapeutic Follow-up" appears the following: "Writer suggested Resident #3 be monitored by staff and change to single room. Writer also suggest she receive sexual counseling to deal with her feelings and learn to express herself appropriately." The Report concludes that no one was notified of the incident. Resident #3's Case Record Notes for March 2nd morning shift advise "Resident #3 kept busy in her room cleaning." (Tab 110). Daily Shift Logs maintained by the Residence record both Residents #4 and #6 as being on a home visit. The notation for the morning shift reads: "The residents are doing well and Resident #5 is still on home visit. Resident #4 went for home visit at her boyfriend's house and expecting to be back in the evening. Resident #6 went out in community. Everybody is OK no concern." The Log further notes the Level for each child with Resident #3 at a Level 2, Resident #4 at a Level 1 and Resident #6, although clearly allowed out in the community, is at a Level 0 (Tab 271). No serious Occurrence Report was ever filed with the Ministry, nor is there any indication the York region CAS was ever advised of the allegation (Tab 201). Ms Eboh testified she did not consider the hearsay nature of the allegation sufficient to notify the Society. There is no record the child ever did receive sexual counselling. The incident does not appear on either Plan of Care for Resident #3 covering the time period.

Allowances:

Much evidence was presented concerning the use of allowance monies as a means of controlling the children's behaviour, all of which demonstrated that the practice employed by management was contrary to the written information provided to the children on first entering the Residence, and also contrary to and undermining of the practice employed by staff.

Tab 140 includes "Consequence Sheets" for Resident #3 for the months of April and May 2003. It is noteworthy that there is no reference to an incident in which she spiked

another resident's drink with a laxative, or any consequence noted resulting from that action occurring on April 29th, 2003. There are, however, numerous illustrations that monies provided to the Residence by the CAS for children as allowance for personal needs were docked from the residents as a means of controlling behaviour. For example, on May 2nd, Resident #3 is recorded as being consequenced by losing \$2.00 for yelling and swearing at staff; on May 29th she appears to have been docked \$0.25 for going out into the community without advising staff and \$1.00 for grabbing a pen from staff and leaving a mark on the staff member's hand. On June 20th the notation in the record is that "<name of Resident #3 deleted> came into the office grabbing (sic) things from staff. <name of Resident #3 deleted> grabe (sic) petty cash box from staff. Disconnect fax line so that she can get long distance. Yelling and swearing on staff. For that her allowance this week will not be given to her." On December 2nd, 2003 there is the reference to her again losing her allowance for swearing and being verbally aggressive with staff.

In reviewing York Region files for their child, Resident #3, Ms Spicker testified that she had never seen allowance deductions used for behaviour management in any other facility.

Similar concerns were articulated by Ms McGann regarding consequences imposed on Resident #6. Tab 68 noted the docking of Resident #6's allowance for stipulated behaviour. Ms McGann stated this was extremely unusual and she would expect any residence that employed this form of consequencing to consult with the caseworker as to whether it was appropriate in any given case, as well as to keep a record of the amount and return it to the child at the end of the placement. In May and June CAS caseworkers had advised Evamoore such discipline was inappropriate (Tab 203, p. 486 and p. 178).

In response to these allegations the Applicant testified that on admission to Evamoore, each child was supplied with the house rules, including information on expected behaviour, consequencing, and the level system. Further, all such information was included in documentation submitted to the Ministry for approval prior to her original licence. Ms Eboh further testified that she had not taken money from the children for behaviour infractions after being advised it was inappropriate. She stated that documentation purporting to demonstrate otherwise was misleading. She testified that while staff might make such a report she always ensured each child was given her full allowance, but that staff did not like her vetoing their use of deductions. Ms Eboh also alleged that some of these apparent deductions for infractions were, in fact, loans of money by staff to residents.

High Incidence of Absences Without Leave (AWOLS):

When questioned by Ms Van Noort on the level system employed by the Residence, Ms Eboh advised that all Residents start at Evamoore at Level zero and are placed on Level zero again if they AWOL.

The Ministry's Program Advisor expressed concern with what, to her experience, appeared a highly unusual number of AWOLs with no evidence of standard consequences resulting. At one point when asked about the high incidents of AWOLs at the home, Ms Eboh advised she was taking away the children's shoes (Tab 56).

The Program Advisor also testified to numerous AWOLs of over 24 hours with no notification to the Ministry, in contravention of Regulation 70, section 102.

Ms McGann also testified to York CAS concerns with the lack of reported incidents of AWOLs. She noted that resident Resident #6 had been AWOL for over 24 hours on seven separate occasions during her 9 month stay at Evamoore (January 2003 - November 2003) and Resident #4 had been so absent on three instances during her residency (January – June, 2003).

Ms Eboh, in her defence, testified that York personnel were often hard to reach in emergency situations. She also stated that Resident #6 was known to be a constant runner and that in most cases she, Ms Eboh, knew where the child had gone (her boyfriend) such that she did not view the situation as "serious". The CAS Agreement signed by Evamoore in November 2002 lays out the Parties' obligations. Page 4 deals specifically with situations of a child on an AWOL, which include notice, filing a missing persons report, and forwarding Serious Occurrence Reports to the Society the following day. If a child is known as a chronic runner then a different standard may be arranged between the residence and the child's worker. If not, the Agreement is to apply. There was no evidence a separate understanding had been negotiated between the Society and Ms Eboh concerning Resident #6.

Francis Charuk of Durham CAS testified that the Society's only two wards placed with Evamoore remained in the Residence for less than two weeks in November-December, 2002 and were removed because of repeated AWOLing, such that Durham quickly concluded Evamoore was not capable of controlling them. Ms Charuk testified that one of the children had returned to her mother; the other had been housed by a group home in Scarborough with greater success. She stated that the girls placed at Evamoore were no more difficult or problematic than any others and that the rate Evamoore charged for its services was similar to comparable group homes.

Care & Control:

Ms McGann also testified as to the lack of supervision and structure in the Home. Resident #4 had anger management sessions arranged for her through her probation officer, as ordered for her by the court. She missed a number of these appointments while residing at Evamoore. She also failed to complete an essay that was required of her by the probation program and should have been supervised by the Residence. So too, the Probation Officer to whom Resident #6 was to report for anger management advised the Society in April 2003 that Resident #6 had called to say she had not been able to report as she didn't know the location. Ms McGann stated that Evamoore would have been apprised of this address if the child had not. The same office called again to

report Resident #6 had missed a second appointment on April 9th and, finally, a third on April 11th when Evamoore documentation establishes the child had not got up from bed. This was important as, after three misses, a child is dropped from anger management programming.

Ms McGann noted numerous occasions in which she was advised by the school that Resident #4 and Evamoore had failed to show up for pre-scheduled meetings (Tab 201, pages 62, 73 and 76). Despite missing countless appointments there was no indication from Evamoore as to what structures were in place to consequence such behaviour, or to assist in ensuring it wasn't repeated save for a phone call from Resident #6 on June 3rd advising that she had refused to attend school and Ms Eboh had responded by placing her belongings in garbage bags, as if dismissing her from the home (Tab 195, Page 150). On another occasion Ms Eboh admitted she had given Resident #6 the phone number of a shelter after the child was caught smoking in her bedroom.

Ms McGann concluded that neither Resident #6 nor Resident #4 was receiving any firm behaviour standards from the Residence, such that they were able to run their own show, however poorly. If Evamoore attempted to impose any demands then the girls would simply go AWOL.

In cross-examination Ms McGann acknowledged she had not read Evamoore's Reports on the children at the time of their being directed to her due to time constraints such that, at the time of both Resident #4's and Resident #6's placements, she had not questioned Ms Eboh or her staff, or indicated any of her concerns to them. She also admitted to knowledge that the children's allowances were being deducted for behavioural concerns, but never queried the appropriateness of this intervention or whether the funding was being retained in trust for the children.

Medical issues.

Ms Van Noort testified that on her inspection of the Residence in April, 2003 she was advised by a staff member (Staff #4) and a resident (Resident #6) that one of the girls was carrying her own birth control medication (Tab 21). This concern was corrected by Ms Eboh, as noted in her letter to the Ministry of May 8, 2003.

Another medical concern was later highlighted in the case of Resident #2. Her medication was being dispensed, as with other residents, in predispensed amounts by agency staff unfamiliar in some cases with the children and/or their needs and without verifying what each container actually contained. Ms Van Noort noted (Tab 174) that the staff administering the drugs simply initialled having done so; a procedure the Ministry witness advised the Applicant was inadequate for later follow-up purposes.

More significantly, however, the November 2003 file records staff administering a particular prescription to Resident #2 daily when staff notes at the bottom of the page state that she is only to receive the medication on alternate days. The same medication

is incorrectly administered for the time period the child remained in the home during December (Tab 174).

Surprisingly, notwithstanding that Evamoore records indicate Resident #2 was administered this particular prescriptive medication at 8:00 a.m. every day in November, her arrest report for a November 13th, 2003 incident of being AWOL at 00:50 hours, records her as having the medication on her person at the time of her arrest (Tab 168f). Had she been properly observed taking the medication, then this might have been another pill she had in her possession. However, no internal Incident Report exists alleging Resident #2 may have stolen this pill. Neither is there any such allegation made in the Residence's Daily Logs. Her Case Record Notes do not indicate there was any consequence or discipline employed by the Residence for her having gone AWOL or having the drug on her person at the time of her arrest.

Ms Van Noort queried the fact that, even as late as November 2003, after being in operation for more than one year, the staff had no apparent idea that Resident #2 had this prescription drug on her at the time of her arrest and no follow-up by them was documented.

Ms Eboh noted that mistakes were made by staff from time to time but strenuously denied any improper administration of medication. She stated that her Policies and Procedures Manual, as approved by the Ministry, stipulates that only she is to dispense medicines and she would not do differently unless the change was also approved. This contradicted medical sheets in evidence, which demonstrate that dispensation of medication continued to be initialled by various staff on shift.

In response to allegations that certain children were not given a medical examination within 72 hours of admission to Evamoore, as per the legislation, Ms Eboh stated that she had believed she was allowed an additional 30 days if the procedure could not be arranged within 72 hours. Now, advised differently, albeit some two years after commencing operation, she would be more than willing to change her practice.

4. Staff Training

Ms Van Noort expressed that she constantly felt on her visits to Evamoore as if the children were in control, running the home. This observation was also noted by Ms Spicker as well as Ms Dickson. It was repeated by Constable Brown – see below. In cross-examination Ms Van Noort stated she had not seen such indications in other homes for which she is responsible. She further noted how, in most cases where situations arose in the home, Ms Eboh was called in by staff on location to take control. This involved Ms Eboh traveling some significant distance from her home in Scarborough to the Residence location in Markham, often late at night when a situation involving the residents was volatile.

As early as her first investigation Ms Van Noort had flagged issues with staff qualifications, training and competency. Of the two staff then on duty, one was not aware of the Residence's emergency procedures, use of fire equipment, discharge and/or transfer of a resident, Operator's Code of Conduct, complaint procedures, the children's rights, or the definition and requisite details for Plans of Care. Moreover, both were unaware of local Children's Aid protocols for the investigation/reporting of alleged abuse (Tab 22).

Ms Dickson described the incident in December wherein Ms Eboh was found by the CAS to have used physical force in removing a telephone from Resident #3. Ms Dickson stated that she believed the staff at Evamoore should have been better trained in de-escalation methods for the children's behaviour.

Ms Dickson recalled one staff member's frustration with Resident #3 refusing to attend school and the staff member asking the caseworker if the police could be called in to force attendance.

In October 2003 York Region's last child at Evamoore, Resident #6, was returned to the custody of her family. In cross-examination Ms Spicker acknowledged that during her nine months of residency with Ms Eboh, Resident #6 had taken on a part-time job, but the number of non-consequenced AWOLS were always of concern, as was the fact that she was suspected of continued drug use while at Evamoore. While Ms Eboh denied any drugs in the Residence, the facts establish that Resident #1 was able to bring needles into the home with staff only becoming aware on a child's disclosure of the fact. At the very least, Ms Spicker stated, the Director as well as the staff should have been making an effort to install procedures to deal with these concerns. There was no evidence this was done.

Constable Brown of York Regional Police testified that Exhibit 7, Tab B consists of 55 separate police investigations and reports on incidents involving the Evamoore Residence from November 2002 through to September 2003. (A 56th Report concerns an April 2004 break and enter reported at the Home, following the children's removal.) The Constable testified that such reports are only filed where the police assess some follow-up is required. He thus concluded police attendance at the home over the period in question was actually higher.

Constable Brown stated he has been an officer for four years. He attended the Evamoore Residence on more than one occasion; it was "one of those locations (we) know simply from the address being called in..." The only other similar residence in the area was Hamilton Hall, a bigger house that also houses troubled female youth under 17 and which had less calls to police over the same time period. (Ms Dickson also testified that she was aware Ms Eboh herself was frustrated with the amount of police assistance staff required to control the girls.)

Other than attending for missing person calls, police attendance at Evamoore included assaults, suicide attempts, theft and disciplinary concerns. Constable Brown testified

there were two or three incidents in which his observation was that police were called in for matters that should have been handled internally by the staff. He noted the example of being called to the home to deal with a resident and her boyfriend being outside and the resident not entering when the staff directed her to do so. In cross-examination Constable Brown noted another occasion when he was called to Evamoore due to what he perceived as a confrontation between a resident and staff member. He concluded that the staff had not adequately taken control of the situation. The third time he attended at Evamoore he had been called in by staff attempting to get the girls back into the house after curfew. While the call came in as "Unwanted persons" the Constable testified that, on arrival, the police quickly concluded that these were friends of the girls. There was no indication of any threats, aggression or fights and, by the time the police arrived, the friends had left.

On December 5th Ms Dickson attended Evamoore for a Plan of Care meeting. The events of the previous night were discussed in detail. The police had been called on three occasions that night to attend the home. The first occasion was at the request of staff who had been unable to control Resident #3 when she threw another resident's clothing out of the house. The second time staff had called police because the girls were refusing to go to bed at 12:45 a.m. and were cooking hotdogs. The third call was from Resident #3 calling 911 when Ms Eboh refused Resident #3 use of the office phone. Ms Eboh wanted Resident #3 removed from the Residence immediately. Ms Dickson reminded her that she required seven days notice as per their contract to find another placement. Ms Dickson advised that Ms Eboh was distant and withdrawn throughout the meeting: non-participative and cold (Tab 204, pages 206-208). Ms Dickson found this unprofessional, noting it was exactly the kind of response that would feed on Resident #3's sense of drama and control.

On the night of December 9th the Residence again erupted. Ms Eboh was unsuccessful in attempting to control the situation. Police, ambulance and York CAS were there. Ms Dickson described the scene as "worse than any apprehension I ever had" with girls crying and shouting; a needle in Resident #1's possession; and staff and children yelling at one another (Tab 204, page 227).

Testimony from both Simcoe and York workers included statements by their children of staff at Evamoore regularly "yelling". Ms Dickson of Simcoe stated that Resident #5 – very loyal to and affectionate towards Ms Eboh, whose Residence she had been in for so long a period of time - had, during her exit interview in December 2003, maintained Ms Eboh yelled frequently. While the same allegation was investigated by York in its first investigation into the Residence in March 2003 and not found verifiable, this finding is not a conclusion the allegation was without merit. It was the conclusion of the CAS witnesses that, in the end, the children's version of events was, in this matter, more believable than that of the Applicant.

Uncontradicted evidence submitted by the Ministry demonstrated that none of the Evamoore staff were qualified social workers. Many of the incidents of concern to the Director occurred at night when staff contracted from outside agencies were on shift.

While Ms Eboh testified that employees of outside agencies were never alone on a shift, and she always had an Evamoore employee in attendance, she also testified that the incidence of Resident #2's arm being grabbed occurred when only outside agency staff were present. Further, while the Applicant submitted all her staff were fully trained on the policies and procedures of the Residence, she also testified that staff from outside agencies only received a one-day orientation with her staff on Evamoore practice and process. Despite her assertion that if her procedures were not followed she would fire the offending staff person, Mr. McNamara stated that one of the major triggers for his decision to issue the Notice of Intention was the Applicant's tendency to blame staff for poor documentation, improper consequencing, inaccurate logs etc. In cross-examination Ms Eboh acknowledged that in her one year of operation there were over twenty-four staff people only one of whom, Staff #4 – who was suspended by Ms Eboh for allegedly becoming too closely involved with a resident – had been trained as a child youth worker. Ms Eboh did not agree that the number of staff was unusually high for her limited period of operation.

Evidence from the Applicant was that she had university qualifications in social work and many years experience in settings similar to that of Evamoore. She had worked for Danny's Place and Nora's Place, the latter as more of a bookkeeper and administrator. Yet, Ms McGann queried her professionalism in interactions she observed between Ms Eboh and Resident #3 in late December when the Applicant's distant and closed approach appeared to feed into Resident #3's sense of controlling the situation. Mr. McNamara also testified to Ms Eboh's unprofessional reaction when it became apparent her licence would not be renewed. He concluded her verbal aggression and lack of control indicated volatility not conducive to managing high-needs adolescents in traumatic situations.

Ms Eboh testified that in May of 2004, while contemplating renewal of her licence, she had finally hired a supervisor with clinical qualifications for the Residence.

5. CAS Concerns:

Ms McGann testified she first became concerned with Evamoore's ability to run a group home for the girls when she attended the first 30 day Plan of Care meeting for the child Resident #6, in February 2003. She was perturbed that the Plan of Care noted the child had been taken to the doctor's for red eyes she sustained in a fight while AWOL. However, Ms McGann, as the child's caseworker, had never received any medical report from the Residence. Such reporting was required by the Residence pursuant to its Agreement for Service signed with the CAS in November 2002 (Tab 189).

Within the month a case consultation was performed by York CAS due to the numerous concerns raised from caseworkers involved with children placed at Evamoore. Resident #6's worker had advised of allegations of insufficient food, staff yelling at the children, meetings forgotten and irregular school attendance, and prohibited overnight visits to her boyfriend without the Residence advising the CAS worker. Ms Spicker testified that allegations had also been made by the caseworker for another ward at Evamoore, of

inconsistent consequencing, a level system not understood by staff or residents, no incident reports, and an unprofessional attitude. Finally, worker Monica Carey, (caseworker for Resident #4, the first resident placed in the Home in November 2002, who had left by mid-December 2002) testified she had not been consulted by Evamoore on her Resident #4's Plan of Care, and had other concerns including: male staff alone on duty, incomplete medicals, and unprofessionalism of the Operator (Tab 194, pages 36, 37 and 38, Tab 201). Ms Carey testified that her ward did what she wanted at Evamoore, as Ms Eboh did not appear to have the skills to manage the child's behaviour and activities.

The resulting investigation consisted of interviews conducted with Ms Eboh, staff at the Residence as well as children. The conclusion of the Report was that various allegations "could not be verified" but that:

...it became apparent that the staff are not adhering to the expectations of YCAS regarding the need to secure consent for certain activities for the children and the need to involve the children in plans of care meetings... (Tab 194, p.133).

Ms Eboh was advised of the investigation results by letter dated April 10th, 2003.

As is usual after placing children in a new facility, Carolyn Hall, Supervisor of Foster Care and Adoption with York CAS, was asked to provide an initial assessment of Evamoore. This was completed by Ms Hall in April 2003. She concluded there were numerous concerns, including that the clinical services and treatment espoused in the Program's description and philosophy, were not being delivered. In May the Society made an internal decision to no longer place children with Evamoore (Tab 186, page 26-27)

A further on-site review occurred on June 19th. Only Resident #4 and Resident #6 remained at the Home at this time. This review confirmed earlier concerns including the lack of consequencing as well as the poorly prepared Plans of Care. It also noted no treatment had been initiated by Evamoore to deal with Resident #6's repetitive AWOLs. Further, concerns were raised regarding her lack of anger management therapy. Indeed, by the time Resident #6 left Evamoore she had been there ten months but had only attended some four such group meetings with Dr. Kwan.

A letter sent by fax as well as mail to Ms Eboh dated July 28th sets out the Society's conclusions. It re-iterated the Society's concerns regarding her not delivering the clinical services and programming espoused in her Program material and also found:

... an absence of documentation that would have demonstrated your knowledge and implementation of clinical thought, interventions and programming. (Tab 185)

It repeated the verbal recommendations made to her in April to follow specified recommendations if the Society were to continue placing children with her. These included:

- Evamoore contacting other youth facilities including DFR and Pathways as well as the Ontario Association of Residential Treatment for Youth (OARTY) to assist her in effective programming;
- for her to institute a form of ongoing professional consultation and support; and
- for her Residence to be more specific in logs, Plans of Care and documentation used in general.

It concluded it did not have confidence that its youths' needs were being met. (Tab 185).

Ms Spicker acknowledged that the Society's Report would be shared with other societies having children resident in the home.

On December 8, 2003, although it no longer had any of its own wards at Evamoore, York CAS again became involved with the Residence when advised of operational concerns by Oxford CAS, which continued to have children in the home. These included the various incidents of December 2003 involving Resident #1 and the needles, as well as Resident #3 and the alleged assault by Ms Eboh.

York's consequent investigation was completed on December 22nd, 2003. It concluded that all children in the home at the time (5) had verified Ms Eboh had physically pushed one child and that needles had been brought into the Residence by one or more of the children. Again, the Report would have been circulated to all CAS agencies with children residing in the home. On January 6, 2004 Ms Eboh was advised by the Investigator that York's internal decision of the previous May not to place any more girls with Evamoore had never been rescinded.

In cross-examination Ms Spicker acknowledged that the children taken in by Evamoore were hard to place with serious emotional, behavioural and/or psychological issues. She agreed that a number of them were known AWOLers, but emphasized that other group homes have interventions in place, which successfully deal with this. This testimony corroborated that earlier expressed by Ms Charuk of Durham CAS. Both CAS supervisors testified that they would not place children with Evamoore even if the Tribunal were to award Ms Eboh her licence renewal as they had no confidence in the Applicant's operational ability.

Ms McGann also concluded that Evamoore appeared incapable of providing the discipline, structure and programming which such high-needs children require. She noted that Resident #4's Discharge Report, as completed by Evamoore, notes the child is being discharged because she "needs a highly structured program" (Tab 301 p. 226), which was exactly what York thought it was getting when it signed up with Evamoore. Ms McGann testified that despite being in regular communication with Ms Eboh concerning the girls in care, as well as knowing the difficulties the Residence faced in attempting to have the children attend school and counselling, Evamoore failed to have the basic discipline and structure required of any licensed operator such that there could

be no consistency of behaviour management, not to mention the lack of proper therapy or counselling as held out by Program Plan materials.

Ms Spicker stated she had some communication with Ms Eboh in February of 2004 when the Applicant advised she was looking for placements. Ms Spicker testified that Ms Eboh became angry and accusatory when advised York would not be placing children with her. It was Ms Spicker's view that Ms Eboh had not taken ownership for the problems at Evamoore, instead accusing other agencies of working against her (Tab 193) and eventually leaving intimidating voice messages alleging discrimination (Tab 191).

Ms Dickson of Simcoe CAS testified that Resident #4 remains in touch with Ms Eboh and the fact she was at Evamoore for over a year was significant for a child who has been moved often and frequently and that, consequently, Resident #4 feels close to, and protective of, Ms Eboh. Ms Dickson stated that Resident #4 is an honest and truthful child but she would not want to say anything that might land Ms Eboh in trouble. However, Ms Dickson was present when Resident #4 was interviewed by York Region after the December 8th crisis at Evamoore's and remembers Resident #4 clearly stating that Ms Eboh, after repeatedly asking Resident #3 to leave the office, had indeed pushed Resident #3 from the office. She also was clear in advising she never witnessed staff physically discipline children, but that Ms Eboh did shout when angered.

Documents referring to the care of Resident #4 included phone calls from her to the caseworker in March of 2003 advising she was bored in the Residence and was going out unsupervised (Tab 203, pages 223, and 396), leading to incidents of unprotected sexual activity on at least two occasions (Tab 203, pages 445 and 217) as well as the fact that because she was often grounded, and because of the yelling in the Residence which reminded her of her home life, she would AWOL frequently (pages 169 and 211).

In May and June, documentation from caseworker notes indicate that concerns were raised with Evamoore as to the docking of Resident #5's allowance for behaviour infractions (pages 486 and 178).

In February Evamoore staff advised Resident #5's caseworker that Resident #5 had been on a phone chatline for 2½ hours (Tab 203, page 417), unsupervised while in the Residence.

Ms Dickson admitted she did not always believe everything the children told her, but that she accepted their version of events over that of Ms Eboh and, at the end, did not believe Evamoore to be a safe home for them.

Ms Eboh claimed Oxford CAS had advised her they would be willing to work with her once she had been approved to resume her operation by the Ministry. She also stated she had contacted a John Royal from Simcoe CAS who had suggested that Society would send her children. The Applicant testified that she believed that she could re-gain

a trusting and mutually satisfying relationship with the various CASs were she to be given another opportunity to operate her Group Home.

She claimed she had consistently attempted to work with the Ministry and CAS staff in good faith to improve on all aspects of the management of her Home. She felt it was clear to all that there was a learning curve for any new operator, and that nothing was written in stone. She testified she never received any complaints from CAS clients that her Plans of Care meetings were improper in any way or her Plans of Care documentation in any sense inadequate. Generally, meetings were pleasant and without animosity. She stated she never knew there was any problem until the Notice of Intention and hearing.

Ms Eboh advised that Ms Van Noort's removal of her documents for photocopying in December of 2003 had resulted in missing forms dealing with behaviour management, log keeping, etc.

She testified that all her forms, including Program Plans and Policies and Procedures as well as other documentation had been approved by Ms Van Noort for the Ministry. Ms Eboh testified that much time had been taken by her in consultation with others as to the format and content of these forms such that she felt they correctly reflected what was required. She was confused by the information thrown at her that, despite the hard work and approvals, such were now found to be inadequate and sufficient to discredit her suitability for licence.

The Applicant testified she had significant schooling including a BA in Social Work; extensive work experience having "practically run" Nora's Place from 1998-2000, where she'd been originally hired as a bookkeeper, and Digs for Kids from April through to November 2002. The Applicant further stated she had a Diploma from the Toronto Business School and certification in Pastoral Counseling from Tyndale University. She advised she has a certificate in instruction for crisis prevention so that she can train her staff.

It was her evidence that she had always made every effort to work with the Ministry even to the extent of repeated responses for what she actually felt were often nit-picky details.

THE LAW:

The *Child and Family Services Act*, R.S.O.1990, c. C-11 provides:

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

- (a) the licensee or an employee of the licensee, or where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene,
 - (i) this Act or the regulations,

- (ii) another Act, or the regulations made under another Act, that applies to the activity for which the licence is required, or
- (iii) a term or condition of the licence;

...

- (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;

197. (1) Where a Director proposes to refuse to issue a licence under section 195 or to refuse to renew or to revoke a licence under section 196, the Director shall cause notice of the proposal, together with written reasons, to be served on the applicant or licensee, who may require a hearing.

...

(3) Where an applicant or licensee does not require a hearing under subsection (2), the Director may carry out the proposal.

Regulation 70 provides:

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. 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.

- (2) A plan of care for a resident shall include,

- (a) a description of the resident's needs that is developed with reference to the findings of current or previous assessments of the resident;
- (b) a statement of goals to be achieved for the resident while the resident is in the residence;
- (c) a statement of the means to be used to achieve the goals referred to in clause (b);
- (d) a statement of the educational program that is developed for the resident in consultation with the school boards in the area in which the residence is located;
- (e) where applicable, a statement of the ways in which a parent of the resident will be involved in the plan of care including arrangements for contact between the resident and a parent of the resident and the resident's family;
- (f) particulars of any specialized service to be provided directly or arranged for by the licensee;
- (g) particulars of the dates for review of the plan of care;

- (h) a list of revisions, if any, to the plan of care; and
 - (i) a statement of the anticipated plan for discharge of the resident.
- (3) The initial plan of care referred to in subsection (1) and particulars of any reviews of the plan of care shall be entered in the resident's case record.
- (4) Every licensee shall ensure that, where possible,
- (a) a parent of the resident or the person who placed the resident;
 - (b) any children's aid society or probation officer who is supervising or otherwise providing services to a child, but who is not a parent; and
 - (c) the resident, where the resident is twelve years of age or over, are consulted and involved with the development of each plan of care for each resident in a residence operated by the licensee.
- (5) Where the plan of care is developed without the consultation or involvement referred to in subsection (4), the reason for the lack of consultation or involvement shall be noted in the resident's case record.
- (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.
- (7) A resident shall be given an opportunity to express his or her views during each review referred to in subsection (6).
- (8) Every licensee shall ensure that each plan of care with respect to each resident in a residence operated by the licensee is reviewed three months and six months after the resident is admitted to the residence and if requested by any person involved with the development of the plan of care every six months after the initial six month review.
- (9) A review of the plan of care referred to in subsection (8) shall involve,
- (a) the resident;
 - (b) a parent of the resident; and
 - (c) any other person who was involved in the development of the plan of care.
- (10) Where it is not possible to review the plan of care with each person referred to in subsection (8), the reasons for the lack of a review shall be noted in the resident's case record.

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.95:

(5) The licensee shall ensure that where a punishment is administered to a resident or other intervention that is intended to reduce or eliminate a behaviour of a resident is used with a resident the fact is recorded in the resident's case record by the person employing the punishment or intervention and that the licensee or a person designated by the licensee is informed of the application of the punishment or intervention. s. 99(1):

...

- (h) school records and reports concerning the resident, where applicable;
- (i) the plan of care developed for the resident and particulars of any review of the plan of care or of the resident's status;
- (j) reports of any serious occurrence involving the resident;
- (k) where applicable, documentation of the circumstances of transfer or discharge of the resident, the name, address and relationship of the person to whom the resident is transferred or discharged and the summary report referred to in subsection 90 (2);
- (l) where an incident referred to in subsection 102 (1) occurs, the time of the occurrence, the name of the person reporting it and the person to whom the report was made; and...

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.

(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.

ANALYSIS:

Pursuant to section 197 of the Act, this Tribunal may substitute its decision for that of the Director when a Notice of Intention is appealed. To fulfill this obligation, the Tribunal is required to hold a hearing into the allegations. From the evidence presented at the hearing the Tribunal itself must decide whether the Applicant is, or is not, entitled to the licence. Based on all the evidence brought before us in this matter, we have reached the conclusion that Ms Eboh o/a Evamoore is not so entitled. The Tribunal had the opportunity to read the submitted documents, and to observe the demeanour of witnesses brought to testify in this matter, and to consider their evidence. Our conclusion is based upon the totality of that evidence.

We are not persuaded by the notion advanced by the Applicant that, due in part to the uncomfortable relationship between Ms Eboh and the Program Advisor, Ms Van Noort, the Notice of Intention resulted from some form of vendetta. The Applicant extrapolated from a request York CAS had made to her regarding her budget in the spring of 2003, that the Society had determined to work against her and had done so with the support of Ms Van Noort. There was no corroborating evidence of any such collusion. In fact, while York admittedly stopped placing children in the Residence that spring, they continued to leave Resident #6 there until the following November. The Ministry continued to inspect, review, discuss, consult, advise, and meet with Ms Eboh for another nine months and three temporary licences. Moreover, York CAS witnesses as well as Ms Van Noort specifically denied the allegation.

Ms Eboh claimed that much of the Ministry's concern with her operation was "nitpicking" over technicalities. It is our conclusion, however, that the integrity of records maintained by a group home are pivotal to any hope of stability and security for these vulnerable children, dependent for caregiving as they are on a combination of bureaucratic systems and commercially-focused enterprises. The evidence before us demonstrates not just the odd error, but repeated illiterate, and thus incomprehensible, review and planning documents on specific children (Plans of Care); inadequate and unreliable documents dealing with the medication of specific children; incoherent and contradictory documents concerning programs and services provided to the children; and confusing and inconsistent documents of management, and control/supervision of staff on whom the children were dependent.

In the 2005 decision of this Tribunal, *Reista's Place*, Vice-Chair McIntosh determined that the Applicant in that matter was not suitable for registration under the Act, based on a number of factors found to be equally present in this case. One of the Tribunal's main concerns in that case was the inadequacy of the group home's documentation,

documents that the testimony of Ms Eboh, before us, established were also drafted by her. Vice-Chair McIntosh observed:

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.

The evidence on the Plans of Care documentation is extremely relevant to what Mr. McNamara testified was at the heart of the Ministry responsibility over regulated licensees, the health and welfare of the children in care. It became clear to us over the eight days of this hearing that these documents are the primary written record of a child's progress and development in a given facility. They are the only written record shared by all the parties involved in the child's upbringing. While we are troubled that Society workers did not advise Ms Eboh of particular inadequacies with this documentation on any specific level – in particular the testimony of Ms McGann that she was too busy to ever even read over their content – and we accept the Applicant's testimony that she did make attempts to improve upon them when specific faults were pointed out to her by the Program Advisor, the fact remains that the children at Evamoore remained ill-served by their Plans of Care, even after such corrections. The issue here is not whether the Applicant was given fair notice of her incompetence in drafting these records, (although we find there was ample evidence here that Ms Eboh was warned on a number of licence review inspections by Ms Van Noort, as well as the CAS Report to her, of report and document inadequacies), but whether the health and safety of the children was endangered by such incompetence. This was well articulated by Vice-Chair McIntosh in *Reista's Place* when he noted on page 29:

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 Resita's. If not then Reista's should not be licensed.

Here, the evidence of such significant omissions as Resident #3's alleged sexual assault, Resident #6's on-going anger management issues and Resident #4's numerous AWOLs, when coupled with the often vague, inarticulate and often irrelevant expression of "goals", result in Plans of Care which are mockeries of their intended purpose. From the evidence, the Tribunal concludes that Ms Eboh relied on a template document, approved by the Ministry before she opened, which she either could not, or chose not to, properly modify for individual children in her care.

Equally of concern to the public regulator, and thus to ourselves no less than to the CAS clients themselves, must be the misleading and, frankly, false marketing and/or disclosure material provided by Ms Eboh describing Evamoore's program and services. Again, the evidence supports the only reasonable conclusion for such a disconnect

between that which was described and that which was delivered as Ms Eboh describing a program and service which would be approved by the Ministry rather than one she felt obligated to deliver. Her position that she was unable to make good her undertakings because the Ministry failed to approve her budget is simply unacceptable. Evidence was provided that other, similar, group homes do manage to provide the treatment programs and clinical services promised by Ms Eboh on similar fee structures. Furthermore, the Ministry evidence that her approved budget was very close to that which she originally requested was not contradicted by the Applicant. Most importantly, however, Ms Eboh was specifically notified that York CAS was disturbed by the conflict between the programming she espoused and that which she provided in its letter to her of July 2003. A reasonable and responsible administrator would have been alerted to the immediate need to either change programming/services by actually hiring some qualified individuals to provide that which was promised, or to modify the marketing material. Ms Eboh, however, did neither. Indeed, the one time actual clinical services were contracted for, in anger management, staff were unable to ensure regular attendance by the children and not one successfully completed the program. Moreover, none of the staff, including Ms Eboh herself, were prepared to partake in the sessions specifically included in the price and designed for caregivers.

The Applicant's deferral of responsibility over inadequate staff training and staff incompetence is equally unacceptable to the Tribunal. Ms Eboh reiterated her testimony that she ensured all staff were adequately trained, but that "mistakes do happen". The Tribunal finds that, rather than simply "mistakes," numerous problems with the management of the Residence were directly attributable to staff decisions and lack of independent authority. From the outset this Tribunal is discomfited by the fact that Evamoore staff consistently depended on the Applicant's attendance whenever trouble occurred at the Residence. There was no evidence that any individual other than Ms Eboh herself had supervisory or management authority. When the Applicant finally determined it would behove her operation to employ a qualified staff member in May 2004, it was much too late since, by this time, there had been no children in the home for over five months and all Evamoore's CAS clients had concluded they would no longer use her Residence.

In her testimony Ms Eboh advised that staff were advised to call police if she were not available. Constable Brown testified that the Evamoore Residence received more police attention than did the other group home located in the division. He supported the Ministry's contention that staff were unable to correctly manage the home when he concluded a number of police calls to the Residence were the result of staff not being able to manage a domestic incident, rather than matters requiring police interventions.

The issue of the allowance monies illustrate similar contradictions – that Ms Eboh testified staff continued to use allowance funds as a means of behaviour modification, whereas she would countermand these attempts at discipline by negating them and providing the girls with their full allowance weekly.

Such action persuades the Tribunal that Ms Eboh, while clearly well intentioned in her efforts to reach these troubled teens, was not always professional in her interactions with the girls. This was witnessed by Ms Dickson, a forthright and consistent witness, who observed the Applicant turn cold and withdraw from Resident #3 once Resident #3 became problematic, thereby feeding into Resident #3's manipulation; it was also witnessed by the Director when Ms Eboh became vulgar and aggressive during their January meeting; and it was verified by the CAS in their interviews with the children who claimed that Ms Eboh often "yelled" when angered.

This evidence causes us particular concern when viewed in tandem with the suggestion advanced by the Applicant that the crisis of December 9th was the result of the children's behaviour at the Residence, and not her staff. This attitude, like her claim that Serious Occurrence Reports are not required because she does not find the situation serious, or that an AWOL is not an AWOL but rather a discipline concern, or that certain omissions on Plan of Care documents are "errors" by staff, supports the Director's conclusion that Ms Eboh has still not been able to accept responsibility for the many problems at Evamoore.

The above also supports the Ministry's stated concern that the Applicant is quick to blame others for her misfortune. This concern was supported by the Applicant herself on many instances throughout her evidence. It was her evidence that it was her staff that ran the home on a day-to-day basis and, as such, they were responsible for decisions as to whether or not to file reports. Ms Eboh noted that she had no reason NOT to file the Serious Occurrence Reports, but that it was the staff's decision; indeed she advised there was no room on the form for her to initial. She also testified that the Ministry had never specifically advised her that AWOL incidents must be recorded in the home's daily logs. If it had, she testified, she would have ensured they were so recorded. This misses the point that a prudent Operator would be aware that missing children pose a significant safety risk to themselves and potential problems for the Residence, such that their absence must be clearly recorded for new staff coming on shift to be aware of – not simply their absence, but what particular action had been taken to locate them. Ms Eboh recognized the necessity for such recordings: she did, in fact, acknowledge the location of the residents was a safety concern; she also advised any AWOL would have been documented somewhere, but stated that either the Ministry itself had lost the relevant records when photocopying her materials, or her staff had made a recording error.

So too the Tribunal is not sympathetic to the Applicant's position that she has been "surprised" by the allegations against her. Instead it finds a surfeit of evidence detailing on-going efforts by Ms Van Noort to alert Ms Eboh to grave misgivings with her operation over her year of operation, efforts Ms Eboh may have determined as being "nitpicking" and which she thus chose to dismiss. She could not however, as a reasonably competent business manager, credibly dismiss the two different Reports from York CAS noting concerns with her Residence and the subsequent decision of the Agency to no longer place children in her Residence. The Tribunal concludes this position on the part of Ms Eboh is, at best, disingenuous. If she truly was taken by

surprise, then this only provides further grounds to conclude she is unsuitable for a licence in a regulated industry.

Ms Eboh noted that the allegations against her leading to the CAS April investigation into her Residence were never verified and, therefore, she finds it unreasonable that the Ministry rely on these in this hearing. She was aware that York, while finding the allegations unverifiable, did cease to place new children in Evamoore following their Report. It is striking that she could conclude from this “everything was fine”. This assertion directly disregards the consequent Report of the investigation sent to Ms Eboh advising she contact a private advocacy agency (OARTY) to assist her in her programming and documentation, and that the Residence was not meeting York CAS expectations. It demonstrates certainly insensitivity on the part of Ms Eboh to the reality of her relationship with York CAS.

Counsel for the Applicant argued that, when it was effectively closed in December 2003, Evamoore was operating at full capacity and “no one was complaining”. We do not agree. Rather, the evidence established that, on December 9th no York children remained, the last two of Simcoe children were being removed (Resident #3 as a result of an earlier request made by the Applicant) and three new children from Simcoe and Huron-Perth had been there less than two weeks and included Resident #1, a child clearly demonstrating serious problems. Further, there was convincing evidence of numerous long-standing concerns, many of which had been clearly articulated to the Applicant by both the Ministry and different CAS workers.

The Tribunal concludes the Applicant is unable to grasp the significance of licensing – that it compels accountability of her operation not merely to clients she serves (the CAS), but also to the regulator Ministry.

Another example of the Operator’s inadequacy for the role of licensee is illustrated by her attitude towards the issuance of Serious Occurrence Reports. It remained her position before us that she had not erred in her decisions not to issue these Reports. She reasoned that it was within her discretion to issue such Reports and that she had appropriately exercised that discretion at all times. Three particular examples canvassed in the evidence cause the Tribunal misgiving: when resident Resident #3 was accused of sexually assaulting another resident, when Resident #2’s wrist was grabbed by staff and Ms Eboh had her taken to hospital for X-rays, and the situation of Resident #1 bringing needles into the Residence in early December. In the first case Ms Eboh determined the evidence was not substantiated; in the second situation she unilaterally decided the issue was one of safety and not appropriate for a Serious Occurrence Report; in the last, it was her conclusion the activity was “normal for children like <name of Resident #1 deleted>” and thus not appropriate for any further reporting.

While section 102 of the Regulation does not specifically cover either of the last two situations, the first involved a serious allegation of abuse and did trigger the obligation to report. As concerns the other two situations, the Tribunal finds that in both cases Ms Eboh’s exercise of her discretion to not issue such a Report was inappropriate. With

regard to Resident #2, the section does specifically reference both where a child is injured by staff and where a resident is mistreated or abused. A reasonably prudent operator would conclude that, despite the fact X-rays revealed no serious injury, the mere fact that X-rays were even considered necessary brought the scenario into the ambit of the section and made it incumbent on the Residence to follow-up with a “serious occurrence” Report, which means a record is sent to the Ministry. Similarly, stolen needles, even when the owner deemed it not necessary to lay charges, are of such potential seriousness that a reasonable operator would have felt compelled to make such a Report – if only to ensure his or her own protection in the event of future complications arising from the incident.

The other equally significant concern to the Tribunal is our finding regarding the credibility of the Applicant. There is no doubt that there was a personality or communications clash between Ms Eboh and Ms Van Noort. However, before us, Ms Van Noort appeared credible. Over a lengthy testimony canvassing complex, contradictory and abundant material, her testimony remained consistent, clear and convincing – that Ms Eboh simply didn’t satisfy her expectation of a prudent, professional and competent licensee. Mr. McNamara’s credibility was also apparent. If he erred, then he erred by providing the Applicant with too long a time period to attempt to come into compliance. As he testified, group homes such as Evamoore are in short supply and thus are carefully nurtured by all involved in the hopes of ensuring their success. The number of provisional licences given to Evamoore over its short period as a licensee demonstrated the Director’s patience with a learning curve for such an Operator. Mr. McNamara was aware of only two other residences in the Central East Region who have had their Group Home licenses refused under the Act in his 32 years of experience with the legislation.

The evidence of the four months delay in advising the Applicant of the Ministry’s decision to refuse further licensing is troubling to us. The robbery in the winter of 2004 only made more difficult and expensive Ms Eboh’s efforts to bring her Residence into compliance for renewal of her licence in May. This might have been avoided had she been promptly advised, in January of that year, of the Ministry’s decision not to renew. We are, however, also aware of the large amount of documentation and the numerous administrative procedures and processes required by the Ministry to prepare the Notice of Intention. Moreover, Ms Eboh was certainly not in any position to reopen during the winter months of 2004 given the damage to the property and the fact that she was out of the country for some time. She also had the results of the CAS investigation, which she knew had been shared with other CASs who had utilized her Residence, none of which had resumed placements with her. As a result, the issuance of the Notice of Intention can not have been a surprise to her.

We are also disturbed by the admission of the CAS witness that she did not review Plans of Care for one particular child due to her “time constraints”. As was made clear to us over the evidence in this matter, these documents are of prime importance to the health and safety and care of these ward children. They form the bridge by which all concerned are kept informed. However, we are not mandated to review or decide upon the merits of CAS bodies.

DECISION:

Based on the totality of all the above, the Tribunal orders the Director to carry out his Notice of Intention dated July 16th, 2004.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Jane Weary,
Vice-Chair

Donald Benninger,
Member

RELEASED: February 15, 2006

File : 2522.cfsa.evamoore.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.

This decision will also be available on Quicklaw at a later date. The names of any witnesses or other third parties will not appear in the decision (unless they took part in the hearing in a professional capacity or as a regulator).

OMEGA HOUSE INC.

MOTION FOR AN ORDER REQUIRING THE CHILDREN'S AID
SOCIETY OF TORONTO TO PRODUCE RECORDS RELATING TO
CHILDREN IN THE CARE OF THE SOCIETY, UNDER SECTION 198
OF THE *CHILD AND FAMILY SERVICES ACT*

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

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

No one appeared on behalf of the Applicant

DATE OF
HEARING: January 27, 2006

Toronto

ORDER

Following attendance on January 27, 2006, at a hearing of a motion before this Tribunal of Katharine Renison, Counsel, representing the Director, under the *Child and Family Services Act* (the "Respondent"). No one appeared on behalf of Omega House Inc. (the "Applicant") as confirmed by Counsel representing the Applicant in a letter dated January 11, 2006 to the counsel representing the Respondent.

Where Counsel for the Applicant also confirmed, in the same letter, that his client will not oppose the motion, the Tribunal makes the following Order:

1. The Children's Aid Society of Toronto is required to produce records relating to children in the care of the Society who resided at Omega House children's residence between June 12, 2001 and January 10, 2006.
2. 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 expert witnesses.
3. Nothing in this Order is to be construed to prevent reference in the Orders of the Tribunal to the existence of Children's Aid records or to the Tribunal's review of

records produced by the Children's Aid Society, but any such reference shall protect the privacy of children in care by the use of non-identifying information.

At the end of the hearing of this matter, or of any appeal, the Tribunal shall retain one copy of the records and Counsels shall share all others in their possession.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: January 31, 2006

File: 3334.cfsa.omega.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.

This decision will also be available on Quicklaw at a later date.

**Licence
Appeal
Tribunal**

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



836591 ONTARIO LTD. OPERATING AS MARY HOMES

APPEAL TO THE LICENCE'S TERMS AND CONDITIONS
PRESCRIBED BY THE DIRECTOR FOR WILHAVEN RESIDENCE,
NAVAN RESIDENCE (MARY'S), EMERGENCY RESIDENCE, (MARY
& ANDRE) UNDER SECTION 198 OF THE *CHILD AND FAMILY
SERVICES ACT* REGARDING

TRIBUNAL: DONALD BENNINGER, Member

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

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

DATES OF HEARING: November 16 and 17, 2005

Ottawa

ORDER

BACKGROUND:

Under Part IX of the *Child and Family Services Act*, RSO 1990, c.11, and Regulation (the "Act"), a Director issues licences for the operation of children's residences. 836591 Ontario Ltd. operating as Mary Homes (the "Applicant") is such a licensed Operator of ten residences. Renewal of licences for the residences under appeal have been issued by the Director under the *Child and Family Services Act* (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 these terms and conditions.

This Tribunal heard an earlier appeal of the same terms and conditions attached to other licensed residences operated by this Applicant, in August of 2004. The decision upholding the Director was appealed to the Divisional Court. The Tribunal, on January 6 and 7, 2005, heard another appeal of the same terms and conditions attached to other licensed residences operated by this Applicant. Prior to hearing evidence in this matter, the Parties agreed to accept as fact, all the facts found in the Decisions of the Licence Appeal Tribunal released on October 19, 2004, and February 15, 2004, and they could be utilized

in making a decision in accordance with section 201 (7) of the Act.

Counsel for the Applicant advised the Tribunal that the appeal concerning Wilhaven Residence is withdrawn as the residence is closed and a letter indicating the closure was presented. Thus on consent, the Tribunal considered it withdrawn.

Counsel for the Director introduced a motion of res judicata stating that the appeals had dealt with exactly the same issues and that the Director's condition was upheld.

Counsel for the Applicant objected, stating these appeals before the Tribunal were for different residences and there were different term dates as well as different terms and conditions for the licences under appeal at this time.

The Tribunal concurred with Counsel for the Applicant that there were sufficient differences in the two licences to consider their appeals as separate from those previously heard by the Tribunal. Then, the hearing of the appeals proceeded.

EVIDENCE

The Applicant's witness was Ms. Mary Descoeurs, director of Mary Homes. The Director's witnesses were Ms. Katherine Neff, Program Supervisor, Eastern Region, and Ms. Kathy Hryshko-Renaud, Manager of Compliance and Program Review, both with the Ministry of Children and Youth Services.

Mary Descoeurs

The sworn evidence of the Applicant included a review of the licences issued for Emergency Residence (Mary & Andre) dated February 7, 2005, and Navan Residence (Mary's) dated December 9, 2004, as well as correspondence between the director of Mary Homes, and Katherine Neff, Program Supervisor, Eastern Region, Ministry of Community and Social Services.

In addition, there was recognition of a document entitled *Child Welfare Program Evaluation* (Exhibit 2, tab H) and an acknowledgement of a document entitled *CAS facts April 1, 2002 – March 31, 2003* (Exhibit 2, tab I). In the latter document, it was pointed out "*CAS funding has, as a result, increased by 80% since 1998-1999*" (Exhibit 2, tab I, Page 2). As well, the Witness recognized that the total calls received and services provided to families and children had increased from 192,869 in 1998-1999 to 236,430 in 2002-2003 (Exhibit 2, tab I, page 3). In addition, Counsel for the Applicant directed his witness to Exhibit 2, tab I, page 10 that shows the total full time equivalent staff in 1998-2003, has increased from 4,490 to 7,013, which is a 56% increase.

The Witness acknowledged that she was aware of the Policies and Procedures Manual for

Regional Offices (Exhibit 2, tab L) and specifically under the general policies point number I and point number II and that they were relevant to her business.

The Witness testified she did not receive any subsidies or mortgage assistance from the Province of Ontario when she was establishing her operation.

On cross-examination, Descoeurs stated that she chose not to have a rate setting meeting for Navan Home, but rather requested to use the same rate as another residence namely Lacroix Home and received the Ministry's approval to do so without providing financial records. Similarly, when the director decided she was closing Wainfleet Residence and reopening 3360 Wilhaven Drive, she was advised in writing that there was no need for a rate review.

Katherine Neff

Ms. Katherine Neff is the Program Supervisor, Eastern Region for Ottawa and was called as a Witness for the Director. Once again, the finding of facts from the previous two hearings was affirmed. She testified that the Transfer Payment Agencies, (the "CAS"), have a contractual arrangement with the Government (Province of Ontario). The CAS has a contractual arrangement with the Operator of the Homes, i.e. Mary Homes, sample template provided by the Ministry, which indicates the services expected and the per diem rate. The CAS cannot exceed the per diem rate as established by the Ministry unless for an identified special need, but may negotiate a lesser rate with the operator. She continued later in her testimony stating that placements from out of province or other than CAS agencies can negotiate for services with an operator without any restrictions or limitation from the Ministry.

Ms. Neff testified that the responsibility to set per diem rates rests with regional office staff who invite other participants to the rate setting meeting. These include the operator, two program supervisors, a financial analyst and a representative from the local CAS that obtain services from the operator. She testified that when the rate is set, the operator can appeal. Then, the Ministry would ask for more financial information. This is not the case in the matters before the Tribunal. The only time, other than above, that the operator can request a rate review is when there is a change in the type of program or the client served. The Applicant has not requested a rate review based on these criteria.

She confirmed in her testimony that the only increase in per diem since the initial rate-setting meeting was in November 2000, when there was a per diem adjustment to address human resource pressures in 2000-2001 and 2001-2002. She continued her testimony stating there was no audited financial statements required at that time but there would be if a rate review was requested by the operator. Only the operator can request a rate review, as the Ministry has no mechanism to initiate a rate review.

Ms. Neff testified that the letter of October 27, 2003, was intended to clarify the request

sent to all operators in the Eastern Region regarding demographics, client information, financial information, where possible, based on an externally audited financial statement. From this request, she testified the regional office would use this document to get a picture of what services were available to CAS as well as a provincial picture to assist CAS staff. She stated that the program expenditures in detail was the same information as requested for initial rate setting. The Witness testified that Ms. Descoeurs did not complete the staffing expenditure section of the form, but did complete the other parts. On November 13, 2003, Counsel for the Applicant wrote to Ms. Neff requesting clarification, and she testified that she responded on December 3, 2003, including the authority for such a request, namely subsection 78(1) of Regulation 70 under the Act. Still, the operator did not comply. Thus, the licence with the condition to submit the most recent audited financial statements for both residences.

On cross-examination, Ms. Neff testified there are no contractual arrangements between the Government and the service provider. As well, she testified that Regulation 70 of the Act gives the Ministry authority to establish policies and procedures, including rate setting. When suggested that this process was one of attempting to fund downward across the board, Ms. Neff testified 'no'.

With regard to the licence for Emergency Residence (Mary & Andre) dated February 7, 2005, Ms. Neff testified that paragraph two (Exhibit 2, tab E) was in her view a term or condition the same as the rest of the licence document. She stated the issuance of a licence with conditions is a form of progressive enforcement.

Kathy Hryshko-Renaud

The next witness for the Director was Kathy Hryshko-Renaud, Manager of Compliance and Review. She testified that she has twenty years of accounting experience. Ten years in the private sector before being employed by the Ministry of Health as Manager of Finance and Administration and then with the Ministry of Children and Youth Services. She testified that the operator had previously submitted various financial documents to the Ministry. She verified that she had recommended a term or condition indicating the most recent audited financial statement for the agency (Mary Homes) be submitted to Kathy Neff, Program Supervisor by a specific date. She stated during her testimony that she was not involved in the preparation of budgets.

SUBMISSIONS

The Applicant withdrew the appeal # 2708/CFSA/04/09, relating to the licence of Wilhaven Residence.

In the submission from the Applicant, it was stated that the Applicant has been in operation since 1989 and has all its residences licensed until 2004 without the condition to submit audited financial statements. This condition is an issue.

Another issue involved, is whether the Director has the authority to impose such a condition. Also an issue, is whether the licence for Emergency Residence includes the condition to submit an audited financial statement to the Director.

The Applicant submits that the only connection the Applicant has with the Ministry is that it receives the licence to operate the children's residence from the Director, but the Applicant and the CAS's relationship is contractual in nature.

The Applicant submits that the terms and conditions in the Navan Residence's licence is to gather expenditure data to fix a per diem rate and the Ministry, or the Director, have no authority to fix per diem rates. The Applicant recognizes the Director has a general power to impose terms and conditions, but this power must be exercised pursuant to the purpose or objective of the Act. The Applicant submits that the purposes of the Director or Ministry in imposing the terms and conditions do not come within section 193(5) of the Act. The only possibility is to imply this power from this provision or the Act as a whole. Furthermore, the Act does not mandate this power and that it was created by 'policy' of the Ministry.

The Applicant directed the Tribunal's attention to the following common law right in *Colet v. R.*, where Mr. Justice Ritchie stated:

if there is an ambiguity, the construction which is in favour of freedom of the individual should be adopted.

In *Morguard Properties Ltd. v. Winnipeg*, Mr. Justice Estey of the Supreme Court stated:

In more modern terminology the courts require that, in order to adversely affect a citizen's rights, whether as a taxpayer or otherwise, the Legislature must do so expressly.

The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule.

The Applicant further submits that the Act does not authorize the Director to impose a condition with retroactive effect, and to do so, impairs the vested rights of the Applicant, alters past events and is inequitable.

With regard to the licence of the Emergency Residence, the Applicant submits there is no terms or conditions relating to the submission of audited financial statements, but only an erroneous assertion that the Applicant does not meet the requirement for the issuance or

renewal of a licence.

In the Director's submissions, the identified issues are:

- 1- Whether the Director has authority to impose a condition on a licence to require the Applicant to submit audited financial statements for the purpose of providing the Ministry's regional office with financial information to assist the regional office to, among other things, set the per diem rate to be paid by Children's Aid Societies for residential care.
- 2- Whether the licence for the Emergency Residence contains a valid term and condition.

The Director recognizes the Policy and Procedure Manual for Regional Offices, setting and recovering rates for per diems, funded Children's Residential Programs as the one used by the Ottawa Regional Office not the Mississauga Regional Office manual.

The Respondent submits that it is the regional office's responsibility to set and review rates for per diem licensed children's residences, as well as set rates for new programs. This requires the operator to *'prepare and keep on file and provide to a director when required by a director a plan for securing funds to establish, equip and operate the residence'* (Subsection 105 (1)(h) of R.R.O, 1990, Regulation 70 under the Act). Through the use of financial information and meetings with the operator and the local CAS, the regional office did set a rate for the Emergency Residence in 1997. Instead of a meeting to set a per diem rate for Navan Residence, the operator requested the rate of the Lacroix residence be transferred to Navan Residence, and the Ministry approved this. The usual practice is to request financial information from each operator before the Ministry establishes a per diem.

The Respondent submits that the rate reviews are initiated by the operator. The per diem for a children's residence is the maximum amount a Children's Aid Society can pay for services at that residence. However, the Society can negotiate a lower rate. The operator can negotiate a per diem rate above the maximum with the CAS for a special need resident.

The Respondent confirmed that there was province wide a 0.05% reduction in 1995 and increases totalling 2.5% in the per diem from 2000 to 2002 to reflect increases in labour costs.

In October 2003, the Respondent stated that a letter was sent to all private operators and all Transfer Payment Agencies in the Eastern Region, requesting pertinent and consistent information for per diem and residential care treatment programs regarding expenditure

information.

The Respondent submits that the Licence Appeal Tribunal heard the same, or similar, evidence on this subject in January 2005 and the decision of the Tribunal stated:

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.

The Respondent submits that on admission by Counsel of the Applicant, there were substantial financial records and reports prepared and retained by the operator to meet the many legislature requirements, such as, but not limited to, Income Tax, Employment and Health Tax, Employment and Safety Board requirements, Provincial Sales Tax and General Sales Tax requirements.

The Respondent submits that it was for enforcement purposes that terms and conditions on both the Emergency Residence and the Navan Residence's licence were imposed by the Director of the Ottawa's regional office, when the financial information was not provided by the operator as requested. This system of progressive enforcement starts with a condition and could use Refusal to Renew as the most severe penalty.

The Respondent submits that the Act's paramount purpose is to promote the health, safety and well being of Children. Under the Act, the Minister designates a Children's Aid Society to carry out certain prescribed functions and pays every Society an amount determined in accordance with the regulation. The per diems paid by Societies for residential care, form part of the amount paid to Children's Aid Societies by the Minister. Children's Aid Societies may provide care for children in society-run residences or may purchase residential care for children from per diem operators licensed under the Act. The Respondent submits the Director has the authority to request financial information from licensees under the regulations (Section 78 of R.R.O. 1990, Regulation 70 under the Act).

The responsibility for setting and review of per diems rests with Ministry's regional offices by way of Ministry policy. The purpose is to ensure that public funds used by placement agencies to purchase residential care for children do not exceed an amount considered reasonable by the Ministry.

The Respondent submits that when the Licence Appeal Tribunal heard the same or similar evidence on the subject in January 2005, it was the decision of the Tribunal, stated by Ms. Jane Weary, Vice-Chair, on February 15, 2005, that:

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.

The Respondent submits that the licensing requirement for the operator to prepare and keep on file and provide to a Director, when required by a Director, a plan for securing funds to establish, equip and operate the residence and the rate setting policy builds on the licensing requirement, is in keeping with the intent and spirit and has roots in the legislation of the Act, and creates accountability with respect to public funds.

It expands the legislation in a manner which is consistent with its intent, as well as conforming to public expectation regarding government's fiscal responsibilities.

The Respondent submits that a per diem rate setting does not encroach on the Applicant's common law rights. After reasonable considerations, the per diem is set and represents what the Ministry regional office's believes the Children's Aid Society should pay to operators for the provision of residential care; the Children's Aid Society and the operator negotiate between themselves the specific terms of their contract. The per diem rate is consistent with the scheme and purpose of the Act as it enables public funds to be allocated fairly to help protect the maximum number of children possible.

The Respondent submits that the best interest, protection and well being of children, as well as the overall public interest, should be placed ahead of the business concerns of individual private operators.

The Respondent submits there is no ambiguity in the provisions relied upon by the Respondent to justify the setting of per diem rates and submits that in order to discern the intent of the Act, the court needs to look no further than Section 1, which sets out the paramount purpose of the Act, which is to promote the health, safety and well being of children.

The Respondent submits that the Minister is a steward of public funds and is held accountable by the legislature for the use or misuse of legislative appropriations granted to the Ministry. The Minister requires those who manage the public funds under her jurisdiction to be able to verify that the funds distributed have been used for purposes intended by the legislature in the most fiscally prudent manner.

The Respondent submits that the requirement for operators to produce financial information enables the Director to assess whether the funds are being used in an appropriate way.

The Respondent submits that the legislature contemplated the necessity for the Director to obtain financial information, as stated in Subsection 78(1) of R.R.O., 1990, Regulation 70 under the Act:

(b) prepare and submit financial reports to a Director when required by a Director including reports by a public accountant licenced under the Public Accountancy Act.

In its submission, the Respondent states that when the Licence Appeal Tribunal heard the same or similar evidence on this subject in January 2005, Ms. Jane Weary, Vice-Chair, wrote in her decision, released on February 15, 2005:

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 Respondent submits that subsection 193(5) of the Act provides the power for a Director to impose any term and condition on a licence in order to allow the Director the discretion to deal with any issue of concern.

It is submitted that it is inaccurate to maintain that a term and condition should always have a general character and govern all operators. The fact that most operators in the Ottawa region provided financial information when requested by the regional office, precluded the need for a term and condition to be imposed on their licences.

The Respondent submits that the condition was imposed by the Director not as a penalty, but as a way to obtain information. The Respondent used the terms and conditions as an enforcement tool to obtain information deemed necessary. This information was to be used for province wide consideration of the need for a consistent method of analysis of the costs of case. The Respondent submits that, by imposing a condition, as opposed to suspending, revoking or not renewing the licence, the Director was actually taking the least rigorous and serious of possible enforcement actions under the Act. This provided the Applicant with another opportunity and additional time to comply. These terms and conditions were not decided on irrelevant considerations and in bad faith.

The Respondent submits that the rule against retroactive application does not apply to the condition imposed by the Director. This condition is not imposed directly by Statute but is imposed by a Director using his authority to exercise his discretion. The Respondent submits that the condition is not retroactive in its effect.

Although the condition imposed was for financial data from the past, it does not affect the past actions of the operators. The condition is to be applied in the future of the ongoing licensing process even though it has existed since the start of the licensing relationship between the Director and the Applicant.

The Respondent disputes that the Applicant has a vested right but rather has a conditional right to a licence. The Respondent submits that the Applicant has not provided sufficient authority for this argument as the Applicant does not provide details of what its vested rights are or why they were impaired.

The Respondent submits that the condition is not discriminatory and hence not invalid. Where operators have submitted an audited financial statement, there would be no necessity to place a condition on the licence. The Applicant operator stated that she is opposed to providing financial statements on any terms. Therefore, the placing of the condition on the licence is directly related to the individual conduct of the Applicant's operator. The Respondent submits that the authority to impose the condition is legislative in origin, but that the imposition of the condition is wholly within the authority and discretion of the Director.

With regard to the licence of the Emergency Residence, the Respondent submits that the disputed clause is placed between two major terms of the licence. Clause number 1 sets the length of time the licence is in force and clause number three sets out the maximum number of children that may be served at any one time. Clause number two, by implication, sets out a condition on which the Applicant has a right to a licence. The condition refers to issuance/renewal, which means that it applies in either circumstance on a plain meaning interpretation of the phrase. The Respondent agrees that the financial statement is not required to be audited, but submits that it is clear that the licensee must prepare and submit financial reports to the Director.

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

This hearing involved the licensing of three residences operated by the Applicant. At the commencement of the hearing, the appeal involving Wilhaven Residence was withdrawn by Counsel for the Applicant and consented to by Counsel for the Respondent as the Residence is now closed. The Tribunal concurred.

ISSUES

- 1- Whether the Director has the authority to impose a condition on a licence to require the Applicant to submit audited financial statements for the purpose of providing the Ministry's regional office with financial information to assist them to, among other things, set the per diem to be paid by CAS to pay for residential care.
- 2- Whether the licence for the Emergency Residence dated February 7, 2005, contains a valid term and condition when it states:

The Applicant does not meet the following requirements for issuance/renewal of a licence:
R.R.O. 1990, Regulation 70, Section 78(b): Every licensee shall, in respect of each residence maintained and operated by the licensee, 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.

(Exhibit 2, Tab E)

At the commencement of the hearing on November 16, 2005, the Applicant accepted as facts all facts found in the decisions of the Licence Appeal Tribunal on October 19, 2004 and on February 15, 2004. Since the facts of this hearing are agreed and the two previous decisions have already been published, this Tribunal is not about to reproduce the rational and legal reasons given in the previous decisions.

With regard to the Director's authority to impose a condition, the onus is on the Applicant to establish that the authority doesn't exist in law and is not legitimate.

The Tribunal has reviewed the evidence as presented orally and the written submission of the Applicant and the Respondent. Also reviewed were the Act's relevant sections, the law from previous Decisions of the Tribunal.

After considering all of the above, the Tribunal agrees with the position put forth by Counsel for the Ministry, that to discern the legislative intent of the Act, one need to look no further than Section I.

With regard to the Applicant's position that the Director cannot, by condition on a licence, demand audited financial statements, Vice-Chair Jane Weary clearly states the Tribunal's view, in her decision released in February 2005:

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 above applies to the Director's authority and to the licence renewal for Navan Residence (Mary's) dated December 9, 2004.

With regard to the Director's proposed use of the financial information from the operators, there was no persuasive evidence or anything put forth by the Applicant that it would be used for any other purpose than rate setting or monitoring the use of public funds available to the CAS with a view to providing services to children intended by the Act.

This Tribunal is of the view that if the Director has not used his statutory power for an

unauthorized purpose, then there is no discrimination and the condition is valid.

The Tribunal finds that the Director does have the authority to impose a condition on a licence to require the Applicant to submit audited financial statements for the purpose of providing the Ministry's regional office with financial information.

The retroactivity of the condition in issue was another argument. The Tribunal agrees with the Respondent's position that the condition is not retroactive in its effect and that it does not affect the past actions of the operator.

Counsel for the Applicant accepted the condition was not onerous for his client, as detailed financial records are already being maintained by his client in order to satisfy other legislative requirements.

The Tribunal does not accept the argument put forth by the Applicant that the condition is retroactive and thus invalid for the purpose of rate setting and at the same time, monitoring the use of public funds to ensure the purpose and intent of the Act are met.

The remaining issue to be addressed by the Tribunal is whether clause number two on the licence of Emergency Residence (Mary & Andre) dated February 7, 2005, is a term and condition.

Clause number two reads as follows:

The Applicant does not meet the following requirements for issuance/renewal of a licence R.R.O. 1990, Regulation 70, Section 78(b): Every licensee shall, in respect of each residence maintained and operated by the licensee, 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.

Although this clause is included on the licence, the Tribunal finds that it does lack specific terms relevant to compliance when compared to the terms and conditions as set out in number four.

The Respondent's position that indicates clause number one sets out the length of time the licence is in force and clause number three sets out the maximum number of children that may be cared for in the children's residence at anyone time. Thus clause number two, by implication, sets out a condition on which the Applicant has a right to a licence. The Tribunal does not agree with this position but views clause number two as a finding of fact and states the legislative authority why it should be met in order to have a licence renewed, but is not directory in nature as are the terms and conditions as set out in clause number four. The Tribunal agrees that the terms and conditions in clause number four are exactly that in as much as they give the authority and clear direction on how, to whom and by when the terms and conditions can be met. Clause number two is lacking in its content

and direction and thus the Tribunal does not agree that the manner in which it is written represents a term or a condition.

DECISION

FIRST ISSUE

For all the reasons given, the Tribunal upholds the Director's terms and conditions of licensing Navan Residence (Mary's) and consequently denies the Applicant's claim.

SECOND ISSUE

The Tribunal having considered the positions of the parties regarding clause number two on the licence of Emergency Residence (Mary & Andre) dated February 7, 2005, rules in favour of the Applicant and declares clause number two is not a term or a condition.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Member

RELEASED: January 19, 2006

File: 2708.2828.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.

This decision will also be available on Quicklaw at a later date.

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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 Navan Residence (Mary's), Wilhaven Residence and Emergency Residence
- Date of Issue of Licences: December 9, 2004
November 10, 2004
February 7, 2005

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 hearing in the above matter on Monday and Tuesday, October 17th and 18th, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the parties* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Wednesday and Thursday, November 16th and 17th, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: October 13, 2005

Filename: 2478.2479.2480.Mary Homes.adj.doc

PRE-HEARING

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* REGARDING

LAT FILE NOS. 2708/CFSA/04/09 (WILHAVEN RESIDENCE),
2791/CFSA/04/10 (NAVAN RESIDENCE)
2828/CFSA/04/11 (EMERGENCY RESIDENCE
(MARY AND ANDRE))

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: KATHARINE RENISON, Counsel, appearing on behalf of 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 July 25, 2005
Teleconference
PRE-HEARING:

By

ORDER

BACKGROUND:

Following attendances on July 25, 2005 at a pre-hearing by teleconference before the Tribunal of Katharine Renison, Counsel, who appeared on behalf of the Director under the *Child and Family Services Act* (the "Respondent") and Kathy Neff, Supervisor, *Child and Family Services Act*, Kathy Hryshko-Renaud, Supervisor, *Child and Family Services Act* and Emilio Binavince, Counsel, who appeared on behalf of 836591 Ontario Ltd. operating as Mary Homes (the "Applicant");

1. Settlement not having been achieved, the three files 2708/CFSA/04/09 (Wilhaven Residence), 2791/CFSA/04/10 (Navan Residence) and 2828/CFSA/04/11 (Emergency Residence – Mary and Andre) are set down for a hearing in Ottawa to commence on Monday, October 17, 2005 and to proceed if necessary on Tuesday October 18, 2005.
2. The parties will comply with the disclosure requirements as set out in the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

RELEASED: July 29, 2005

File : 2708.2791.2828.cfsa.maryhomes

PRE-HEARING

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* REGARDING

LAT FILE NOS. 2708/CFSA/04/09 (WILHAVEN RESIDENCE),
2791/CFSA/04/10 (NAVAN RESIDENCE)
2828/CFSA/04/11 (EMERGENCY RESIDENCE
(MARY AND ANDRE))

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: KATHARINE RENISON, Counsel, appearing on behalf of 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 April 4, 2005
PRE-HEARING:

By Teleconference

ORDER

BACKGROUND:

Following attendances on April 4, 2005 at a pre-hearing by teleconference before the Tribunal of Katharine Renison, Counsel, who appeared on behalf of the Director under the *Child and Family Services Act* (the "Respondent") and Kathy Neff, supervisor, *Child and Family Services Act* and Emilio Binavince, Counsel, who appeared on behalf of 836591 Ontario Ltd. operating as Mary Homes (the "Applicant");

1. It is ordered that a further pre-hearing be scheduled for Tuesday, June 28, 2005 to allow the parties time to finalize any settlement negotiations.

2. It is ordered that the pre-hearing of the Applicant and the Respondent regarding LAT File No. 2828/CFSA/04/11 (Emergency Residence (Mary and Andre)) that is scheduled for May 5, 2005 be adjourned to the date of June 28, 2005.
3. If the parties should reach a settlement from these three files prior to the date of the pre-hearing of June 28, 2005, they shall inform the Tribunal forthwith.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

RELEASED: April 5, 2005

File : 2708.2791.2828.cfsa.maryhomes



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PRE-HEARING

NADER M. FARAH

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

TO REVOKE REGISTRATION

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

APPEARANCES: L. VIET NGUYEN, Counsel for the Applicant

JAMES STEBBING, Counsel for the Registrar
BRIAN PITKIN, Registrar, *Collection Agencies Act*

DATE OF
PRE-HEARING: February 14, 2006 *by teleconference*

ORDER

Following attendances *by teleconference* on February 14, 2006 at a pre-hearing before this Tribunal by the Parties listed above, the Tribunal makes the following Order:

1. The hearing of the appeal shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Friday, the 24th day of March, 2006 and shall be continued thereafter, if required, at the earliest possible date to be scheduled by the Registrar of the Tribunal.

2. The Parties hereto shall strictly comply with Rule 6 of the Tribunal's Rules of Practice which relates to disclosure.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

RELEASED: February 22, 2006

FILE NAME: 3264.caa.Farah.prehrg order.doc

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Decisions under Day Nurseries Act

Fiscal Year 2005 - 2006

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- >> [BHAMATIE MEGHAN O/A PERFECT LITTLE ANGELS DAYCARE](#) 
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BROADVIEW FRENCH MONTESSORI SCHOOL II LIMITED

APPEALS UNDER SECTIONS 14 (1) AND 13 (4) OF THE
DAY NURSERIES ACT, R.S.O. 1990, CHAPTER D.2 (THE
“ACT”) FROM A NOTICE OF DIRECTION MADE BY THE
DIRECTOR, ACTING UNDER THE ACT DATED AUGUST
9, 2005 AND FROM A NOTICE OF PROPOSAL TO
REVOKE MADE BY THE SAID DIRECTOR ON
NOVEMBER 3, 2005

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

APPEARANCES: JAY L. NASTER,
Counsel, representing the Applicant

KATHARINE RENISON,
Counsel, representing the Director under the *Day Nurseries Act*

DATES OF HEARING: November 2, 9, 23, 24, 2005
December 19, 20, 2005
January 24, 2006
Toronto

ORDER

Upon hearing the submissions of the parties;

And with the consent of the parties that licenses be issued for School #1 and School #2 in the form attached as Appendix A and Appendix B respectively;

The Tribunal Orders that:

1. The Director renew the licence of Broad View French Montessori School II Limited, to operate a day nursery at 1236 Kingston Road, Toronto, Ontario, for a period of six months commencing January 24, 2006, on the terms and conditions as agreed to by the parties.

2. The Director renew the licence of Broad View French Montessori School Limited, to operate a day nursery at 1007 Broadview Avenue, Toronto, Ontario, for a period of six

months commencing January 24, 2006, on the terms and conditions as agreed to by the parties.

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

Released: February 9, 2006

File name: 3125.broadview French Montessori School II.dna.doc

**PERMIS/RENOUVELLEMENT DE PERMIS
AUTORISANT L'EXPLOITATION
D'UNE GARDERIE
FORMULE 4**

**Loi sur les garderies
n° : 0002910**

Date de délivrance : 25 janvier, 2006

Aux termes de la *Loi sur les garderies* et des règlements pris en application de cette loi, et sous réserve des restrictions qui y sont prévues, le présent permis est accordé à :

BROAD VIEW FRENCH MONTESSORI SCHOOL II LIMITED

dans la ville de Toronto pour l'autoriser à exploiter une garderie nommée :

BROAD VIEW FRENCH MONTESSORI SCHOOL # 2

à/au 1236, rue Kingston dans la ville de Toronto.

1. Le présent permis expire le **24 juillet, 2006**.
2. Capacité autorisée de la garderie.
14 bambins – 18 à 30 mois
19 enfants d'âge préscolaire – 2½ à 5 ans
Totale : 33

Conformément au paragraphe 55(2) l'approbation est accordée en ce qui concerne le groupement des enfants mixte.

3. Le présent permis est assorti des conditions suivantes :
 - (1) L'exploitant devra s'assurer qu'une affiche sur la délivrance de permis aux services de garde est placée bien en vue dans la garderie, près de chaque entrée normalement utilisée par les parents.
 - (2) L'exploitant continuera s'assurer d'avoir un(e) directeur/directrice approuvé(e) par un directeur du Ministère sur place qui est responsable de l'exploitation de la gestion courante. L'exploitant doit informer le bureau de secteur de Toronto de chaque changement du directeur/directrice d'ici 24 heures.
 - (3) L'exploitant devra confirmer par écrit au Ministère qu'il y aura toujours le nombre d'employés qualifiés exigé par la Loi sur les garderies.
 - (4) L'exploitant devra confirmer par écrit au Ministère de tout changement du personnel d'ici 24 heures.

Judy Mac Leod
Coordinatrice, Unité des permis



**PERMIS/RENOUVELLEMENT DE PERMIS
AUTORISANT L'EXPLOITATION
D'UNE GARDERIE
FORMULE 4
Loi sur les garderies
n° : 0002910
Date de délivrance : 25 janvier, 2006**

- (5) L'exploitant devra s'assurer que le manuel Guide sur les garderies reste sur place, est passé en revue avec le personnel et est disponible aux employés comme une ressource.
- (6) Conformément au paragraphe 53(2)(a) du O. Règlement 262, l'exploitant devra afficher les plans de programme qui comprennent des activités du groupe et individuelles, des activités visant à favoriser la capacité motrice globale et fine, le développement du langage et le développement intellectuel et affectif et des jeux actifs et tranquilles. Comme alternative, les exploitants peuvent aviser le Directeur du Ministère que les plans de programmation individualisés pour chaque enfant seront maintenus selon le Guide de permis pour les programmes Montessori, Les directives et guide internes, # 1, 2.
- (7) Conformément à l'article 48(1)(m) du O. Règlement 262, l'exploitant doit obtenir la permission écrite et l'approbation des parents si les parents donnent la consentement de fournir les repas de midi et les collations pour leurs enfants.
- (8) Conformément aux paragraphes 39(c) et 40(1)(2) du O. Règlement 262, chaque parent recevra, pendant l'inscription de son enfant, les renseignements et les exemples des menus pour la préparation des repas de midi selon le Guide des Aliments Canadien ainsi que les renseignements concernant la réfrigération ou les petites boîtes de glace pour conserver ces repas. Cette information sera affichée bien en vue dans la garderie et sera passée en revue avec chaque parent pendant l'inscription. Cette information sera aussi incluse dans le guide des parents. La garderie devra s'assurer que, si un enfant a oublié son repas de midi, il y aura un plan alternatif en place.
- (9) Conformément à l'article 4(1)(f) du O. Règlement 262, le nombre de personnes, y compris le personnel et les enfants, sur place ne doit jamais excéder 40.
- (10) L'exploitant devra s'assurer qu'une affiche sur la délivrance de permis aux services de garde est placée bien en vue dans la garderie, près de chaque entrée normalement utilisée par les parents.

Judy Mac Leod
Coordonnatrice, Unité des permis



**PERMIS/RENOUVELLEMENT DE PERMIS
AUTORISANT L'EXPLOITATION
D'UNE GARDERIE
FORMULE 4
Loi sur les garderies
n° : 0002895**

Date de délivrance : 25 janvier, 2006

Aux termes de la *Loi sur les garderies* et des règlements pris en application de cette loi, et sous réserve des restrictions qui y sont prévues, le présent permis est accordé à :

BROAD VIEW FRENCH MONTESSORI SCHOOL LIMITED

dans la ville de Toronto pour l'autoriser à exploiter une garderie nommée :

BROAD VIEW FRENCH MONTESSORI SCHOOL

à/au 1007 Broadview Avenue dans la ville de Toronto.

1. Le présent permis expire **le 24 juillet, 2006.**
2. Capacité autorisée de la garderie.
15 bambins – 18 à 30 mois
15 enfants d'âge préscolaire – 2 ½ à 5 ans
Totale : 30
Conformément au paragraphe 55(2), l'approbation est accordée en ce qui concerne le groupement des enfants d'âge mixte.
3. Le présent permis est assorti des conditions suivantes :
 - (1) L'exploitant devra s'assurer que le permis d'exploitation est affiché bien en vue à l'entrée principale de l'école pour les parents.
 - (2) L'exploitant continuera s'assurer d'avoir un(e) directeur/directrice approuvé(e) par un directeur du Ministère sur place qui est responsable de l'exploitation de la gestion courante. L'exploitant doit informer le bureau de secteur de Toronto de chaque changement du directeur/directrice d'ici 24 heures.
 - (3) L'exploitant devra confirmer par écrit au Ministère qu'il y aura toujours le nombre des employés qualifiés exigé par la *Loi sur les garderies*.
 - (4) L'exploitant devra confirmer par écrit au Ministère de tout changement du personnel d'ici 24 heures.
 - (5) L'exploitant devra s'assurer que le manuel *Guide sur les garderies* reste sur place, est passé en revue avec le personnel et est disponible aux employés comme une ressource.
 - (6) Conformément au paragraphe 53(2)(a) du O.Règlement 262, l'exploitant devra afficher les plans de programme qui comprennent des activités du groupe et individuelles, des activités visant à favoriser la capacité motrice globale et fine, le développement du langage et le développement intellectuel et affectif et des jeux actifs et tranquilles. Comme alternative, les exploitants peuvent aviser le Directeur du Ministère que les plans de programmation individualisés pour chaque enfant seront maintenus selon le *Guide de permis pour les programmes Montessori*, Les directives et guide internes, #1, 2.



**PERMIS/RENOUVELLEMENT DE PERMIS
AUTORISANT L'EXPLOITATION
D'UNE GARDERIE
FORMULE 4
Loi sur les garderies
n° : 0002895
Date de délivrance : 25 janvier, 2006**

- (7) Conformément à l'article 48(1)(m) du O.Règlement 262, l'exploitant doit obtenir la permission écrite et l'approbation des parents si les parents donnent la consentement de fournir les repas de midi et les collations pour leurs enfants.
- (8) Conformément aux paragraphes 39(c) et 40(1)(2) du O.Règlement 262, chaque parent recevra, pendant l'inscription de son enfant, les renseignements et les exemples des menus pour la préparation des repas de midi selon le Guide des Aliments Canadien ainsi que les renseignements concernant la réfrigération ou les petites boîtes de glace pour conserver ces repas. Cette information sera affichée bien en vue dans la garderie et sera passée en revue avec chaque parent pendant l'inscription. Cette information sera aussi incluse dans le guide des parents. La garderie devra s'assurer que, si un enfant a oublié son repas de midi, il y aura un plan alternatif en place.
- (9) L'exploitant devra s'assurer qu'une affiche sur la délivrance de permis aux services de garde est placée bien en vue dans la garderie, près de chaque entrée normalement utilisée par les parents.

(signature du directeur)

Judy Mac Leod, Coordonnatrice, Unité des permis

**Ministry of Community
and Social Services**

**Ministère des Services sociaux et
communautaires**



**Ministry of Children and
Youth Services**

**Ministère des Services à l'enfance et
à la jeunesse**

Toronto Region
477 Mount Pleasant Road, 3rd Floor
Toronto, ON M7A 1G1
Toronto Region Office

Région de Toronto
477, ch. Mount Pleasant, 3^e étage
Toronto, ON M7A 1G1

SCHEDULE A

Broad View French Montessori School Limited

1007 Broadview Avenue, Toronto ON M4K 2S1

Licence number: 0002895

Terms and Conditions:

- 1) The operator shall ensure the licence is clearly visible to parents and is posted in the front entrance of the centre beside the doors.
- 2) The operator shall continue to have in place a supervisor approved by the Ministry responsible to the operator for the day to day operation and management of the Centre and shall inform the Ministry in writing within 24 hours of any change in supervisors.
- 3) The operator shall provide written confirmation to the Ministry that the required number of qualified staff has been employed.
- 4) The operator shall advise the ministry of staff changes in writing within 24 hours.
- 5) The operator shall ensure the Day Nurseries Manual is on site, reviewed with all staff and is available to all staff as a resource.
- 6) The operator shall post daily program plans pursuant to section 53(2)(a) identifying the planned group and individual activities that promote gross and fine motor skills, language and cognitive, social and emotional development and active and quiet play. Alternatively, the operators may advise the Director they wish to maintain individual program plans pursuant to "Licensing Guidelines for Montessori Programs", Internal Directives and Guidelines no. 1.2.
- 7) Pursuant to sub-section 48(1)(m) of O.Reg 262, parent's written instruction and approval must be obtained if parents consent to provide bagged lunches and snacks.
- 8) Pursuant to sub-sections 39(c), 40 (1)(2) of O.Reg 262, guidelines and sample menus for preparing bag lunches which meet Canada's Food Guide, as well as procedures for refrigeration or the use of ice packs with bag lunches, shall be provided to each parent and posted at the centre. The operator shall review this information with parents at the time of enrollment and the information shall be included in the centre's parent handbook. The centre shall ensure back-up procedures are in place if a bag lunch is forgotten.
- 9) The operator shall ensure that the child care licensing poster is posted in a conspicuous place in the day nursery at or near each entrance commonly used by parents.

Judy Mac Leod
Director, Day Nurseries Act

Ministry of Community
and Social Services

Ministère des Services sociaux et
communautaires



Ministry of Children and
Youth Services

Ministère des Services à l'enfance et
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SCHEDULE A

Broad View French Montessori School II Limited

1236 Kingston Road, Toronto ON M1N 1P3

Licence number: 0002910

Terms and Conditions:

- 10) The operator shall ensure the licence is clearly visible to parents and is posted in the front entrance of the centre beside the doors.
- 11) The operator shall continue to have in place a supervisor approved by the Ministry responsible to the operator for the day to day operation and management of the Centre and shall inform the Ministry in writing within 24 hours of any change in supervisors.
- 12) The operator shall provide written confirmation to the Ministry that the required number of qualified staff has been employed.
- 13) The operator shall advise the ministry of staff changes in writing within 24 hours.
- 14) The operator shall ensure the Day Nurseries Manual is on site, reviewed with all staff and is available to all staff as a resource.
- 15) The operator shall post daily program plans pursuant to section 53(2)(a) identifying the planned group and individual activities that promote gross and fine motor skills, language and cognitive, social and emotional development and active and quiet play. Alternatively, the operators may advise the Director they wish to maintain individual program plans pursuant to "Licensing Guidelines for Montessori Programs", Internal Directives and Guidelines no. 1.2.
- 16) Pursuant to sub-section 48(1)(m) of O.Reg 262, parent's written instruction and approval must be obtained if parents consent to provide bagged lunches and snacks.
- 17) Pursuant to sub-sections 39(c), 40 (1)(2) of O.Reg 262, guidelines and sample menus for preparing bag lunches which meet Canada's Food Guide, as well as procedures for refrigeration or the use of ice packs with bag lunches, shall be provided to each parent and posted at the centre. The operator shall review this information with parents at the time of enrollment and the information shall be included in the centre's parent handbook. The centre shall ensure back-up procedures are in place if a bag lunch is forgotten.
- 18) Pursuant to sub-section 4 (1)(f) of O.Reg.262, the number of persons at the centre, including staff and children, shall not exceed 40.
- 19) The operator shall ensure that the child care licensing poster is posted in a conspicuous place in the day nursery at or near each entrance commonly used by parents.

Judy Mac Leod
Director, *Day Nurseries Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BHAMATIE MEGHAN O/A
PERFECT LITTLE ANGELS DAYCARE

APPEAL UNDER SECTION 15 OF THE *DAY NURSERIES ACT*, R.S.O. 1990, CHAPTER D.2 AS AMENDED (THE "ACT") OF A NOTICE TO SUSPEND OPERATION, DATED MARCH 10th, 2005, AS WELL AS A NOTICE OF INTENTION TO REVOKE THE LICENCE TO OPERATE, DATED APRIL 8, 2005, ISSUED BY THE DIRECTOR, UNDER THE ACT

TRIBUNAL: JANE WEARY,
Vice Chair

APPEARANCES: AHMAD BAKSH,
Counsel, representing the Applicant

DANIELA BERTOSI and KATHARINE RENISON,
Counsels, representing the Director under the Act,
Respondent

DATES OF
HEARING: August 15, 16, 17 and 18, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

On a cold March morning this year, two government employees attended Perfect Little Angels daycare Center (the "Center") in Metro Toronto. It was their sixth inspection visit to the Center in three weeks. By 3:00 p.m. the Applicant had been arrested, the Children's Aid Society had been contacted and the Director under the Act (the "Director") had issued a Direction ("the Direction") under section 15 of the Act, requiring immediate suspension of the Center's operation. On April 8th, 2005, the Director issued a Notice of Intention to Revoke the licence of the facility. The Applicant appeals both decisions to this Tribunal in accordance with section 13 of the Act.

PARTICULARS:

The Direction of March 10th listed 6 separate concerns with the operation of the daycare causing the Director to conclude that the safety, health and welfare of the children were compromised. It stipulated that all concerns required elimination prior to the facility re-opening. To date, the Director is of the position that all such matters have not been satisfactorily resolved. The Notice of Intention issued on April 8th listed over 55 areas of non-compliance with legislative requirements leading the Director to conclude the Applicant is not competent to operate or maintain the daycare in a responsible manner in accordance with the legislation.

While the Director's Notice of Intention is 43 pages and alleges non-compliance with 48 sections of the Act, the Tribunal requested the Parties focus on the following:

1. harsh and degrading punishment of children, including confining children as discipline
2. medical and nutritional concerns impacting on the health of children
3. insufficient written records, including programming for the children
4. inadequate staffing
5. non-compliance with health and safety bylaws.

Issue:

Are the Director's actions against the Applicant justified?

The Evidence:

The evidence presented consisted of 15 Exhibits as well as the following witnesses:

For the Director:

Sue Ewan	Program Advisor, Review and Compliance Unit
Mary Jane Cummins	Analyst, Service Programs
Bonnie Corey	Director under the Act
Meagan Chamberlain	Former staff, Applicant
Stephanie Poitras	Former staff, Applicant
Johanna Hoy	Former staff, Applicant
Jennifer Coleman	Former staff, Applicant
Shari Sahadeo	Children's Aid Society, intake, Peel Region

For the Applicant:

Jane Vincent	Former staff, Applicant
Bhamatie Meghan	Applicant

A. The Director:

1. Sue Ewan

Sue Ewan is a Program Advisor in the Ministry's Review and Compliance Unit. She has held this position since May, 2003. She has worked in childcare for seventeen years beginning with a UK Nursing Nursery Certificate. In Canada she has both a Bachelor of Arts (BA) degree from Ryerson where she majored in Early Childhood Education (ECE) as well as a later ECE Certificate from Sheridan College. She is a part-time lecturer at Sheridan specializing in ECE courses, which include emphasis on interpersonal skills development.

As Program Advisor, Ms Ewan assists operators of licenced daycare facilities in Peel region. She is responsible for 137 such facilities. Her duties include: helping operators understand Ministry requirements of operation, providing public information on facilities, following-up on complaints received by the Ministry concerning facilities and making recommendations on licensing to the Director.

Ms. Ewan testified that, once licenced under the Act, each operator receives a Ministry Operation Manual and is advised of their Program Advisor's contact information. Ms. Ewan explained how site visits to Centers are the major tool used by program advisors as it is through these, as well as consumer complaints, that information on the operation of a Center comes to the authorities. Such site visits occur at initial licensing and at a minimum of once a year thereafter. A program advisor will go more frequently if there are compliance issues or if there has been a complaint received by the Ministry against an operator. On renewal of a licence, an unannounced site visit of the facility is undertaken. Each site visit follows the same format. The program advisor observes the site, the staff, the programming and the documentation and discusses all aspects with the operator. Checklist and summary sheets are compiled detailing legislative requirements. Any compliance issues are flagged and the operator advised of specific timelines whereby such compliance must be recorded. A copy of each is signed, dated and received by the operator. Follow-up will be performed either in person with another site visit, or through written confirmation from the operator.

Ms. Ewan testified that she had no reason to visit the Applicant's daycare until she received an anonymous complaint against the Center in July of last year. At the time, Perfect Little Angels was under a regular short-term licence of six months. Based on the complaint, which alleged health and safety concerns, Ms. Ewan determined a site visit was necessary. Her summary sheets from the visit were submitted as Exhibit 5, Volume 1, Tab 24C. The following concerns were noted:

1. Three different staff members were unable to advise the correct number of children in their care. When following up with a review of the Attendance Records of the day, five errors were noted where children were either

found to be there and weren't recorded or vice versa. Ms. Ewan testified she explained to the Applicant the fundamental importance of ensuring all children's attendance was correctly recorded in case of fire or other emergency. Ms. Ewan suggested the many instances of incorrect information might be a reflection of the record being used and provided the Applicant with a sample Attendance Record that she might implement instead (see Tab 26).

2. Two instances of improper staffing ratios were noted: one occurred when a staff member left the playground to accompany a child to an indoor washroom leaving inadequate staff to supervise the outdoor play; the other was observed in a room where a toddler (under two years) was brought into the pre-school age room thus requiring toddler ratio be implemented in the room as opposed to the preschool supervisor/child ratio. Such was not done. Ms. Ewan discussed the importance of maintaining legislative and licence ratio requirements with the Applicant.

3. Medication was observed unlocked in the kitchen cupboard.

4. A stove burner was found to be "on" during the visit at 2:15 p.m., while lunch had been served to the children at 11:30 a.m. The cook was not present.

5. Unused food was left in the open. Proper storage and hygiene was discussed with the Applicant.

Ms. Ewan testified that the number of compliance issues was unusually high, involving as it did a summary sheet of more than ten pages. However, the Applicant appeared to understand all the requirements and indicated she was willing to ensure compliance such that no further action was deemed necessary.

When her licence renewal application was received by the Ministry the following October, an unannounced site visit by Ms. Ewan took place. As a licence renewal visit, this visit of October 5th, 2004 involved the Program Advisor canvassing all requirements of operation with the Applicant and cross-referencing those with the Ministry's Manual of operation earlier provided. It was as a result of this visit that Ms. Ewan became concerned with the Applicant's management and operation. Ms. Ewan testified that her summary sheets for October 5th illustrate 9 pages of non-compliance concerns – again a higher than normal number (Tab 6).

Serious problems, which had been identified back in July, appeared to still be in issue. These included both attendance records and ratio limits. As regards the former, more than one instance of inaccurate attendance recording was apparent. Ms. Ewan noted that one of these concerned an autistic, high needs child – C. – who was wrongly accounted for in the records for October 4th. The significance of this repeat negligence was expressed to the Applicant. Ms. Ewan advised that a recommendation would be immediately made to the Director that a

Term and Condition be imposed on her licence requiring her to perform some reporting on this issue.

Ratio requirements were again not met in the school age room, which had more than 16 children requiring a second qualified staff. The Applicant's qualified Director's approval did not extend to approval for this age group. The Applicant was reminded that the Act set out *minimum* operational requirements.

A third issue involved the Supervisor who, due to the facility employing over five fulltime staff, was required to be off-program 50% of the time. The Applicant advised that the Supervisor was utilized 100% in programming.

Finally, record keeping of medications was not allocated to a particular identified staff as was required by legislation.

The Applicant was given until October 19th to bring all staff up-to-date on the issues and develop necessary procedures to ensure the Act was met. The Supervisor was also advised and given an opportunity to review the concerns identified.

Despite receiving written verification of compliance on October 19th, given the concerns identified, Ms. Ewan determined to perform a follow up visit on October 21st. The most disturbing concern then identified was that there remained insufficient qualified staff on the premises despite the Applicant having been reminded of this minimum requirement on both earlier visits. School age children still did not have qualified staff. The Applicant stated she was only a few courses short of her ECE Certificate, which she should receive in December, and asked to be given Director's approval for qualified status. She advised that another staff member, Ms Hoy, was in a similar position. Ms. Ewan recommended to the Director that such approval be granted to assist the Applicant in her staffing needs. Although this approval was granted it later transpired that neither the Applicant, nor Ms Hoy, ever completed the ECE course work. Ms. Ewan reviewed the summary sheets with her Director, who granted the Applicant a short-term licence subject to two additional Terms and Conditions concerning playground repair and the attendance record (Tab 12).

On February 17, 2005, the Ministry received a second anonymous complaint. It alleged problems with staff qualifications and unmet ratios, but also raised issues of harsh and degrading discipline procedures and food shortages (Tab 102). Given her concerns, Ms. Ewan asked for the assistance of another program advisor to attend with her for the site visit. This was the first time she had ever felt such assistance was needed. Her request was approved and Maria Saunderson accompanied her to the Center on February 24th, 2005.

Summary sheets for this fourth visit appear at Tab 14. They evidence the following: on arrival at 2:25 p.m., the Ministry Advisors were able to walk into the unlocked Center, pass the unattended office and into the next room where three

kindergarten aged children appeared to be playing unsupervised. Ms. Ewan noted an individual sitting in the corner dressed in her coat with her purse on her lap. When asked by Ms. Ewan as to who was in charge, she appeared nervous and responded, "I guess I am." She was asked the number of children in the room and responded incorrectly. When asked to provide the Attendance Record, she left the room to locate it. The individual was observed using the telephone. It later transpired she was calling the Applicant.

In another room an adult was observed holding an infant. This adult was later identified as "Shirley", who is not an employee of the Applicant but an independent resource person for an autistic child at the Center. There were 22 children, toddlers and pre-schoolers, lying in cots in the same room. The rest period had long since passed. At 2:34 p.m., the Applicant arrived. She informed Ms. Ewan that her infant was with her mother. When the Program Advisor stated she had not seen the mother arrive, the Applicant acknowledged that she was on her way. When asked where the infant was, the Applicant took Ms. Ewan to an unsupervised room where the baby was lying on the floor. Ms. Ewan testified that she had earlier advised the Applicant that, once her child was born, she would not be able to care for it in the daycare Center because it was not licenced for infants. The Applicant had indicated her husband was to look after the infant.

Ms. Ewan noted additional concerns including: a battery powered drill in working condition in a room with unsupervised children; an electrical cord lying in the hallway; at 4 p.m., dirt and debris left since 2:25 p.m.; open and accessible lockers with pliers and oil; accessible matches; kitchen open and accessible and dirty; medication box accessible; program plans listed (as required) outdated; and, no supervisor (Applicant had advised supervisor no longer employed).

In compliance with the Director, Ministry staff remained at the daycare until it closed. The summary sheet was reviewed with the Applicant who signed her acknowledgment. She provided the Program Advisor with numerous justifications for what had been observed including the fact that her sister dropped off the infant at the daycare Center unexpectedly. Ms. Ewan advised that immediate compliance on all issues impacting health and safety, ie. qualified staff was necessary before the Center re-opened; timelines for compliance on other issues were also stipulated. The Applicant indicated she understood what and when all action by her was required.

The following day, Ms. Ewan and Ms. Saunders returned to the daycare. The Applicant stated she had expected more time to come into compliance. At this, the 5th site visit within 7 months, a number of continuing violations were observed as well as some new ones. Continuing ones included: the medication box remained accessible; program plans remained outdated; accessible lockers still held inappropriate materials; dirt and debris remained in the school room; power drill still accessible, being in an unlocked room; used drink cups and foods still out in the kitchen. New concerns included: staff verification lunch given not that posted for parents; medical forms incomplete concerning parents' authorization

and schedule; daily log missing; snack served not that posted; one preschool child alone in unsupervised room. When taken to supervised area, staff not aware of his entry; and, conflicting information from the Applicant as to when the Supervisor left - later determined to have been the previous December.

Ms. Ewan observed she had never seen such incoherence and non-compliance concerns. When reviewing her inspection visits of February 24th and 25th with the Ministry Director, the Director asked to meet with the Applicant as soon as possible. A date of March 1st was agreed upon. In the meantime, Ms. Ewan was to return the following workday for further follow-up.

The Program Advisor's notes of her visit of February 28th appear in Tab 16. They reflect attendance issues concerning one child, F., not marked present by 4:10 p.m. when the record was checked, but staff advising he had been there since 11:45 a.m. Also, the toddler attendance record illustrated three children still at the Center, but the staff stated that two had in fact left earlier. As regards supervision, staff again miscounted the number of children present. One child, C., left the pre-school room unnoticed; he was later returned by staff who neglected to advise that he had gone and was being returned. A staff in the pre-school room appeared oblivious to the danger of children jumping off a stairway of five steps, until such was pointed out by the Ministry staff. Medication forms found to be incomplete on February 25th, 2005 had still not been corrected. In addition, a further nine such forms were revealed. Food storage remained substandard such as a milk bottle left not refrigerated in a cubby. Notification of qualified staff being hired had not still been received although this was the date set for compliance for this issue. Moreover, the Applicant advised that she was using a new daily log, as the older one could not be located. It was later found by Ms. Saunders in a bin in one of the rooms. Ms. Ewan testified as to the importance of maintaining up-to-date and current daily logs as it is a primary communication tool for staff and Applicants regarding children, routines, notices, etc. Ms. Ewan and Ms. Saunders remained at the Center until closing for the third time due to their concerns about adequate supervision and the children's ongoing health and safety. Again, the summary sheets were carefully reviewed by the staff and the Applicant who was specifically advised to contact other daycare Centers, in order to get a copy of proper medical forms and policies for her to implement. Ms. Ewan noted the Applicant downplayed Ministry concerns, deflecting most items, blaming others and offering excuses rather than taking responsibility for the issues.

At the Director's meeting the Applicant's past history was reviewed. She was reminded of ongoing, repeated infractions and cautioned her licence was already under terms and conditions. The Act was reviewed as was the fact it set out minimum compliance requirements, many of which she had repeatedly failed to meet. At the conclusion of the meeting, Ms. Ewan believed the Applicant still did not understand the importance of her compliance, deflecting much of the responsibility to others and simplifying the Ministry's position to concerns over attendance and supervision.

The seventh site visit was a follow-up to the Director's meeting and took place on March 8th, 2005. Ms. Ewan's summary sheets appear in Tab 19. She arrived at 1:35 p.m. to find one qualified staff member, Joanna, on the premises with Shirley, the non-staff, resource helper, responsible for 23 children. There was still no supervisor. Two children were in their beds and staff confirmed they had never slept despite being put in cots at noon contrary to the Act which specifies that children who cannot rest be allowed quiet playtime. Ms. Ewan noted the cold temperature in the Center. The staff admitted that the facility was always cold. Although the Applicant advised it was the result of parents leaving the doors open when coming to collect their children, Ms. Ewan concluded such was unlikely, given the number of doors to be passed into the rooms. She later brought a thermometer into the daycare, which registered a temperature one degree below compliance. Ms. Ewan also testified that the snack served to the children during her visit was neither nutritious nor sufficient. One staff member advised Ms. Ewan that the daycare was opened in the morning to receive pre-school children with an unqualified staff member. Also, there was no record in the daily log of fire and health reports required under the Act. Again, programs as posted for parents in the rooms were not those in use. In fact, Ms. Ewan testified the programming appeared to be non-existent and incoherent. She noted material in the rooms appeared inappropriate and included violent content video such as the "Hitchhiker" and "Cheerleader" as well as 13+ category "Judge Judd". While the Applicant advised that medical procedures had been changed, whereby she was to dispense all medication, interviews with staff revealed that the Applicant had not communicated such to them. Shirley was observed using non-hygienic methods when cleaning children and food still was not labeled nor stored appropriately. When the Applicant reviewed these concerns, she disputed the arrival time of school-age children.

March 10th was the final site visit made by Ms. Ewan and her colleague to verify two allegations the Ministry had received: one that unqualified staff were responsible for arrival procedures at the daycare opening time; and two, that the Applicant had knives in the van she uses to transport the children to and from school. Ms. Ewan testified they arrived shortly before 7 a.m. and observed one unqualified staff in attendance with six children. They entered the Center. The Applicant arrived with two children at about 7:25 a.m. Ms. Saunders inspected the van and discovered two butcher-type knives in the driver's door pocket. Later, the Applicant removed a sledgehammer. When the police arrived after being called in by the Director, a third knife was found under one of the mats in the van. They arrested the Applicant. She was taken for interviews. She left the Center without appointing anyone in charge and Ministry staff felt obligated to remain on site until she was later released without charge. While at the Center, Ms. Ewan noted that pre-recording of attendance was revealed in the attendance record, with notations made for March 11th. She also noted C. had never been marked as having left the day before. An Enbridge Gas employee arrived and advised Ms. Ewan he was there to turn off the gas based on non-payment. He agreed to refrain from doing so. At 3:15 p.m., the Director issued and posted the

section 15 Direction closing the daycare until certain elements of operation had successfully met compliance. The CAS was notified of the situation concerning the Applicant's son, D.J., who, Ministry Staff determined, needed temporary care.

Ms. Saunders and Ms. Ewan met up with ex-employees Chamberlain and Coleman that evening. A third ex-employee, Joanna Hoy, was later interviewed by Ministry staff. The information provided by these former employees verified much of the Program Advisors' own observations of the Center. It went further and alleged numerous instances of abusive behaviors, which Ms. Ewan testified triggered her duty to advise the Children's Aid Society (CAS) which she did the following day. She followed up with a report to the Society on March 24th. The Ministry received the CAS Report verifying "cruel and inappropriate treatment" on April 20th (Tab 69), the day after the Director issued her Notice of Proposal.

2. Meagan Chamberlain

Meagan Chamberlain graduated from High School in 2004 and worked that summer for a mini-school daycare. She testified that the Applicant hired her in August 2004 to assist in the pre-school room. She later moved to the Toddler room. She stated that she had left the Applicant's daycare in December of 2004 due to the Applicant's disapproval of her notifying parents that a communicable disease appeared to exist within the Center. The Applicant had advised both Ms. Chamberlain and her co-staff, Ms Hoy, they had been irresponsible, as no verification of a disease had been received by the Health Department. In cross-examination Ms. Chamberlain stated the Applicant had never advised the Health Department of the possible concern.

Ms. Chamberlain testified to instances of children placed by the Applicant in unsupervised rooms alone. She testified to numerous incidents where she and/or other staff were out of ratio. On one occasion, the Applicant told her to assist in the kitchen leaving one ECE qualified staff alone with 22 children. In December, Ms. Chamberlain stated Johanna was called out almost daily to run errands with the Applicant, leaving staff out of ratio.

Ms. Chamberlain stated the Applicant used inappropriate discipline: on one occasion slapping a child who attempted to play with new dolls, on others, pulling children by the ear. She noted the autistic child, C., was afraid of the Applicant and would hide behind Jennifer. She observed the Applicant once threaten C. with a juice bottle. Ms. Chamberlain testified that the Applicant had hit her 7 years old son D.J. with a spatula in front of other children causing him to cry. She testified the Applicant used profane expressions in the lunchroom to staff in front of children and referred to one child as a "nigger" in the hearing of children. Jennifer Coleman also attested to these occurrences.

The witness testified that there was often insufficient food served; for example,

Doritos for lunch, or, on another occasion, leftover cupcakes. Also, menu changes were often not posted.

She stated that the situation worsened once the Supervisor, Stephanie, left the Center in December. Ms. Chamberlain testified that she had not reported her concerns to the Ministry as the Applicant intimidated her. She testified that the Applicant knew voodoo and that, while she herself did not believe in voodoo, she felt unsettled by stories from the Applicant detailing her attempts to ram her husband's suspected lover's car and using a knife on his telephone cord. Eventually, in February she did make an anonymous complaint to the Ministry and, contacted it again when Johanna advised her that the Applicant kept a knife in her van to deal with people who "fuck with her".

In cross-examination Ms. Chamberlain denied any collusion with Jennifer or Joanna in reporting concerns to the Ministry.

3. Stephanie Poitras

Ms. Poitras graduated with her ECE Diploma in 2001. Her only prior job experience was with a daycare in Oakville where she had been employed for close to a year. The Applicant hired Ms Poitras in June 2003 as an Assistant Supervisor. She received no specific instruction as to what was required by her as an Assistant Supervisor and provided with no time off programming or class to perform any supervisory function until October, 2004 when Sue Ewan advised such was mandated by legislation. She remained employed by the Applicant until the end of October 2004 when she left the Center for a better paying position and a better work environment.

She spoke of children being placed alone in pre-school room to watch T.V. or play Nintendo, or being removed to an unsupervised room if disruptive. She testified to situations where staff were out of ratio, and described one such situation where the Applicant left her alone and out of ratio, to go with another staff for a manicure.

Ms Poitras stated that she overheard the Applicant yell at the children. She also testified that the Applicant uses the expression "I'm going to fix your business" as a form of discipline. She testified that she did have some concerns with regards to food at the Center, and would take items from the pre-school room when her children remained hungry after eating. However, in cross-examination she stated that she did not find the food to be inadequate although she recollected occasions where refrigerated foods were not properly stored.

Ms. Poitras was told by the Applicant to fill out fire drill forms when no fire drills had taken place. Ms. Poitras testified the Applicant arranged for one toddler to be placed with her in the school room but returned to the toddler room when the parents came to pick him up which caused the child certain stress, but ensured

the Applicant received the higher fee charged for toddlers. She also recalled the Applicant calling her in March asking her to advise the Ministry that she had remained on, as part-time staff, after Christmas. She testified that the Applicant did not intimidate her, but she stopped answering her phone this March.

4. Johanna Hoy

Johanna Hoy was employed by the Applicant from September 2004 to the March 10th closure of the facility. While she had been granted Director's approval for qualified status on Ms. Ewan's recommendation in October, she advised that she still needs to complete course work to graduate with an ECE diploma.

Ms. Hoy corroborated the testimony of the earlier witnesses that the Applicant used the expression "I'll fix your business" as a form of discipline with the children. She also testified that C. was afraid of the Applicant and would respond to her by cringing. She testified that the Applicant used degrading language on the children calling one, S., who was autistic, a "fat slob" in front of other children, and another, K., "stupid".

Ms. Hoy testified to one occasion, corroborated by Jennifer Coleman, where one child, A., was provided with a snack from his mother which she and Jennifer gave him. The Applicant grabbed the child by the neck, forcing him to spit the food into the waste bin in front of his classmates causing him to cry.

Ms. Hoy also testified to inaccurate medication records completed by the Applicant as well as the Applicant requesting she leave her program duties to complete the Applicant's ECE homework assignment. Ms. Hoy testified that the Applicant brought her baby into the Center everyday after its birth, until notified by Ms. Ewan in February that such was in contravention of her licence.

The witness stated the ratios were often ignored by the Applicant when she, or other staff, were pulled out of programming to rake leaves, prepare food or attend with the Applicant on errands.

Ms. Hoy admitted that she had told Megan Chamberlain of an instance where the Applicant had pulled a knife out of the van. Ms. Hoy testified the Applicant told her that she keeps it for "anyone who fucks with me". The witness testified that she had told the police, when questioned in March, that she understood the Applicant kept the knife for purposes of self-defense.

Ms. Hoy testified that she realized much of the Center's operation was improper but she feared the Applicant who had personal knowledge of her and who employed her. She had once suggested the Applicant close the Center, but the Applicant had responded the money was too good for her to do so. Ms. Hoy testified that when the Applicant called her after March to advise her wage subsidy could be collected, she opted not to go as she did not want to meet with

the Applicant.

In cross-examination, Ms. Hoy acknowledged that she had written a letter attesting to the “loving environment” at the Center, which she had signed when requested to do so by the Applicant as she felt she couldn’t refuse.

5. Jennifer Coleman

Jennifer Coleman, like other former staff witnesses, is young and inexperienced. She had recently graduated with an ECE diploma, when hired by the Applicant at the end of October last year. Jennifer had a one-month prior job experience at a daycare in Applewood. Therefore, neither she nor Stephanie had the qualifications of supervisor, as required by the Act: being an ECE with two years of job experience. However, the evidence was undisputed that the Applicant had met compliance while Stephanie was supervisor as the Director had granted Stephanie such approval. No evidence was led suggesting that such had been the case with Jennifer. Jennifer was only with the Center for some eight weeks, choosing to leave at Christmas, 2004 for a better paying position at another Center. Ms. Coleman testified that she left Perfect Little Angels as she did not like her minimum pay and because she was concerned with the treatment of the children.

Ms. Coleman testified to autistic children being sent to the office for behavioral management. She stated this occurred in particular with S. (10 or 11 years) and C. (4 and a half years), either by the Applicant, or by Ms. Coleman believing the Applicant was in fact in the office to supervise, and later fetching the children only to find there was in fact no supervision and each had been alone. Ms. Coleman corroborated earlier testimony that C. was “deathly afraid” of the Applicant and would grip Ms. Coleman’s leg when the Applicant was present. She also related the incident of the Applicant threatening the child with the juice bottle.

Ms. Coleman testified as to frequent incidents of being out of ratio, corroborating other testimony as to incidents where she was removed to prepare for DJ’s birthday, leaving Shirley with one other staff and 27 children; as well, repeating an occurrence testified to by Ms. Chamberlain, where the Applicant and Joanna went to purchase a microwave leaving her and another staff, S. out of ratio; and other occasions where 24 children would be with one staff during rest period.

Earlier evidence that insufficient food was frequently served to the children was corroborated by this witness who relayed an incident where pizza served for lunch required the staff to cut in bite size pieces because it was so hard; also watered down soup. Ms. Coleman corroborated the testimony of Johanna concerning the child A. being forced to spit up foods in front of the other child causing him to cry.

Ms. Coleman repeated earlier testimony attesting to the Applicant calling children

“stupid”, “fat slob” and “nigger” in their and other children’s presence. She also testified to the Applicant’s frequent use of the phrase: “I’ll fix your business” in behavior management with the children, which she found intimidating, whatever tone may have been employed.

The witness also testified that the Applicant had requested she complete some of the Applicant’s ECE homework. . She testified that the Applicant had requested she fill out medication forms with false information, as she was the only person authorized to complete the forms as she had the ECE qualification. She never did state medicine was given when it was not, but did fudge time of administering medicine on occasion.

As with Ms. Chamberlain and Ms. Hoy, Ms. Coleman testified she did not report any of these concerns in part because the Applicant intimidated her. She testified that the Applicant’s son advised her that his mother had beat him up with an electric cord the night before; she did not report it to the authorities, although she knew from her training such was her duty. Ms. Coleman denied any belief in voodoo, but testified that she feared the Applicant in part due to the violent stories she related concerning her personal life.

In cross-examination, Ms. Coleman admitted she and Ms Chamberlain had talked of reporting the Applicant but that she was concerned about her job. She stated she determined to report once otherwise employed, but neglected to do so until February, when she agreed to be part of the anonymous complaint. She denied ever speaking to Joanna about reporting the Applicant and denied any collusion between her and Meagan

The witness explained that she was not qualified to care for autistic children and found having C. in her classroom extremely difficult, especially when S. was also present. Finally, Ms. Coleman testified that best efforts to keep attendance records were employed by staff, but that, sometimes, proved impossible when rooms were out of ratio with developmentally challenged children and inadequate staff. She concluded that she would like the Center to remain closed, as she never believed it was a safe environment for the children.

6. Shari Sahadeo

Shari Sahadeo is a Children’s Aid Society intake worker for Peel Region. Her testimony was provided to the Tribunal under subpoena. She was responsible for the investigation into the Applicant initiated by the CAS after the incident of March 10th, 2005. In doing so, she interviewed the Applicant’s children, the Applicant, children at the Center determined by the CAS to be “eligible” and their parents/guardians. “Eligible” refers to those children whom the Society’s investigation revealed were sufficiently evidenced, through, in this case, consistency of staff interviews, to have been at risk.

Ms. Sahadeo concluded that the Applicant had in fact struck D.J. with objects

despite her denial and characterization of her son as a liar. In total three allegations were found verified by the Society (Tab 73) and such was communicated to the Applicant in its Verification Decision sent to her by letter on April 19th (Tab 91). In response to questioning by the Ministry Counsel, Ms. Sahadeo testified that the Applicant never took responsibility for any of the accusations/findings. The Investigator noted that no further action was required regarding the daycare, as, by the time the CAS had completed its investigation, the Ministry had closed the Center.

7. Bonnie Corey

Bonnie Corey is a Director under the Act. As Project Manager for the Central West Region, she is responsible for over 830 licenced daycare facilities. She testified that in her six years, this is the third instance of her having issued a section 15 Direction and the 5th Notice of Intention for licence revocation

Prior to becoming Director, Ms. Corey had been a Program Supervisor and, before that, a Program Advisor. She described the purpose of the Act as being to regulate operators to ensure the health, safety and welfare of children in their care. To ensure the requirements are met, the Act provides for inspection and enforcement. Total compliance is required as the terms set by the legislation are minimum standards.

Ms. Corey testified that her concerns leading to the Direction, and eventual Notice of Intention, were based on the Applicant's persistent non-compliance despite what the Ministry felt was more than sufficient guidance as well as the severity of the issues involved.

Ms. Corey testified that she first became concerned when Ms. Ewan called for back-up assistance during her on site investigation of February 24th, 2005. Although such inspections usually last an hour or two, in this instance she directed the Program Advisors remain on site until the day's end due to the non-compliance concerns. A meeting took place that evening between her, Ms. Ewan and Ms. Saunders, culminating in her decision that the two should return the next day for monitoring. Based on this second visit, she also directed they return the following work day (Monday, February 28th) as well as set up a meeting between her and the Applicant on March 1st.

The March 1st meeting included discussion of the complaints as well as the summary sheets detailing the numerous areas of non-compliance. Ms. Corey testified she felt the Applicant did not understand the reasoning behind the requirement of compliance and instead relied on excuses, justifications and deflection. For example, the Applicant claimed her infant was not in any risk at the Center when the issue was she had been already advised her Center was

not licenced for the child's care; the Applicant insisted she always had two staff when the concern was that three staff were required for her numbers under the Act, as well as a supervisor; and, the Applicant stated she had not applied for Supervisor status as she had thought the previous supervisor would return, despite the fact it was now over two months since Stephanie Poitras had left.

Ms. Corey advised the Applicant of the seriousness of her situation. She noted the licence was already subject to terms and conditions. Ms. Corey further advised the Applicant that the evidence on the management of the Center under her control did not satisfy the Director she was capable of being given supervisor status under Director approval.

The Director determined further monitoring and staff interviews should be undertaken. The March 8th investigation revealed continuing problems and, then, on March 9th, she was advised of the allegation by former staff that the Applicant kept a knife in her van. When the March 10th early morning inspection determined gas payment and supervision/qualified staff issues, as well as verified the existence of the knife, Ms. Corey determined the section 15 Direction was required.

On April 8th, the Director issued the Notice of Intention to revoke the licence based on the past competency of the Applicant. She also considered the Applicant's failure to supply a Serious Occurrence Report on the March 10th incident, her apparent obliviousness to the need for ensuring competent management for the Center when removed from the premises that day; and, perhaps most importantly, the information revealed in the ex-staff interviews corroborating observations of Ministry staff of ongoing and repeated non-compliance.

B. The Applicant:

1. Jane Vincent

Jane Vincent worked for the Applicant on a fulltime basis last October; she moved to part-time from November through December; then back to full-time in January through to March 10th. She had previously worked as an assistant to an ECE where she served lunch, cleaned and took the children outside for play. She advised that she had been a piano tutor for some period in Sri Lanka prior to immigrating to Canada.

Ms Vincent had some trouble making herself understood and expressing herself, whether through nerves or through her ability with the English language, and perhaps both. For instance, she began by testifying that she had finished her ECE, but later in cross-examination clarified that she had never completed an ECE, but rather had taken a six-month "Assistant" course at a private college. She also testified she was not aware of why she was appearing at the Tribunal.

Ms. Vincent testified that she had never seen the Applicant treat any child badly. She stated that Perfect Little Angels was a nice place with a clean and healthy atmosphere. Fresh food was cooked daily by the Applicant's mother. Everyone at the Center was very friendly; Jennifer was Ms. Vincent's best friend as well as was the Applicant. She stated that she did not know that Meagan, Joanna and Jennifer had complained about the Applicant.

Ms. Vincent testified that it was "a bit cold" at the Center.

On March 10th, Ms. Vincent testified that she arrived at the Center at 7 a.m., then the Applicant and two children arrived and finally the Ministry staff, Ms. Ewan and Ms. Saunders. She advised that only one child had arrived early, but by 8 a.m. she and the Applicant were busy in the pre-school room with 10 children. Ms. Vincent was not aware of much of the activity with the Ministry staff that morning as she testified that she was busy with the children. She did remember them taking pictures. Ms. Vincent testified she did not know any numbers to call for D.J. alternative care, although she did have Joanna's and Maria's phone numbers, as they were her friends. She did not know anything about D.J. and the CAS that day, although was aware he was crying for his mother in the morning.

In cross-examination, Ms. Vincent seemed uncertain about ratios for the daycare. She believed that the pre-school room was 1:8 or 12-24 children for 2 staff. Although toddlers would sometimes come into her room, she was not aware what effect such might have on ratios. On being questioned, she recollected that she was alone with one qualified staff and 24 children on February 24th, which was in ratio. On further questioning, she admitted "in truth not in ratio".

The attendance record was not her responsibility but fell to the ECE staff.

Ms. Vincent testified that when the Applicant returned from her meeting with the Director on March 1st, she was upset and blamed the staff for the problems, telling Ms. Vincent that she must do a better job of cleaning.

2. Bhamatie Meghan

Bhamatie Meghan introduced herself as having twenty years experience with children. She is mother to four children aged 16 years to 6 months. Prior to coming to Canada when she was 17, Ms. Megan was a kindergarten teacher in her native Guiana. She testified that she had run a daycare out of her home for two years prior to being licenced in July 2002. She had spent a great deal of time and money in meeting all requirements for running a licenced facility, which she hopes to continue to run.

Ms. Megan testified that the first Ministry Program Advisor that she had was a B.

Wilson with whom she had no problems; however, Ms. Ewan was someone she could not talk to, despite trying her best to meet all concerns. Other Operators had advised her that she should simply comply with Ms. Ewan's demands.

Ms. Megan testified that she recognized the importance of the children's health and safety and did her best to ensure such. She did address all of Ms. Ewan's concerns of October 2004, even though some were, in her opinion, petty. She referenced the Program Advisor's issue with sealed soap packages stacked on the bathroom floor, as a potential hazard. She also noted the Program Advisor finding her non-compliant with cots stacked as high as 24" when the requirement was no more than 20". She referenced the debris and dirt in a corner of the playground, which she was unable to clean due to her having need for the city to inspect in order for it to release her money.

The Applicant stated that she had never told staff to falsify medical records but advised them they too could be held responsible for medicating on an as-needed basis after Ms. Ewan had advised this was improper.

With reference to supervision, Ms. Megan stated that she offered to loan Joanna money to complete her course work, as the Director's approval she had as supervisor, was dependent on her achieving her ECE. Since Johanna never registered for these courses, the Applicant never approved her any pay raise.

On March 10th, 2005 Ms. Vincent was in charge of opening the Center, which, usually, only has one child in attendance prior to her own arrival at 7:30 a.m. The Applicant stated that she was never told that a qualified staff was necessary.

Ms. Megan testified that she attempted to ensure more prudent staff control of the attendance records by instituting random checks and having staff sign updated policies. She felt that the situation had improved although there continued to be some errors made by staff in this regard.

No stale or leftover foods were served at the Center. Her mother acted as the main cook until February when she began to care for the Applicant's infant. Then, the Applicant herself or other staff took over responsibility for food preparation.

Ms. Megan advised that the fire concerns involved staff lists, which she could not keep updated, as they were in a locked firebox and her staff kept changing. As concerns the fire door, the Applicant had attempted to remove ice blockage with a knife a few days before March 10th, but the knife had broken. As a result, she brought knives and a sledgehammer on the 10th, which she had intended to immediately remove from the van on her arrival. However, she had other items, including laundry, which she had carried into the Center first. She testified that she had not attempted to conceal any of these items but had simply covered the sledgehammer so as not to expose it. The \$4,000.00 cash, which she had on her in an envelope, was money that she was intending to bank that day: she has

always had large sums of money and usually amasses a fair amount before bothering with banking.

The Applicant testified she had never threatened any of the staff with voodoo.

Ms. Megan explained that the expression “I’ll fix your business” is simply an expression, which she often uses, although never to any child in her care, save perhaps her own son, and intends no threat.

Ms. Megan denied ever insulting the children S. and J. and in fact continues now to care for J.’s sister, as she and the mother are friends. She denied ever pulling children by the ear and noted that in her years of licence had never any serious occurrence or injury at her Center where the risk of any harm to the children was very low. She denied ever hitting her son with anything other than her hand on the bottom and testified that such spanking wasn’t effective on him in any event.

Ms. Megan concluded that losing her licence to operate was a direct consequence of the incident with the police on March 10th, instigated by the Ministry staff. Any other concerns with non-compliance were not sufficiently serious to pull her licence, as all places had similar infractions.

In cross-examination, Ms. Megan denied ever having over 24 children with one staff. She advised that during rest period, there might be a maximum of 24 as allowed by the Regulations under the Act. She had been late returning the one day, which explained being out of ratio after 2 p.m.; on the other occasion her sister had dropped off her baby before she had time to return to the Center. As a mother of four she felt the Ministry Staff were discriminatory in telling her that the child was unsafe. She blamed Joanna for taking improper attendance on February 28th (see Tab 16). She did not agree that the electric cord was a hazard, but did have it removed; she also had the matches and drill removed, which she agreed were hazards. She blamed the staff for the tool room door to not have been bolted. She did agree the knives in the van might be considered hazards, but disagreed they were in this instance as, being in the driver’s door side pocket, they were not accessible to any child. She denied children would be sent out to the van on occasion and told to wait for her in it, unsupervised, to be driven to or from school.

Closing Submissions:

Ministry Counsel urged the Tribunal to uphold the Director’s Notice of Intention. She noted that seven site visits to the Applicant’s daycare between October 2004 and March 2005, five of which were found to be necessary by the Director in the last two weeks leading up to March 10th, revealed persistent non-compliance issues, some of which were of extreme concern to the welfare of the children under her care. These more egregious matters included unqualified and insufficient staff, who in more than one instance were unable to correctly advise

the Program Advisor of the number of children on site; improper medical records; forged fire records; hazardous items accessible to the children; inappropriate behavioral management including unattended children, verbal threats and physical manhandling, verified by the CAS. Counsel noted the detailed notes kept by Ms. Ewan and specified that she is a credible witness whose testimony was not contested.

Counsel for the Applicant urged the Tribunal to be reasonable in considering the evidence and advised that it is not quantity but rather quality of non-compliance that is in issue. He argued that to conclude the Applicant non-compliant for staff leaving a room to locate an attendance record when asked to do so is “bureaucracy run amok” as is the expectation, the Applicant should provide a Serious Occurrence Report for an incident initiated by the Ministry itself, and of which the Ministry has more detailed knowledge than even the Applicant herself. He argued that the March 10th police involvement precipitated the Director’s actions, for which she now has attempted to provide evidence justify her actions. Mr. Baksh submitted that her wrongful arrest had been based on false information given to the police by the Ministry. He argued the CAS conclusions were based on allegations, without independent evidence and thus were merely speculative.

Mr. Baksh noted the time lapse of months between the time Meaghan and Jennifer left the Center and the time they eventually reported the Applicant to the Ministry. He also referred to their admission of discussions pertaining to such reporting. He argued the only reasonable inference was that these employees were on a mission to close the Center. Finally, he urged the Tribunal to find the Applicant credible in making effort to comply with regulatory requirements and dismiss the proposal.

THE LAW:

The relevant sections of the Act and Regulations provide as follows:

(12) revocation or refusal to renew

(2) subject to section 13, a director may refuse to renew or may revoke a licence issued to a day nursery or a private-home day care agency, where in the director’s opinion,

(a) the licensee or any employee of the licensee, or where the licensee is a corporation, any officer, director or employee thereof, has contravened or has knowingly permitted any person under the control or direction of or associated with the licensee, officer, director or employee, as the case may be, to contravene,

(i) any provision of this act or the regulations or of any other act or the regulations thereunder applying to the establishment, operation or Maintenance Of the

day nursery or the provision of private-home day care, as the case may be, or

- (ii) any term or condition of the licence;
- (b) the building or buildings or accommodation in which the day nursery is established, operated or maintained or the private-home day care is provided, does not comply with the requirements of this Act and the regulations;
- (c) the day nursery is established, operated or maintained or the private-home day care is provided in a manner that is prejudicial to the health, safety or welfare of the children cared for in the day nursery or in the place or places where private-home day care is provided; [or]
- (d) any person has made a false statement in the application for the licence or renewal thereof, or in any report, document or other information required to be furnished by this Act or the regulations or by any other Act or regulation that applies to the day nursery or private-home day care agency, as the case may be; or

Section 13 provides a right of appeal to this Tribunal from a Director's Notice of Intention to Revoke a licence. Subsection (4) reads:

Powers of Tribunal where hearing

- (4) Where an applicant or licensee requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, at the hearing, may by order direct the Director to carry out the Director's proposal or refrain from carrying out the Director's proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director. R.S.O. 1990, c. D.2, s. 13 (4); 1999, c. 12, Sched. G, s. 21 (3).

Section 15 authorizes the Director to issue a Direction where of the opinion that there is a threat to the health, safety or welfare of the children cared for and provides that the Direction acts as a licence suspension for which the section 13 right of appeal applies.

The relevant sections of Regulation 262 provide:

- 3. (1) Subject to subsections (2) and (3), every operator shall be responsible for the operation and management of each day nursery or private-home day care agency operated by the operator, including the program, financial and personnel administration of each such day nursery or private-home day care agency. R.R.O. 1990, Reg. 262, s. 3 (1).
- (5) Every operator of a day nursery shall employ a supervisor, who shall be a person described in section 58, who shall plan and

direct the program of the day nursery, be in charge of the children, oversee the staff and who shall be responsible to the operator. R.R.O. 1990, Reg. 262, s. 3 (5).

4. (1) Every person who applies for a licence to establish, operate or maintain a day nursery under section 11 of the Act shall at the time of application file with a Director evidence that the premises used or to be used as a day nursery comply with,

(c) any by-law of the municipality or any by-law of the council of the band on the reserve, as the case may be, and any other law for the protection of persons from fire hazards;

(f) the requirements of the Fire Code made under the Fire Marshals Act, where applicable. R.R.O. 1990, Reg. 262, s. 4 (1).

12. Every operator shall ensure that in each day nursery operated by the operator and in each location where private-home day care is provided by the operator, the temperature is maintained at a level of at least twenty degrees Celsius. R.R.O. 1990, Reg. 262, s. 12.

19. Every operator of a private-home day care agency shall ensure that in respect of each location where private-home day care is provided by the operator,

(a) all poisonous and hazardous substances are inaccessible to children in attendance; and

35. Every operator shall ensure that,

(a) there are written policies and procedures with respect to serious occurrences in each day nursery operated by the operator and each location where private-home day care is provided by the operator; and

(b) a program adviser is notified of any serious occurrence in any day nursery operated by the operator or any location where private-home day care is provided by the operator within twenty-four hours of its happening. R.R.O. 1990, Reg. 262, s. 35.

- 37 (1) Where an operator agrees to the administration of drugs or medications, the operator shall ensure that,

(d) a drug or medication is administered to a child only where a parent of the child gives written authorization for the administration of the drug or medication and that included with the authorization is a schedule that sets out the times the drug or medication is to be given and amounts to be administered; and

41. (1) Every operator of a day nursery shall post planned menus for the current and following week in a conspicuous place in each day nursery operated by the operator with any substitutions noted on the posted menus. R.R.O. 1990, Reg. 262, s. 41 (1).

45. (1) No operator shall permit,

- (a) corporal punishment of a child;
 - (b) deliberate harsh or degrading measures to be used on a child that would humiliate a child or undermine a child's self-respect; and
48. (2) Every operator shall ensure that a record is kept of the daily attendance of each child enrolled in each day nursery operated by the operator and in each location where private-home day care is provided by the operator. R.R.O. 1990, Reg. 262, s. 48 (2).
- (3) In the case of a day nursery, the daily attendance record referred to in subsection (2) shall show the arrival and departure of each child or if a child is absent. R.R.O. 1990, Reg. 262, s. 48 (3)
55. (3) The number of employees required for the care and guidance of the children enrolled in a day nursery when on the premises or during activities off the premises shall be determined by the operator of the day nursery in accordance with the ratios set out in Column 2 of Schedule 3 or 4, unless otherwise approved by a Director. R.R.O. 1990, Reg. 262, s. 55 (3).
- (5) A resource teacher shall not be included when calculating the number of employees under subsection (3). R.R.O. 1990, Reg. 262, s. 55 (5).
- (6) Despite subsection (1), except where the children enrolled are under eighteen months of age, during the periods of arrival and departure of children and during the rest period the ratio of employees to children may be reduced to less than that set out in Schedule 3 or 4, as the case may be, if the observed ratio is not less than two-thirds of the required ratio. R.R.O. 1990, Reg. 262, s. 55 (6).
- (7) Where,
- (a) fewer than five full-time employees are required to meet the ratios as set out in Schedule 3 or 4, the supervisor may be counted as a full-time employee;
 - (b) five or six full-time employees are required to meet the ratios as set out in Schedule 3 or 4, a full-time supervisor may be counted as a full-time employee for up to half the time a full-time employee is required to be on staff; and
- (8) Every operator of a day nursery shall ensure that where there are in attendance at a day nursery operated by the operator,
- (a) fewer than six children eighteen months of age or over, there is at least one adult in attendance;
 - (b) six or more children eighteen months of age or over, there are at least two adults in attendance;
 - (c) fewer than four children under eighteen months of age, there is at least one adult in attendance; and

- (d) four or more children under eighteen months of age, there are at least two adults in attendance.
R.R.O. 1990, Reg. 262, s. 55 (8).

58. A supervisor shall be a person who,

(a) holds,

(i) a diploma in early childhood education from an Ontario College of Applied Arts and Technology, or

(ii) an academic qualification that a Director considers equivalent to a diploma referred to in subclause (i);

(b) has at least two years of experience working in a day nursery with children who are at the same age and developmental levels as the children in the day nursery where the supervisor is to be employed; and

(c) is approved by a Director,

or is in the opinion of a Director capable of planning and directing the program of a day nursery, being in charge of children and overseeing staff. R.R.O. 1990, Reg. 262, s. 58

Schedule 3 of Regulation 262 of the Act provide as follows:

[Schedule 3](#)

NUMBER OF STAFF REQUIRED FOR A DAY NURSERY OTHER THAN A DAY
NURSERY FOR HANDICAPPED CHILDREN

Item	Column 1	Column 2	Column 3
	Age of Children in Group	Ratio of Employees to Children	Maximum Number of Children in Group
1.	Under 18 months of age	3 to 10	10
2.	18 months of age and over up to and including 30 months of age	1 to 5	15
3.	More than 30 months of age up to and including 5 years of age	1 to 8	16
4.	Over 5 years of age and less than 6 years of age	1 to 12	24
5.	6 years of age and over up to and including 12 years of age	1 to 15	30

R.R.O. 1990, Reg. 262, Sched. 3.

Facts Found and Analysis:

The Tribunal heard extensive evidence in this matter and agrees in part with the Applicant's Counsel that a number of allegations against his client were trivial when considered alone: contraventions found, for example, when staff were merely following Ministry's direction to locate a manual, or even when a staff, no doubt made nervous by the visit from the Program Advisor, made a clear and

obvious counting error when she said two children were present when clearly three were in the room. To some extent this myopic detailing of non-compliance suggests an over zealousness which itself raises some doubt as to the good faith intention of the Advisor to work collaboratively with the Applicant. However, this said, the evidence presented by Ms. Ewan as to what she observed over five site visits, from late February through early March, paints a picture of a daycare which was inadequately managed, negligently supervised, and haphazardly controlled. It is also abundantly clear from the evidence that these concerns persisted despite many attempts to inform the Applicant of the necessity for correction. This Tribunal consequently finds it entirely reasonable that Ministry staff, responsible for ensuring this Center complied with legislative requirements, would become frustrated and conclude collaboration with the Applicant was not feasible. In this respect it is noteworthy that the Applicant herself testified that communication with Ms. Ewan was not effective, suggesting that she, too, found collaboration difficult to sustain.

As was acknowledged by the Counsel for the Applicant, Ms. Ewan's professionalism is unquestionable. She presented her evidence in a clear, unwavering, confident and passionate manner and this Tribunal finds her entirely credible. She has significant experience in working for, as well as being responsible for, the smooth operation of such a Center, albeit one some six times larger than that of the Applicant. It is reasonable to conclude that Ms. Ewan is able to distinguish between those non-compliances, which are fundamentally dangerous to the safety, and welfare of the children and others which may be less so. Moreover, the evidence was that Ms. Ewan's mounting concerns were shared by her colleague, Ms. Saunders, as well as her Director.

Ms. Corey is an individual with direct experience in these matters, having been a Program Advisor herself. She, too, concluded that increasingly serious sanctions against the Applicant were justified with mounting and repetitive evidence regarding the inadequate structure and management of the Center. Consequently, the Applicant, who had since the beginning, been licenced under short-term licences, had, as a result of Ms. Ewan's first site visit, additional Terms and Conditions attached to the licence.

Had it not been for what later transpired to be Ms. Chamberlain's anonymous complaint on February 17th, there the situation might have rested. As such, the Applicant would have remained like "other Operators" with some compliance issues believed by the Ministry to be reasonably controlled through licensing provisions. However, Ms. Chamberlain's complaint triggered the unannounced site visit of February 24th, which demonstrated such "incoherence" of the Applicant's Center that Ms. Ewan took the highly unusual step of asking for a support colleague to assist in the investigation.

The Tribunal accepts the evidence that numerous contraventions of the legislation were observed including insufficient staff numbers for 26 children,

most of who were still in their cots at 2:30 p.m., and accessible hazardous materials. The gravity of the situation triggered the Director's decision to order Ministry staff to remain on site through the day and schedule a meeting with the Applicant for the following week. Despite these actions, and despite the Applicant being cautioned as to the importance of specified problems through the Summary Sheet reviewed, many of the same problems were still outstanding the next day when the Program Advisors returned – the unlocked tool room, outdated plans, no Daily Log, children unsupervised, food left out, and the conflicting evidence given by the Applicant as to the existence of any Supervisor. Based on her review of the outcome of the February 25th visit, the Director approved the Program Advisors return a third time for the following work day. Here again, staff were not capable of counting the number of children in their care, attendance records failed to record a child who had arrived some four hours earlier, medical forms remained incomplete, food was found in cubbies, children were jumping off stairs, there was still no Supervisor, the Daily Log was missing – all, once again, requiring Ministry staff remain on site until closing.

Despite the above, the Director continued to give the Applicant the benefit of the doubt, and the meeting of March 1st went ahead as planned. It was the Director's conclusion from this meeting that the Applicant, in her reliance on explanations and justifications, simply didn't understand the severity of the situation, nor accept responsibility for her situation. In her testimony before the Tribunal, the Applicant demonstrated a similar position, claiming the licence suspension and eventual Notice to Revoke were not the culmination of these contraventions, which she stated, existed in all facilities. Contrary to the Applicant's submission that these are minor infringements, the Tribunal finds them significant and of serious potential danger to the well being of the children under her care. However, equally concerning, is the fact of the Applicant's attitude such that she continues to deny the existence and significance of her many non-compliances.

The evidence that the Applicant did not take her situation seriously is seen in follow-up inspection as ordered by Ms Corey for one week later. It revealed the same on-going issues: insufficient staff, children still in bed at 1:30 p.m., though not sleeping, no Operator, no supervisor, insufficient snack or snack not as posted, no program plans as well as fire department infractions and the evidence of regular temperatures below that mandated in the legislation. The fact that the same infractions and, at best, sloppy management continued to exist provide to this Tribunal further evidence as to the ungovernability of the Applicant.

The Tribunal is satisfied that the inspection of March 10th included the van used to transport the children as it finds that the van is part of the Applicant's facility and is therefore subject to inspection by a program advisor under the Act. The fact that there were knives as had been alleged by former staff, when added to the track record of repeated non-compliance and the Director's conclusions from the March 1st meeting, entirely justify the issuance of the Direction of March 10th

with its effect of immediate suspension of licence, as well as the following Notice of Intention to Revoke.

Before this Tribunal the Applicant has, as she did when meeting with Ministry Staff and the Director, opted to rely on outright denials or justifications for the various non-compliance matters found. The Tribunal notes the testimony of the CAS worker, Ms. Sahadeo, that when speaking to the Applicant after the mailing to her of the CAS Report, she took no responsibility for any of the findings made by the Society.

The Applicant testified that she had never left the Center with staff being out of ratio, save the two occasions when Ministry staff arrived unannounced and that this was during rest time, when ratios were reduced which was not always 12-2 p.m., but on these occasions 12:30 to 2:30 p.m. While she acknowledged that the drill was a hazardous item, she blamed staff for it not being locked away; she blamed staff for attendance records; she blamed parents for cold temperatures; she blamed ice build-up for the knives; she blamed staff turn-over for not keeping fire records properly; she blamed her son for lying as to corporeal punishment; she blamed ex-staff for collusion in their testimony against her. In the end, she blames her present predicament on the Ministry's instigation of her "false arrest". She presented no evidence to corroborate any of this.

The Applicant chose to rely on the testimony of Ms Vincent to support her position. The Tribunal does not find Ms. Vincent a credible or helpful witness. She appeared, at best, vague and uncertain of most aspects of the management at the Center, whether through ignorance or poor memory or simply nervousness at the Tribunal. She was evasive concerning her qualifications. Only under repeated questioning did she admit she had an ECA opposed to an ECE Diploma from a recognized college. She admitted to not telling the truth regarding being in ratio when questioned by the Ministry counsel.

Where Ms. Megan and the ex-staff have conflicting evidence, the Tribunal prefers that of the ex-staff, especially on items repeated by more than one ex-staff member. Despite the Applicant's attempts to discredit their testimony by alleging collusion by ex-staff witnesses, none was found to have occurred. Not one appeared evasive or tainted by vengeful or otherwise suspect motive. All were very young and new to the workforce. They were therefore relatively inexperienced and vulnerable such that their testimony as to being intimidated and cautious of the Applicant, herself older and more experienced, as well as their employer, is entirely believable. It is accepted that this was a factor in their subsequent maneuverings. The Tribunal finds from the evidence, that the Applicant chose to increase her profits at the Center, by paying staff low wages and therefore only attracting inexperienced people who would not be cognizant of their authority and all their responsibilities.

These staff were, moreover, oppressed by the working conditions imposed by the Applicant (all, for example, testified to their having to ensure their rooms were cleaned at the end of each day) such that responsibility given to them such as attendance records could not be adequately performed. It was this inadequate staffing, both in terms of number of staff, as well as their qualifications, that the Tribunal finds had direct impact on ongoing non-compliance issues. Fire drills were not properly conducted, nor was there time for food to be properly cleaned away after meals, nor could overworked staff properly maintain a room with autistic children or toddlers for whom they weren't qualified to care. As a result of the Applicant's desire to economize on adequate numbers and training of staff, she placed these vulnerable children at risk.

By thus not maintaining compliance with the Act, she also placed her licence at risk. From October, when these concerns were clearly put to her by Ministry staff, she prevaricated and disingenuously played for time, by, for example, never hiring a properly qualified supervisor. This Tribunal finds that the Applicant is clearly the author of her own misfortune.

The Tribunal accepts the evidence of Ms Chamberlain in particular. It finds that she contacted the Ministry due to her sincere misgivings as to the management of the Center. Later greatly, and legitimately, in the Tribunal's opinion, exaggerated due to her being advised by Ms Hoy, herself still at the Center, of the knife. Rather than imputing any fault to her, the Tribunal lauds the actions taken by this principled and honest young woman. Through her brave proactive measures, authorities acted quickly and competently in turn, leading to the finding of other witnesses with evidence corroborating hers and thus supportive of licence removal. This includes clear and incontrovertible evidence of the following specific infringements of the legislation:

- No supervisor as required
- Ratios out of compliance
- Unqualified staff
- Colder temperatures than required
- Abusive behavior to children as verified by the CAS in an independent Investigation
- Medical procedures lackadaisical
- Food and hazardous items not prudently supervised.

The granting of a licence by the Province denotes regulatory approval of a service upon which the Ontario public relies. Once licenced, the service is subject to regulatory controls over basic operational standards. Logically then, if these standards are not in effect, the public would expect the licence to be removed. When the Director took that later action in April, this Tribunal finds she was entirely correct to do so. At that point, not only had she the original evidence of non-compliance, as supplied by her staff and her own experience with the Applicant, she now also had further evidence of serious concerns detailing abusive behavior management corroborated by Ms. Chamberlain, Ms Hoy and

Ms Poitras, who also repeated experiences of inadequate staffing, improper medical distribution and insufficient management. As was clear from the testimony of the witnesses, Ms. Corey issued her Proposal to Revoke the licence of the Applicant prior to the CAS finalizing their report into the daycare. She had more than enough grounds to act without this being necessary. When it arrived, nine days later on April 19th, verifying the allegations of abuse by Ms. Megan, such became *additional* justification for the Proposal already issued.

The young women who testified before this Tribunal were able to admit to wrongdoing for which they demonstrated remorse: the completion of the Applicant's homework; the forged fire drills; misinformation on medical forms; children unsupervised; rooms out of ratio; witnessing abusive and degrading treatment. They recognized these as serious concerns for which they, eventually, took responsibility. Such is not the case with the Applicant. The Tribunal's mandate is to determine the ability of the Applicant to meet the requirements of licence as set out in the Act. In the opinion of this Tribunal that ability remains undemonstrated by this Applicant.

ORDER:

Pursuant to the authority vested in the Tribunal by the Act, the Tribunal orders that the Director revoke the Applicant's licence.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice Chair

Released: October 7, 2005

File name: 2876.perfect little angels.DNA.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
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Tribunal
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PRE-HEARING

BHAMATIE MEGHAN
PERFECT LITTLE ANGELS DAYCARE

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

TO SUSPEND AND REVOKE A LICENCE

TRIBUNAL: JIM KENNELLY, Member

APPEARANCES: BHAMATIE MEGHAN, Applicant

RAYMOND MOTEE, Counsel for Applicant

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

BONNIE COREY, Director, under Day Nurseries Act

MARIA SAUNDERS, Program Advisor, Ministry of Children and
Youth Services

CHERYL WOZNICA, Student at Law, Ministry of Community and
Social Services and Ministry of Children and Youth Services.

DATE OF
PRE-HEARING: May 25, 2005

Toronto

ORDER

Following attendances from the above at a prehearing on May 25, 2005 the Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday June 29, 2005 and to continue, if necessary, on Thursday June 30, 2005 at the Tribunal's Chambers, 1 St.Clair Avenue West, 12th Floor, Toronto, Ontario.

With the Parties consent, the matter of 'Suspension' and of 'Revoking' the Daycare Licence of Bhamatie Meghan / Perfect Little Angels Daycare will be consolidated as one Appeal (LAT Files 2876 and 2958).

Upon having submissions made by Counsel for the Respondent and without objection from Counsel for the Applicant, without prejudice, this Tribunal orders that:

1. The Peel Children's Aid Society produce forthwith all records and documents related to all children in the care of the Society who were placed with Bhamatie Meghan and Perfect Little Angels Daycare (Mississauga, Ontario).
2. It is further ordered that the Chief of Police and/or Designate of the Peel Regional Police Force disclose and produce forthwith the records of incidents at Perfect Little Angels Daycare (Mississauga, Ontario) from the period July 25, 2002 to April 8, 2005.
3. The materials provided to the Tribunal from the Peel Children's Aid Society and the Peel Regional Police Force shall not form part of the public record and will be limited in their distribution to the Tribunal and the Parties.

Ms. Renison, on behalf of the Director, today supplied four volumes of hearing documents along with two sets of different photograph exhibits. All of these materials have also been provided to the Applicant.

Counsel for the Applicant agreed to review with his client all documents intended for the hearing. Following, he agreed to communicate to Ms. Renison, Counsel for the Respondent, which issues in the documentary evidence can be agreed upon. It was agreed this will be done well before the expected hearing date of June 29-30.

Mr. Motee also agreed to supply to Ms. Renison one recent letter from the Children's Aid Society addressed to the Applicant, the Behavior Modification Policy of the Perfect Little Angels Daycare and letters of support for the Applicant from two staff members. All of these documents are new to the Respondent.

Both parties were reminded of the requirements of the Tribunal regarding the time periods and calling of expert witnesses (LAT Rules of Practice 6.4). Both parties were also reminded of the Tribunal Requirements of disclosure (LAT Rules of Practice 6.3)

There was also a brief discussion on the importance and the requirement that all witnesses be able to provide evidence without interference.

With the possibility of nine witnesses from the Ministry and at least two witnesses for the Appellant further hearing dates were considered. The dates July 6-7, 2005 have also been reserved if necessary.

LICENCE APPEAL TRIBUNAL

Jim Kennelly, Member

RELEASED: June 6, 2005



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PREHEARING

CHERYL BELSHAW and PEACEFUL TRANSITION

APPEAL UNDER SECTION 22(2) OF THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT* R.S.O. 1990, CHAPTER F. 36 AS AMENDED FROM A NOTICE OF PROPOSAL TO REVOKE, PURSUANT TO SECTION 22(1).

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JOHN ANDERSON, Counsel appearing on behalf of CHERYL BELSHAW and PEACEFUL TRANSITION.

JULIE MACIURA, Counsel appearing on behalf of the Registrar, *Funeral Directors and Establishments Act*

DATE OF
PREHEARING: December 14, 2005 Toronto

ORDER

Following attendances on December 14, 2005 at a pre-hearing at the offices of the Tribunal, John Anderson, Counsel appearing on behalf of Cheryl Belshaw and Peaceful Transition and Julie Maciura, Counsel appearing on behalf of the Registrar, *Funeral Directors and Establishments Act*

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on January 25, 2006 at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on January 26, 2006 at the aforementioned address;

1. The Parties to the hearing are Cheryl Belshaw and Peaceful Transition (the "Applicants") and the Registrar.

2. The Registrar and the Applicants acknowledge that each has had documentary disclosure from the other. In the event that further documentary disclosure is necessary the Applicants and the Registrar shall fully comply with Rule 6 of the Rules of Practice of this Tribunal and in regard to Rule 6.4 of such Rules disclosure shall be made at least 30 days before the hearing. The parties shall not less than 30 days prior to hearing serve on the other and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.
3. The Registrar and the Applicants shall not less than 30 days prior to the hearing provide to the other the full names of all witnesses that they intend to call to testify on their behalf at the hearing and shall further provide such other party or parties with a brief written summary of the intended evidence to which such witnesses shall testify.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: December 21, 2005

File Name: 3159.FDEA.Belshaw.prehrg.doc

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website www.lat.gov.on.ca in approximately two weeks time. The decision will also be available on Quicklaw at a later date.

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CHERYL BELSHAW – ADJ - Adjournment

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

IN THE MATTER OF
CHERYL BELSHAW

AND IN THE MATTER of the DECISION by
the Discipline Committee of the Board of Funeral Services
- Decision dated: August 26, 2005

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

CHERYL BELSHAW

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 December 2, 2005.

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against both parties* to commence at the Licence Appeal Tribunal, 1 St. Clair Ave. West, 12th Floor, Toronto, Ontario, at 1:30 p.m. on Wednesday, December 14, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: December 5, 2005

FILE NAME: 3159.fdea.Belshaw.adj.doc



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

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2756-MED-ADJ-ADJOURNMENT

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Minister
of Transportation pursuant to section 32(12)(b)(i)
of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

Applicant

and

MINISTER OF TRANSPORTATION

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 22, 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 10:30 a.m., on Thursday, May 19, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

RELEASED: April 25, 2005

FILE NAME: 2756.med-adj-Adjournment

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Appeal
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d'appel en
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HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

2847-MED-DIS-Dismissal

IN THE MATTER of an APPEAL of A DOWNGRADE OF A
DRIVER'S LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 32(12)(b)(i) of the *Highway
Traffic Act* TO DOWNGRADE A PERSON'S DRIVER'S LICENCE
FOR A MEDICAL REASON

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 31(12)(b)(i) of the Act to downgrade the Applicant's driver's licence;

AND WHEREAS the Applicant has failed to submit a completed Notice of Appeal form and 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 submit a completed Notice of Appeal form and 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 downgrade the driver's licence of the Applicant.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 6, 2005

FILE NAME: 2847.med.dis.doc



Licence Appeal Tribunal

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Decisions under Highway Traffic Act

Section 47(1) (b) - Medical

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2906-MED-ADJ-ADJOURNMENT

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Registrar
of Motor Vehicles pursuant to section 47(1) of
the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

Applicant

and

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 13, 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 Friday, June 17, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 27, 2005

FILE NAME: 2906.med-adj-Adjournment

2842-MED-PERC- Perceptual Problems

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: DAVID HURST, M.D., Member

APPEARANCES: APPLICANT, unrepresented

KYLE BIEL,
Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: April 7, 2005 *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).

FACTS:

Kyle Biel from the Ministry of Transportation ("MTO") presented their position as the Respondent to the Applicant's appeal to the Tribunal concerning the suspension of his licence. On May 28, 2004 the Ministry received a medical report from Dr. Trevor Bon, geriatric and internal medicine, St. Joseph's Hospital, Thunder Bay, in which he informed the Ministry that the Applicant is suffering from a cognitive impairment that may put him at risk to drive. He had been assessed by Dr. Bon and by a psychologist and both felt that he

has impairments that will preclude safe driving. He was aware that this letter was being sent and that he was not to drive until he had heard from the Ministry. On June 25, 2004 a letter was sent to the Applicant from the Ministry of Transportation regarding this medical report indicating that his impairments affected his ability to safely operate a motor vehicle. The Registrar of Motor Vehicles decided therefore to suspend his driving privilege for medical reasons under Section 47(1) of the *Highway Traffic Act*.

They indicated this case could be reconsidered on receipt of medical information satisfactory to the Registrar, specifically they indicated they must receive an up-to-date detailed assessment from a physician familiar with his medical history, a neurologist or a physician specializing in geriatric medicine. This report would have to evaluate his cognitive functions and confirm there are no other disqualifying medical concerns. A driving evaluation at a rehabilitation centre might be required.

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 Ministry on receipt of the medical report from Dr. Bon in Thunder Bay had no alternative but to suspend the Applicant's driving privileges.

The Applicant submitted a detailed description of his extensive driving record over many years, but these details bore no relevance concerning his present difficulty as outlined by his doctor.

The hearing was conducted electronically and the Applicant appeared quite confused about the purpose of the phone call and his responses to Mr. Biel's presentation for MTO were inappropriate. The Applicant failed to understand that his extensive driving record over the past 52 years had no bearing on the present events. Mr. Biel asked the Applicant if he was able to get a report stating that it was safe for him to drive and his answer was "no". The Applicant volunteered that he had been told he was suffering from Alzheimer's disease.

At this point the Tribunal spoke with the Applicant's wife to be certain that there was understanding of the purpose of this telephone interview. She volunteered that she has power of attorney over the Applicant's care and that her son has similar responsibility for his finances and she was very concerned about his driving ability.

Mr. Biel for the MTO, on cross-examination and summing up, cited report from Dr. Bon indicating significant cognitive failure recommending that his driving privileges be suspended and that the reason for his suspension now is this very significant impairment of thought processes and the Respondent recommended that this decision not be set aside or modified.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 14, 2001 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

David Hurst, M.D.,
Presiding Member

RELEASED: April 18, 2004

FILE NAME: 2842.med.perc

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.

2804-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 FLYNN, M.D. Presiding Member

APPEARANCES: APPLICANT,
unrepresented

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

DATE OF
HEARING: April 13, 2005

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. Letter regarding Suspension of Driver's Licence effective February 5, 2005 issued by the Registrar of Motor Vehicles, filed by the Respondent.
2. Notice of Appeal Form received at the Tribunal February 10, 2005, filed by the Applicant.

PRELIMINARY MATTERS:

1. This Tribunal convened a hearing on March 23, 2005 and was adjourned to April 13, 2005 when the Applicant could not be contacted.
2. The Applicant advised the Tribunal that he did not take delivery of the Respondent's Summary of Evidence sent to him by courier. He confirmed with the Tribunal that he had copies of all relevant correspondence that the Respondent intended to enter as evidence and agreed to continue the hearing.

FACTS:

On August 11, 2004 the Registrar of Motor Vehicles received a Medical Report from Physician "A", the Applicant's Family Physician in accordance with Section 203 of the *Highway Traffic Act*. The Report stated:

Reason for referral: Seizure ?idiopathic. Early July.

On October 19, 2004 the Registrar informed the Applicant that he must file an up-to-date assessment from a neurologist by December 14, 2004. On December 3, 2004 the Registrar received a Medical Information Form completed by Physician "B" a neurologist, that answered "Yes" to the question: "Has there been any episodes of sudden loss of consciousness or any other incident(s) which may affect his ability to operate a motor vehicle?" The neurologist stated that the Applicant attended on September 3, October 28 and December 2, 2004 and corroborating medical information was received from a hospital in Ohio. He stated that the Applicant was a commercial pilot and while visiting in Ohio he was observed by his co-pilot, while sleeping, to have a seizure. He had a second seizure while undergoing an EEG in hospital the next day and a third seizure resulted in a fall. He was discharged from the hospital on medication for epilepsy, Depakene. He elected not to continue medication since his commercial pilot licence required him to be both seizure free and off medication and had been off anticonvulsant therapy and was seizure free.

Copies of Reports from the hospital in Ohio were received by the Registrar, including a negative MRI Exam. Report.

These reports stated that a co-pilot had been sleeping in the bunk next to the Applicant and was awakened by a strange breathing noise and he found the Applicant to be somewhat stiff and was unarousable. An ambulance was called and found him to be post-ictal and combative and he was taken to hospital. On arrival he was alert and denied having any symptoms and he advised staff that there had been one episode in the past during sleep when he experienced some stiffening.

He was sent for an EEG next day and while was witnessed to have generalized tonic clonic seizure with epileptiform abnormality seen on the EEG. Physical examination and the usual

diagnostic tests were otherwise normal. He was advised to consult a neurologist on return to Canada and was also advised against driving, swimming, baths and flying. His family physician in Canada was contacted and advised to refer him to a neurologist.

On January 14, 2005 his case was reviewed by the Medical Advisory Committee (MAC), which recommended suspension of his driving licence and that he be reconsidered for reinstatement with a detailed neurologist's assessment confirming that he remained seizure free for one year, together with anti-convulsant levels. MAC expressed serious concern regarding his non-compliance, and the serious implications for his pilot's licence.

On January 19, 2005 the Registrar informed the Applicant that his licence to drive was suspended for medical reasons under Section 47(1) of the *HTA*. He was advised of the requirements for consideration for reinstatement and of the right of Appeal. He was sent a Notice of Suspension dated February 2, 2005.

On February 4, 2005, the Applicant submitted Notice of Appeal.

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 the following:

1. Section 47(1) of the *HTA* that states:

Subject to section 47.1, the Registrar may suspend or cancel a driver's licence for

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

2. Regulation 340/94 Section 14 that states:

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

3. The Canadian Council of Motor Transport Administrators Medical Standards for Drivers, Section 6.3.2 that states:

The individual who has suffered a single unprovoked seizure should not be considered for any class of motor vehicle until a detailed neurological assessment and EEG have been performed and are satisfactory.

Where the EEG shows signs of epileptiform activity, the patient should not be allowed to drive for a period of twelve months.

The Respondent also submits that the Applicant has not been compliant with anti-convulsant medication.

The Applicant acknowledged in Reasons for Appeal that he has suffered a number of seizures in the past seven months, always in his sleep. He stated that he is now taking Dilantin and has been seizure free. He has relinquished his pilot's licence.

THE TRIBUNAL FINDS AS FACT:

1. The Registrar was justified in suspending the Applicant's licence to drive on receipt of the physician's medical report of seizures, pursuant to Section 203 of the *Highway Traffic Act*.
2. The Registrar was justified in continuing the Suspension under Regulation 340/94.
3. The Registrar was correct in adopting the CCMTA Medical Standard 6.3.2 in requiring a period of 12 months seizure free and a detailed neurological assessment with an EEG showing no epileptiform activity.
4. The report from the hospital in Ohio shows that the Applicant suffered a witnessed seizure during sleep, and also while undergoing an EEG which confirmed epileptiform activity.

DECISION:

Upon the application by the Applicant to appeal the decision effective February 5, 2005 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

Kevin Flynn, M.D.,
Presiding Member

RELEASED: April 19, 2005

FILE NAME: 2804.med.seiz

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.



2849-MED-ALCL-Alcohol

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: DAVID HURST, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

APPLICANT

DATE OF
HEARING: April 7, 2005

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. Laboratory report from Dr. Greenberg of March 21, 2005, with GGT and MCV.
2. Notice of suspension of the Applicant's driver's licence dated November 4, 2004.
3. Detailed report of the physical assessment and laboratory evaluation by the Applicant.

FACTS:

This Ministry's case was presented by Kim Beintema, hearing officer for the Respondent, Registrar of Motor Vehicles.

The Ministry acted with respect to the Law after receiving a report from Dr. Richard Gorman of the Toronto East General Hospital from October 18, 2004. He stated that the Applicant has a severe alcohol addiction, which he has admitted and was confirmed by his wife. He is also driving his car, which he admitted during his course of treatment with Dr. Gorman and he recommended suspension of the Applicant's driver's licence. Subsequent to this the Applicant was informed in writing that his licence would be suspended under Section 47 (1) of the *Highway Traffic Act*. This was sent on November 4, 2004.

The Applicant was advised that the case could be reconsidered on receipt of an enclosed Substance Abuse Assessment Form. The form was to be completed by a physician familiar with his medical history, or one specializing in Addictions Medicine. An interpretation of biochemical markers (MCV and GGT) was also required. The Applicant was informed of his right to appeal to the Licence Appeal Tribunal. On December 7, 2004 this completed form was returned to the Ministry reviewing drinking habits over the years and its consequences. It was noted that previous treatment included a 28-day course at the Bellwood Health Centre and he had then been dry for two years. He had been a faithful attender of meetings with the AA. The Applicant was advised that the report filed on his behalf had been reviewed and that his driving privilege should remain under suspension.

He was also informed that a longer period of stability was necessary to ensure that his condition has been adequately controlled. The Ministry would reconsider his case on receipt of a detailed up-to-date report from his treating physician confirming that he has remained abstinent from alcohol for a period of one year. This period may be reduced if he provides confirmation that he has successfully completed an alcohol treatment program upon favorable recommendation from either his treating physician or an addictions specialist report would also include interpretation of his biochemical markers (MCV and GGT).

The Applicant indicated that he was now seeing his family doctor (Dr. Greenberg) on a fairly regular basis and per his latest blood work (exhibit one) including an MCV of 90.6 FL (normal range 80 to 97) and a GGT of 23 UL (normal range 5 to 50).

The Applicant in stating his case said that he had taken the option of following along with the Bellwood Clinic at the rate of one night a week for a year beginning of April 2003 and finishing in April 2004. He has continued with the AA on a regular basis, but went on a spree in the fall of 2004, lasting seven weeks using vodka.

His wife in desperation called the police who took him to the hospital where he was then

admitted to a psychiatric ward of drying out on librium when his doctor found out he had been drinking and driving.

As a result of this experience and the extreme anxiety that he has caused his family, he has now been completely dry since October 2004.

In cross examination by Ms. Bientema who learned that up to the age of 58 he described himself as a social drinker only, but admits now to three serious drinking sprees in 1996, 2002 and 2004. In 1996, he was in hospital and went to AA, but had no other serious treatment program. In 2002, he went to the hospital but did not stay and ultimately went to the Bellwood Clinic for 28 days and again in 2004, under Dr. Gorman. The Applicant agreed that he has not fully complied with the Ministry regarding documentation.

In summing up, Ms. Bientema indicated that the Applicant must go through a treatment program because of his relapse in 2002. If he was unable to do that he must do a one year documented survey by Dr. Greenburg, which might possibly be shortened if there was suitable documentation from his doctor. In essence, the Ministry has not received enough documented information.

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:

Dr. Gorman acted directly and responsibly in reporting the Applicant's dependency to the Ministry.

The Ministry acted in accordance with the Law and indicated the importance of the Applicant to send medical reports on his progress during therapy.

The Applicant has made some progress but it is still not clearly documented over a sufficient length of time that he has controlled his addiction.

The Applicant has reported that he has had no driving offences.

The Applicant clearly admits that he is an alcoholic and has good insight into the problem. He has made significant strides.

The Applicant has failed to conform to the standard requirements of the Ministry as outlined under the Law. He has neither undergone a complete program documented by doctors nor gone through documented sufficiently long period of abstinence.

DECISION:

Upon the application by the Applicant to appeal the decision effective November 14, 2004, 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

David Hurst, M.D., Presiding Member

RELEASED: April 14, 2005

FILE NAME: 2849.med.alcl.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.



2827-MED-DISM-DISMISSAL

HIGHWAY TRAFFIC ACT

Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

IN THE MATTER of an APPEAL of A SUSPENSION OF A
DRIVER'S LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 47(1) of the *Highway Traffic Act*
TO SUSPEND A PERSON'S DRIVER'S LICENCE FOR A
MEDICAL REASON

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 47(1) of the Act, to suspend the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic 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;

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(2) 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.

LICENCE APPEAL TRIBUNAL

Carl Dombek,
Chair

Released: April 6, 2005

File name: 2827.med.dism.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2818-MED-ALCL-Alcohol

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.KEVIN FLYNN, Member

APPEARANCES: TERRY COPEs, Agent for Applicant

ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: March 23, 2005

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 issued by the Registrar of Motor Vehicles dated February 5, 2005, filed by L.A.T.
2. Notice of Appeal dated February 16, 2005, filed by L.A.T.

FACTS:

An unsolicited Medical Report completed by Physician "A" under Section 203 of the *Highway Traffic Act* on December 21, 2004 was received by the Registrar on January 13, 2005. It stated:

42 year old female with alcohol dependency.

On January 30, 2005 the Registrar acknowledged the Medical Report and indicated that the Applicant's licence to drive was suspended.

The same date, the Registrar wrote to the Applicant advising her that her licence was suspended under Section 47(1) of the *Highway Traffic Act*.

The Applicant was advised that her case would be reconsidered upon receipt of medical information satisfactory to the Registrar. She was requested to arrange for an up to date detailed report from a physician who specializes in Addictions Medicine. The report must include a physical examination, a complete alcohol use history and an interpretation of biological markers (MCV & GGT). It must also confirm that she had completed the treatment program recommended by her physician, that she has remained abstinent from alcohol for a period of 12 months and was participating in a relapse prevention program. She was also advised that she may appeal this decision to the Licence Appeal Tribunal.

The Applicant acknowledged that she has an alcohol problem, and that she has agreed to attend an Addiction program and has been on a waiting list since January 2005. She has seen a counsellor four times since the beginning of February 2005. She stated that she has been off alcohol for two days in anticipation of starting a Day Treatment program on March 29, 2005. She has been seeing a Naturopath to help her cope. She states that she has never driven after drinking and does not drive after dark. She has attended Physician "A" for four years, and her doctor has told her that the Medical Report was an opportunity for her to take steps to deal with her alcoholism. She has been drinking since she came of age and realized that she had a problem in 1996. She estimated her consumption of alcohol at about three drinks a day. She would drink a bottle of wine a day before the letter to MTO. She has no faith in Alcoholics Anonymous and has not been involved with a support group. She takes medication for high blood pressure and for anxiety depression.

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:

1. Section 47(1) of the *Highway Traffic Act* that states:
 the Registrar may suspend or cancel,
 (b) a driver's licence; (for)
 (g) any other sufficient reason not referred to in clause (d), (e) or (f).
2. The Registrar acted on receipt of an unsolicited Medical Report from a physician pursuant to Section 203 of the *HTA*, and had an obligation to suspend the Applicant's licence for reasons of public safety.
3. No further medical information has been received following the letter to the Applicant on January 30, 2005.
4. The Applicant has admitted to an alcohol problem and has been drinking up to two days before the Hearing commencement in anticipation of commencement of a Treatment Program.
5. No information has been received to warrant consideration for re-instatement.
6. The CCMTA (Canadian Council of Motor Transport Administrators) Medical Standard 13.2 states:
 Patients with a history of alcohol dependence ...should not be allowed to drive any type of motor vehicle. Persons habitually dependent on alcohol should not be allowed to drive until evidence of alcoholism is no longer a problem. These patients must complete a recognized rehabilitation program for substance dependence and remain alcohol free...for a specified period of time before recommending driving.
 STANDARD: MAY NOT DRIVE ANY TYPE OF MOTOR VEHICLE FOR 12 MONTHS DURING WHICH TIME THE INDIVIDUAL MUST REMAIN... ALCOHOL-FREE.
 EARLIER RELICENSURE MAY BE CONSIDERED UPON FAVOURABLE RECOMMENDATION FROM AN ADDICTION SPECIALIST RECOGNIZED BY THE LICENSING AUTHORITY AND THE SUCCESSFUL COMPLETION OF AN ALCOHOL REHABILITATION PROGRAM.

(emphasis in original)

The Applicant relies on:

1. Her clean driving record.
2. The only evidence for suspension is the Medical Report.
3. The Applicant understood that an Alcohol Use form would be sent by the Registrar for completion by her physician. The letter was ambiguous in that the Applicant understood that she had to wait until she was twelve months alcohol-free before submitting a report from an Addictions Specialist.

4. She has never driven after drinking.
5. The Registrar should have relied on the Regulations, not on the CCMTA Standard before issuing the suspension.
6. There is no proof that she is unsafe to drive and the onus should be on the Registrar to prove that she is unsafe.

The Tribunal finds as fact:

1. The Registrar was justified in issuing a suspension on receipt of the Medical Report that indicated that the Applicant suffered from alcohol dependence.
2. The Registrar was justified in continuing the suspension based on the CCMTA Standard for Drivers 13.2. This Standard is accepted as a guide in establishing minimum medical qualifications and are utilized by both physicians and administrators in assessing an individual's ability to operate a motor vehicle.
3. The Applicant admits that she has an alcohol problem and has agreed to participate in a Treatment Program. She has not demonstrated to the Tribunal strong motivation for completing the requirements set by the Registrar before consideration for re-instatement.

DECISION:

Upon the application by (the "Applicant") to appeal the decision dated February 5, 2005 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

Kevin Flynn, M. D.,
Presiding Member

RELEASED: April 5, 2005

FILE NAME: 2818.med.alcl

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.



2806-MED-ALCL-ALCOHOL

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. PATRICK G. COFFEY, Presiding Member

APPEARANCES: ADELAIDE PINDER, Representative for the Registrar of Motor Vehicles

APPLICANT
JOHN S. KIRKLAND, Solicitor for the Applicant

DATE OF
HEARING: March 31, 2005 *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:

Exhibit 1. Notice of Suspension of Driver's Licence, effective January 16, 2005, issued by the Registrar of Motor Vehicles.

Exhibit 2. Notice of Appeal Form received at the Tribunal February 10, 2005, filed by the Applicant.

Exhibit 3. MTO (Ministry of Transportation) File Summary.

PRELIMINARY MATTERS:

The Counsel for the Applicant, Mr. John Kirkland, said that he had read through the file submission and had no objection to the Respondent abbreviating what was written in the file when it came to the Respondent. The Respondent concurred.

FACTS:

On June 18, 2003, Dr. C. Ehrat, family doctor for the Applicant, a 71 year old male, sent in a medical report concerning the Applicant stating that he had a condition, ("alcohol or drug abuse"), likely to significantly interfere with driving, and that there was a long-standing history of alcohol abuse with intermittent relapses.

On August 1, 2003, the MTO wrote to the Applicant stating that a medical report had been received and it had been decided to suspend his driving privileges. The MTO went on to say that his case could be reconsidered upon receipt of medical information satisfactory to the Registrar and requested a medical report from a physician specialising in Addictions Medicine.

On November 4, 2003, Cliff Redman of the Tricounty Addictions Services sent in a report concerning the Applicant to his family physician, Dr. C. Ehrat. In this, he wrote, in part, and going over the recent history, that the Applicant had gone to see his family doctor and was under the influence of alcohol when he arrived. As a result of this, his family doctor had to send in a report to the MTO and made an appointment for the Applicant to attend the Tricounty Addictions Services.

At this assessment with Cliff Redman of the Tricounty Addictions Services, the Applicant said that he had never driven in an intoxicated state before this episode. The report of Cliff Redman went on to say that the Applicant admitted to a history of alcohol abuse for most of his adult life and had attended several treatment programs including the residential treatment program at Elliott Lake two years ago, after which he was abstinent from alcohol for six to eight months. It was the opinion of Cliff Redman that the Applicant's drinking "may initially be triggered by sporadic episodes of depression". His current prescribed medication, Effexor, is meant to moderate this tendency to depression. His wife has been very supportive. He will continue to meet with an addictions counsellor and he is about to be referred for a psychiatric assessment.

On February 6, 2004, psychiatrist Dr. Joy Albuquerque of Lanark County Mental Health sent in a report regarding the Applicant. In this she reviewed the recent and past psychiatric history, medications (Effexor), personal history, family history and medical problems and described the mental status examination and her impression. Under "Impression" she stated that the Applicant is "Currently almost seven months sober. He is motivated currently not to drink and he appears to be responding well to Effexor". She recommended that the Applicant remain on Effexor, because she was of the opinion that anxiety and excessive worry were some of the Applicant's underlying problems. In

conclusion, the psychiatrist wrote, "At this point in time, I don't see that there is any clear psychiatric illness, other than the addictions, that might be underlying this gentleman's problems".

April 22, 2004, the Laboratory results for the Applicant showed that the tests for alcoholism, the GGT and the MCV were normal.

On May 5, 2004, Anne Ness, addictions counsellor of the Tricounty Addiction Services wrote to Dr. Ehrat about the Applicant. She said that he had been seeing her regularly at about two week intervals. She said that he had completed the goals listed in the previous assessment report, namely, first - maintain abstinence, secondly - part-time work only, third - re-apply for driver's licence, and fourth - travel. She thought that he was able to maintain these goals and wrote, "I would see no psychological reason to keep his licence under suspension".

On March 18, 2004, Dr. C. Ehrat sent in another medical report on behalf of the Applicant. The doctor said that the Applicant had been a patient of hers since 1996 and that he had attended multiple treatment programs for alcoholism including Alcoholics Anonymous. She (the doctor) said that she had notified the MTO in 2003 after the Applicant had presented to her office intoxicated and having driven himself there.

The doctor went on to say that since his last admission to a medical institution in 2003, and until this recent episode, "to the best of my knowledge he has remained abstinent from alcohol". The Applicant had been attending AA meetings and meeting counsellors from the Tricounty Addiction Services and had been compliant with her treatments.

On April 13, 2004, the MTO wrote to the Applicant stating that "it will be necessary to file a detailed assessment from a psychiatrist". Also the MTO asked for a further report from Dr. Ehrat.

On April 22, 2004, Dr. Ehrat sent in a "Release of Medical Information" form in which she wrote concerning the Applicant that the answer was "NO" to the following questions.

1. Is there evidence that this condition is not currently well controlled?
2. Have there been any episodes of sudden loss of consciousness or any other incident, which may affect the ability to operate a motor vehicle?
3. Is there evidence of non-compliance to treatment that may affect the ability to operate a motor vehicle?

On June 7, 2004, the MTO wrote to the Applicant stating that his medical report had been approved and that a notice of reinstatement of his licence would be mailed to him.

On June 7, 2004, another letter was sent by the MTO to the Applicant stating that he was required to file an up-to-date assessment from a physician specialising in addiction medicine or a physician familiar with his medical history. The letter went on to say, "Please arrange for this office to receive the above-mentioned assessment by November 12, 2004, or your driver's licence will be suspended".

On November 17, 2004, Dr. Ehrat wrote to the MTO enclosing blood work results, dated October 13, 2004, which showed that the GGT for the Applicant was 102 (normal 8 to 61) and the MCV was 103 (normal 81 to 100). She wrote, "Unfortunately, he had a relapse with respect to his alcohol consumption during these last few months as reflected in his GGT and MCV".

On January 6, 2005, the MTO wrote to the Applicant saying that, having received a medical report, it had been decided to suspend his driving privileges. The letter went on to write, "You must arrange for this office to receive an up-to date, detailed report from a physician who specialises in Addictions Medicine. The report must include a physical examination, a complete alcohol use history and an interpretation of bio-chemical markers (MCV and GGT). It must also confirm that you have completed the treatment program recommended by your physician, that you have remained abstinent from alcohol for a period of 12 months and that you are participating in a relapse prevention program".

March 2, 2005, MTO certified copy of Applicant's Driving Record showed that his current demerit points were zero.

Applicant's Evidence

At the Hearing on March 31, 2005, the Applicant's evidence was supplied by his counsel, Mr. John Kirkland.

When the Applicant had a relapse in the Fall of 2004, and consumed alcohol again, this relapse was not a very severe one. This was brought on by financial anxieties, depression and a family problem, all of a temporary nature. He has not consumed alcohol since then.

He has to depend on his wife to drive him to his part-time work.

His driving record is excellent.

He is seeing the addiction specialists (Tricounty Addiction Services) and his family doctor regularly.

In the opinion of the Applicant, and also of his counsel, the penalty, (that is this second suspension of his driving privilege), is too severe for this one and only relapse which occurred last Fall.

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

APPLICATION OF THE LAW TO FACTS:

The Tribunal sympathizes with the Applicant's request for return of his driving privilege.

The Tribunal recognizes that the Applicant is attending the treatment program of the Tricounty Addictions Services regularly and that the counselors here are pleased with his progress.

The Tribunal recognizes that Anne Ness of the Tricounty Addictions Services wrote on May 5, 2004, "I would see no psychological reason to keep his (the Applicant's) licence under suspension".

However, the Tribunal finds as a fact that the Applicant failed to maintain his abstinence from alcohol status once again in the Fall of 2004, and had his driving licence suspended again on January 6, 2005.

The Tribunal recommends that reinstatement of the Applicant's driving privilege not be considered for at least six months after the licence suspension of January 2005, and then only after a satisfactory report from either his addiction counselors or family doctor, including reports on the biochemical markers (MCV and GGT).

DECISION:

Upon the application by Applicant to appeal the decision effective January 16, 2005, of the Registrar of Motor Vehicles (the "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 G.Coffey, M.D.
Presiding Member

RELEASED: April 5, 2005

FILE NAME: 2806.med.alcl.doc

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Licence Appeal Tribunal

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M.J. JONES INC. AND 942225 ONTARIO LIMITED - ADJ - Adjournment	
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LECLERC, NOEL J.	
1461391 ONTARIO INC.	
SHERRY A. GENIER, MARIO A. GENIER AND SHERMAC LTD.	
1648291 ONTARIO INC.	
OVER THE TOP FREIGHTWAYS INC. and BSA TRUCKING LTD.	
1099261 ONTARIO LTD. O/A FORESHEW TRUCKING	
3075-CVOR- ADJ-Adjournment	
DORNER TRANSPORT CO LTD.	
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1480769 ONTARIO INC. o/a UNIQUE MOTOR FREIGHT SYSTEMS	
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NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD, 1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE LTD – ADJ - Adjournment

HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATIONS of

NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD,
1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE LTD

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: January 27, 2006

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

NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD,
1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE LTD

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the pre-hearing in the above matter on March 7, 2006;

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, April 11, 2006.

TAKE NOTICE that hearing dates will be set at the pre-hearing of April 11, 2006.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: March 6, 2006



HIGHWAY TRAFFIC ACT

Revised Statutes of Ontario, 1990, Chapter H.8, as amended

M.J. JONES INC. AND 942225 ONTARIO LIMITED – ADJ - Adjournment

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATIONS of

M.J. JONES INC. AND 942225 ONTARIO LIMITED

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: November 23, 2005

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

M.J. JONES INC. AND 942225 ONTARIO LIMITED

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the pre-hearing in the above matter on February 24, 2006;

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 Friday, March 31, 2006.

TAKE NOTICE that new hearing dates will be set at the pre-hearing of March 31, 2006.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: February 27, 2006



HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

3274-CVOR- ADJ-Adjournment

M.J. JONES INC. AND 942225 ONTARIO LIMITED

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATIONS of

M.J. JONES INC. AND 942225 ONTARIO LIMITED

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: November 23, 2005

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

M.J. JONES INC. AND 942225 ONTARIO LIMITED

- and -

Applicants

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the pre-hearing in the above matter on February 7, 2006;

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 Friday, February 24, 2006.

TAKE NOTICE that new hearing dates will be set at the pre-hearing of February 24, 2006.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: February 6 2006

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



PRE-HEARING

LECLERC, NOEL J.

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 LECLERC, NOEL J. for a Commercial Vehicle Operator's Registration (CVOR) certificate;

AND IN THE MATTER of the safety record of LECLERC, NOEL J. (CVOR #076-660-203);

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: PETER J. BELLAN, Counsel, representing Noel J. Leclerc.

MURRAY G. FORBES, Counsel, representing the Registrar of Motor Vehicles.

DATE OF
PRE-HEARING: February 7, 2006 *by teleconference*

ORDER

Following attendances on February 7, 2006, at a pre-hearing before this Tribunal of Peter J. Bellan, by teleconference, Counsel for Noel J. Leclerc (the "Applicant") and Murray G. Forbes, Counsel for the Registrar of Motor Vehicles (the "Respondent");

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m., on March 31, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue, 12th Floor, Toronto, Ontario;

1. The Applicant's Counsel advised that the Applicant would not be proceeding with the appeal as it is "without purpose" considering the amendments to the *Federal Motor Vehicle Transport Act* along with the introduction of the *Motor Carrier Safety Fitness Certificate Regulations* which came into effect on January 1, 2006.

2. The Applicant's Counsel advised he was aware the Applicant would need to forward a copy of his Safety Fitness Certificate/National Safety Code (NSC) number to the Ministry of Transportation if he intended to travel in Ontario with his commercial motor vehicle. Counsel for the Applicant confirmed he had in his possession a copy of the Ministry's Notice, dated November 17, 2005.
3. The Parties agreed that the matter was thereby concluded and the hearing will not be necessary.

LICENCE APPEAL TRIBUNAL

Simon Dann
Presiding Member

Released: February 13, 2006

FILE NAME: 3253.cvor.Leclerc.pre-hrg.doc

The decision will also be available on Quicklaw at a later date.



PREHEARING

1461391 ONTARIO INC.

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED FROM A CANCELLATION AND SEIZURE ORDER, PURSUANT TO SECTION 47(1), IN RELATION TO A COMMERCIAL VEHICLE OPERATOR REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: KULDIP SINGH, Agent, appearing on behalf of 1461391 Ontario Inc.

MURRAY FORBES, Counsel appearing on behalf of the Registrar of Motor Vehicles

DATE OF
PRE-HEARING: January 27, 2006 Toronto

ORDER

Following attendances on January 27, 2006, at a pre-hearing at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, of Kuldip Singh, Agent, appearing on behalf of 1461391 (the "Applicant") and Murray Forbes, Counsel, appearing on behalf of the Registrar of Motor Vehicles (the "Registrar").

And following the Applicant's notification to the Tribunal that it wished to withdraw its appeal.

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on February 17, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Applicant having withdrawn its appeal, the appeal is hereby dismissed.

2. The Registrar shall carry out the provisions of the Cancellation and Seizure Order dated November 3, 2005, at such time and in such manner as the Registrar deems fit.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: January 31, 2006

File Name: 3256.cvor.1461391 Ontario.prehrg.doc

This decision will also be available on Quicklaw at a later date.



SHERRY A. GENIER, MARIO A. GENIER AND SHERMAC 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: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: TERRY HAWTIN, Counsel appearing on behalf of SHERRY A.
GENIER, MARIO A. GENIER and SHERMAC LTD.

MURRAY FORBES, Counsel appearing on behalf of the
Registrar of Motor Vehicles

DATE OF
HEARING: November 23, 2005 Toronto

CONSENT ORDER

Upon the application to the Tribunal by Sherry A. Genier, Mario A. Genier and Shermac Ltd., Applicants, and the Registrar under the Motor Vehicle Dealers Act for issuance of a Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the Motor Vehicle Dealers Act as to the disposition of these proceedings which is filed and attached hereto as Schedule "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

D. Gregory Flude, Vice-Chair

RELEASED: December 2, 2005

SCHEDULE 'A'

1. The Applicants agree to the cancellation of Shermac Ltd.'s CVOR # 126-964-992 and Mario A. Genier's CVOR # 071-753-130.
2. The Applicant, Sherry A. Genier, agrees to report to the Ministry of Transportation within 15 days the number of commercial motor vehicles in the fleet.
3. The Applicant, Sherry A. Genier, agrees to plate all of the vehicles in the fleet within 30 days.
4. The Applicant, Sherry A. Genier, agrees to retain a qualified transportation consultant within 45 days. The consultant shall be retained for 90 days. The consultant shall establish and implement the attached "Safety Action Plan," which shall be implemented no later than March 31, 2006.
5. The consultant shall establish a satisfactory vehicle inspection and maintenance plan to improve the mechanical safety of the vehicles and implement this plan by March 31, 2006 and advise the Carrier Safety Office of this plan.
6. The Applicant shall ensure that Mario A. Genier complete a driver training programme in order that he is qualified to implement the "Safety Action Plan" requirements for driver safety and to provide evidence of the successful completion to the Carrier Safety Office by March 31, 2006.
7. The Applicant, Sherry A. Genier, consents to the suspension of CVOR # 111-771-896 for a period of 10 days.

MARIO A. GENIER

For the Applicants
Sherry A. Genier
Mario A. Genier
& Shermac Ltd.

I have authority to bind the
corporation and individuals in
this matter

MARIO A. GENIER

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



1648291 ONTARIO INC.

Appeal under section 50.(1) 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 152-313-797 issued to 1648291 Ontario Inc. and its President Jeffrey Clare;

AND IN THE MATTER OF the Commercial Vehicle Operator's Registration (CVOR) certificates 103-441-649, 077-948-177 (Terminated) and 066-459-106 (Terminated) issued to Aylmer Meat Packers Inc., 571245 Ontario Ltd. O/A Butch Clare Livestock, Warren, Elaine, I and Aylmer Meat Products DBA Butch Clare Livestock USDOT 878169, operators related to you;

AND IN THE MATTER OF the safety record of unpaid fines of Aylmer Meat Packers Inc. an operator related to you;

AND IN THE MATTER of Suspension and Seizure Order (under appeal) to Aylmer Meat Packers Inc., 571245 Ontario Ltd. O/A Butch Clare Livestock, Warren, Elaine, I and Aylmer Meat Products DBA Butch Clare Livestock US DOT 878169, operators related to you.

TRIBUNAL: SIMON DANN, Presiding member

APPEARANCES: JENNIFER BREITHAUPT, Counsel, representing 1648291 Ontario Inc.

PATRICK MOORE, Counsel, representing the Respondent

DATES OF
HEARING: August 16 and 17, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by 1648291 Ontario Inc. (the "1648291 Ontario Inc.") respecting a Cancellation and Seizure Order dated July 26, 2005, (the "Order"), issued by the Deputy Registrar of Motor Vehicles (the "Registrar") pursuant to sections 47 and 47.1 of the *Highway Traffic Act* (the "Act").

The Cancellation and Seizure Order, Exhibit 4, Tab 11, states the following:

AND WHEREAS I have considered your written submissions;

AND WHEREAS I am still of the opinion that 1648291 Ontario Inc., CVOR 152-313-797 is directly or indirectly affiliated to Aylmer Meat Packers Inc., 571245 Ontario Ltd. O/A Butch Clare Livestock, Warren, Elaine, I and Aylmer Meat Products DBA Butch Clare Livestock, Commercial Vehicle Operator's Registration (CVOR) certificates 103-441-649, 077-948-177 (Terminated) and 066-459-106 (Terminated) US DOT 878169, who are presently under a Suspension and Seizure Order (appealed);

AND WHEREAS I am still of the opinion Walter R. Clare, President and Elaine I Warren, Vice President of Aylmer Meat Packer Inc., CVOR 103-441-649 directly control or manage or will directly control or manage 1648291 Ontario Inc., CVOR 152-313-797.

AND WHEREAS I am still of the opinion I would have Refused to issue a Commercial Motor Vehicle Operator's Registration certificate (CVOR) to 1648291 Ontario Inc. and its President Jeffrey Clare having known of the affiliation to Aylmer Meat Packers Inc., 571245 Ontario Ltd. O/A Butch Clare Livestock, Warren, Elaine, I and Aylmer Meat Products DBA Butch Clare Livestock.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of 3rd day of August, 2005, CVOR certificate 152-313-797 and plate portion of permits for all commercial motor vehicles and trailers registered in the name of 1648291 Ontario Inc., be Cancelled and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

There were no preliminary matters.

OPENING STATEMENTS:

Mr. Moore submitted that the CVOR of 1648291 Ontario Inc. should be cancelled, not for reasons of its safety performance as it did not yet have a record, but rather on the performance of the related company, Aylmer Meat Packers Inc. ("Aylmer").

Mr. Moore advised he would present evidence in three parts to show the basis upon which the order for cancellation should be confirmed. These are:

1. A review of the safety performance guidelines.
2. A review of the Aylmer safety record, which was so poor that it gives concern for the performance of the related company.

3. The incorporation of 1648291 Ontario Inc., the acquisition of its vehicles and who is involved.

Ms. Breithaupt advised she would present one witness and that the sole issue was whether or not the Deputy Registrar erred in issuing the cancellation order because of Aylmer and that the evidence would show Aylmer was not related to 1648291 Ontario Inc.

Ms. Breithaupt added that:

1. Jeff Clare is the sole directing mind behind the company though he may turn to others for advice; and
2. The Ministry would have ample opportunity to monitor the company's performance as it goes forward.

THE EVIDENCE:

John Miller testified on behalf of the Deputy Registrar. Jeff Clare testified for 1648291 Ontario Inc.

Testimony of John Miller:

Mr. Miller testified that he is employed by the Ministry of Transportation (the "MTO") in its Sanctions and Investigations Branch as a Safety Rating Administrator which position he has held for about five years. His duties involve doing integrity checks, doing interviews and reporting on his findings to the Registrar for a decision on a future course of action.

Mr. Miller stated that MTO has a publication titled "Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline". The ratings method found in this guideline is used to identify and reflect the safety performance and compliance rating of commercial vehicle operators. There are five ratings that the Registrar may issue to such operators and the ratings are of importance not only in regard to public safety but also to the commercial vehicle insurance industry. The five ratings that the Registrar may assign to a commercial vehicle operator are:

1. Excellent
2. Satisfactory
3. Satisfactory, Unaudited
4. Conditional
5. Unsatisfactory

An operator's safety record consists of information from that operator's CVOR record as well as audits of the operator which would include information regarding accidents, convictions, inspections, interviews, sanctions and other relevant information. An Unsatisfactory rating indicates a one hundred percent violation rate and the MTO will suspend an operator with such a rating. Other considerations are taken into account when rating an operator such as violation rates and accidents involving property damage and injuries as well as convictions resulting from a driver's performance.

A Conditional rating is applied to an operator who has an unacceptable violation rate based upon accidents, convictions and other criteria over a 24-month period. An unacceptable violation rate exceeds 35% of an operator's threshold. When the violation rate exceeds 65% of their threshold a facility audit will be triggered. A violation rate that exceeds 80% of the threshold will trigger an interview with MTO and a violation rate that exceeds 100% will result in sanctions against the operator.

A Conditional rating is applied to an operator whose violation rate is in excess of 65% of threshold but less than 100% of threshold. Currently, only 3,350 operators are rated conditional out of over 113,000 carriers. Out of that number about 145 are rated unsatisfactory.

A refusal to issue a CVOR certificate will occur where the Registrar has reason to believe that the applicant will not operate a commercial motor vehicle safely and in accordance with law. In addition, if an applicant is related to a person whose CVOR certificate has been cancelled the applicant would be refused a certificate.

Mr. Miller explained that operators are considered "related" if:

1. The applicant and the person are related individuals;
2. 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;
3. Either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or
4. The applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.
5. [*Highway Traffic Act*, Section 17. (4) (a) (b) (c) and (d)]

Mr. Miller then explained that a CVOR was inadvertently issued to 1648291 Ontario Inc., a company that was considered to be related to Aylmer Meat Packers, without a review. When asked how this happened, Mr. Miller said the name "Clare" was only added to an internal Alert List 5 days after the CVOR was issued. He said the Alert List provides a cross-reference of names for Ministry staff to watch out for, as terminated and/or sanctioned companies have been known to set up under other family members or related people.

The Ministry's policy towards CVOR applications by individuals who are related to carrier operators with unsatisfactory or conditional ratings is to refuse granting a CVOR if a relationship can be shown. Mr. Miller confirmed that in his experience there have been hundreds of such application instances.

In the case of 1648291 Ontario Inc., the Ministry believed it was related to Aylmer Meat Packers, which had failed a facility audit in September 2001 and whose rating was then assigned as being Conditional (Exhibit 3, Tab 7 and Tab 5, page 65).

The January 2005 Carrier Record Review (Exhibit 3, Tab 4) for Aylmer Meat Packers showed the following:

COMPANY IS CONDITIONAL AND OUT-OF-SERVICE IN THE U.S.A.

FINES	\$27,136.25 TOTAL
ACCIDENTS	3 64.9% OF THRESHOLD
CONVICTIONS	61 272.1% OF THRESHOLD
INSPECTIONS	19 104.7% OF THRESHOLD
OVERALL	125.6%

MINISTRY INTERVENTIONS

97-05-14	WARNING LETTER
97-11-21	MTO FACILITY AUDIT
	DRIVER COMPLIANCE RATE 91.25%
	VEHICLE COMPLIANCE RATE 66.67%
	OVERALL 78.96% - PASS
01-02-13	WARNING LETTER
01-09-19	MTO FACILITY AUDIT
	DRIVER COMPLIANCE RATE: 11.1%
	VEHICLE COMPLIANCE RATE: 62.2%
	OVERALL 36.7% - FAIL
04-08-05	INTERVIEW
05-01-25	SANCTION ANALYSIS

VEHICLE IMPOUNDMENTS

02-02-02	TRAILER IMPOUNDED-OVER 50% OF BRAKES-OUT-OF-ADJUSTMENT-CRITICAL
04-01-05	TRAILER IMPOUNDED-OVER 50% OF BRAKES OUT-OF-ADJUSTMENT-CRITICAL

ACCIDENTS

03-07-18	DRIVER ACTION-IMPROPER	TURN-CLASS-PROPERTY DAMAGE

04-04-08	CLASS-PROPERTY DAMAGE- 0 POINTS
04-04-25	DRIVER ACTION-LOST CONTROL-DRIVER CONDITION FATIGUE-CLASS-INJURY DRIVER CHARGED-8 POINTS

FATAL ACCIDENT IN U.S.A

MATHEW CHARLES JOHNSTON WAS A DRIVER FOR AYLMER META PACKERS INC. HE WAS INVOLVED IN A SINGLE TRACTOR TRAILER ACCIDENT ON JANUARY 8, 2005 WHERE HIS TRUCK CAUGHT ON FIRE. HE WAS KILLED ALONG WITH SEVERAL PIGS FROM HIS LOAD.

(Report details for this event are contained in Exhibit 3, Tab 15, page 134)

At time of fatality, the Operator, Aylmer meat products, o/a Butch Clare Livestock of 109 Murphy lane, Nicholasville, Kentucky, was under an out-of-service order for failure to pay fines and not allowed to operate in U.S.A.

During the course of an interview of Aylmer Meat Packers, August 5, 2004, it was learned that the company did not have any accident prevention plan in place (Exhibit 3, Tab 11).

On March 11, 2005, the Deputy Registrar of Motor Vehicles issued a Suspension Order for a period of 30 days and "until all outstanding fines are paid" (Exhibit 3, Tab 20).

Mr. Miller then provided a review of the similarities between Aylmer Meat Packers and 1648291 Ontario Inc.:

1. The same address, telephone and fax numbers;
 - a. The driver record addresses for Jeffrey Clare and Walter R. Clare are the same (Exhibit 4, Tabs 7 and 8);
2. The similarity of kilometers noted on CVOR documents submitted by each;
3. Richard Walter Clare is a corporate officer and or partner in Aylmer Meat Packers (Exhibit 3, Tab 2, page 4) and while listed as first director and officer of 1648291 Ontario Inc., and having resigned on the same date, June 14, 2005 (Exhibit 4, Tab 1), he is still listed as a director on a Corporate Profile Report dated August 9, 2005 (Exhibit 4, Tab 6);
4. Diana Stickles is a contact person for both companies; during a CVOR interview meeting with Aylmer Meat Packers, Ms. Stickles was also noted to be the company's Compliance Manager (Exhibit 3, Tab 11);
5. Similar fleet size (Aylmer Meat Packers adjusted fleet size is 12 [Exhibit 3, Tab 4] and 1648291 Ontario Inc. is 13 [Exhibit 4, Tab 1]);

At the conclusion of the August 5, 2004, CVOR interview of Aylmer Meat Packers, in which Mr. Miller met with Kellie Byerson, the Aylmer Meat Packers

Safety and Compliance Consultant, the operator provided a commitment for payment of outstanding fines and a safety action plan (Exhibit 3, Tab 11).

Mr. Miller said the company's performance was monitored subsequent to the interview and a CVOR summary for the period August 5, 2004, through to March 11, 2005, (Exhibit 3, Tab 13, page 125) showed an overall threshold rate of 60.8%, comprised of:

	# EVENTS =====	% OF THRESHOLD =====
ACCIDENTS	0	0% OF THRESHOLD
CONVICTIONS	9	158.2% OF THRESHOLD
INSPECTIONS	2	84.9% OF THRESHOLD

On July 19, 2005, Mr. Miller received a fax from the U.S. Department of Transportation (Exhibit 3, Tab 14) stating that Aylmer Meat Packers dba Butch Clare Livestock, USDOT 878169 had *"been operating in violation of our OOS Orders on a continuous basis for over 18 months [and] Please send me a copy of any judgement or Order that you impose for use in our future proceedings against the company"*.

Mr. Miller then reviewed the following events:

1. June 23, 2005, fax from Jeff Clare to submit CVOR application (Exhibit 4, Tab 1);
 - a. The application form included a page from the articles of incorporation showing Richard Clare as the first Director as well as a page showing his resignation on June 14, 2005, though there was a question as to whether this resignation was ever properly submitted to the corporations branch of the Ministry of Government Services;
2. CVOR was issued to 1648291 Ontario Inc. on June 28, 2005, (Exhibit 4, Tab 2);
3. August 5, 2005, letter advising that the appeal on behalf of Aylmer Meat Packers was abandoned (Exhibit 6);
4. Background documents (Exhibit 4, Tab 3) requesting the lifting of a freeze on the Aylmer Meat Packers equipment;
 - a. Aylmer Meat Packers and its President, Richard Clare, were advised they were in default of a credit facility and that the holder, 1553603 Ontario Inc., was "exercising its option to declare the borrowings under the agreement to be immediately due and payable";

- b. Transfer of truck equipment occurred once the freeze was lifted and a record of those transfers is contained in Exhibit 4, Tab 4;
- 5. A corporate profile search on 1553603 Ontario Inc. showed the directors and administrator to be Richard Walter Clare, Jeffrey William Clare, Elaine Irene Clare, Jay David Clare and G. Edward Oldfield (Exhibit 4, Tab 5).

Mr. Miller stated that if the Ministry had known who was behind 1553603, it would not have lifted the freeze to allow the transfer of equipment and Aylmer Meat Packers' settlement of their credit debt. He added that while Aylmer Meat Packers may still have 2 or 3 trucks, a flag at MTO prevents any licence from being issued for those trucks.

A number of other issues, which Mr. Miller identified as pointing to a relationship between 1648291 Ontario Inc. and Aylmer Meat Packers, included:

- 1. The U.S. DOT number shown on the side of 1648291 Ontario Inc.'s truck is the same as the Aylmer Meat Packers number when each carrier should have its own number.
- 2. 1648291 Ontario Inc. carrying a load for hire without an operating licence (Exhibit 5, Tab 6);
- 3. 1648291 Ontario Inc. had not yet received a fuel tax number;

In cross-examination Mr. Miller confirmed the Ministry was concerned Butch Clare would be running the business of 1648291 Ontario Inc.

Testimony of Jeffrey Michael Clare:

Jeffrey Clare stated that he is the President of 1648291 Ontario Inc. and the only shareholder. Butch (Richard) Clare is his stepfather and Elaine Warren, who was said to have not been in the office for 2 years, is his mother.

The address shown on the initial corporate return (Exhibit 5, Tab 1) is the office address and this site is shared with other businesses, which are owned and operated by Butch Clare. The company's letterhead (Exhibit 5, Tab 5) shows a phone number listed in the Aylmer Meat Packers records (Exhibit 3, Tab 2) and Jeff Clare, who was previously employed by Aylmer Meat Packers, has no prior involvement with trucking.

Jeff Clare stated he has a CIBC small business account (Exhibit 5, Tab 3) and that he is the only one with signing authority. The company currently has no loans or securities registered against it. He makes no payments to Butch Clare.

He described Diane Stickles as someone who had worked "for us" for 10 years and is involved with the other companies. She would be helping him with the administrative duties and her experience would be helpful because "I don't know how". Ms. Stickles would also be paid extra for her work with Jeff Clare.

Of the drivers listed in the September 18, 2001, facility audit of Aylmer Meat Packers (Exhibit 3, Tab7), Jeff Clare said that he employed only John Hofer. He also said that while Jeremy Wernham was a current employee, he had been placed on leave due to a speeding violation.

He acknowledged that the Province of Quebec had held a truck for one day because 1648291 Ontario Inc. didn't have a Quebec permit but that was resolved and the truck was released.

There is a lease agreement with Butch Clare (Exhibit 5, Tab 4) for which Jeff Clare pays \$500 a month rent and a percentage of the utilities costs. Another person (Lynn Langille) has been hired and is expected to start in two weeks.

Jeff Clare said the invoice at Exhibit 5, Tab 6, was a bill for cattle shipped to Saskatchewan on July 7, 2005, after the CVOR issue date of June 28th.

He confirmed he has used another company's USDOT number and gone into Saskatchewan without his own IFTA fuel tax sticker but that Diane Stickles had now made the registration applications for the IFTA and U.S. DOT numbers.

He said Ms. Stickles is paid by one of the companies and she has worked there for so long that she is considered part of the family and comes for holiday dinners.

Regarding maintenance, he said he has a licensed mechanic on-site and that mechanic is on salary. For safety and training policies and procedures, Jeff Clare said that Kelly Byerson, who had previously worked at another trucking company, would help put programs in place. However he did not know the length of her prior experience.

Jeff Clare said he started 1648291 Ontario Inc. because he was no longer employed at Aylmer Meat Packers and he needed a job. He acknowledged that he is involved in the executive decisions of the Butch Clare businesses and that Butch Clare may also provide advice to 1648291 Ontario Inc.. Jeff Clare said he hopes to truck Butch Clare's cattle as Butch Clare "wants out of the business" and he (Jeff Clare) has "done some investigation on how to operate a trucking company" and wants to turn the company around.

When asked what procedures he would use to deal with problem drivers, Jeff Clare said that all the trucks had been turned down and governed to not exceed 72 mph (approximately 115 kph); the log books had been tied to their payments and he explained it meant that if the driver turned proper records, they would get paid.

Jeff Clare said that he had not previously been aware that the CVOR for Aylmer Meat Packers was "so bad".

Through cross-examination, the Tribunal learned the following background

information:

1. Butch Clare and Elaine Warren live at 350 - 5th Concession, Burford, which is where the office building for 1648291 Ontario Inc. is located but it is a completely separate building;
2. Aylmer is about 45 minutes west of Burford and the Aylmer meat packing plant is no longer operational;
3. There are several other businesses in the office building as Butch Clare has a number of corporations which manage his business interests, including the farms he operates;
4. Jeff Clare was previously the manager of Aylmer Meat Packers but was unemployed for the previous two years;
5. There was an export business which had been started by Butch Clare, 571425 Ontario Ltd. about 3 or 4 weeks ago but it was not operational;
6. Banking instructions also authorized Diana Stickles to give instructions on behalf of the company by phone or fax (Exhibit 5, Tab 3, page 3);
7. Jeff Clare has 9 trucks stored on a property owned by his mother - service work is done in another location and his company does not pay rent in either location - there are also 16 trailers registered to 1648291 Ontario Inc. and these were previously owned by Butch Clare;
8. Todd Good started in January 2005, as the company's mechanic and he had not worked for Aylmer Meat Packers;
9. Jeff Clare said he was not aware of the outstanding fines until the day before the hearing; he was also aware of some charges related to the Aylmer Meat Packers plant but did not know it was part of his duties as plant manager to pay the fines;
10. He acknowledged the charges against 1648291 Ontario Inc. were for not having authority to transport in the Province of Quebec and being overweight in Missouri.

When asked how he got into the trucking business, Jeff Clare explained that he was considering the dump truck business and discussed it with Butch Clare who then asked him if he wanted to take over the trucking business, including the equipment and drivers.

He confirmed that he now owned the 9 trucks and 16 trailers, which could have a value of about \$340,000, if they were sold as used equipment, but he has no loans outstanding. He had no money to start with and his wife paid for the plates for the vehicles. He also received a \$13,000 loan from his mother-in-law.

Jeff Clare said he thought about it for a week and then decided to go ahead with it. He added that he had always been in the family business and what interested him most about the opportunity was that it was going to be his business and he would be in charge. He had a verbal agreement with Butch Clare for 6 months and at the end of that period, Butch Clare would be out of the company. Jeff

Clare acknowledged he does ask for advice and what rates to use.

When asked about the process for how 1648291 Ontario Inc. was set up, he said Butch Clare had a “shelf company” which “I could take over and he would resign”. As the company was incorporated on June 14, 2005, he agreed that it was not a shelf company for very long and also acknowledged that he was not too clear about the incorporation dates or initial return which still show R. Clare (Butch Clare) as a director and officer (Exhibit 5, Tab 1, page 2, Exhibit 4, Tab 6 page 2).

Jeff Clare reviewed the various companies, which list him as a director. When asked about 1553603 Ontario Inc. (“1553603”), Jeff Clare said it was a holding company with mortgages and real estate, including the mortgage on the Aylmer Meat Packers property. He said he did not know if he was an owner, though he is listed as a Director.

He confirmed that Butch Clare paid out the Aylmer Meat Packers debt to the Royal Bank and the loan to Aylmer by 1553603 was then called because Aylmer Meat Packers could not make the payments. He confirmed Butch Clare is the owner of the two companies and was involved in the decision to call the loan.

When asked how he could take on the business with a minimum of knowledge, Jeff Clare said Kelly Byerson would help him or he would hire a safety administrator.

On redirect, Jeff Clare confirmed that of the outstanding environmental charges, there were two in the amount of \$13,125.00, which were being appealed.

CLOSING:

The Respondent

In his closing submission, Mr. Moore said the safety record of Aylmer Meat Packers was terrible and their abandonment of their CVOR appeal was “a blatant avoidance of being sanctioned”. He also presented a review of the ways in which the Ministry believed 1648291 Ontario Inc. and Aylmer were related companies and that Jeff Clare had brought no assets to its start-up.

Mr. Moore submitted that the transactions created by 1648291 Ontario Inc. present an image of a business that is Jeff Clare’s stepfather’s business, and all the evidence seems to show Butch Clare will manage and direct the business, though Jeff Clare says no and that he will.

Mr. Moore also pointed to the timing of the set up of the corporation and Jeff Clare’s taking over after the pre-hearing of the Aylmer Meat Packer Inc. Appeal on May 9, 2005, as well the use by 1648291 Ontario Inc. of Aylmer’s USDOT number and operating without a fuel tax number.

Mr. Moore submitted that the evidence is not persuasive that Jeff Clare would be able to turn the trucking company around as he did not know Aylmer's record and he has no background in trucking.

Regarding Jeff Clare's reference to the involvement of Kelly Byerson and Diane Stickles or Lynn Langill, Mr. Moore suggested the evidence is vague and additionally there was no one to testify about how the safety performance of the company would be managed.

CASE LAW REFERENCED:

Garcha Transport Inc. (2003) LAT ("Garcha")

In this case, while the Registrar considered the Applicant's father "directly or indirectly controls or manages or will control or manage the Applicant", the Tribunal concluded otherwise. Mr. Moore submitted that this case was different in that the father did not incorporate the company and was never an officer. In addition, the son was not using the father's trucks and the operation was not a gift.

Quick Service Transportation Ltd. (2003) LAT ("Quick Service")

The Registrar proposed a cancellation and seizure based on concerns for safety and that related persons were controlling the company. The Tribunal did not find the relationship to exist but concluded the Applicant's safety record was the defining issue and, therefore confirmed the Registrar's proposal. Mr. Moore added that while the two businesses shared the same premises, the Applicant's brothers were neither incorporators nor officers of the Applicant's business.

South Shore 83 Inc. (2003) LAT ("South Shore")

Among the grounds for a suspension and seizure order, the Registrar was of the opinion that individuals related to the Applicant would "directly or indirectly control or manage or will control or manage" the Applicant's business. Mr. Moore submitted that in this case, there was no evidence to show any influence from the related problem company. In addition, the related individuals had not incorporated the Applicant's company nor did they provide it with any assets.

H & B Transportation Ltd. (2004) LAT ("H & B")

Mr. Moore submitted that the relevance of this case has to do with the Tribunal's recognition that "It is the directing mind of the companies that is of concern to the regulator" and had the Registrar known who was involved with the Applicant when it applied for a CVOR, it would not have been issued. The Tribunal in arriving at a decision to confirm the Registrar's decision, considered the safety record of the companies with which the Applicant's officers had been involved.

THE APPLICANT

In her closing argument for 1648291 Ontario Inc., Ms. Breithaupt acknowledged that while there was no dispute about the Aylmer Meat Packers safety record, the Tribunal should remain focused on the issue of whether or not the companies are related and if Jeff Clare would go forward as an unrelated entity.

It was acknowledged that Jeff Clare didn't know about the Aylmer record as he was not a contact with the Ministry and when he had approached Butch Clare it was only about another type of trucking business. It was Butch Clare who had suggested taking over the existing trucking company because Aylmer Meat Packers was out of business.

Ms. Breithaupt suggested there was no conclusive evidence to suggest anything had been planned in advance regarding Butch Clare's calling of the debt for the trucks owned by Aylmer Meat Packers or that Jeff Clare had been involved in the Aylmer Meat Packers issues.

Regarding the timing of the company's incorporation and the shared facilities, she stressed that Jeff Clare had been forthright and had not held responsibility for payment of the fines levied against Aylmer Meat Packers. The startup funds had also come from his mother-in-law and his wife.

Ms. Breithaupt submitted that the heart of the matter was who would control 1648291 Ontario Inc.'s business and the 6 months involvement of Butch Clare was simply an indication of his helping with the set up of the business. It should also not be surprising to find common directors due to the nature of the family's holdings and for a variety of reasons, it should be seen that Jeff Clare will be the controlling operator.

Ms. Breithaupt responded to the case law examples cited by submitting that in *Garcha*, the son had no previous experience and it was an example of the father helping out; *Quick Service* is different in that it was a direct purchase of the business and the Tribunal concluded there was no relationship.

Regarding *South Shore*, Ms. Breithaupt pointed to the Tribunal's finding that while the same individuals may be holding positions on two different companies at the same time; it did not mean there was crossover control or management.

Ms. Breithaupt also submitted that the facts in the *H & B* matter were different because there were 4 companies actively trucking while this is not the case here.

LAW:

The *Highway Traffic Act*, Revised Statutes of Ontario, 1990, Chapter H.8, as amended states the following:

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

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

(2.1) Subsection 17(4) applies, with necessary modifications, for the purpose of determining who are related parties under clause (1)(f).

17.4 An 1648291 Ontario Inc. is related to a person for the purpose of subsection (3) if,...

- (c) either 1648291 Ontario Inc. or the person, directly or indirectly, controls or controlled or manages or managed the other;...

ANALYSIS:

The issue in this appeal is whether 1648291 Ontario Inc. is related to Aylmer Meat Packers and if so, are there reasonable and probable grounds for the Deputy Registrar to have a valid concern for highway safety based on the safety record of Aylmer Meat Packers.

Through Mr. Miller's testimony, the Tribunal heard substantial evidence regarding the poor safety record of Aylmer Meat Packers, a record that the company ultimately chose not to dispute. Therefore, the evidence regarding Aylmer Meat Packer's safety performance is taken as fact and will be referred to as its record.

On the question of relatedness, the Act clearly states that an applicant is considered related to another person (entity) if that person or entity directly or indirectly controls or manages the applicant.

The Deputy Registrar's position is that the timing of the incorporation of 1648291 Ontario Inc., and the company's first director and how it acquired its vehicles, is indicative of the related nature of the companies.

Regarding the matter of incorporation and the way 1648291 Ontario Inc. came into being, it can reasonably be expected that once Jeff Clare decided to take on the Aylmer Meat Packers trucking business, he might turn to a more experienced person for advice on how to get started.

The closest person with such experience would likely have been his stepfather, Butch Clare. The Tribunal is willing to accept that at face value and not presume it to mean Butch Clare would control how Jeff Clare managed the business.

However, through Jeff Clare's testimony, it became evident that he has limited knowledge of the incorporation, after the fact, when presumably he would have acquired intimate knowledge of how his new company came into being. His testimony revealed that he was unclear about whether 1648291 Ontario Inc. had been in existence long enough to be called a 'shelf' company or his role as a director of other companies belonging to Butch Clare.

In his replies to cross-examination questions, Jeff Clare used the phrase "I don't know" enough times that it was found to contradict his claim that he would run 1648291 Ontario Inc. on his own. This contradiction puts the credibility of his claim in question and suggests instead that he was not in control of the process or decisions, which created his company. It also puts into doubt whether he is in control of the on-going operation.

Having observed Jeff Clare give his evidence, I did not obtain the impression that he was an individual who had taken personal and direct control of his own destiny. His acknowledgement of only learning about the Aylmer Meat Packers record the day before the start of the hearing only adds to view that he accepted what he was given, or told, and failed to carry out his own investigation of exactly what it was that he was getting into or taking on.

Again, the evidence conveys an impression of someone who did not, on his own initiative, seize the business opportunity through his own commanding will. The evidence that despite being the Aylmer Meat Packers manager, he took no direct, hands-on action regarding the fines levied against the company reinforces this view.

As manager, it is expected that he would know about the fines and take action to resolve them to the company's best interests. However, he did not undermine his claim to operating independence.

He also had not known that Kelly Byerson's authority with the bank extended to the point where she was able to instruct the bank regarding financial transactions.

The fact that Jeff Clare began operating without first obtaining his IFTA, USDOT numbers and Quebec authorization also raise particularly serious questions about the integrity of his business decisions or whether he is being directed by someone else.

The nature of these actions, their disregard for the regulatory requirements, is reminiscent of the attitude displayed by Aylmer Meat Packers in its disregard towards its operating responsibilities. We have only to look at Aylmer's failure to pay outstanding fines as well as its continued operation into the U.S. without

resolving 3 USDOT 'Out of Service' orders to see that 1648291 Ontario Inc. is 'trending' in the same behavior direction.

With regard to the manner in which 1648291 Ontario Inc. acquired the Aylmer Meat Packers trucks and trailers, it could, on the one hand, be allowed that Jeff Clare received them as a very generous gift to help him get started. However, the manner in which the transfer was affected is seen as a calculated manoeuvre to get the trucks back on the road and adds to the doubt that Jeff Clare is in control of the company.

When the totality of events regarding Jeff Clare's period of unemployment, his decision to go into the trucking business, the Ministry's decision to take action against Aylmer Meat Packers for their poor safety record, and the coming into existence of 1648291 Ontario Inc. are listed in chronological sequence (see below table), the timing of 1648291 Ontario Inc.'s incorporation and business start-up is simply too large a coincidence to ignore.

Chronological sequence:

1.	Notice of Suspension and Seizure (Aylmer Meat Packers and others) - 30 days & payment of all outstanding fines	Feb. 14, 2005 (Exhibit 3, Tab 16)
2.	Suspension and Seizure Order (Aylmer Meat Packers and others) - 30 days & payment of all outstanding fines	March 11, 2005 (Exhibit 3, Tab 20)
3.	Notice of Appeal by Aylmer Meat Packers	Received at the Tribunal on March 23, 2005
4.	O.L.A.T. Prehearing Order	May 13, 2005 (Exhibit 3, Tab 1)
5.	1648291 Ontario Inc. incorporation	June 14, 2005 (Exhibit 4, Tab 6)
6.	CVOR application faxed to MTO by Jeff Clare re 1648291 Ontario Inc..	June 23, 2005 (Exhibit 4, Tab 1)
7.	Fax to Ministry of copy of letter to Aylmer Meat Packers re Credit Facilities in default (collateral described in letter of notice from debt holder re truck and trailer units)	June 28, 2005 (Exhibit 4, Tab 3)
8.	Truck and trailer transfers to 1648291 Ontario Inc.	July 6, 2005 (Exhibit 4, Tab 4)
9.	Invoice for freight load to Saskatchewan by 1648291 Ontario Inc. to customer in Ontario	July 7, 2005 (Exhibit 5, Tab 6)
10.	Notice of appeal abandonment by Aylmer Meat Packers	August 5, 2005 (Exhibit 6)

In addition, the physical proximity of the parties to each other also takes away credence to the proposition that Jeff Clare will operate in complete

independence.

Based on the documentary and oral evidence presented through the course of this hearing, it is this Tribunal's finding that 1648291 Ontario Inc. and Aylmer Meat Packers are related. Considering the record of events as discussed, is also this Tribunal's finding that Butch Clare directly controls or manages or will directly control or manage 1648291 Ontario Inc.

On the matter of Aylmer Meat Packers safety record, the question to consider is whether it is a concern for how 1648291 Ontario Inc. may perform.

It is this Tribunal's finding that the manner in which Aylmer Meat Packers performed has already influenced the highway performance of 1648291 Ontario Inc. and therefore the Deputy Registrar is correct in having a valid concern for highway safety.

The principal reasons for this finding are that 1648291 Ontario Inc. began moving freight before obtaining its IFTA number and Quebec permit. The fact that 1648291 Ontario Inc. actually used the Aylmer Meat Packers USDOT number, despite there being U.S. Department of Transport out of service orders against the number, is found to be direct evidence of Butch Clare's influence over 1648291 Ontario Inc.

It is also noteworthy that Jeff Clare's testimony was that he did not have any knowledge of the trucking business but he would be relying on Kelly Byerson for advice on what applications the company needed to make and, to some extent, the safety requirements which would need to be prepared for. However, Ms. Byerson was not present to give evidence as to the substance of her experience and capabilities.

Jeff Clare did note he had set the governors on the trucks down to 72 mph and tied driver compensation to having accurate logbook records.

Having found that 1648291 Ontario Inc.'s relationship to Aylmer Meat Packers meets the definition stated in s.17.4(c) of the Act, and having regard for the poor safety record of Aylmer Meat Packers, the Tribunal finds as a fact that, there is reason to believe the holder will not operate a commercial motor vehicle safely or in accordance with the Act and regulations and other laws relating to highway safety. Thus, the Registrar's order complies with section 47(1)(f) of the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 50 of the *Highway Traffic Act*, the Tribunal confirms the Cancellation and Seizure Order of the Deputy Registrar dated July 26, 2005, and orders that the CVOR certificate numbered 152-313-797 and the plate portion of permits for all commercial motor vehicles and trailers issued to 1648291 Ontario Inc. be cancelled and the plate

portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Decision released: November 23, 2005

Name: 3092.1648291.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.

This decision will also be available on Quicklaw at a later date.



OVER THE TOP FREIGHTWAYS INC. and BSA TRUCKING LTD.

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

AND IN THE MATTER OF the Commercial Vehicle
Operator's Registration (CVOR) certificates 144-200-
188 issued to Over The Top Freightways Inc., 133-
802-864 issued to BSA Trucking Ltd. and 134-867-
424 issued to Load Chauffeur Transport Ltd.;

AND IN THE MATTER OF an Application by Over
The Top Freightways Inc. dated, July 19, 2005, for a
hearing before the Licence Appeal Tribunal pursuant
to section 50(1) of the *Highway Traffic Act* appealing
the Suspension and Seizure Order of the Registrar of
Motor Vehicles dated July 14, 2005;

AND IN THE MATTER OF the record of unpaid fines
of and safety record of Over The Top Freightways Inc.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: PATRICK MOORE, Counsel, representing the Registrar of Motor
Vehicles

NO ONE appearing on behalf of the Applicant, Over Top
Freightways Inc.

DATE OF
HEARING: November 17, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Over the Top Freightways Inc. (the "Applicant") respecting a Suspension and Seizure Order dated July 14, 2005, (the "Order") issued by the Deputy Registrar of Motor Vehicles (the "Registrar") pursuant to sections 47 and 47.1 of the *Highway Traffic Act* suspending for a concurrent period of 14 days the CVOR of the

Applicant, BSA Trucking Ltd and Load Chauffeur Transport Ltd.

The Suspension and Seizure Order was entered as Exhibit 1. It states:

WHEREAS a Notice of Suspension & Seizure dated the 6th day of June, 2005, was issued proposing a 30-day Suspension and Seizure of CVOR certificates 144-200-188, 133-802-864 and 134-867-424 issued to Over The Top Freightways Inc., BSA Trucking Ltd. and Load Chauffeur Transport Ltd. and the Suspension and Seizure of the plate portions of permits and number plates;

AND WHEREAS provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar of Motor Vehicles on the 21st day of June 2005, (subsequently changed to July 11, 2005 at your request) to show cause why the Suspension and Seizure Order should not be issued;

AND WHEREAS I have considered your submissions, action plan, past Ministry interventions, your safety record including your record of convictions, accidents and vehicle out-of-service rates, I remain concerned for highway safety.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the *Highway Traffic Act* that as of the 2nd day of August 2005, CVOR certificates 144-200-188, 133-802-864 and 134-867-424 and the plate portion of permits for all commercial motor vehicles and trailers registered in the name of Over The Top Freightways Inc., BSA Trucking Ltd. and Load Chauffeur Transport Ltd. be suspended for 14 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and number plates be seized.

The Suspension and Seizure will be effective at 9:00 a.m. Eastern Daylight Saving Time on the 2nd day of August 2005 to 8:59 a.m. Eastern Daylight Saving Time on the 16th day of August 2005.

DATED at St. Catharines this 14th day of July 2005.

GROUND FOR APPEAL

The Notice of Appeal, Exhibit 2, sets out the grounds for the appeal, which the Tribunal paraphrases as follows:

1. Since the Applicant is currently the only one of the three entities operating in Ontario, it is unreasonable to link its Commercial Vehicle Operators Registration (CVOR) with Load Chauffeur Transport Ltd. As BSA Trucking Ltd. does not operate in Ontario at all; it should not be subject to any sanction.
2. Unpaid fines should not be taken into consideration, as they are either the responsibility of the individual drivers who have now been fired or arise out of unfair citations.
3. It is unfair to consider the safety record of Load Chauffeur Transport when

dealing with the Applicant since at the time (2003) when Load Chauffeur Transport received a suspension in Ontario the president of the Applicant, Bupinder Singh Aujla, was merely a dispatcher at Load Chauffeur Transport and had no responsibility for safety and had no interest or share in Load Chauffeur. By linking the safety records of the two corporations the Applicant has been prejudiced by not allowing it to show improvements in its own safety record.

4. The Suspension and Seizure Order is unnecessarily harsh and should not have been imposed without giving the company a number of months to rectify its problems and set up a good and safe operation.

ISSUES

1. Was there a prejudicial linkage between the safety record and CVOR of the Applicant and Load Chauffeur Transport?
2. Is the Registrar correct in including BSA Trucking Ltd. in the Order given the fact that it has not, so far, operated in Ontario?
3. Is the Registrar correct in including Load Chauffeur Transport Ltd. in the Order given the fact that it is no longer in operation and has not operated in Ontario since 2003?
4. Did the Registrar fail to give the Applicant an opportunity to set up a good and safe operation?
5. Should the Tribunal confirm, modify or set aside the Registrar's Order?

STATUTORY AUTHORITY

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 47, 47.1 and 50 of the *Highway Traffic Act*. The Tribunal will set them out here for clarity.

Suspension and cancellation of licence, etc., general

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).

(2.1) Subsection 17 (4) applies, with necessary modifications, for the purpose of determining who are related persons under clause (1) (f).

Power to seize number plates

(8.1) If the plate portion of a permit is suspended or cancelled under clause (1) (a), the Registrar may order that the plate portion of the permit or the number plates issued in connection with the plate portion of the permit be seized and any police officer or officer appointed for carrying out this Act may seize the plate portion of the permit and the number plates and deliver them to the Ministry.

Definitions, “commercial motor vehicle”, etc.

(9) For the purposes of this section and section 47.1, “commercial motor vehicle”, “operator” and “safety record” have the same meanings as in subsection 16 (1). (“véhicule utilitaire”, “utilisateur”, “fiche de sécurité”)

Power to seize out-of-province permits and plates

(10) The Registrar may, at any time for misconduct or contravention of this Act, the *Truck Transportation Act*, the *Public Vehicles Act* or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the *Public Vehicles Act* or the *Truck Transportation Act* may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

Notice of proposed action, s. 47

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.

Powers of Tribunal

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

For the purposes of defining a related person, subsection 17.(4) states:

Interpretation

17. (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.

EXHIBITS

The following exhibits were entered at the hearing:

- Exhibit 1 Suspension and Seizure Order of the Registrar dated the 14th day of July, 2005;
- Exhibit 2 Notice of Appeal of the Applicant dated July 19, 2005;
- Exhibit 3 Letter dated November 16, 2005, from the Applicant to the Tribunal advising the Tribunal that the Applicant would not attend the hearing but wished the hearing to proceed in their absence;
- Exhibit 4 Respondent's Appeal Book;

FACTS:

The Applicant did not attend the hearing. Accordingly, the Tribunal commenced the hearing and then stood the matter down for 30 minutes to see if anyone would attend on his behalf. After the lapse of the 30 minutes period, the Applicant had still not appeared. The Tribunal then reviewed Exhibit 3. The Tribunal noted that it is a three-pages fax. The fax cover page and the attached letter are on the letterhead of Applicant and the letter purports to emanate from Madhu Prasad, identified in these proceedings as the agent for the Applicant. It is not signed, however. The Tribunal noted that the fax banner indicates that Exhibit 3 was sent from the offices of the Applicant. Accordingly, the Tribunal is satisfied that Exhibit 3 was, in fact, sent by Mr. Prasad, that the Applicant had notice of the hearing and that they were content for the hearing to proceed in their absence. No request for an adjournment being before the Tribunal, we proceeded to hear evidence.

John Miller testified on behalf of the Registrar. The Ministry of Transportation has employed Mr. Miller for 20 years. He has worked as a Scale Supervisor, National Safety Code Officer and Transportation Officer as well as a CVOR Analyst. He has held his present position, Carrier Safety Rating Administrator working for the Deputy

Registrar of Motor Vehicles, for the past six years. In his current position Mr. Miller is responsible for dealing with refusals of applications and sanctions to be levied against holders of CVOR permits. In this role, he interviews carriers and deals with files where sanctions are proposed. He was responsible for the recent dealings with the Applicant, BSA Trucking Ltd. and Load Chauffeur Transport.

Mr. Miller reviewed the "*Ontario Safety Rating and Commercial Vehicle Operator's Registration System*" as set out in the readily available *Public Guideline* at Tab 23 of Exhibit 4. His evidence was that, commencing in and around 1997 the Ministry and various industry stakeholders devised a rating scheme whereby the Ministry could track the safety of commercial vehicle operators using the province's highway system. The program, called Target 97, recommended a points system whereby commercial vehicle operators would provide information to the Ministry about their fleet size and the number of kilometres driven in Ontario each year. On the basis of this information, the Ministry would then set a safety rating threshold for each CVOR holder that would take into account and assign points for the number of accidents that a company's vehicles were involved in, the number of convictions recorded against drivers while operating company vehicles and the number of safety violations discovered by inspectors randomly stopping trucks on the highway. The safety rating takes into account points earned in the preceding two years.

Target 97 was fully implemented by the Ministry in 1999, with the enactment of Regulation 197/99, which amended Regulation 424/97. The Safety Rating and CVOR System carefully track the wording of the regulation with respect to those factors which make up an operator's safety record. Data with respect to any given commercial operator is automatically entered into a computer. Once an operator's points level reaches 35% of the company's safety threshold, the file is referred to a CVOR Analyst who then will send a warning letter. If the 65% level is reached, the Ministry will trigger an audit of the operator's facilities. Where the operator is out of Ontario, the Ministry will request the home jurisdiction to conduct the audit. Of necessity control and timing of a facility audit in other jurisdictions is out of the Ministry's hands. At 80%, the commercial operator must attend an interview concerning the safety of their operation. Finally, once the points level exceeds the safety threshold, the Ministry will seek to levy sanctions. While it is usual to track all four steps, an operator can jump levels if he amasses points rapidly.

Mr. Miller testified that files are referred to him from CVOR analysts when an interview or sanctions are considered. The first step he takes when he receives a file where an interview or sanctions are being considered, is to do an integrity check. An integrity check involves ensuring that the information entered into the automatic computer system is indeed correct. Once he is satisfied that the computer data is, in fact, correct, he will then take the appropriate action: i.e. either an interview or proposal of sanctions. A carrier's record is available in abstract form and at any time either online or in hard

copy. The fee for an abstract is five dollars. The Ministry recommends that carriers order and review their abstracts regularly as it may be the only source of information the carrier has regarding driver or safety violations incurred many miles away from home base. Given the transparency and clarity of the points system and easy access to abstracts, a commercial operator has no excuse for not being aware of its rating, driver performance or safety violations.

Exhibit 4 sets out dealings between the Ministry and the Applicant. The original CVOR was issued on December 13, 2002¹. By April of 2004, the Applicant had reached at least the 35% threshold and was sent a warning letter.² A letter was also sent regarding the issue of unpaid fines. On May 12, 2004, apparently the 65% level was reached as the Ministry requested a facility audit from British Columbia, the home jurisdiction of the Applicant.³ In his evidence, Mr. Miller testified that to the best of his knowledge this audit had not yet been completed.

By June 2005, Applicant had exceeded the 100% threshold. Accordingly, the Deputy Registrar issued a Notice of Suspension and Seizure proposing a 30-day suspension and citing concerns with the unpaid fines and safety record of the Applicant.⁴ The company was given the opportunity to attend a show cause meeting, which was ultimately held in St. Catharines on July 11. The president of the company, Mr. Aujla, attended the meeting with a safety consultant, Don Gillet. Mr. Miller was in attendance and took extensive notes. Also in attendance, were J. Greig Beatty, the Deputy Registrar of Motor Vehicles, and William Herale, Acting Program Standards Manager. While the Tribunal will review certain aspects of this meeting later on in these reasons, suffice it to say that the notes reveal that Mr. Aujla had full opportunity to present his case, including setting out an action plan for the future improvement of the company's safety record. His arguments must have carried some weight with Mr. Beatty as the 30-day suspension proposed in the earlier Notice of Suspension and Seizure was reduced to 14 days. It is that proposed 14-day Suspension that is the subject matter of this appeal.

The company's safety record in June 2005, after approximately two and a half years of operation and one and a half years after taking on Load Chauffeur's drivers, can only be described as abysmal. It is set out in detail in Exhibit 4, Tabs 7 and 8. Out of 9 accidents, 6 involved some fault on the part of the driver. This rate was three times the provincial average. Its drivers have had 28 convictions, 25 of them safety related. In 21 safety inspections 62% revealed deficiencies so severe, that the truck was declared out of service until repairs were made. To put it another way, more than half of the trucks

¹ Tab 8 page 26

² Tab 13

³ Tab 15

⁴ Tab 5

stopped on the highway should not have been on the highway in their, then current, condition. The overall safety rate was 106.6% of the safety threshold. Mr. Miller testified that out of 113,300 CVOR holders licensed to operate in the Province of Ontario, 145 were found to be in an unsatisfactory state. This is a rate of 0.16% of operators. The Applicant has gained membership in an exclusive but certainly not an elite group.

The record indicates that in April 2004, timely warning was given that the company was proceeding down the wrong path yet no steps were taken to improve matters. Further, Mr. Aujla acknowledged at the show cause hearing in July 2005, that he had been contacted for a facilities' audit, the second level of enforcement, so he was well aware that the safety trend was not improving. Finally, he could have reviewed his company's performance at any time by the simple expedient of ordering a CVOR abstract. Whether he did or not is unknown. What is known is that the company did not materially improve. There were three accidents in early 2005. Between April 2004 and March 2005, the rate at which inspections found an out of service condition actually increased compared to a year earlier from 50% to 66.67%, that is, for every three trucks stopped two were in an unsafe condition. Given the history of warnings the Tribunal can find no merit in the position that the Registrar should have allowed the company a period of several months to improve its safety record before a suspension was imposed. The company had at least a one-year notice that it was heading down the wrong path. On a review of the evidence concerning the safety record of the Applicant, the Tribunal has no hesitation in finding the Registrar of Motor Vehicles justified in levying a 14-day suspension and the Tribunal confirms that part of the Suspension and Seizure Order.

In arriving at this conclusion, the Tribunal has not dealt with the issue of unpaid fines. At the hearing, Mr. Miller advised that, to the best of his knowledge, the Applicant has paid its outstanding fines and that the Registrar is not seeking to rely on unpaid fines as a ground for its Order. Further, in arriving at this conclusion, the Tribunal has not considered the prior track record of Load Chauffeur Transport. The Tribunal can find no evidence that the Registrar did either. All of the steps taken by the Registrar: sending a warning letter, requesting a facility audit and issuing a Notice of Suspension and Seizure relate solely to the points levels achieved by the Applicant. Linkage of the prior record was simply not an issue in this process and the Tribunal finds there is no merit in this allegation made in the grounds for appeal.

Having addressed linkage with respect to the Applicant's safety record does not end the issue there, for linkage does have a role in this appeal. Pursuant to the provisions of subsection 47. (1) (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." It is the Registrar's position that the Applicant,

BSA Trucking Ltd. and Load Chauffeur Transport Ltd. are related persons.
Section 17. (4) defines a related person as follows:

17. (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.

Mr. Miller very thoroughly reviewed the evidence of the interrelation of these three companies and the people who owned or operated them. Carriers are required to file details of their address and corporate officers with the Ministry. It appears from the Ministry's records that the address of all three companies is 14932 72nd Avenue, Surrey B.C.⁵ Mr. Miller also produced a British Columbia Driver Record on Buphinder Singh Aujla and on his spouse who has been known variously as Sukhwinder Kaur Pannu and Sukhinder Kaur Aujla. The address given for Mr. & Mrs. Aujla is 14932 72nd Avenue, Surrey, B.C.⁶ Clearly there is a close relationship between Mr. & Mrs. Aujla and the three corporate entities. Mr. Aujla is also shown as a Vice-President of Load Chauffeur Transport Ltd., a fact he confirmed at the show cause meeting. He states that his partnership with the president of Load Chauffeur Transport Ltd. ended in December 2003, when Mr. Uppal took half the company and set up a rival, Viper Transport.⁷ Thus, by his own admission, Mr. Aujla is both a partner in Load Chauffeur and an officer. With respect to BSA Trucking Ltd. and the Applicant, the current Ministry records indicate that Mr. Aujla is an officer of both entities. Applying the facts to the definition in 17 (4) the Tribunals finds that all three corporate entities are related persons by virtue of the fact that they have officers and partners in common. Given the wording of section 47, this finding is sufficient on its own to support the Suspension and Seizure Order with respect to BSA Trucking and Load Chauffeur Transport. However, in this case there are further considerations, which strengthen the case for extending the Order to the other two corporations.

The related person provision addresses a very important safety concern. It prevents an operator which has had its CVOR suspended, from simply using or creating another corporate entity and proceeding with the same unsafe practices as before until the safety threshold is exceeded once again. Using the related person provisions, the Ministry has the ability to stop this fact situation from developing. There is evidence in

⁵ See Tab 1 for Over The Top, Tab 2 for BSA Trucking and Tab 17 with respect to Load Chauffeur Transport.

⁶ See Tab 3

⁷ See Tab 21

the record that Load Chauffeur Transport and the Applicant achieved a flip in December 2003, when Load Chauffeur had its Ontario CVOR suspended for 30 days. According to Ministry's records, Load Chauffeur Transport had a fleet size of thirteen trucks, with an Ontario "Adjusted Fleet Size" of seven trucks. By Order of this Tribunal, dated November 4, 2003, the CVOR of Load Chauffeur Transport was suspended for thirty days effective December 1, 2003.⁸

Effective December 1, 2003, the Applicant, a related person under the *Highway Traffic Act*, increased the number of trucks in service from 1 truck to 8, an addition of seven new trucks.⁹ At the show cause meeting, Mr. Aujla confirmed that these trucks and drivers had come from Load Chauffeur. This fact was then confirmed by an analysis done by Mr. Miller.¹⁰ Mr. Miller testified that the Ministry did not pick up on the fact that the two companies were related because the president of the Applicant at that time was Mr. Aujla's spouse, using her maiden name, Pannu. It would appear that the impact of the Suspension of Load Chauffeur Transport's CVOR was negated by using another related corporate entity. The same drivers and vehicles simply operated under a different corporate banner. What is perhaps more indicative of a continuing cavalier attitude to safety is that the safety rating of Load Chauffeur Transport at the time of its suspension is almost identical to the safety rating of the Applicant, 107.743% of safety threshold¹¹ for Load Chauffeur Transport versus 106.6% for the Applicant.

With respect to BSA Trucking Ltd., it would appear to be poised to achieve the same outcome. Like the Applicant, immediately prior to the Suspension of Load Chauffeur Transport in 2003, it has one truck. Like the Applicant, in December 2003, it has no record of safety violations in Ontario, in its case due to the fact that it does not operate in Ontario. Finally, like the Applicant, at that time it already holds a CVOR and there is no impediment to it commencing operations in Ontario. Failure to include BSA Trucking Ltd. in the Suspension and Seizure Order would simply create a situation where the Applicant could circumvent the impact of the Suspension by transferring operations to BSA.

After a careful review of the evidence, the issues in this matter may be determined as follows:

1. Was there a prejudicial linkage between the safety record and CVOR of the Applicant and Load Chauffeur Transport?

There is no evidence whatsoever that the Registrar considered the safety record of Load Chauffeur Transport in arriving at the decision to levy sanctions against the Applicant. The evidence clearly indicates that the Applicant started with a clean sheet in December 2003, and within approximately 18 months, had amassed such an extensive number of safety violations that it was in the worst 0.16% of operators in the Province of Ontario.

⁸ See Tab 19

⁹ See Tab 4

¹⁰ See Tab 7

¹¹ See Tab 19

2. Is the Registrar correct in including BSA Trucking Ltd. in the Order given the fact that it has not, so far, operated in Ontario?

The evidence clearly indicates that the Applicant and BSA Trucking Ltd. are related persons as that term is used in section 47. (1) (f) and defined in section 17. (4) of the *Highway Traffic Act*. They share a common officer, Buphinder Singh Aujla. Both the Applicant and BSA Trucking Ltd. are CVOR holders, and without including BSA Trucking Ltd. in the Order, there is no impediment to Mr. Aujla simply transferring his current operations to BSA Trucking and circumventing the terms of the Suspension and Seizure Order. The Registrar was correct to include BSA Trucking in the Order.

3. Is the Registrar correct in including Load Chauffeur Transport Ltd. in the Order given the fact that it is no longer in operation and has not operated in Ontario since 2003?

The admissions of Mr. Aujla at the show cause meeting in July 2005, shows that he was both an officer of Load Chauffeur Transport and a partner in it. It is therefore a “related person” to the Applicant as set out in section 47. (1) (f). By his own admission, as a dispatcher, Mr. Aujla was aware of the safety violations of Load Chauffeur Transport, yet, on the Suspension of Load Chauffeur Transport’s CVOR effective December 1, 2003, the Applicant simply hired drivers from Load Chauffeur Transport and continued to operate in an equally unsafe manner. While there is hearsay evidence that Load Chauffeur Transport has been dissolved and is no longer operating, it is still registered with the Ministry and still holds a CVOR. As a result, Load Chauffeur Transport is equally as poised as BSA Trucking Ltd. to circumvent the Suspension and Seizure Order by the simple expedient of recommencing operations and hiring the Applicant’s drivers.

4. Did the Registrar fail to give the Applicant an opportunity to set up a good and safe operation?

The evidence establishes that the Applicant was first made aware that its safety record was unacceptable in April 2004, one year and five months after it was granted a CVOR and five months after it commenced operations using drivers hired from Load Chauffeur. Between April 2004 and the issue of the Notice of Suspension and Seizure in June 2005, the record indicates that the Applicant’s safety record, not only showed no signs of improvement, but substantially worsened to the point where the Registrar sought to invoke sanctions. The scheme of the “*Ontario Safety Rating and Commercial Vehicle Operator’s Registration System*” gave the Applicant plenty of opportunity to recognize unsafe trends and set up a good and safe operation yet it failed to do so. The Registrar had no further obligation to give the Applicant such an opportunity.

5. Should the Tribunal confirm, modify or set aside the Registrar’s Order?

On a thorough review of the evidence, this Tribunal is satisfied that there are reasons to believe, having regard to the safety record of the Applicant, that the Applicant will not

operate a commercial motor vehicle safely or in accordance with the *Highway Traffic Act*, the regulations and other laws relating to highway safety. The evidence further discloses that Load Chauffeur Transport and BSA Trucking are “related persons” to the Applicant, and that there are reasons to believe that, without inclusion of these two entities in the terms of the Suspension and Seizure Order, neither of these entities will operate a commercial motor vehicle safely or in accordance with the *Highway Traffic Act*, the regulations and other laws relating to highway safety. Accordingly, this question is answered in the affirmative and this Tribunal confirms the terms of the Registrar’s Order.

DECISION:

By virtue of the authority in it pursuant to the provisions of section 50 of the *Highway Traffic Act*, the Tribunal confirms the Order of the Deputy Registrar of Motor Vehicles dated the 14th day of July 2005, and orders that as of December 5, 2005, effective 9:00 a.m. Eastern Daylight Saving Time, CVOR certificates numbered 144-200-188, 133-802-864 and 134-867-424 and the plate portion of permits for all commercial motor vehicles and trailers registered in the name of Over The Top Freightways Inc., BSA Trucking Ltd. and Load Chauffeur Transport Ltd. be suspended for 14 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and number plates be seized.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: November 23, 2005

Name: 3075.overthetop.cvor.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.

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



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 (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: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: MURRAY FORBES, Counsel for the Respondent, the
Deputy Registrar of Motor Vehicles

PETER STEUERNOL, Agent for the Applicants

DATE OF HEARING: April 11, 12, 2005
and September 13, 2005

North Bay

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

This appeal is brought pursuant to section 50(1) of the *Highway Traffic Act* R.S.O. 1990 Chapter H 8 as amended ("HTA") from a decision of the Registrar of Motor Vehicles ("the Registrar").

On November 4, 2004 the Registrar issued a 7day Suspension and Seizure Order against the Applicant ("the Order"), pursuant to the authority granted him under section 47 and 47.1 of the HTA, to take effect on November 22, 2004 and to remain in effect until November 29, 2004. As stated in the initiating document a preceding Notice of Suspension and Seizure for thirty days had been issued on October 13, 2004. The Registrar had entertained submissions from the Applicant following this Notice and had reduced the suspension period to the seven-day period placed in the Order now under appeal. The effect of the Order if upheld is a suspension of the Applicant's Commercial

Vehicle Operator's Registration (CVOR) certificate along with the seizure of the plate portions of permits issued with respect to the Applicant's motor vehicles and trailers for the designated period. The Applicant's company is located in Powassan, a town just south of North Bay off of Highway 11.

ISSUES:

It was the position of the Registrar that the imposition of a seven-day suspension upon the operation of the Applicants pursuant to the Order was appropriate given the record compiled through the Ontario Ministry of Transport's CVOR tracking system. That system allows the Ministry's regulators to gather data on any Ontario commercial operator falling within their purview and apply that data to set industry wide criteria in order to establish an individual operator's safety record.

The position of the Applicant was that although the CVOR tracking system had compiled a record of infractions below the required standards the commitments to improvement made by the Applicant should be taken by the Tribunal as evidence sufficient to allow continued operation without the proposed suspension. The Applicant stated that alternative audits to the Ministry's show a safety record at odds with the one forming the basis of the suspension. Further as the imposition of a seven-day suspension puts the company out of business for a period sufficient to cause irreparable harm to its operations and the coincident harm to its employees. Such a penalty is disproportionate to the safety deficiencies if any before the Tribunal.

The Ministry disputed the effects of the suspension and in any event it is the public interest that has priority over all else and the regulator's decision should be upheld in order to serve that primary end.

EVIDENCE;

The case for the Ministry was put in through Ms Rachelle Baker a shift leader at a truck inspection station and Mr. John Miller a carrier safety rating administrator. Mr. Craig and Mr. Carey Foresheew testified for the Applicant.

Mr. Miller described the CVOR system which tracks carriers' safety records in Ontario. The Ministry has established three categories of safety indicators: Accidents, Convictions and Inspections. Data collected for example from inspection stations and police reports are assigned a point total and entered into the CVOR tracking system. Points are assigned to different reported incidents on the basis of how in the regulator's determination they affect his primary concern of Ontario highway safety. For example Accident data carry a weight of two over Convictions and Inspections when factored together. To the regulator over time accidents, particularly when fault is found are proportionately more significant. As well, inspections that reveal serious defects and result in a rig being put out of service (OSS) carry a higher point total than those that do

not. Tabulations of accumulated points are made on a running basis over time and applied against the carrier's record. In this way the regulator is able to see the carrier's safety record over any period of time. For example if the regulator wants to view a safety record over six months or over two years he can, thus giving him an insight into rising or declining point accumulations.

The resulting figures kept in the form of a printout known as an "abstract" (available to operators) allow for an industry wide assessment of carrier performance when placed beside the actual number of tractors and trailers operated by the carrier in question. As fleets enormously in size and percentage of travel on Ontario highways and as the correlated data of Accidents, Convictions and Inspections only makes sense when held up against the scale of an operation an "adjusted fleet size" for each carrier under regulatory review is calculated. As each of Accidents, Convictions and Inspections data are applied against the established adjusted fleet size a comparative analysis between carriers operating under Ontario regulations is possible. It is incumbent upon operators to notify the Ministry upon any change in fleet size by addition or reduction in equipment.

Threshold rates are established for each of the three categories as well as for the carrier's overall safety rating. These rates have been established by the Ministry over time and through experience and serve as a warning system to the regulator about safety concerns in any carrier's operation. As various threshold levels are reached by an operator the Ministry will intervene in the form of warnings and meetings prior to formal sanctions being levied. For example at 35% of a threshold level being reached a Ministry letter will go out to the operator and at 65% a level two intervention consisting of an audit will take place. At 100% sanctions in the form of licence revocation are considered. Mr. Miller emphasized that only one percent of all Ontario based operators ever approach 100%.

The Applicant has a history of Ministry interventions. A Notice of Suspension and Seizure was issued against the Applicant on March 21, 2001 resulting from a threshold being reached. A show cause hearing was held on March 29, 2001 to allow the Applicant to explain his situation. At that time the Applicant had an adjusted fleet size of 12 and 18 full time drivers.

Mr. Carry Foreshow, president, on behalf of his company convinced the Deputy Registrar at that time that the safety shortcomings flagged by the Ministry were in the process of being addressed. This was to involve new maintenance standards and mandatory safety meetings. In the result the Suspension and Seizure was set aside. The safety rating of the Applicant went up to "Satisfactory" the following July after passing a subsequent safety audit.

In August 2002 after compiling the requisite adverse points the Applicant reached a threshold of 35% on the CVOR system requiring the issuance of a warning letter. In July of the following year 2003 the Applicant's record had deteriorated to a level requiring the issuance of a "Conditional" safety rating. This eventuality called for a Ministry

intervention, which took the form of an interview held the following August 14. The Applicant attended in the persons of Carey and Dustin Foreshew. The threshold figures noted on the interview sheet were: Accident 97.8%, Convictions 158.6% and Inspections 61.3%. The history of Ministry interventions was gone over including audits, warning letters and interviews. The operator was expected to put forth an action plan and did. The plan called for more in house inspections, training, more frequent examinations of driver abstracts to track any ongoing difficulties. The point of course of such interventions is to impress upon the carrier the importance of keeping a safe operation and the expectation of the Ministry that the steps towards improvement will be acted upon.

A number of CVOR abstracts referable to the Applicant were introduced for various periods of time. The usual CVOR "window" represents two years of operation. From September 2002 to September 2004 the abstract shows the following threshold numbers: Accident 88.8%, Convictions 251.3% and Inspections 89.2% for an overall rating of 129.6% of threshold. In short this figure represented to the Ministry ample reason for sanction leading up to the present appeal, particularly as the trend was not healthy. Within a sample span of safety record time each of the categories will fluctuate and result in distortion not representative of overall safety trends hence a longer record such as two years is tracked to reduce such anomalous results.

Ms Baker explained the procedure at truck inspection stations. Trucks are put on scales and documents are checked, particularly the driver's logbook. Sometimes mechanical inspections are carried out. Inspections are carried out in accordance with North American wide standards referred to as the Vehicle Safety Alliance. If the standard is not met then the vehicle is deemed not safe. If egregious enough a safety defect can result in an OOS or out of service designation. Ms Baker referred the Tribunal to the Applicant's CVOR Inspection History Report. This document is a compilation of inspection results on the Applicant's fleet over time from various inspection stations, in this case from early 2003 to April 2004. The witness ran through examples of some inspections. On March 16, 2003 at HWY 17 West station a power unit and two trailers were inspected and a total of 17 violations were detected with 9 being out of service (OOS). Faced with the inspection results at the stations around North Bay Mr. Foreshew contacted the Ministry enforcement coordinator and a meeting with Ms Baker was arranged for the following June. At the meeting she informed the Applicant of the nature of the inspection process. Each inspection is done in accordance with a schedule resulting in most being random. If however a vehicle pulls into a scale and there is an obvious defect this too can trigger an inspection. She also explained that an operator's CVOR record is not used to determine whether an inspection was to take place. That is, there is no targeting of operators by inspection stations even though inspectors have access to driver information in order to verify documentation. Finally Mr. Foreshew was informed that warnings had been given to drivers without violations being cited for defaults. She stated that warnings to drivers are expected to be passed on to operators. She noted that Mr. Foreshew was satisfied with the meeting and undertook improvement particularly on the basis that a large number of inspections had resulted in equipment being put out of service.

On October 28, 2004 another show cause hearing was held at the Ministry's office in St. Catherines. At the time the Applicant had 40 trailers 18 company power units and 15 owner/operators. As in previous meetings Mr. Foreshew introduced a series of action plans and evidence of improving procedures. He pointed to an American Department of Transport safety audit successfully completed and the introduction of consultants. The minutes of the meeting also disclosed that he felt that a "spike" in points against had occurred due to the attitude problems between the scales personnel around North Bay and his drivers. He told of the increases in and refurbishment of his fleet size and the stricter line he was taking with his drivers. Within the previous year of 44 drivers 34 had been fired or quit for attitude problems. A decrease in insurance premiums was pointed out as an indication that his safety measures should be taken into account by the regulator. Mr. Foreshew also raised the program of spot checks and instruction to drivers on aspects of their operation including proper tie down procedures to cut down the number of out of service inspections. The regulator's representative pointed out the fact that since the interview the previous August the overall violation rate was 106 and 109%. The principal rationale proffered by the Applicant for the regulator to withdraw further sanction was the insurance data and the successful USA DOT audit.

The content of the show cause minutes was largely repeated in Mr. Foreshew's direct testimony. He was in agreement with the Ministry that a longer "window" of CVOR tracking allows for a more accurate analysis. As stated the Ministry appears to base its primary analysis upon the two-year window. The description of the operation given was of a family affair with relatives working under the primary decision maker Craig Foreshew. Shareholding was not spread throughout the family members. The main loads were lumber. The rapid expansion of the operation was not contested nor was in any real sense the CVOR record with the exception of an entry that had been duplicated adding some six questionable points onto that record. In the overall two year window such a Ministry oversight would not have altered the regulator's assessment. Mr. Foreshew agreed that the fleet size at the time of the Ministry intervention of March 2001 was three tractors and 20 trailers with 12 tandems owned by 8 different brokers. By the intervention of October 2004 there were 18 tractors and 40 trailers. There was a claim by Mr. Foreshew that, as with other operators, he was at the mercy of the market for drivers at any given time. About one half of his drivers were over two years in his employ the others were somewhat more itinerant. He stated that some drivers are controllable, for example through a good record bonus system some are not. Evidence was introduced showing that despite expressed intentions drivers falling short of the promised new guidelines were not terminated or dealt with appropriately. As to the evidence of a correlation between insurance premiums and operator safety it was asserted that insurance is a commodity the price of which fluctuates for any number of reasons of supply and demand. The fact that an underwriter believes a carrier is a worthwhile risk may be the result of a safety record but may also be the result of market capacity for the period in question.

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,...
 - (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation of a motor vehicle
 - (e) conviction of the holder of an offence referred to in 210
 - (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 Registrar considers relevant, that the holder will not operate a commercial 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 (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF LAW TO FACTS:

The evidence presented before the Tribunal in this matter graphically illustrates the situation faced by the regulator in matters under the Act. The regulator's primary concern is and must be highway safety as demanded by the legislators. As well he must take into account the operators entitlement to operate a business under the Act. Counsel for the Registrar forcefully put forth the argument that the regulator in this case gave the Applicant a great deal of latitude to improve his operation prior to sanction. From the first Ministry intervention to the present some two years passed with no real improvement, instead there was a multi fold increases in the operation.

The counter argument that the Applicant's operation would suffer irreparable harm if a seven-day seizure was enforced, it was argued, should fail both on policy and substance. The evidence does not, he contended, portend the dire business consequences put forth by the Applicant and in any event those arguments cannot outweigh public safety. The operation displayed the classic safety concerns of rapid expansion. The Applicant went from three to eighteen units and 20 to 40 trailers in some three years. The evidence simply does not bear out the diligence required to enable an expanding enterprise to establish appropriate self-regulating procedures. The driver training and maintenance changes did not alter the safety profile in a manner that is convincing to any degree. The argument that some drivers are uncontrollable is no answer to the issue of public safety, it is a non-sequitor. It is the carrier that holds the licences and bears the responsibilities (and reaps the rewards) there under.

It is impossible for the Tribunal to differ from the conclusions reached by the regulator on the public interest (highway safety) argument. That interest must trump other considerations given the intent of the governing legislation. The argument surrounding the potential harm to the ongoing viability of the Applicant's operation if the regulator's sanction is imposed is one that cannot stand even if established once the safety issue been successfully advanced. In any event the Tribunal is not convinced that the Applicant's position on this point has been made out. The evidence advanced by the Applicant that a revenue stream was essential for the health of his operation in that his receivables were security for his line of credit was at least partially countered by the fact that his costs would be concomitantly reduced during any cessation of operations. In any event this borders on an argument that the regulator should forswear sanctions in the face of economic consequences alone. The Tribunal cannot square this analysis with the overarching intent of the legislation being highway safety.

It is unusual that a matter come on appeal before this Tribunal where the Regulator has shown such a degree of tolerance to the expressed concerns of an operator. The opportunity through the show cause process and other chances offered to the Applicant, more than once, has to be seen as evidence of the regulator taking the balancing act described above seriously. Indeed in this case the Tribunal would have seen less scrutiny as sufficient evidence of the Ministry's required diligence.

DECISION AND ORDER

For the reasons stated the Tribunal orders that the Registrar carry out the sanction of the seven day suspension contained in the Suspension and Seizure Order from which this appeal was taken to take effect five days from the issuance date of this Decision.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: November 24, 2005

FILENAME: 2688.cvor.foreshow.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.

This decision will also be available on Quicklaw at a later date.

HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

3075-CVOR- ADJ-Adjournment

OVER THE TOP FREIGHTWAYS INC. AND BSA TRUCKING LTD.

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATIONS of

OVER THE TOP FREIGHTWAYS INC. AND BSA TRUCKING LTD.

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: July 14, 2005

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

OVER THE TOP FREIGHTWAYS INC. AND BSA TRUCKING LTD.

- and -

REGISTRAR OF MOTOR VEHICLES

Applicants

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on October 20, 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, November 17, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: October 19, 2005

FILE NAME: 3075.cvior.Over_the_Top.Adj.doc

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website <http://www.lat.gov.on.ca/> in two weeks time. The decision will also be

available on Quicklaw at a later date.

PREHEARING

DORNER TRANSPORT CO LTD.

In the matter of an application by Dorner Transport Co Ltd. dated August 12, 2005, pursuant to section 50. (1) of the *Highway Traffic Act* to consider the appeal of a Suspension and Seizure Order of the Deputy Registrar dated August 5, 2005

TRIBUNAL: ELIZABETH L. SPROULE, Member

APPEARANCES: J.F. LEE, Counsel, appearing on behalf of Dorner Transport Co Ltd.

PATRICK S. MOORE, Counsel, appearing on behalf of the Registrar of Motor Vehicles

DATE OF
PREHEARING: September 15, 2005 Toronto

ORDER

Following attendance on September 15, 2005, at a pre-hearing before this Tribunal of J.F. Lee, Agent, on behalf of Dorner Transport Co Ltd. (the "Applicant") and Patrick S. Moore, Counsel, on behalf of the Registrar of Motor Vehicles (the "Registrar"), the Tribunal makes the following Order:

1. The Parties to the hearing are the Applicant, Dorner Transport Co. Ltd., holder of CVOR Licence 078-573-557, and the Registrar of Motor Vehicles.
2. The hearing is scheduled for October 21st and 28th, 2005.

3. The Respondent indicated that one witness, Sherry Atallah of the Ministry of Transportation of Ontario, would be called.
4. The Applicant indicated that 1 or 2 witnesses would be called: Gloria Dorner and possibly Charles Dorner.
5. The parties agreed that the accuracy of the CVOR record is not in dispute.
6. The sole issue relates to the safety record of the Applicant.
7. The Parties shall fully comply with all applicable requirements of Disclosure as set forth in rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Member

RELEASED: September 16, 2005

File Name: 3116.cvor.Dorner.prehrg.doc



PRE-HEARING

OVER THE TOP FREIGHTWAYS INC. AND BSA TRUCKING LTD.

IN THE MATTER OF application by Over The Top Freightways Inc. and BSA Trucking Ltd. dated July 19, 2005 and July 28, 2005 respectively 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 July 14, 2005;

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 144-200-188, 133-802-864 and 134-867-424 issued to Over The Top Freightways Inc., BSA Trucking Ltd. and Load Chauffeur Transport Ltd.;

AND IN THE MATTER of the record of unpaid fines and safety record of Over The Top Freightways Inc.;

AND IN THE MATTER of the safety record of Load Chauffeur Transport Ltd.;

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: MADHU PRASAD, Agent representing Over The Top Freightways Inc.

PATRICK MOORE, Counsel representing the Deputy Registrar of Motor Vehicles

DATE OF
PRE-HEARING: September 26, 2005 *by teleconference*

ORDER

Following attendances by teleconference, on September 26, 2005, at a pre-hearing before this Tribunal of Madhu Prasad, Agent appearing on behalf of Over The Top Freightways 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. E.D.T. on October 20, 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 Respondent.
2. It was recorded that there was no resolution of the issues in this matter.
3. In questioning why Load Chauffeur Transport Ltd., ("Load Chauffeur") and BSA Trucking Ltd. ("BSA") were named, the Applicant's Agent advised that Load Chauffeur was no longer active and BSA only had two trucks, which operated in the local delivery area only. Upon learning that the companies were named for reasons including that each still held CVOR certificates, the Applicant appeared to indicate that consideration could be given to surrendering those CVOR certificates.
4. The Respondent indicated his intention to call one witness. The Applicant's Agent indicated that she may have two witnesses, one of whom would be the president of the company but as there might be a scheduling conflict, she undertook to advise whether an adjournment would be required by or before October 7, 2005. In the event an adjournment would be required, the Respondent noted that the hearing should then be scheduled for the next soonest date and the Applicant's Agent agreed.
5. The parties were made aware of their obligations for full and timely disclosure of all documents and things to be relied upon during the hearing as set forth in Rule 6.3 and Rule 6.4 of the Rules of Practice of the Tribunal. The Applicant's Agent confirmed that she had a copy of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: September 29, 2005

File: 3075.cvor.Over The Top .prehrg.doc

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



9120-8512 QUEBEC INC. o/a MINHAS 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, Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent, the
Deputy Registrar of Motor Vehicles

SUKHWINDER MINHAS, appearing for the Applicant

DATE OF HEARING: September 7, 2005

Toronto

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

The Applicant, 9120-8512 Quebec Inc. o/a Minhas Transport ("Minhas") appeals to the Licence Appeal Tribunal from a Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles ("Respondent") dated May 27, 2005 and issued pursuant to Section 47 & 47 (1) of the *Highway Traffic Act*.

On May 9, 2005, the Deputy Registrar issued a Notice of Suspension and Seizure proposing a thirty (30) day suspension of the CVOR certificate issued to 9120-8512 Quebec Inc. o/a Minhas Transport and that the plate portions of permits and number plates be seized.

The Notice of Suspension and Seizure advised the Applicant that a Show Cause meeting was scheduled for 10:00 A.M., Thursday, May 26, 2005. The reasons for the Notice were stated as follows:

AND TAKE NOTICE that this is based on your safety record including:

- a) Safety Record Review dated May 2005
- b) Commercial Vehicle Operator Record
- c) Safety Net Inspection Reports
- d) Accident Reports

AND TAKE NOTICE that the Deputy Registrar is not satisfied with your safety record.

The Notice of Cancellation and Seizure was accompanied by a letter of the same date advising the Applicant that its safety rating had been categorized as UNSATISFACTORY.

As no one from Minhas contacted the Deputy Registrar in reply nor did anyone from Minhas appear on the appointment date, the Deputy Registrar issued a decision wherein he stated...

AND WHEREAS on May 26, 2005 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 you did not attend the scheduled meeting or make any submissions;
NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the *Highway Traffic Act* that as of June 6, 2005, CVOR certificate 146-609-499 and plate portion of permits for all commercial motor vehicles and trailers issued to 9120-8512 QUEBEC INC. be suspended for 30 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

ISSUE:

The issue to be decided on in this appeal is whether or not the Registrar made an error in issuing the Suspension and Seizure Order.

OPENING STATEMENTS:

Counsel for the Registrar stated that he would present one witness and review the Applicant's CVOR record of safety infractions and accidents to substantiate the reasoning for the Deputy Registrar's Order.

Mr. Minhas, on the Applicant's behalf, stated the company only started in 2003 and in the absence of a safety inspection program, the company relied on driver log books for compliance confirmations. In the last six months, the company has taken steps to correct this and no longer relies on the log books.

EVIDENCE:

The Respondent's Witness

Sherry Atallah:

Ms. Atallah, is a Carrier Safety Rating Administrator with the branch of the Ontario Ministry of Transportation ("Ministry") responsible under the *Highway Traffic Act* and Regulations ("legislation") for regulation of the commercial-carrier industry in this province.

Ms. Atallah has been in this position for 4 years. Her duties involve preparing and reviewing sanction files; conducting interviews regarding safety issues; and attending Show Cause Meetings. Her role with respect to Minhas was to analyze the CVOR record and file information which had been forwarded to her by a CVOR analyst.

Ms. Atallah referred to Exhibit 3, Tab 12, which contains a current copy of 'Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline' ("Guideline") and explained that there are five possible safety ratings. These are Excellent; Satisfactory; Satisfactory-unaudited; Conditional; Unsatisfactory and an unsatisfactory rating means that there is a one hundred per cent violation rate.

Usually the Ministry will sanction a carrier with an Unsatisfactory rating 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 of that carrier's CVOR record. However, less than 1% of carriers go over the 100% threshold. The Guideline is publicly available and can be obtained through the Ministry's office and the internet.

The Carrier Record Review, which Ms. Atallah completed in May 2005, showed that the overall threshold standing of Minhas was at 190.2%. The complete record details are found in Exhibit 3, Tab 5.

The overall average of 190.2% was drawn from the carrier's record in Ontario only and based on an available period of less than two years (September 5, 2003 through to April 5, 2005) and was comprised of:

- accident violation % of threshold: 250.7%
- conviction violation % of threshold: 197.6%

A chronology of events for Minhas was as follows:

- Sept. 5, 2003 original CVOR certificate issued
- Oct. 15, 2003 satisfactory unaudited safety rating assigned
- May 30, 2004 conditional safety rating assigned

- Jan. 19, 2005 wheel separation incident - charges laid (convictions occurred in July 2005)
- February 26, 2005 wheel separation incident (2nd incident)

Ms. Atallah stated that if the most recent events were included in the CVOR review, the company's current average violation rate would be 205.4%. If the convictions, resulting from these charges were also factored into the Applicant's record the violation rate would go to 263.7%. The charges in the second wheel-off incident are still before the courts.

Regarding the Inspection Violation rate, Ms. Atallah pointed out that of the 13 inspections in the review period, 9 were out-of-service results (Exhibit 3, Tab 4, page 11). This produced an Inspection % of Threshold rate of 61.9% versus the provincial standard of 35.3%.

One inspection report presented in testimony was from June 8, 2005 (Exhibit 3, Tab 9, page 47) and showed that the truck was in such poor condition that the plates were removed and the driver was charged with failing to maintain the vehicle. The driver of that truck was the vice president of the company.

The types of inspection violations found in two vehicles, in the April 1, 2004 and March 31, 2005 period, included (Exhibit 3, Tab 7):

- air supply lines leaking
- windshield damaged
- lighting system - turn signal lamp
- brake inoperative
- brake linings/pad loose/cracked/missing
- brake linings/pads/thickness
- wheel bearing hub - cracked/welded

An updated CVOR Summary dated August 25, 2005 and covering the period of September 5, 2003 through to July 25, 2005 showed the Applicant's overall threshold rate was still high at 179.6% (Exhibit 4).

She added that this was a company which went to a Conditional rating (exhibit 3, Tab 5, page 24) in less than one year and then to the sanction stage in less than 2 years. The Applicant did not request a Show Cause meeting and nothing was received in reply to the Notice of Suspension.

Ms. Atallah also pointed out that carriers are expected to report address changes within 15 days and that when the Ministry or Deputy Registrar sends any document or materials to a carrier, it is considered to have been received... "Unless the person

establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control" (Exhibit 3, Tab 12 page 111).

The Notice of Suspension materials that were sent out to the Applicant were returned by the courier, Purolator, for the reason it was refused (Exhibit 3, Tab 2, page 5). Ms. Atallah confirmed that the address (Minhas Transport, 9840 Gouin O., #407, Pierrefonds, QC H8Y 3H1) to which everything was sent was the same as what was on record and which the Applicant wrote on the Notice of Appeal. A second effort was made to send the Notice of Suspension by registered mail (Exhibit 3, Tab 2, page 6). This was believed to have been delivered as nothing came back.

Ms. Atallah stated that this carrier had a serious problem with vehicle maintenance and the problems were not just in one area but in all three, being accidents, convictions and inspections. She referred to the vehicle wheel-off incidents and said that this is one type of incident the Ministry "never wants to see".

Ms. Atallah concluded by saying that over 80% of Conditional Rating recipients improve but in this instance, the Applicant's record did not improve.

There were no cross-examination questions.

The Applicant's Witness

Sukhinder Minhas

Mr. Minhas said that he started the company in November 2003 with his brother (Avtar) and father (Trilochan). His brother had previously been a driver with Day & Ross but now looks after the safety checks while his father takes care of office duties and he (Mr. Minhas) does dispatch.

Avtar Minhas, who now does safety checks and pre-inspection reports, has not been driving for about 4 to 5 months though he will fill in to drive a truck if no driver is available.

The company had its first load in December 2003 and initially operated with "a couple of trucks" and then added a few more. When the trucks return to the yard and repair work is needed, they go to the Akbas garage which is on the truck yard grounds.

Mr. Minhas said the second wheel-off incident, from February 26, 2005, occurred just after a garage inspection had been completed. He also acknowledged that the first incident, from January 19, 2005, was a result of driver negligence.

Mr. Minhas acknowledged drivers were not checking their vehicles or reporting defects as the daily logs showed there were no defects (Exhibit 5, pages 7, 8, 9, 10). The company did not have any training programs in place but had started a program to change this in the last six months.

Mr. Minhas submitted copies of bills for repairs to truck and trailer equipment (Exhibit 5, pages 1, 2, 3, 4,) stating that the company had spent \$20,000 to \$30,000 on repairs in the past 5 to 6 months. The bill copies contained in Exhibit 5 totaled about \$12,470.00 and were cross-referenced to related exhibit documents to show the company had made repairs to problem equipment.

Regarding the refusal of the couriered Notice of Suspension and included materials, Mr. Minhas explained that the address was his family home and when he moved out, a friend had taken over the residence. Mr. Minhas stated that this friend had not known what the courier package was about and had therefore refused it.

Through cross-examination it was also learned that the Applicant's business...

- park their trucks at 6855 Cote de Liesse, which is the Akbas garage location;
- has 6 parking spots at Akbas and operates 7 tractors, 5 of which are on the road and 2 are parked; there are also 5 trailers;
- uses Akbas for all of its repairs;
- there is no office at this location;
- records were moved from 9840 Gouin to 4808 Berthiaume about the 1st of July but no one has notified the Ministry of the change of address.

Mr. Forbes asked Mr. Minhas about the qualifications of Avtar Minhas to do safety inspections and also cited Avtar's speeding conviction (Exhibit 3, Tab 5, page 17) and out-of-service inspection result (Exhibit 3, Tab 9, page 47).

Mr. Minhas said he hires the drivers and part of his new program is based on a driver manual which was provided to him by a friend who had previously worked at "one of the big companies". He stated that if a driver has one accident he is fired.

Mr. Forbes asked Mr. Minhas if he knew about Quebec's safety rating program and if it was similar to the Ontario program. Mr. Minhas agreed that it was but he did not know his company's Quebec rating.

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.

Mr. Forbes referred to the evidence that had been submitted and that in less than one year the Applicant's record went to a Conditional rating and then deteriorated further. In less than 2 years, the Applicant's rating went to more than 2 times the rating threshold.

He submitted that this was a small company that had grown quickly and needed time to consolidate its operating and safety procedures. Therefore, the Suspension and Seizure Order for 30 days should be confirmed.

Mr. Minhas closed by stating that he accepted responsibility for the company's record but submitted that the company has started in the right direction.

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:

The Respondent presented significant documentary evidence regarding the Applicant's CVOR record and while all of it was considered, only summary facts have been noted in this decision. The record of accidents, convictions, out-of-service inspections, and the less than two year period in which they occurred, was not disputed by the Applicant and therefore the Applicant's CVOR record is found as fact.

Therefore, it is clear that the concerns of the Deputy Registrar regarding the past safety record of Minhas and "*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*" are justified.

However, the Applicant's attitude in accepting responsibility for his company's CVOR record and submission of evidence to show that proper repair and maintenance steps had been taken were viewed with favour. In addition, the Applicant's evidence that safety checks, driver training and discipline programs and policies were being implemented suggest that this carrier is acting to take the necessary steps to improve its safety performance.

However, there are other facts which remain and do not alleviate concern about this carrier's safety performance and whether they can in fact be relied upon to improve. These include:

- the Applicant does not know his Quebec safety rating
- that he places reliance on a driver manual provided by a friend
- a copy of which was not presented in the hearing
- no evidence of competency was presented regarding either Mr. Minhas' qualifications to confirm the capabilities of new driver hires or the qualifications of Avtar Minhas to competently carry out safety inspections

Considering the full weight of evidence found in the Applicant's CVOR record, the short time in which this record was acquired, the Tribunal cannot ignore that in the interest of highway safety, perhaps a Cancellation and Seizure Order may be the more appropriate decision. Of particular weight in this consideration are the two wheel-off incidents in which, fortunately, there were no resulting personal injuries.

However, in light of the Applicant's testimony with regard to steps being taken to improve their safety performance and the tangible evidence to that effect through maintenance expenditures, the Tribunal agrees with the Deputy Registrar's decision for a suspension and also determines that in this specific instance, attaching terms and conditions to the Suspension and Seizure Order would be appropriate.

ORDER

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, orders the Deputy Registrar of Motor Vehicles to proceed with issuance of the 30 day Suspension and Seizure order to the Applicant, 9120-8512 Quebec Inc. o/a Minhas Transport and to add the following conditions:

1. That by or before the conclusion of the 30 day Suspension period, the Applicant shall provide the Deputy Registrar with a reasonable and practical Action Plan to improve the Applicant's safety performance;

2. That in addition to the Action Plan, the Applicant shall list the qualifications and competency of the individual(s) charged with implementing and monitoring the Plan to improve the safety performance of the Applicant;
3. In the event the Applicant fails to deliver the Action Plan and the qualifications and competency of the individual(s) charged with implementing and monitoring the Plan, the Deputy Registrar may choose to issue a Notice of Cancellation and Seizure

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

RELEASED: September 23, 2005

FILENAME: 3009.cvor.Quebec Inc.o/a Minhas 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.



HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

2913-CVOR- ADJ-Adjournment

SHERRY A. GENIER, MARIO A. GENIER and SHERMAC LTD.

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATIONS of

SHERRY A. GENIER, MARIO A. GENIER and SHERMAC LTD.

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: March 29, 2005

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

SHERRY A. GENIER, MARIO A. GENIER and SHERMAC LTD.

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on September 29 and 30, 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 Wednesday November 23, 2005 and to continue on Thursday, November 24, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: September 28, 2005

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



1480769 ONTARIO INC.
o/a UNIQUE MOTOR FREIGHT SYSTEMS

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, Member

APPEARANCES: MURRAY G. FORBES, Counsel for the Respondent, the Deputy Registrar of Motor Vehicles

No Appearance by the Applicant, 1480769 Ontario Inc. o/a Unique Motor Freight Systems

DATE OF HEARING: August 26, 2005 Toronto

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

The Applicant, 1480769 Ontario Inc. o/a Unique Motor Freight Systems ("Unique") appeals to the Licence Appeal Tribunal from a Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles ("Respondent") dated May 30, 2005 and issued pursuant to Section 47 & 47 (1) of the *Highway Traffic Act*.

On April 27, 2005, the Deputy Registrar issued a Notice of Suspension and Seizure proposing a thirty (30) days suspension of the CVOR certificate issued to 1480769 Ontario Inc. o/a Unique Motor Freight Systems and that the plate portions of permits and number plates be seized.

On May 24, 2005, a Show Cause meeting took place and on May 30, 2005, the Deputy Registrar issued a decision wherein he states that "I have considered your submissions, action plan, past Ministry interventions, your safety record including your record of convictions, accidents, vehicle out-of-service rates and record of unpaid fines, I remain concerned for highway safety".

On the basis of the Show Cause meeting and the submissions of the Applicant's consultant, the Deputy Registrar Ordered that the Applicant's CVOR be suspended for 15 days. This Order had the effect of reducing the original suspension from 30 days to 15 days. It is this Order that is the subject of this Appeal.

A pre-hearing was held on August 11, 2005, and it was recorded that there was no appearance by the Applicant or anyone on its behalf.

Upon the start of the hearing, a Tribunal staff member reviewed the efforts to contact the Applicant and its Agent as follows:

- July 11, 2005 fax and registered mail notices were sent out; a fax confirmation is on file;
- July 22, 2005 a letter was received by the Tribunal from Larry Young, the Applicant's consultant, advising that he no longer represented the Applicant;
- August 25, 2005 the Applicant's business telephone number was called and it was learned that number was no longer in service.

On the basis of that information, the Tribunal asked the Respondent to proceed with their case.

Counsel for the Respondent, Mr. Forbes advised he would call one witness and asked the Tribunal to consider the appeal to be abandoned.

John Miller

Mr. Miller was the Respondent's only witness. He is with the Ministry of Transportation and deals with integrity checks of CVOR records. He does interviews, interventions, 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. He received the Unique file from a CVOR analyst because that carrier's safety rating had gone over 100%.

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.

Unique operates 25 truck tractor units and the total distance travelled by its trucks in Ontario was reported as being 505,880 km annually.

Jasvinderpal Barn is President of the company and took that position in March 2003. Prior to taking over Unique, Mr. Barn was Vice-President of 1039012 Ontario Inc., o/a Hummer Transportation ("Hummer"), from May 1996 through to March 2003.

Mr. Miller referred to his notes from the Carrier Record Review (Exhibit 3, Tab 8) to say that Unique failed a facility audit (Exhibit 3, Tab 14) conducted on September 30, 2003, as did Hummer (Exhibit 3, Tab 13) on May 4, 2004.

Unique also lists 4 addresses, being:

1. 7325 Torbram Road, Mississauga
2. 2299 Drew Road 1, Mississauga
3. 7280 Dixie Road, Mississauga
4. 1767 Drew Road, Mississauga

The Drew Road address is the same as Hummer.

The Carrier Record Review completed by Mr. Miller showed that the overall threshold standing of Unique was at 181.9%. This overall average was drawn from Unique's two year CVOR record (March 28, 2003 through to March 27, 2005) and comprised of:

- Safety Related Convictions: 52
- Non-Safety Related Convictions: 2
- Safety Inspections: 29 events in previous year or out-of-service rate of 41.4% vs provincial average of 38.0%
21 events in current year or out-of-service rate of 57.1% vs provincial average of 35.3%

Mr. Miller pointed out that the provincial average for out-of-service safety inspection ratings went down while the Unique record was going up or getting worse.

The record review also listed the Ministry's interventions as follows:

- May 27, 2003 - warning letter (Exhibit 3, Tab 19)
 - o key points of this warning letter were that the carrier had an "unacceptable performance" which showed a "serious lack of

compliance with rules and regulations governing transportation in the Province of Ontario. Immediate action is required on your part to prevent further unsafe and non-compliant activities.”

- October 7, 2004 - interview (Exhibit 3, Tab 16)
 - o an outcome of the interview was an Action Plan listing a series of items which Unique signed and undertook to implement; the details are recapped in Exhibit 3, Tab 16A

Mr. Miller said that following the interview and action plan undertaking, there was no improvement in Unique's safety record. Out of approximately 113,000 CVOR holders in Ontario, only 145 operators are in the same condition as Unique.

Mr. Miller then provided a review of individual accidents and CVOR inspection results (Exhibit 3, Tab 12) and added that in the beginning months of Jasvinderpal Singh Barn's management of the company, April 17, 2003 through to and including October 16, 2003, Unique's overall violation rate deteriorated further to 325.9%.

On February 27, 2004, Unique was assigned a 'Conditional' safety rating "based on the results of a failed facility audit" and also advised that "The Registrar may also propose the same safety rating to an entity or entities with which your operation is affiliated. The affiliates are: 1039012 Ontario Inc. o/a Bal Transport Co." This company, 1039012 Ontario Inc. subsequently became known as Hummer.

On September 1, 2004, the Ministry wrote to Unique (Exhibit 3, Tab 17) stating that...

A review of your operating record ... indicates that you have accumulated safety-related violations at an unacceptable rate. You (Jasvinderpal Barn) or another officer/partner of your company are requested to attend an interview to discuss your operation and solutions to your safety problems.

and added that:

It is imperative that you bring the following documents to this meeting:

1. Written safety action plan, outlining in detail with implementation dates, the steps you propose to take or have taken to improve your safety record.
2. An equipment list showing all commercial motor vehicles being operated by your company indicating make, year, license plate number and registered gross weight.
3. Copy of your operating record (attached) and any recent reports of violations not included on this record.

On April 27, 2005, the Deputy Registrar issued a Notice of Suspension and Seizure (Exhibit 3, Tab 6) on the basis of the Applicant's safety record. This was followed with a

notice that an 'Unsatisfactory' safety rating had been assigned to Unique (Exhibit 3, Tab 7).

Between May 16, May 26 and May 30, 2005, Mr. Miller received communications from Larry Young (Exhibit 3, Tab 3B) asking, first, for a meeting and then received confirmation that Mr. Young's company and Unique had signed an agreement. Lastly, Mr. Young's office advised that they were having difficulty in obtaining information needed to complete the Unique CVOR update.

Mr. Miller related these communications to his notes from the May 24th Show Cause Meeting (Exhibit 3, Tab 3) during which Mr. Young gave him a Safety and Compliance Action Plan (Exhibit 3, Tab 3A) with the comments that...

- "this would be implemented if he was hired";
- "complete control must be given to him for safety and compliance as well as hiring";
- "the money [to pay for his services] must be upfront to show sincerity";
- he would not represent the company under any other circumstances".

Mr. Miller then confirmed that based on the meeting with Mr. Young and the submitted Action Plan, as well as the understanding that Unique would be committing to having Mr. Young implement the plan, the Deputy Registrar reduced the suspension and seizure period from 30 days to 15 days (Exhibit 3, Tab 2).

On July 22, 2005, the Tribunal received a fax letter from Mr. Young (Exhibit 1, page 6), stating the following:

Please be advised that at this time we would like to formally remove ourselves as the agents on record for the above listed appeal [Unique v. Registrar of Motor Vehicles].

Unique Motor Freight has abandoned their Action Plan together with all commitments made regarding the company's record. Unique has given us no indication that they wish to continue with their corrective measure and initiatives put forward to the Ministry of Transport.

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.

Mr. Forbes further stated that the Registrar reduced the suspension from 30 days to 15 days due to the fact that the Applicant had made commitments to hire a consultant to help the company and to implement the consultant's Action Plan.

However, as Unique has decided to not proceed with Mr. Young, the original Suspension and Seizure Order for 30 days should 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:

The evidence presented by the Respondent, despite being in summary, presented a picture of an extremely poor CVOR record.

As the record of the Applicant is not in dispute, it is clear that the concerns of the Deputy Registrar regarding the past safety record of Unique and *“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”* are justified.

Of particular concern to the Tribunal is the Applicant's complete disregard for improving its record based on:

- its non-appearance at both the pre-hearing and hearing; and
- abandonment of the Action Plan prepared by Mr. Young, including the decision not to proceed with Mr. Young.

The prior involvement of Unique's principal officer, Mr. Barn, in Hummer, and the poor record of that CVOR holder while Mr. Barn was Vice-President is also seen as being of

some concern since it is taken to confirm an on-going disinterest in safety-related issues. This is of grave concern and cannot be overlooked.

The fact that the Tribunal was unable to contact Unique or Mr. Barn and was only able to access a phone company message that the number was no longer in service also places into doubt whether Unique is even still in business.

Considering the full evidence found in the Applicant's CVOR record, the non-appearance at either the pre-hearing or this hearing and the undisputed abandonment of any plan to improve their safety performance, the Tribunal concludes that the primary concern of highway safety has been appropriately weighed in arriving at a decision in favour of not allowing the continuation of the Applicant's operations in Ontario.

Therefore, and in due consideration of the changed circumstances since the Deputy Registrar issued the suspension order, it is evident the Deputy Registrar was not in error in concluding that he had reasonable grounds to remain concerned for highway safety and in this specific instance, the more appropriate decision is for a Cancellation and Seizure Order.

ORDER

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, orders the Deputy Registrar of Motor Vehicles to issue a Cancellation and Seizure order to the Applicant, 1480769 Ontario Inc. o/a Unique Motor Freight Systems.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

RELEASED: September 14, 2005

FILE NAME: 3010.cvor.unique.

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

1480769 ONTARIO INC.
O/A UNIQUE MOTOR FREIGHT SYSTEMS

In the matter of an application by 1480769 Ontario Inc. o/a Unique Motor Freight Systems dated June 7, 2005, pursuant to section 50.(1) of the *Highway Traffic Act* to consider the appeal of a Suspension and Seizure Order of the Deputy Registrar dated May 30, 2005

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MURRAY G. FORBES, Counsel appearing on behalf of the Deputy Registrar of Motor Vehicles

No appearance by 1480769 Ontario Inc. o/a Unique Motor Freight Systems or on its behalf.

DATE OF
PREHEARING: August 11, 2005 Toronto

ORDER

Following attendances on August 11, 2005, at a pre-hearing before this Tribunal of Murray G. Forbes, Counsel, on behalf of the Deputy Registrar of Motor Vehicles (the "Registrar") there being no appearance by or on behalf of 1480769 Ontario Inc. o/a Unique Motor Freight Systems (the "Applicant");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 10:00 a.m. on Friday, August 26, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;

1. The Parties to the hearing are the Applicant and the Registrar.
2. Due to the Applicant not being present at this pre-hearing despite having been advised by written notice dated July 11, 2005, of the date,

time and place of the pre-hearing namely August 11, 2005, there was no resolution of any of the issues in this matter.

3. The Parties shall fully comply with all applicable requirements of Disclosure as set forth in rule 6 of the rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: August 15, 2005

File Name: 3010.cvor.unique.prehrg.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ROOTS GOODS CARRIER LTD.

IN THE MATTER OF THE REFUSAL BY THE DEPUTY REGISTRAR
OF MOTOR VEHICLES DATED NOVEMBER 23, 2004 TO ISSUE A
COMMERCIAL VEHICLE OPERATOR'S REGISTRATION
CERTIFICATE AND TO ISSUE AN OPERATING LICENCE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MYRON J. WILLIAMS, Agent, representing the Applicant Roots
Goods Carrier Ltd.

PATRICK MOORE, Counsel, representing the Respondent, Deputy
Registrar of Motor Vehicles

DATE OF
HEARING: July 5, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Deputy Registrar of Motor Vehicles (the "Registrar") issued a notice of refusal to issue to Roots Goods Carrier 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 November 23, 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 "HTA") 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 safety record of Robust Transport Services Ltd., an operator directly or indirectly related to you.
- I am of the opinion Rajvinder Grewal, President of Robust Transportation Services Ltd. directly or indirectly controls or manages the applicant or will directly control or manage the applicant.

The Applicant has filed appeals to the Tribunal and has requested a 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 Karmjit Singh Grewal testified for the Applicant.

The Testimony of John William Miller

Miller testified that he is employed by the Ministry of Transportation (the "MTO") in its Sanctions and Investigations Branch as a Safety Rating Administrator which position he has held for about five years. His duties involve doing integrity checks concerning certain matters and holding interviews following upon his checks. Pursuant to his checks and interviews he reports as to his findings and the Registrar will then decide upon the future course of action.

Miller went on to state that MTO has a publication titled "Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline". Ratings are applied to operators of commercial motor vehicles using Ontario's roadways and their ratings identify and reflect safety performance and compliance by commercial vehicle operators. There are five ratings that the Registrar may issue to such operators and the ratings are of importance not only in regard to public safety but also 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 that operator's CVOR record as well as audits of such operator which would include information regarding accidents, convictions, inspections, interviews, sanctions and other relevant information retaining to the Applicant. An Unsatisfactory rating indicates a one hundred percent violation rate and the MTO will suspend an operator if it has such a rating. Other considerations are taken into account when rating an operator such as violation rates and accidents involving property damage and injuries as well as convictions resulting from a driver's performance.

A Conditional rating is applied to an operator where such operator has an unacceptable violation rate based upon accidents and convictions of the operator as well as other criteria over a 24-month period. An unacceptable violation rate exceeds 35% of such operator's threshold. When the violation rate exceeds 65% of an operator's threshold a facility audit will be triggered and a violation rate that exceeds 80% of an operator's threshold will trigger an interview with MTO. A violation rate that exceeds 100% will result in sanctions against the operator.

A Conditional rating is applied to an operator whose violation rate is in excess of 65% of threshold but less than 100% of threshold. As of the end of 2004 only some 3000 operators in North America are rated conditional out of over 100,000 carriers.

A refusal to issue a CVOR certificate will occur where the Registrar has reason to believe, having regard to an applicant's safety record and other relevant information, that such applicant will not operate a commercial motor vehicle safely and in accordance with law. In addition, if an applicant is related to a person whose CVOR certificate has been cancelled such applicant would be refused a certificate.

Miller went on to explain when persons are considered related individuals. Persons are considered "related" 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.

[Highway Traffic Act, Section 17.(4) (a) (b) (c) and (d)]

Miller went on to state that the documents filed in this matter indicate that the Applicant and Robust Transport Services Ltd. ("Robust") are closely related. The Applicant and Robust have a common address at 31612 Ridgeview Drive in Abbotsford, British Columbia. Robust's president and corporate officer is Rajvinder Singh Grewal. The latter is a brother of Karmjit Grewal who is president and corporate officer of the Applicant. Karmjit signed and completed the Applicant's application for competency certificate on October 21, 2004, the same date that his brother Rajvinder communicated with MTO enquiring regarding the Applicant's application (Exhibit 5, tab 2, pages 16 and 25).

Karmjit has two convictions registered against him when he was convicted as driver for Robust on September 24, 2003 (Exhibit 5, tab 8, page 31). The safety record of Robust according to Miller was poor with a violation rate over 65%. The rating of Robust is Conditional (Exhibit 5, tab 8, page 34). Miller testified further that Robust had a violation rate of 76.9% with accidents as the main contributing factor to its safety rating.

Miller also noted that the Registrar issued Notices of Refusal of both the CVOR Certificate and Operating Licence to the Applicant on October 26, 2004 and despite being given until November 17, 2004 to show cause the Applicant did not communicate with MTO or make representations to MTO. The only response to the Registrar's refusal to issue came on November 25, 2004 when Karmjit faxed the Applicant's letter of November 19, 2004 to MTO (Exhibit 5, tab 11, page 42).

Miller further stated that Robust's registration became conditional on November 17, 2003 and that when it became apparent that a conditional rating was going to be imposed upon Robust, the Applicant was incorporated on November 28, 2003. The Registrar was concerned that in order to overcome the intervention by the Registrar when he issued a conditional rating to Robust, the Applicant was incorporated to take over from Robust and thus circumvent the Registrar's intervention.

The Testimony of Karmjit Singh Grewal

Karmjit testified that he completed and signed the application for the Applicant's Commercial Vehicle Operator's Registration (Exhibit 5, tab 1, pages 1 to 6). He also confirmed that he completed and signed the Applicant's application for a licence under the Truck Transportation Act (Exhibit 5, tab 2, pages 8 to 15). Karmjit further stated that he authored the Applicant's letter to the Registrar dated November 19, 2004. He also confirmed that he used to work for Robust, that his address, namely 31612 Ridgeview Drive, Abbotsford is the same address as Rajvinder's address. The latter address is their father's house where their parents reside as does Rajvinder, his wife and children. He stated that the Applicant commenced to operate on October 1, 2004 and possesses authority to operate commercial vehicles in the United States. He has worked in trucking for about 12 years and as a driver for about nine years.

Under cross-examination he stated that he worked for Robust as operator/owner. Rajvinder started Robust and he (Karmjit) supplied and used his trucks in Robust. Presently he has 2 trucks which he owns and which work for Robust. Another 2 trucks, also owned by him, work for the Applicant.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal:

1. By written applications dated and signed on October 21, 2004 by Karmjit Singh Grewal, acting in his capacity as President and Officer of the Applicant, the latter applied for a Commercial Vehicle Operator's Registration Certificate under the *Highway Traffic Act* and for an Operating Licence under the *Truck Transportation Act*.

2. By written notices of refusal dated October 26, 2004, the Registrar gave the Applicant notice that he was intent on refusing to issue both the above Certificate and Licence to the Applicant based upon the safety record of Robust, an operator directly or indirectly related to the Applicant and based further upon Rajvinder Grewal, President and Officer of Robust, being in direct or indirect control or management of the Applicant or who will be in direct or indirect control and management of the Applicant.
3. Despite the Applicant having been given notice by virtue of the Registrar's written refusals dated October 26, 2004 that prior to November 17, 2004 it may make written submissions to the Registrar to show why the Registrar's refusals shall not be of effect, the Applicant did not show cause by November 17, 2004 nor did it seek an interview with the Registrar.
4. By written notices dated November 23, 2004, the Registrar advised the Applicant that pursuant to the Applicant's failure to show cause and the Applicant not having made written submissions to the Registrar, and Order was issued by the Registrar refusing the issue of the Certificate and Licence.
5. Karmjit Singh Grewal acted as driver of commercial motor vehicles operated by Robust. In his capacity as driver Karmjit Singh Grewal was charged and convicted of two offences under the *Highway Traffic Act*.
6. Robust operates in the course of its business two commercial motor vehicles which are owned by Karmjit Singh Grewal.
7. The Applicant and Robust are related persons within the meaning of section 17. (3) of the *Highway Traffic Act*.
8. Robust was issued a Conditional rating by the Registrar on November 17, 2004 and currently retains such rating.
9. Ravinder Grewal is President of Robust and Karmjit Singh Grewal is President of the Applicant

THE 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.

APPLICATION OF LAW TO FACTS:

The onus of proof rests upon the Registrar to prove that the evidence presented to the Tribunal affords reasonable grounds for the Registrar's 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 and evidence placed before it and its findings and conclusion follow.

The issues for consideration are whether Robust and the Applicant are related within the meaning of section 17. (4) of the Act and if they are related consideration must then be given to the safety record of Robust as well as its Conditional rating.

The issue of relatedness in terms of section 17. (4) of the Act

The uncontraverted evidence of the Registrar is that Karmjit and Rajvinder are brothers; that they reside at the same address, namely 31612 Ridgeview Drive, Abbotsford, British Columbia. The brothers are both in the business of operating commercial motor vehicles. Karmjit is President of the Applicant while Rajvinder is President of Robust. Additionally, both the Applicant and Robust have their corporate offices at 31612 Ridgeview Drive, as above (Exhibit 5, tab 1, page 2 and tab 8, page 31).

Karmjit has on his own testimony acted as owner/operator with Robust and driver of commercial motor vehicles operated by Robust. In fact he was convicted of two driving offences when driving vehicles operated by Robust (Exhibit 5, tab 8, page 34).

Karmjit further conceded under cross-examination that he is the owner of two commercial motor vehicles presently being operated by Robust and in addition he has two commercial motor vehicles operating with the Applicant. Besides the two vehicles owned by Karmjit that operate for Robust there were another two such vehicles owned by Karmjit that were operated by Robust in its trucking operations.

There is no doubt in the Tribunal's mind that Karmjit was and presently is intimately involved in the trucking operations of Robust. It is also apparent that Rajvinder is involved in the operation of the Applicant. The Tribunal accepts the evidence of the Registrar that Rajvinder called a MTO employee by name Diane Cunningham on October 21, 2004 and made enquiries on behalf of the Applicant. This in and of itself indicates that there is a direct relationship between Robust and the Applicant. Clearly Rajvinder contacted MTO as he as President of Robust has a deep interest in the applications submitted by his brother on behalf of the Applicant.

Having regard to what is stated above the Tribunal is satisfied that there is an ongoing relationship between the Applicant and Robust as envisaged by section 7. (4)(c) of the Act.

Karmjit, who testified on behalf of the Applicant, was found by the Tribunal to be evasive or obstructive in his answers to questions put to him in cross-examination. When pressed for answers to questions he displayed a lack of veracity in his answers and repeatedly avoided giving forthright answers by sheltering behind unconvincing proclamations of lack of knowledge. The Tribunal found itself unable to place weight or reliance on the testimony of Karmjit.

The issue of the safety record of Robust

Robust was assigned a Conditional safety rating by the Registrar. Such a rating indicates an extremely poor performance record by Robust. In fact the evidence of Miller indicates that of about 100,000 commercial vehicle operators operating on Ontario roads only some 3000 operators have this dismal rating. This rating assigned to Robust has not changed or improved and indicates serious problems in its overall operations. The Tribunal believes that cognizant of this poor rating, steps were taken by those in actual management or control of Robust, such steps being the formation of another corporation so as to circumvent the adverse results of further probable interventions by the Registrar.

The Tribunal finds that both issues as discussed above have been proven by the Registrar. The Tribunal accordingly finds that the Registrar was correct when he refused to issue a Commercial Vehicle Operator's Certificate and an Operating Licence to the Applicant. Not only has the Registrar proven that Robust has a poor safety record that has

resulted in its Conditional rating but the Registrar has proven that the Applicant is related to Robust within the meaning of section 17. (4) of the Act.

ORDER:

Accordingly, the Tribunal orders the Registrar to refuse to issue a Commercial Vehicle Operator's Registration and Operating Licence to the Applicant, Roots Goods Carrier Ltd.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 28, 2005

Filename:2892.cvor.Roots_Goods

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

SHERRY A. GENIER, MARIO A. GENIER AND SHERMAC 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: DEREK ISRAEL, Vice-Chair

APPEARANCES: SIMON LEONARD, Agent appearing on behalf of SHERRY A. GENIER, MARIO A. GENIER and SHERMAC LTD.

MURRAY FORBES, Counsel appearing on behalf of the Registrar of Motor Vehicles

DATE OF
PREHEARING: June 22, 2005 By Teleconference

ORDER

Following attendances on June 22, 2005 at a pre-hearing by teleconference before this Tribunal of Simon Leonard, Agent, appearing on behalf of Sherry A. Genier, Mario A. Genier and Shermac Ltd., and Murray Forbes, Counsel, appearing on behalf of the Registrar of Motor Vehicles (the "Registrar").

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on September 29, 2005 at Holiday Inn Sudbury, Georgian C Conference Room, 1696 Regent Street, Sudbury, Ontario and to continue if necessary on September 30, 2005 at the aforementioned address;

1. The Parties to the hearing are Sherry A. Genier and Mario A. Genier (the "Applicants") and the Registrar.
2. The Agent for the Applicants and Shermac Ltd. consented and recorded at this pre-hearing that Shermac Ltd.'s CVOR certificate be forthwith cancelled.

3. The Applicants shall, by no later than 30 days after the release of this Order serve on Counsel for the Registrar and file with the Tribunal an amended Notice of Appeal which shall set forth detailed written reasons for their disputing the Registrar's allegations concerning the Applicant's safety record and the basis for their appeal;
4. The Registrar and the Applicants shall fully comply with Rule 6 of the Rules of Practice of this Tribunal and in regard to Rule 6.3 of such Rules disclosure shall be made at least 30 days before the hearing. The parties shall not less than 30 days prior to hearing serve on the other and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.
5. The Registrar and the Applicants shall not less than 30 days prior to the hearing provide to the other the full names of all witnesses that they intend to call to testify on their behalf at the hearing and shall further provide such other party or parties with a brief written summary of the intended evidence to which such witnesses shall testify.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: June 30, 2005

File Name: 2913.cvor.Genier.prehrg.doc



TRIPMATE TRAVEL & TOUR GUIDE CO. LTD.

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: SIMON DANN, Presiding Member

APPEARANCES: NILS CONNOR, Counsel, for the Applicant (January 10, 12, 2005)
DON GILLET, Agent, representing the Applicant (April 6, 2005)
MIKE NEZIOL, Counsel, for the Applicant (April 8, 2005)

PATRICK MOORE, Counsel, for the Registrar of Motor Vehicles (the "Respondent")

DATES: January 10 and 12, 2005
April 6 and 8, 2005

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 September 24, 2004, to issue a 21-day Suspension and Seizure Order relating to the Ontario Commercial Vehicle Operator Registration ("CVOR") certificate #122-598-357 of Tripmate Travel & Tour Guide Co. Ltd. ("Tripmate"), pursuant to section 47 and 47(1) of the Act.

The 21-day Suspension and Seizure Order was to take effect October 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 September 3, 2004, and was accompanied by a letter of the same date advising Tripmate 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.

The Show Cause meeting held on September 21, 2004, resulted in a lesser Suspension as reflected in the Suspension and Seizure Order of September 24, 2004.

A substantial amount of evidence was heard through the course of the hearing, including testimony and records from the Respondent's witness regarding details of the Applicant's safety record and the Applicant's steps to improve its operating practices.

While all the evidence was carefully considered, the focus of this decision is upon evidence relevant to the Applicant's CVOR record and the Act.

Opening Statements

The Respondent's Counsel, Mr. Moore, submitted that the company operates buses in Ontario and has been doing so since 2001. The hearing is concerned with the company's CVOR safety record.

Mr. Moore said the Ministry's only witness will review the CVOR safety rating process and focus on the motor coach side in presenting the 2 year period of convictions, mechanical inspections, history of events, including interventions to improve the company's performance safety record.

Mr. Moore added that the proposed suspension is based on the company's safety record.

The Applicant's Counsel, Mr. Connor, submitted that the order should be rescinded as there are inaccuracies in the record. He added that substantial weight has been placed on matters beyond the company's control and the record somewhat distorts the actual.

He submitted that the CVOR record of the company is actually below the threshold and there has also been substantial improvement and there should no longer be any concern for safety. In the alternative, Mr. Connor submitted that if sanction is to occur, then a lesser one than imposed would be more appropriate.

EVIDENCE:

The Respondent's Witness

Sherry Atallah:

Ms. Atallah, is a Carrier Safety Rating Administrator with the branch of the Ontario Ministry of Transportation ("Ministry") responsible under the *Highway Traffic Act* and Regulations ("legislation") for regulation of the commercial-carrier industry in this province.

Ms. Atallah has been in this position for 4 years. She prepares analyses for sanctions and possible interventions and reports to Mike McKay who then makes recommendations to Mr. Greig Beatty, the Deputy Registrar. Ms. Atallah prepared the Tripmate analysis and did the interview as well as the analysis for sanction.

Much of her testimony related to an explanation of the structure and application of the Commercial Vehicle Operator Registration (CVOR) System maintained by the Ministry. In summary, carriers, including bus operators, operating in Ontario have been required to register with the Ministry since July of 1989. While each operator need not be the vehicle owner, 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 through a Ministry office or the Ministry web site.

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".

Ms. Atallah testified, as set out at page 30 of Exhibit 3, Tab 1, what may happen to a CVOR holder with an unacceptable Violation Rate. Specifically, the disciplinary interventions are as follows:

- a warning letter is issued when a carrier's overall Violation Rate exceeds 35% of its overall CVOR threshold;
- a facility audit may then occur if a carrier's overall Violation Rate exceeds 65% of its overall CVOR threshold;

- an interview is then triggered when a carrier's overall Violation Rate exceeds 80% of its overall CVOR threshold;
- a sanction is the fourth Intervention and is triggered if a carrier's overall Violation Rate reaches 100% of its overall CVOR threshold.

Ms. Atallah then described how points are assigned to a carrier's CVOR (Exhibit 3, Tab 1 pages 22-23). Point values are assigned for accidents encountered by drivers and accidents are pointed based on their severity (property damage, personal injury or fatal injury) and impropriety (vehicle defect, driver action, driver condition), which is noted on the motor vehicle accident report. The point values assigned for accidents are 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 stated that the Ministry learns about accidents from police and collision reporting centres and that all accidents are reported and factored into the record, whether they are pointable or not. She said that a high number of accidents are always concerning and even if there is no conviction, points remain in the record based on the police report. There are only two ways in which points are removed: the first is if the police amend the report and the second is if the court states the charge should not have been laid.

Ms. Atallah testified that of approximately 90,000 carriers monitored, only about 100 are in the sanction stage. She added that the Ministry monitors approximately 1900 bus operators and the majority are classified as satisfactory unaudited. Three operators are over 100% of the threshold. One of the three is Tripmate and the other two have had their CVORs for less than one year.

Ms. Atallah said it is "extremely unusual" for bus operators to be over 100% and that only 10 are over 65%. She added that just as the Ministry has higher expectations of bus operators, the bus operators generally have a higher level of safety performance.

In order to treat CVOR holders equally, the Ministry uses the concept of adjusted fleet size which is based on the actual number of vehicles in the carrier's fleet multiplied by the percentage of the mileage travelled in Ontario and which 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. 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.

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%. 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 of 7 to 30 days or to permanent cancellation of the carrier's CVOR certificate in the most serious and persistent cases.

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.

Ms. Atallah provided evidence as to how mechanical inspections are carried out 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") and points are assigned to out-of-service defects at the rate of up to 2 points per unit. These vehicles must be repaired before they are allowed to return to the road.

Ms. Atallah stated that while the Ontario OOS average is about 35.3%, the rate for bus operators is about 6.6%.

Ms. Atallah testified that a CVOR holder is evaluated 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.

Ms. Atallah then reviewed the Notice of Suspension and Seizure Order of September 3, 2004, which was for a 30 day suspension and an opportunity to “meet with the Deputy Registrar of Motor Vehicles ... to show cause why the Suspension and Seizure Order should not be issued”. She stated that as a result of information presented by Tripmate at the Show Cause meeting the actual Order was reduced to 21 days.

Ms. Atallah added that based on the update report received on July 26, 2004 Tripmate has a fleet size of 9 buses and transports passengers in the Toronto region as well as from Toronto to Niagara Casino and return.

A safety record review from August 31, 2004 (Exhibit 3, Tab 4 and Tab 5, page 195) showed the overall violation rate for the two year period of August 8, 2002 through July 31, 2004 was 125.7%, which included 19 accidents, of which 6 were pointable and 11 were safety related convictions, and a failed facility audit.

The witness acknowledged that a fleet size information form dated November 22, 2004 (Exhibit 3, Tab 7, pg 219) showed that Tripmate had increased its fleet size to 12 buses with six double-shifted for a total fleet size of 18.

While this increase would have had the effect of changing the period overall violation rate to 105.9%, in a calculation dated November 29, 2004 (Exhibit 3, Tab 8), it was not considered in the analysis period as it had not been formally received by the Ministry.

Ms. Atallah said the number of accidents was high and they suggested a lack of skill on the part of the drivers. She added that due to the nature of the Tripmate business, the expectation of bus driver performance is higher than of commercial cargo carriers and they are expected to have appropriate defensive driving skills.

When asked if there was a problem indicated by the convictions, Ms. Atallah stated that a 65% violation rate was a problem when 35% was the threshold.

Additional testimony included the following:

- the CVOR abstract review period showed 11 convictions to be safety related;
- while the provincial average for buses for OOS was 6%, the Tripmate record was 44.44% (Exhibit 3, Tab 5, page 196);
- a Facility Audit, which took place on March 24, 2003, (Exhibit 3, Tab 10) resulted in an overall result of 56.7%, based on a compliance rate of 72.2% for drivers and 41.1% compliance rate for vehicles (to obtain a

pass, the results would have had to show at least a 55% compliance rate for both drivers and vehicles);

- o that Tripmate had no Safety Programs and Training in place;
 - o of the 4 vehicles audited, all were found to have defects and 2 were found to have OOS defects;
 - o no records were found to show driver training had occurred;
- a “Conditional” safety rating was assigned to the company on June 9, 2003;
- a warning letter dated June 24, 2003 was issued and it stated that “Immediate action is required on your part...” (Exhibit 3, Tab 11);
- during a CVOR interview with Tripmate executives on February 2, 2004, “The company presented an action plan of items they would begin to implement early this year” (Exhibit 3, Tab 12, page 272);
- at a Show Cause meeting on September 21, 2004 (Exhibit 3, Tab 14), Tripmate acknowledged the accident problems and said that as they were more familiar with the tour business it would take them more time to learn;
 - o at this meeting it was also learned that the Slater Systems data tracking system, which had been mentioned in the February interview, had not yet been implemented;
- an updated CVOR Performance Analysis Report dated November 29, 2004 (Exhibit 3, Tab 8), took the revised fleet size of 18 into account and showed an adjusted violation rate of 105.9% for the two year period of August 1, 2002 through July 31, 2004;
 - o if only the 6 month period of February 1, 2002 through to July 31, 2004 were considered then there would be a further improvement with the overall violation rate falling to 82.5%.

Ms. Atallah testified that the Ministry’s position was that as interventions had occurred without progress and enough time had been given to the CVOR holder, the Ministry took the position that it could not “wait for something to happen”.

Ms. Atallah testified that in reducing the suspension period from the 30 days stated in the original Notice to the 21 days contained in the actual Order the Deputy Registrar had taken into consideration the Tripmate Action Plan and information provided by the company’s transportation consultant at the Show Cause meeting.

In cross examination by Mr. Connor, the witness provided additional evidence about how:

- a company’s safety record is based on information obtained over a two year moving window and is adjusted if new information is received;

- the computerized system is simply a monitoring tool and when an operator's record reaches a threshold level, the Ministry will look at all items, including non-pointable accidents;
- the purpose of having an operator prepare and submit an action plan is to "put the onus on the company to do certain things in certain time frames and monitor" the results.

Ms. Atallah added that the Ministry does not influence the content of an Action Plan because "we want them to put it together". She said that if the operator does not understand what is needed or the plan is not adequate, "we would point out if their plan fails to address main issues".

Ms. Atallah confirmed that the Action Plan submitted by Tripmate did address the Ministry's concerns.

In response to Mr. Connor's questions about the different types of accidents involving Tripmate drivers, Ms. Atallah repeated her conclusion that the accidents could have been "somewhat preventable". She said that because the company was a bus operator there was need for extra care and in consideration of their CVOR record, the Ministry was concerned about the company's policies and management of the drivers.

Ms. Atallah repeated that a bus driver is held to a higher standard of performance and that the accidents suggested a lack of skill.

When asked if all accidents had been zero points, "would we be here today", Ms. Atallah said, "no".

On redirect, Mr. Moore asked Ms. Atallah if her analysis formed a significant part of the Registrar's decision. She replied that it did not as the Registrar carried out a full review of all the details.

On the conclusion of the Respondent's case, Mr. Connor stated his view that the Respondent's evidence was insufficient and he wished to move for an order to set the Registrar's Suspension and Seizure Order aside on the grounds that the evidence lacked essential components and that the proposed sanction was unreasonable.

After receiving Mr. Moore's position, the Tribunal recorded that Mr. Moore in the event of a holding against Mr. Connor's motion, would not object to Mr. Connor with proceeding to introduce evidence in support of his case.

Neither Party was able to provide any authority in regard to this aspect and the Tribunal reserved the right to independently consider whether or not Mr. Connor was entitled to present evidence in the event of an adverse finding on the motion.

Mr. Connor then proceeded and submitted that safety concerns should be forward looking and therefore:

- there was no evidence regarding the company's safety performance;
- s.47 of the HTA specifies the Registrar may suspend a registration regarding an operator's safety record or any other information but the term "will not" was submitted to be operative and that this was future looking while historical information leaves the present and future in question;
- the Tribunal should be considering the CVOR record right up to the present day.

In response, Mr. Moore submitted that no previous Tribunal had any difficulty regarding the absence of information covering time right up to the present. In addition, since future events cannot be proven, the safety record that is available is the basis upon which a decision can be made and that it is not practical to follow up after an Order has been issued as that is the purpose of a decision.

Case Law references cited by the Parties and considered by the Tribunal included:

- *Brenner*, paragraphs 9 and 12;
- *Shine Car Sales*, paragraph 10
- *Muscillo Transport Limited* [1997] O.J. No. 3111
- *A.M.A.N. Logistics Ltd.*, (LAT) January 20, 2004

In consideration of the submissions made by the Applicant's Counsel, Mr. Connor, the Tribunal determined that Mr. Connor failed to show how the Respondent's evidence on the Applicant's CVOR record was lacking or insufficient or how the proposed sanction was unreasonable.

Therefore it was the Tribunal's decision to deny Mr. Connor's motion to have the Registrar's order set aside and to proceed with the hearing.

The Applicant's Witnesses

Linda Ho:

Ms. Ho is the Tripmate Vice President and responsible for monitoring and managing the daily operations of the company. Tripmate was established in 1995 and started with the Toronto to Casino Niagara line.

The company originally chartered buses and then purchased its first bus in 2001 as passenger volumes increased. Tripmate now carries up to 500 passengers per day during the high season period in the Greater Toronto Area ("GTA") and the Toronto-Casino Niagara route.

Ms. Ho testified that the company's attitude towards safety is a high priority one. She said that they have installed the Slater System and hired a clerk to input data. The company now also has its own garage with two licensed mechanics and two helpers (Exhibit 4, Tab 1).

Ms. Ho stated the company originally had difficulty finding a location for the garage due to the bus requirements and landlord concerns. While they started looking after the February meeting with Ms. Atallah, they only found a suitable location in July and set up in September.

The company also hired a safety officer in July 2004 and they have tightened their hiring procedures to include a driving test, abstract and reference checks as well as having employees take defensive driving courses.

Ms. Ho then reviewed several of the accidents (the complete details of which are contained in Exhibit 3, Tab 5) as follows:

- page 253 (March 29, 2003) - the driver received a ticket but police withdrew the charge; the bus touched the pedestrian's hand bag;
- page 201 (November 29, 2003) - the driver was experienced and had been able to stop on time;
- page 195 (May 17, 2004) - the driver that day was on a training run and there were no passengers on the bus.

Ms. Ho testified that the company is in regular contact with its insurance company and has made no claims since 2002. She confirmed that there had been 3 accidents between the interview of February 2, 2004 and the Show Cause meeting on September 21, 2004.

On cross-examination, Ms. Ho testified that Jim McMaster was the company's safety consultant between May and October and that he had set up the driver manuals.

Ms. Ho stated they then hired X-Coppers because they needed more experience. In November 2004, they met Don Gillette, a former Carrier Safety Rating Administrator with the Respondent. Ms. Ho said that Wang Jin Qing, who became the current safety officer in July 2004, was previously a Tripmate bus driver.

In response to questions about certain accidents listed in Exhibit 3, Tab 5, Ms. Ho stated:

- that she considered the Tripmate driver to have been at fault ("yes, I would say so") and that he was disciplined (page 204, March 22, 2003/Zhang, Miaofang);
- the driver was at first suspended for one month and then not called back or "terminated" (page 202, July 22, 2003/Ren, Yu, Ming);
- two drivers had accidents while on training - one (Chen, Lu, Jue, May 17, 2004, page 198) was let go and the other left the scene of the accident (John Tavakoli, November 1, 2002, page 207).

When asked if she had been involved with the facility audit, Ms. replied “I wasn’t there”.

Ms. Ho acknowledged the Slater System was implemented about March 2004, one year after the facility audit. Another change which had occurred after the audit was the installation of a computer system to log record inputs.

During cross-examination, the witness stated that if the company were sanctioned, its contract with Casino Niagara would be voided. On further questioning it was learned the agreement with Casino Niagara included a provision saying the contract could be terminated for a HTA violation and if that were to happen it could have the effect of closing the business.

Ms. Ho agreed that based on the company’s CVOR abstract, the company was already in violation. She stated they have not discussed sub-contracting to another carrier during a sanction period and acknowledged that Casino Niagara might agree to sub-contracting out of the busing during a sanction period.

Preliminary Matters on recommencement of the hearing on April 6, 2005:

The Tribunal was advised that Mr. Don Gillett was now acting as Agent for the Applicant who had released their counsel, Mr. Nils Connor, prior to the hearing recommencing.

Mr. Gillett requested an adjournment as Mr. Connor had only been released on April 4, 2005 and Tripmate required additional time to complete the process of obtaining a replacement counsel.

Mr. Gillett submitted he also needed more time to obtain transcripts and materials which remained with Mr. Connor and that it would be prejudicial to the Applicant’s case if he acted as Agent which would prevent him from being a witness on the Applicant’s behalf.

Mr. Moore objected to the adjournment request and submitted there were no exceptional reasons for an adjournment to be granted as there had been adequate time from the date of the Order to the January hearing, March adjournment and then to today’s continuation.

Mr. Moore stated the Registrar was opposed to extending the hearing as it concerned a safety-related matter.

The Tribunal considered the following in determining its response:

- the original Order had been issued in September 2004;

- the hearing had started in early January 2005;
- Mr. Connor had requested information on obtaining transcripts in February 2005;
- a peremptory adjournment had been granted in March 2005;
- the Applicant released its counsel only days before the hearing recommencement date;
- the issue before the Tribunal was a safety-related matter.

In considering the chronology of events from the date of the Order through to and including the hearing dates, the Tribunal determined the hearing should proceed and therefore denied the request for adjournment.

The Tribunal also did not consider the denial to be prejudicial to the Applicant as their counsel had taken initiatives to obtain transcripts in February which should have allowed sufficient time to receive them prior to the April 6th recommencement.

The Tribunal considered that if the transcripts were not now in the Applicant's possession, that failure should not serve to be a burden upon the Parties or further delay the continuation of the hearing process.

Cross-examination of the witness then continued with Mr. Moore asking Ms. Ho about the implementation of the Slater System.

Ms. Ho said that only the program was purchased and other consultants were used to set it up. She stated that pre-inspection maintenance procedures were set up but the Slater System was not fully implemented until the garage was set up in September 2004.

When asked whether the implementation was before or after the Notice of Suspension and Seizure date of September 3, 2004, Ms. Ho said that it was before and "everything was in process".

Ms. Ho was then asked about a number of other driver incidents:

- Exhibit 3, Tab 5, page 198 (May 25, 2004) conviction for failing to display a sticker: Ms. Ho stated the windshield had been replaced and the sticker had not been transferred to the new windshield;
- Ms. Ho stated the annual inspection certificate was at the company's office;
- Exhibit 3, Tab 9, page 250 (police accident report dated March 29, 2003): Ms. Ho stated she could not read the report copy and while she could not remember the details, she knew the driver was "no longer with us".

When asked if the company would consider its driver to be at fault if their bus hit a parked car in a lot, Ms. Ho replied "yes".

Ms. Ho added that the company was learning every day and continued to do so.

When questioned by Mr. Moore why learning had not been done before starting the bus operation, instead of learning from 2001 and on, Ms. Ho said the company was “committed to doing a good job ... whatever MTO requires”.

On redirect by Mr. Gillett the witness undertook to provide a copy of the annual inspection sticker for the next day’s hearing continuation.

Don Gillett

Mr. Gillett then presented himself as a witness on the Applicant’s behalf. He described his experience as including over 20 years with the Ministry of Transport in on-road positions as well as a CVOR Analyst and Carrier Safety Rating Administrator. He stated he has easily conducted more than 1000 facility audits and is knowledgeable of the process. He joined X-Coppers in March of 2004.

Mr. Gillett said he was contacted by Ms. Ho after the November 2004 prehearing and asked to assist Tripmate’s counsel, Mr. Connor. He received a CVOR abstract and following his review of what the company had done to ensure compliance, he delivered a report as found in Exhibit 4, Tab 2.

Mr. Gillett said he reviewed the Facility Audit (Exhibit 3, Tab 10) and felt the 72.2% compliance rate for drivers was a positive factor. In addition, he stated that while the vehicle compliance rate needed to pass was 55%, the company obtained a 41.1% compliance rate and that there had not been a subsequent audit to determine an updated overall compliance rate.

Mr. Gillett pointed to his report citing Tripmate safety and compliance commitments “implemented into Tripmate’s operation...” as well as additional safety programs completed since the Show Cause meeting (Exhibit 4, Tab 2, pages 6 and 7).

Mr. Gillett added that Tripmate had not been given the benefit of their fleet size changes in the CVOR violation rate. He reviewed the case studies described in his report (Exhibit 4, Tab 2, page 1) in which he wrote...

(period of MTO analysis Aug. 1, 2002 to July 31, 2004)

Case #1 - Based on no changes to the accident information other than a correction to the Fleet Size. Fleet Size was changed from 9 to 14 due to the double shifting of 5 buses With a total of 18 accidents and 32 points, the period violation rate ... = 105.01%

Case #2 - ...accidents dated March 22, 2003 & July 22, 2003 charges for both accidents were withdrawn ... could represent the deletion of 4 CVOR accident points ... in turn could reduce the total points assigned from 32 to 28 during this period of analysis. The overall impact to the VR during this period would result in 95.01%

Mr. Gillett reviewed his CVOR accident analysis (Exhibit 4, Tab 2, page 8) and stated that "9 accidents look bad but only 2 involved driver impropriety or 22.2%, which is low".

Mr. Gillett then reviewed the various inspections and work checks listed on pages 9 through 20 and that this information was being logged daily.

During cross-examination of Mr. Gillett, it was also heard that:

- Mr. Gillett's role was intended to be as a witness and not as Agent;
 - o while his last visit to Tripmate was over 2 days in February, he does have continuing involvement, which includes frequent telephone contact, to review all safety and compliance issues and he would like to have the MTO in for a voluntary facility audit;
- Mr. Gillett's most recent Safety and Compliance review was in late February and all records are "in book, in place";
 - o he said he believed Tripmate would score "as close as you can get to a pass" and that it would pass now;
 - o he had not personally checked the driver reporting system but it was part of the procedures;
- Mr. Gillett pointed out that the sample size for an audit would be larger now due to double-shifting of buses and an adjusted fleet size of 18;
- Mr. Gillett was not sure when the additional safety programs noted in Exhibit 4, Tab 2, page 7, were initiated.

When asked whether he thought 19 accidents was a high number of accidents for a company of this size, Mr. Gillett said that he "didn't look at it this way" because despite being events, he didn't know if there had been any driver improprieties and "without statistics, I can't comment on that".

Preliminary Matters on continuation of the hearing on April 8, 2005:

Mr. Gillett advised the Tribunal that new counsel, Mr. Mike Neziol, had been retained by Tripmate.

Mr. Neziol submitted a motion for adjournment in order to have the opportunity to review file documents.

Mr. Moore opposed the adjournment request on the grounds that an adjournment request had been dealt with on the previous hearing day and the matter had been marked peremptory after the adjournment request of March 7, 2005. Mr. Moore added that it had been the Applicant's decision to release their first counsel, Mr. Connor, and that decision had created the difficulty now.

Upon consideration of counsel submissions, it was the Tribunal's decision to proceed with the hearing as it was in agreement with the Respondent's position that the grounds had been dealt with on the previous day.

Cross-examination of Mr. Gillett continued with the submission of Exhibit 7 to confirm Tripmate's purchase of the Slater Systems program in October 2003.

The annual inspection sticker which had been identified as missing from a bus windshield the previous day was submitted as Exhibit 8.

Mr. Gillett confirmed that his report results were based on information received from Mr. Leung at Tripmate regarding the number of buses and the extent of double-shifting.

In response to further questions about accidents, Mr. Gillett stated that he had seen many files and that his main focus had been to see what actions the company had taken to be in compliance. He agreed the company should take action on disciplining drivers, especially if they were at fault.

On questioning by Mr. Neziol, Mr. Gillett confirmed the Slater Systems program had been purchased after the facility audit.

In closing, the Registrar's counsel, submitted that a summary of the Applicant's safety record, with an initial violation rate of 125.5% gave the Registrar proper cause for concern.

Mr. Moore added that even in consideration of an increased fleet size and reducing the accident number from 19 to 18, (removing the incident with the blown tire), the violation rate of 102% was still considered high, especially for a bus operator. Mr. Moore added that the accidents were more of preventability as required by the guidelines on page 22 (Exhibit 3, Tab 1).

Mr. Moore submitted that while the company's OOS rate, compared to the provincial average of 35%, was 44.4%, which compared poorly with the average OOS rate for bus operators which Ms. Atallah had testified the provincial average to be 6%. There were also 11 convictions in the time period under consideration.

Mr. Moore reviewed additional evidence regarding the positive measures presented by Tripmate but which had been implemented at later dates. He submitted that the expectations of this type of operator had been stated as being very high.

Mr. Moore added that the evidence from Ms. Ho was that the company is in a learning curve. However, it is the Respondent's position that the company should not be in a learning curve when it is actually carrying passengers on a daily basis. Therefore the sanction, which was originally for 30 days but reduced to 21 days in the final Order is considered to be completely appropriate.

Mr. Moore cited Lee Trans Corporation (LAT) July 26, 2004, in noting that while "commercial drivers are expected to be well-trained and experienced professionals", a higher standard is expected of drivers in the busing area.

With regard to any economic impact which the sanction might have on the company, Mr. Moore referred to Immediate Logistics Limited (LAT) November 10, 2004 (page 14), in noting the Tribunal's view that "any sanction must hurt if it is to be an effective stimulus to change".

In response to the Applicant counsel's suggestion that in the alternative the Tribunal could consider a fleet size limitation, Mr. Moore submitted that considering the company's record, "such a remedy would be too soft". In addition, the impact would be difficult to gauge as the fleet size varies.

In his closing submission, Mr. Neziol addressed the Tripmate safety record and stated that the company has (1) hired mechanics, (2) set up the garage, (3) purchased and implemented the Slater System to track maintenance and (4) been consulting with Don Gillett. It is his understanding that the company's safety performance has improved.

Regarding the accident record, Mr. Neziol acknowledged that the Tavakoli incident resulted in additional points on the company's CVOR record but that there is no record on file to explain why Mr. Tavakoli failed to remain at the scene of the accident.

Mr. Neziol submitted that the economic impact of the sanction could result in an estimated cost of \$14,000 per day for Tripmate to contract out its busing obligations. The company also employs 45 people and the result would be lost jobs and layoffs.

Mr. Neziol further submitted that as the company could also lose its busing contracts, he was requesting that there be no suspension. He added there should be another facility audit and that what the company needed was guidance to improve their systems.

Mr. Neziol accepted that the Lee Trans Corporation reference had some similarity but he did not know what steps had been taken to remedy the situation.

Regarding Immediate Logistics Limited, Mr. Neziol submitted the hearing process had already stimulated change in the company and a fleet limitation would also meet that goal.

Mr. Moore followed up by submitting that the company's record had not improved after September 2004 and he also advised that the Tribunal did not have the authority to direct a follow-up facility audit.

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 therefore 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.

APPLICATION OF LAW TO FACTS:

The only issue in this appeal is whether the Deputy Registrar of Motor Vehicles made an error in issuing the Suspension Order and concluding the Applicant will not operate bus vehicles safely and in accordance with the Highway Traffic Act, the Regulations and the law.

The Tribunal heard that the Applicant's CVOR record for the period August 1, 2002 through July 31, 2004 included 19 accidents which included 6 pointable accidents and 11 safety related convictions. While there were questions of interpretation by Mr. Gillett and it was considered that perhaps the accident record could have been reduced to 18, the high number of accidents was not disputed.

In addition the Applicant failed the Facility Audit because it did not score the minimum 55% compliance on both driver and mechanical components of the audit. The Applicant scored no points for safety and training programs.

The Tribunal heard Ms. Atallah testify that due to the nature of their business, bus operators are held to a higher standard than carriers of commercial cargo and when compared to the records of other bus operators, the Applicant's CVOR record was of real concern. She stated that of the approximately 1900 bus operators monitored by the Ministry, only 3 are over the 100% threshold and only ten are over 65%. The Applicant is one of the three over the 100% threshold and the other two have been CVOR holders for less than one year.

In June 2003, following the Facility Audit, the Applicant was sent a warning letter advising them that immediate action was required. This was followed by an interview in February 2004 and when the Applicant presented an action plan which was intended to address their operating problems.

However as the record continued to deteriorate the Deputy Registrar chose to issue a Notice of Suspension and Seizure for a 30 day period. At the Show Cause meeting which followed, the Applicant's consultant confirmed that the company's safety record was poor and he also presented an action plan. At the conclusion of the meeting, the Deputy Registrar remained concerned about the pace of implementation.

Through evidence presented by Mr. Gillett, the Applicant's consultant, the Tribunal heard about the positive steps the Applicant had taken towards improving its driver and mechanical maintenance operations by setting up the garage, hiring mechanics, implementing driver training and monitoring programs, as well as hiring consultants to assist them in their efforts.

However, Ms. Ho's reply that the company was "committed to doing a good job ... whatever MTO requires" to a question about why the company was still needing more time to learn about the bus operation instead of having entered the business with that knowledge - this raised a question about the company's own initiatives or whether stimulus still remained a necessary part of ensuring the company remained committed to meeting all the compliance requirements.

While the Applicant attempted to show that a sanction could have a possibly serious effect on its business and that there might be employees who could lose their jobs if the company lost its major contract, the evidence was inconclusive and, as pointed out by Mr. Moore, "any sanction must hurt, if it is to be an effective stimulus to change" (Immediate Logistics Limited (LAT) November 10, 2004).

The Applicant's counsel, Mr. Connor submitted:

(1) that there were inaccuracies in the record but other than questions of interpretation, the Applicant failed to show how the record was inaccurate; and as to the matter of interpretation, the Tribunal favors the combination of police reports and CVOR records over submitted questions as to whether they may be accurate or not;

(2) that there were matters beyond the company's control, it was not shown what those matters were or, if such matters existed, how they were beyond the company's control; if Mr. Connor was referring to the types of accidents then the Tribunal accepts the testimony of Ms. Atallah and Mr. Moore's reference to preventability as well as the importance of the defensive driving skills required of bus drivers;

(3) and as to whether the Applicant's CVOR record was actually below the threshold - if this were accepted, it would need be on the basis of Mr. Gillett's Case #2 analysis presented in Exhibit 4, Tab 2 and allow for points reduction due to withdrawn charges. However, as noted by Ms. Atallah, there are only two ways in which points can be removed and the first is if the police amend the original report and the second is if the court states the charge should not have been laid. Since neither of these are known to have occurred, the point reduction cannot be considered;

(4) and whether there had been substantial improvement in the company's performance - the Tribunal considered the overall evidence presented by the Applicant's representatives and recognized the number of actions taken by the Applicant as a positive effort however, the fact remains that the record in question is for the period of August 8, 2002 to July 31, 2004. While subsequent actions are considered in this matter, the focus remains on the specific record which led the Deputy Registrar to arrive at the decision to sanction the Applicant.

In summary, the essential facts considered are:

1. the Applicant's accident record is high;
2. the accidents were of the preventable kind;
3. the defensive driving skills of bus operators must, by the nature of the business, properly meet a higher standard than those of carriers of commercial freight, which is not suggest or imply that the standards for those drivers can or should be any degree less,
4. the Facility Audit showed the company had no safety training programs in place;
5. the company's initiatives towards improving its safety performance through programs for mechanical and driver operations are to be commended;
6. the pace of implementation has not been on the basis of self-motivation but rather Ministry interventions and that there is evidence to support the Respondent's continuing concern for highway safety.

After considering all the evidence, including the company's initiatives and the testimony of Mr. Gillett, the Tribunal has concluded that a shorter suspension is appropriate to ensure the Applicant's resolve to be more diligent.

Although the Applicant suggested that a suspension could put it out of business,, there was no substantial evidence to confirm this. 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 that 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 21 day suspension in the Suspension and Seizure Order of September 24, 2004, 2004, and to change the effective dates of the Suspension and Seizure Order to begin on a date 30 days after the date of release of this Decision.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: June 15, 2005

FILENAME: 2638.CVOR.Tripmate Travel & Tour Guide

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
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HIGHWAY TRAFFIC ACT
Section 50(1), R.S.O. 1990, Chapter H.8 as amended

KENNETH PETTEY o/a KJP TRUCK SERVICE

IN THE MATTER of the *Highway Traffic Act* R.S.O.
1990, Chapter H.8 as amended (the "Act").

AND IN THE MATTER OF an application by Kenneth Pettey
o/a KJP Truck Service for the Motor Vehicle Inspection
Station Licence.

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

KENNETH PETTEY o/a KJP TRUCK SERVICE

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"), Kenneth Pettey o/a KJP Truck Service (the "Applicant") initiated an appeal under section 50(1) of the Notice of the Registrar of Motor Vehicles made pursuant to section 47(1) of the Act, to revoke the Motor Vehicle Inspection Station Licence dated February 28, 2005 issued to Kenneth Pettey o/a KJP Truck Service;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic 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;

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(2) of the *Highway Traffic Act*, this Tribunal confirms the Notice of Proposal to revoke the Motor Vehicle Inspection Station Licence of Kenneth Pettet o/a KJP Truck Service.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

Released: June 3, 2005

File name: 2927.cvor.Kenneth Petty o/a KJP Truck Service.dism.



HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chapter H.8, as amended

2870-CVOR- ADJ-Adjournment – AYLMER MEAT PACKERS INC.

AYLMER MEAT PACKERS INC., 571245 ONTARIO LTD. o/a BUTCH CLARE
LIVESTOCK AND ELAINE WARREN

IN THE MATTER OF the COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION of

AYLMER MEAT PACKERS INC., 571245 ONTARIO LTD.
o/a BUTCH CLARE LIVESTOCK AND ELAINE WARREN

AND IN THE MATTER of the
SUSPENSION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO SEIZE AND SUSPEND
- Order dated: March 28, 2005

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

AYLMER MEAT PACKERS INC., 571245 ONTARIO LTD.
o/a BUTCH CLARE LIVESTOCK AND ELAINE WARREN

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on July 5 and 6, 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 Tuesday August 16, 2005 and to continue on Wednesday, August 17, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

FILE NAME: 2870.cvor.Aylmer Meat Packers Inc.



PREHEARING

AYLMER MEAT PACKER INC.

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: ELIZABETH SPROULE, Presiding Member

APPEARANCES: JENNIFER BREITHAUPT, Counsel for the Applicant,
Aylmer Meat Packer Inc.

PATRICK MOORE, Counsel for the Respondent,
Registrar of Motor Vehicles

DATE OF
PRE-HEARING: May 9, 2005

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 Aylmer Meat Packer Inc. and the Registrar of Motor Vehicles, Ontario ("the Registrar"). The parties agreed that the corp Applicant is correctly identified and is the holder of the CVOR licence, 103-441- 649.
2. The parties agreed that as CVOR 977-948-177 and CVOR 066-459-106, setout in the Suspension and Seizure Order under appeal, have been terminated, evidence relating to those operators is no longer relevant. However, matters relating to Aylmer Meat Products dba Butch Clare Livestock, USDOT 878169, remain potentially relevant.
3. The appeal is scheduled for two days, to be heard August 16th and 17th, 2005.

4. The parties agree that the sole issue relates to the safety record of the Applicant up to and including March 11, 2005.
5. The Respondent indicated that one witness, John Miller of the MTO, would be called.
6. The Applicant indicated that 2 to 4 witnesses would be called, including Mr. Clair.
7. The Applicant was unclear whether the CVOR record of incidents would be challenged. An undertaking was made by the Applicant to advise the Respondent of any challenges to the CVOR record 30 days prior to the proceeding.
8. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Presiding Member

RELEASED: May 13, 2005

FILENAME: 2122.cvor.Aylmer Meat Packers.Prehrq.Ord.



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Decisions under Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

Fiscal Year 2005 - 2006

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

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

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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

Fiscal Year 2005 - 2006

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BESTWAY CARTAGE 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, Presiding Member

APPEARANCES: HARVEY CAPP, Q.C., Solicitor for Applicant

PATRICK MOORE, Solicitor for Respondent

DATE OF
HEARING: April 5, 2005

London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Bestway Cartage Ltd. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS:

1. Order to Impound and Suspend dated February 4, 2005, issued by the Registrar of Motor Vehicles.
2. Notice of Appeal Form received at the Tribunal February 14, 2005, filed by the Applicant
3. Respondent's Appeal Book
4. Applicant's Book of Documents
5. 'Operation Air Brake' information sheet from Saskatchewan Highways and

Transportation website

FACTS:

The Applicant's trailer was inspected on February 4, 2005, at the Putnam North T.I.S. 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:

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 four years. He has received MTO training in respect of critical defect criteria and holds a Critical Defect Inspection Certificate. Officer Rainville inspects commercial motor vehicles and checks for brake adjustments on commercial trucks and trailers as part of his regular duties.

Officer Rainville started his Level 1 inspection on February 4, 2005, on the subject trailer after the vehicle entered the Putnam weigh scales on the eastbound 401 highway at approximately 7:38 a.m. He requested that the driver, Amardip Pahal, place the truck in neutral and give a brake application. He then observed the push rod travel to determine if there was excessive movement. 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 repeated.

The driver of the truck, Mr. Pahal, 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 was owned by Bestway Cartage Ltd. and was plated as R82879.

Officer Rainville gave evidence that the subject trailer had 2 axles and that the air brakes were clamp type 30, short stroke. He gave detailed evidence as to the Level 1 inspection method used to measure the push rod travel out of the service brake chamber. His examination found the pushrod travel to be:

Right side: 1 3/8. (1 st axle)	2 5/16. (2 nd axle),
Left side: 2 5/16. (1 st axle)	2 5/16. (2 nd axle).

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.

Officer Rainville testified that he called Officer Dan Armstrong to say he felt he had a Critical Defect and wanted to conduct a second inspection.

Officer Rainville gave detailed evidence as to how the two Officers conducted a Critical Defect Inspection and described the change in equipment, which included applying a Ministry supplied air gauge to the air supply line to enable accurate system pressure measurement.

In cross-examination, Officer Rainville stated he had inspected Bestway vehicles in the past and generally found them in good operating condition so he was surprised at his finding with this vehicle.

Dan Armstrong

Officer Armstrong is an MTO Officer and has been in his position for three and a half years. He works at the Putnam Inspection Station on the 401 east of London. His work includes mechanical and brake as well as critical defect inspections.

He confirmed he went out with Officer Rainville and described the inspection procedure in detail including how when they were underneath the vehicle they were head to head so they could observe the same points of measurement. He stated that Officer Rainville gave various instructions to the driver during the procedure.

Additional points made by Officer Armstrong included his testimony that the brakes were cool as the truck had been sitting for an hour and that the position of the tattletale disk on the push rod is only an indicator to assist the driver but does not influence whether or not the brakes are out of adjustment.

In cross-examination, Officer Armstrong confirmed that some notes were written underneath the vehicle and that a flashlight had not been used. He stated he was familiar with tattle tales and acknowledged that there are different types available.

Applicant's Evidence

Larry Franch

Mr. Franch testified that he is a licensed mechanic for automobile, truck and coach. He has 20 years of industry experience and has been licensed for 12 years. He works for Bestway as the fleet maintenance manager and is responsible for scheduling maintenance, training and on-road repairs.

He stated that the subject vehicle was equipped with automatic slack adjusters and tattletale markers. Mr. Franch then referred to his report on the events as well as the procedure he employed to check the brake adjustment. His results showed the following measurements and that three of the brakes were out of adjustment.

Right side: 1 13/16. (axle 4)

2 1/8. (axle 5),

Left side: 2 5/16. (axle 4)

2 3/16. (axle 5).

Mr. Franch acknowledged that there were defects but said they were not critical. In his report of February 8, 2005 (Exhibit 4, Tab 4) he wrote that “three brakes were out of adjustment” and that the “measurement in excess of 2” met the criteria for impoundment”.

Mr. Franch stated that it was possible for brakes to go out of adjustment on a short trip and that temperature could play a role in this as well.

On cross-examination, Mr. Franch provided additional details on the steps he went through to test the measurements and how he took notes and later transcribed those notes. He stated he was not mistaken about his measurements.

Mr. Franch agreed that the brakes were out of adjustment and attributed that to the failure of the automatic slack adjusters and that he had taken this up with the product supplier as a warranty claim.

On redirect, Mr. Franch testified that the vehicle had last been inspected on December 9, 2004 and the next inspection was due in February 2005.

Amardip Pahal

Mr. Pahal testified that he was the vehicle driver and that he arrived at work around 5:00 a.m. and, as he always does, he carried out a review inspection of the tractor and trailer.

He testified that he examined under the truck with a flashlight and saw that the brake indicators, or tattle tales “looked okay”. Mr. Pahal stated he had started with Bestway in July 2003 and was qualified on air brakes. He had been licensed since 1998.

Mr. Pahal said he also conducted a secondary brake check, which was detailed in his statement (Exhibit 4, Tab 5) and this also confirmed for him that he had “good operation of the brakes”. He stated that traffic through Mississauga was light but heavier around Cambridge.

In cross-examination, the witness reviewed the events at the Putnam North Truck Inspection Station as well as the test procedure carried out by Mr. Franch, after his arrival.

ISSUE:

Should the order of the Registrar to impound and suspend the Applicant’s commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Counsel may make regulations,
 - (a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

**PART II
CRITICAL DEFECTS**

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
 - 1. A drum or rotor is cracked, broken or missing.
 - 2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam

shaft, or cam shaft support bracket is broken or missing.

3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
30	8 3/32" (205.58mm)	2" (50.8mm)

APPLICATION OF THE LAW TO FACTS:

The fact that the vehicle brakes were out of adjustment was confirmed by the Applicant's maintenance manager at the time of his inspection on the impound date.

Though his measurement findings vary from those of Officer Rainville, the out of adjustment finding was not in dispute.

The push-rod travel of more than 50 percent of the brakes of the impounded trailer were beyond the permitted 2¼ inches for that type of brake, amounting to a critical defect pursuant to Regulation 512/97 as set out above.

The Applicant gave evidence that proper maintenance and driver pre-trip inspections had been carried out. The Applicant testified that there might have been a product failure with the automatic slack adjusters and that he was pursuing a warranty claim with the supplier. However, no evidence was presented to support this claim.

The Applicant stated that new brakes can be affected by heat, which could result from continual braking in heavy traffic conditions. While the Applicant's driver did refer to traffic conditions being heavier around Cambridge, he stated traffic was light coming out of Mississauga. In effect, the Applicant did not present any compelling evidence to show that the out of adjustment condition could have occurred during the trip from the Bestway Mississauga yard to the inspection station.

While Officer Rainville's testimony was that he was surprised to find this critical defect on a Bestway vehicle, and the testimony of both Mr. Franch and Mr. Pahal confirmed that regular maintenance and inspection procedures were followed, it is evident that in this particular case, with this particular trailer, they were simply not sufficient.

The Tribunal finds that the testimony of the witnesses for the Respondent was not challenged by the Applicant in any way that would enable the Tribunal to conclude that the measurements were not accurate.

In the alternative, the Applicant failed to present any significant evidence to show that the out of adjustment condition could have occurred during the trip between the Bestway Mississauga yard and the Putnam North Truck Inspection Station.

Therefore, 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, which are the two grounds for appeal provided in 50.3(3) of the Act, the appeal must fail.

DECISION:

Upon the application by Bestway Cartage Ltd. (the "Applicant") to appeal the order to impound and suspend dated February 5, 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.

LICENCE APPEAL TRIBUNAL

Simon Dann,
Presiding Member

RELEASED: April 21, 2005

FILE NAME: 2810.cvis.Bestway



Licence Appeal Tribunal

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PRE-HEARING

JOSEPH ABOAGYE DBA GOLDEN TOUCH GARAGE

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990,
CHAPTER H.8 AS AMENDED.

IN THE MATTER OF A MOTOR VEHICLE INSPECTION
STATION LICENCE IN THE NAME OF JOSEPH ABOAGYE
DBA GOLDEN TOUCH GARAGE.

AND IN THE MATTER OF THE MOTOR VEHICLE
INSPECTION STATION MECHANIC'S REGISTRATION OF
JOSEPH ABOAGYE

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: CRISTIAN BIRON, Agent, appearing on behalf of Joseph
Aboagye

PATRICK S. MOORE, Counsel, appearing on behalf of the
Director of Vehicle Inspection Standards

DATE OF
PRE-HEARING: March 17, 2006

Toronto

ORDER

Following attendances on March 17, 2006 at a pre-hearing before this Tribunal of
Cristian Biron, Agent for Joseph Aboagye (the "Applicant") and Patrick S. Moore,
Counsel, for the Director of Vehicle Inspection Standards (the "Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on May 10, 2006, 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 Applicant's Agent, Cristian Biron, handed in to the Tribunal the original letter of Directions and Instructions dated March 16, 2006 and signed by the Applicant to which document is attached the Decision in the matter of *R. v. Romanowicz* [1999] OJ No.3191, 45 O.R. 506 (Ontario Court of Appeal) and marked Exhibit 1 on pre-hearing.
3. Agent Cristian Biron confirmed to the Tribunal that his client, the Applicant, admitted the correctness of the allegations contained in paragraph #2 of the Director's Proposal dated January 24, 2006.
4. The Applicant's Agent informed the Tribunal that he has not, as at date hereof, received the Director's Book of Disclosure Materials and is not in a position to make any further admissions until he is in receipt of such Book of Disclosure.
5. The Director's Counsel informed the Tribunal that the Book of Disclosure Materials, a copy of which was sent to the Tribunal and which was received by the Tribunal on March 16, 2006, was also sent to the Applicant's Agent and that if the latter did not receive same within the next seven days, the Applicant's Agent on advising the Director's Counsel of non receipt will be sent a further copy of the Book of Disclosure Materials by the Director's Counsel.
6. The Applicant shall fully comply with the provisions of Rule 6.3 of the Rules of Practice of the Tribunal.
7. The Agent for the Applicant advised the Tribunal that at this stage, the Applicant intended to call the Applicant as a witness to testify at the hearing. In the event of the Applicant deciding to call further or additional persons to testify at the hearing, the Director's Counsel shall be advised of this no later than 10 days prior to the hearing.
8. Counsel for the Director advised the Tribunal that at this stage, the Director intended to call as witnesses to testify at the hearing, the following three persons:
 - Larry Grimaldi, inspector/mechanic
 - Jim Smith, inspector/mechanic
 - Mark Horton, inspector/mechanic

9. The Agent for the Applicant informed the Tribunal that the Applicant would not require the services of an interpreter at the hearing, as he is conversant with the English language.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: March 20, 2006

FILENAME: 3425.Aboagye.gar.pre-hrg.doc.

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

AUTO COLLISION & MORE INC. AND THONG V. NGUYEN

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS

TO REVOKE THE MOTOR VEHICLE INSPECTION STATION
LICENCE OF AUTO COLLISION & MORE INC. AND REVOKE
THE MOTOR VEHICLE INSPECTION STATION MECHANIC'S
REGISTRATION OF THONG V. NGUYEN

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: SHANE van ENGEL, Counsel, representing the Applicants

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

DATE OF
PRE-HEARING: March 6, 2006

Toronto

ORDER

Following attendances on March 6, 2006, at a pre-hearing before this Tribunal of Shane van Engen, Counsel on behalf of Auto Collision & More Inc. and Thong V. Nguyen (the "Applicants"), and Patrick Moore, Counsel on behalf of the Director of Vehicle Inspection Standards (the "Director" or the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, April 11, 2006 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 Tuesday, April 18, 2006 at the Tribunal's above chambers:

1. The Parties to the hearing are:
 - (a) Auto Collision & More Inc.;
 - (b) Thong V. Nguyen; and
 - (c) The Director of Vehicle Inspection Standards.
2. Mr. Moore provided disclosure of the Respondent's material consisting of evidence upon which the Director intends to rely at the hearing and which was comprised of documentation of (a) physical condition of certain vehicles and (b) paperwork filed by the Applicants.
3. Mr. van Engen said that while regulatory compliance is at issue, he noted the Applicants disputed allegations they had failed to meet all regulatory requirements.
4. Mr. Moore confirmed the Respondent's position as being that the body of evidence is sufficient for the revocation. He advised he intended to present two inspection officers as his witnesses.
5. Mr. van Engen advised he would be calling the Applicant Thong V. Nguyen and possibly an independent mechanic as witnesses.
6. Mr. van Engen agreed to provide disclosure regarding the name and qualifications of the independent mechanic witness, including a written report of anticipated evidence, by or before March 31, 2006.
7. Mr. Moore undertook to provide Mr. van Engen with the curriculum vitae and indication of anticipated evidence of Dan Ventura, an opinion witness upon whom the Director would rely at the hearing.
8. Mr. Moore also undertook to provide Counsel for the Applicants with further disclosure materials of the alleged record keeping contraventions, as well as documents pertaining to a Notice of Further and Other Particulars to be issued by the Director, by or before March 17, 2006.
9. Mr. van Engen undertook to respond in writing by March 24, 2006 to the above disclosure. Both Parties intend by this disclosure to arrange for an Agreement of Facts or Evidence upon which the Tribunal might rely at the hearing.
10. There was no resolution of the issues between the Parties.

11. The Parties are reminded of their obligations for full and timely disclosure under the Rules of Practice and that all Parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6 of the Tribunal's Rules of Practice and, in this case, as set out above.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: March 21, 2006

FILE NAME: 3394.garage.Auto Collision & More Inc. et al.prehrg order.doc

This decision will also be available on Quicklaw at a later date.



PREHEARING

LEPAGE TEST INC. AND FAREEBORZ ZARAINEH

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE AND TO REFUSE TO ISSUE A MOTOR
VEHICLE INSPECTION MECHANIC LICENCE

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: ANTHONY MOUSTACALIS, Counsel for the Applicants

MURRAY FORBES, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING: February 24, 2006

Toronto

ORDER

Following attendances on February 24, 2006 at a pre-hearing at the Tribunal's Chambers at 1 St. Clair Avenue West, Toronto, of Anthony Moustacalis, appearing as counsel for the Applicants and Murray Forbes, appearing as counsel for the Director of Vehicle Inspection Standards;

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, May 1, 2006 at the Tribunal's Chambers and to continue if necessary at the aforementioned address on May 2, 2006;

1. The parties to the hearing are Lepage Test Inc., Fareeborz Zaraineh and the Director.

2. The hearing scheduled to commence at the Tribunal's Chambers at 9:30 a.m. on April 10, 2006 has been rescheduled to commence at the Tribunal's Chambers at 9:30 a.m. on May 1, 2006 and to continue, if necessary, on May 2, 2006.
3. The Director shall provide full disclosure of any and all documents he intends to rely on at the hearing of this matter by providing a copy of any and all such documents to the Applicants and the Tribunal on or before March 8, 2006.
4. The Applicants shall provide full disclosure of any and all documents they intend to rely on at the hearing of this matter by providing a copy of any and all such documents to the Director and the Tribunal on or before March 28, 2006. Further, by March 28, 2006, the Applicants shall advise the Director and the Tribunal if:
 - a. the Applicants are taking issue with the Director's findings as against Fareeborz Zaraineh regarding allegations of two improper vehicle safety inspections, the details of which allegations are more fully set out in the Notice of Proposal,
 - b. the Applicants will be producing and relying on any experts reports, and
 - c. if any of the factual allegations against the Applicants are admitted by the Applicants.
5. The parties shall otherwise abide by all of the Tribunal's rules regarding the disclosure of evidence to the other party and, in particular, any time limits regarding disclosure.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude,
Vice-Chair

RELEASED: March 7, 2006

File name: 3333.gar.lepage.pre

This decision will also be available on Quicklaw at a later date.



PREHEARING

G. GAGNON and R. GAGNON Dba GAGNON & SON ENTERPRISE
and GAETAN GAGNON

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 Gaetan Gagnon and G.
Gagnon and R. Gagnon dba Gagnon & Son Enterprise dated
December 13, 2005 for a hearing before the Licence Appeal Tribunal
pursuant to Section 95 of the *Highway Traffic Act* appealing the Notice
of the Director of Vehicle Inspection Standards dated November 17,
2005;

AND IN THE MATTER OF Motor Vehicle Inspection Station Licence
Number No. 52-27085 in the name of G. Gagnon and R. Gagnon dba
Gagnon & Son Enterprise;

AND IN THE MATTER OF the registration of Motor Vehicle Inspection
Mechanic, Gaetan Gagnon holding Trade Certificate Number 310A-
078391.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: TED TICHINOFF, Counsel, representing the Applicants

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

DATE OF
PRE-HEARING: January 27, 2006

Teleconference

ORDER

Following attendances on January 27, 2006, at an electronic pre-hearing before this
Tribunal of Ted Tichinoff, Counsel, for G. Gagnon and R. Gagnon Dba Gagnon & Son
Enterprise and Gaetan Gagnon (the "Applicants"), and Patrick Moore, Counsel (who
appeared in person), on behalf of the Director of Vehicle Inspection Standards ("the
Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence 10:00 a.m. on Thursday and Friday, March 2 and 3, 2006 at the Northern Research, 142 Algonquin Boulevard East, Timmins, Ontario:

1. The Parties to the hearing are:
 - (a) G. Gagnon and R. Gagnon Dba Gagnon & Son Enterprise;
 - (b) Gaetan Gagnon; and
 - (c) The Director of Vehicle Inspection Standards
2. Mr. Moore provided a summary of the Respondent's material regarding past convictions, tools not on premises, certifications for repairs not made and failing to keep records as required.
3. Mr. Tichinoff accepted the summary and said that while regulatory compliance is at issue, he also noted the issues have now been dealt with and that the required tools are on site, records are being maintained as required, the Applicant no longer does motorcycles, and all regulatory requirements are now being complied with.
4. Mr. Tichinoff agreed the convictions before 1990 were not in dispute and pointed to the gap from 1990 to 2004 and that the 2004 matter was body work related.
5. Mr. Moore confirmed the Respondent's position as being that the body of evidence is sufficient for the revocation. He advised he intended to present two inspection officers as his witnesses.
6. Mr. Tichinoff advised he would be calling the Applicant and possibly the owners of the vehicles listed in paragraph 1(a)(b)(c) of the Proposal, dated November 17, 2005.
7. It was agreed that if Mr. Tichinoff planned to call an expert witness he would provide disclosure regarding the name and qualifications of that expert witness, including any written report, by or before February 13, 2006.
8. There was no resolution of the issues between the Parties.
9. The parties were made aware of their obligations for full and timely disclosure under the Rules of Practice and that both parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6 of the Tribunal's Rules of Practice and, in this case, as set out above.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

File No. 3287.gar.Gagnon.pre

Released: February 3, 2006

The decision will also be available on Quicklaw at a later date.

724718 ONTARIO INC. DBA ROYAL MOTORS AND STEPHEN TRUSZKOWSKI

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
Stephen Truszkowski and 724718 Ontario Inc.
dba Royal Motors dated September 19, 2005
for a hearing before the Licence Appeal
Tribunal pursuant to Section 95 of the *Highway
Traffic Act* appealing the Notice of the Director
of Vehicle Inspection Standards dated August
26, 2005;

AND IN THE MATTER OF Motor Vehicle
Inspection Station Licence Number 21-33539
in the name of 724718 Ontario Inc. dba Royal
Motors;

AND IN THE MATTER OF the registration of
Motor Vehicle Inspection Mechanic, Stephen
Truszkowski holding Trade Certificate Number
T.C. # 999A-158517.

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: MURRAY G. FORBES
Counsel for the Director of Vehicle Inspection Standards

MICHAEL CZUMA,
Counsel for the Applicant

DATE OF HEARING: January 20, 2006 Toronto

ORDER

Following attendances on January 20, 2006, at a hearing in front of the Licence Appeal Tribunal (the "Tribunal") of Murray G. Forbes, Counsel for the Director of Motor Vehicle Standards and Michael Czuma, Counsel, on behalf of the Applicant, 724718 Ontario

Inc. dba Royal Motors and Stephen Truszkowski.

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence before the Licence Appeal Tribunal at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, February 22, 2006.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

RELEASED: January 23, 2006

FILE NAME: 3176.dba royal motors and Stephen Truszkowski.gar.doc

This decision will also be available on Quicklaw at a later date.



AUTO RALLY INC.

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS

TRIBUNAL: WILLIAM M. McINTOSH, Vice Chair

APPEARANCES: ARYAN ZARAINAH, Agent, representing the Applicant
(the "Applicant")

MURRAY FORBES, Counsel, representing the Director of Vehicle
Inspection Standards (the "Respondent" or the "Director")

DATE OF
HEARING: November 30, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant Auto Rally Inc. is a motor vehicle inspection station located in North York. By Notice of Proposal dated June 13, 2005 the Director of Vehicle Inspection Standards, Ministry of Transportation (the "Director") informed the Applicant that the Director proposed to revoke its vehicle inspection licence. The Applicant appealed the Director's proposal by Notice of Appeal dated June 28, 2005. By that same Notice the Director also proposed to refuse the motor vehicle inspection mechanic's licence of Abdol Azim Arbab Tafti.

ISSUES:

The Director stated the grounds for the proposed revocation of the Applicant's motor vehicle inspection station licence in the Notice. They were that the Applicant both made false statements in issued safety standards certificates and that it allowed incompetently performed inspections to be carried out. These are both matters of fact that fall within the grounds stated in section 91 (8) (a), (b) and (e) of the Act.

LAW:

The *Highway Traffic Act*, R.S.O.1990 Chapter H.8 states:

- 90. (3) A safety standards certificate in respect of a motor vehicle shall not be issued or a vehicle inspection sticker affixed to a vehicle unless,
 - (a) the vehicle has been inspected by a motor vehicle inspection mechanic in the motor vehicle inspection station and the vehicle complies with the inspection requirements and performance standards prescribed by the regulations; and
 - (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.
- 91. (1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,
 - (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
 - (b) any inspection authorized by the licence is incompetently performed;
 - (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purposes of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
 - (e) the licensee does not comply with this Act or the regulations;
- 99. (2) Any person who makes a false statement in a safety standards certificate is guilty of an offence and on conviction is liable to a fine of not less than \$400 and not more than \$20,000.

EVIDENCE:

The case for the Director was put in through Mr. Glen Dodwell, a motor vehicle inspection station officer employed by the Ministry of Transportation. In that capacity he was assigned to investigate the station operated by the Applicant.

Mr. Dodwell identified the incorporation documents of the Applicant along with the applications for motor vehicle inspection station licences signed by the operator Faramarz Zaraineh. Included in the Ministry file is a "Station Record". These documents list the licence renewal dates along with interactions between the regulator and the courts, such as Ministry warnings and convictions for offences under the Act. As well the Ministry keeps a record of all licensed safety inspection mechanics employed by a registrant.

The record of the Applicant indicates the following:

The Applicant was first registered in 1999 and received subsequent licence renewals through 2004. Interspersed through the record are six provincial court convictions and five Ministry warning letters.

Mr. Dodwell testified as to offences and dispositions under section 90 (3) (a) on the following vehicles:

Safety Standards Certificate 7269111 2002 Honda
Safety Standards Certificate 7313208 1994 Chevrolet Cavalier
Safety Standards Certificate 6366687 1996 Eagle (conviction)

Mr. Dodwell testified as to offences under section 99(2) on the following vehicles:

Safety Standards Certificate 0635387 1991 Toyota (conviction)
Safety Standards Certificate 4435714 1993 Nissan (conviction)
Safety Standards Certificate 5751679 1996 Ford Van (conviction)
Safety Standards Certificate 5303911 1988 Mercedes (conviction)
Safety Standards Certificate 0148061 1988 Jeep

The records behind Safety Standards Certificate (SSC) 5751679 showed an inspection done December 23, 2003 at the Applicant's station. The vehicle passed inspection at an odometer reading of 117,800. A complaint was reported to the Ministry the following January 21 at an odometer reading of 118,847 or approximately 1,047 kms since the inspection. The complainant had noticed a vibration in the rear wheels and took it to a Ford dealer. Mr. Dodwell was dispatched to do an investigation and discovered excessive play in the rear wheel bearing, a parking brake that would not release, heavy corrosion and scaling on the brake lines, no converter on the new exhaust and a leak in the exhaust above the rear axle. On the basis of his investigation Mr. Dodwell concluded that the deficiencies he discovered could not have occurred since the safety inspection given the time lapse and mileage recorded. He concluded that the safety inspection could not have been adequately done and as the designated inspector he visited the Applicant's station to seek an explanation. Mr. Faramarz Zaraineh the manager of the Applicant was interviewed. He stated that the signature on the Certificate 5751679 was his as licensee. The mechanic who actually carried out the inspection was also interviewed. He stated that he did not notice any of the defects noticed by Mr. Dodwell.

The results of his inspection of the subject vehicle, interviews and his overall investigation led Mr. Dodwell to report to the Ministry on his Enforcement Inspection Report that the Applicant "did unlawfully make a false statement on SSC# 5751679 in regards to a motor vehicle". He repeated his investigative conclusions directed to the Ministry in his testimony stating that charges were laid and a conviction entered.

The records behind SSC 4435714 showed an inspection done on a 1993 Nissan Maxima at the Applicant's shop on February 10, 2003 under its licence number signed by Mr. Faramarz Zaraineh. The vehicle passed the safety inspection at a recorded odometer reading of 144,012 kms. A complaint was reported and an inspection carried out by Ministry inspector Tomasone. That inspection carried out on February 14, 2003 at an odometer reading of 144,581 kms revealed seized left rear brake calipers and the rotor friction surface was rusted. As above the Applicant was interviewed along with the mechanic whose account did not accord with the inspector's findings. As there had been four days and but 569 kms since the safety inspection the inspector concluded that the inspection must have revealed the defect and that the SSC contained false statements. A charge was laid and a conviction entered.

The records behind SSC 6366687 revealed an inspection carried out by the Applicant and signed by Faramarz Zaraineh and the licensee's mechanic. The inspection was done on June 26, 2004 at 159,738 kms on the odometer. The vehicle, a 1996 Eagle, was reported by its owner to have several defects on the following July 2 at an elapsed distance from safety inspection of 682 kms. As the vehicle was in Sault Ste. Marie the Ministry inspection was carried out there and reported to Mr. Dodwell. The inspection disclosed inter alia, a loose steering rack bolt, a faulty door release mechanism, bent rod on the left rear axle, right rear stabilizer disintegrated, too much play in the right front ball joint, inoperative driver window, and a loose window washing system. The investigation following upon the vehicle's inspection by the Ministry convinced the inspector that the SSC was issued with false statements as the defects were too obvious and numerous to have been missed. As described above a report went up the Ministry chain and a conviction was obtained.

The records behind SSC 7269111 indicate an inspection at the Applicant's station on February 10, 2005. The vehicle, a 2002 Honda Civic had an odometer reading of 066,998 kms. A complaint was received and a Ministry inspection on the vehicle was carried out on February 22, 2005. The inspection record revealed a loose headlight housing, non-functioning high beam, hole in rear fender, broken inner fender wells, broken front bumper wrap and defective turn signal indicators. In the opinion of the inspector these defects would not meet the required Ministry standards. Mr. Dodwell as customary attended the Applicant's shop and questioned the mechanic. There was no work order on site and he could not recall the defects and it transpired that the inspection was not done at the licence holder's premises but at the mechanic's own shop, a practice forbidden by the Act. It was clear to Mr. Dodwell that the inspection could not have been carried out in compliance with the Act and charges were laid. The mechanic ceased to do work for the Applicant in March and he stated that he was in Florida at the time of the inspection.

The records behind SSC 7313208 indicate an inspection at the Applicant's premises on February 26, 2005. The vehicle a 1994 Chevrolet Cavalier had an odometer reading of 198,350 kms. In response to a complaint a field inspection was carried out. The discovered defects included an inoperable emergency brake, holes in the left rocker panel, rust perforated rear bumper assembly, wipers that spontaneously began operating. These defects were, in the opinion of the inspector outside of the permissible limits laid down by the regulations. Mr. Dodwell submitted his Enforcement Inspection Report and a charge was laid by Information sworn May 4.

The records behind SSC 5303911 indicate an inspection at the Applicant's premises August 18, 2003. The vehicle a 1988 Mercedes had an odometer reading of 187,085 kms at inspection. In response to a complaint a Ministry inspection was carried out on September 2, 2003. The odometer reading was 188,739 kms. The inspection revealed heavily corroded brake lines, excessive play in the right rear wheel bearing, an incompatible exhaust system, rusted parking brake cable and a worn trailing arm bushing for the right rear wheel. When the usual follow up procedure was carried out at the Applicant's premises there were no records including work orders and the SSC book on the premises. As there were no satisfactory answers forthcoming from the Applicant, Mr. Dodwell concluded that the SSC had been issued containing falsehoods as the defects clearly, in his opinion, should have been caught during a proper inspection. As was his practice he reported up the Ministry chain, a charge was laid and a conviction recorded.

Along with informations laid and convictions relating to false statements on certificates and incompetent inspections there were those relating to improper paperwork under the regulations; more particularly failure to keep records of certificates issued. Mr. Dodwell testified as to the importance of proper paperwork. He stated that the task imposed by the Act upon the regulator is rendered difficult if not impossible if there is not a paper trail between the certificate issued to the licensed inspection station to the vehicle to which it becomes affixed. The station, for good reason, has imposed upon it the duty to keep a record and copies of all inspections.

Mr. Dodwell introduced and explained the station inspection records. The record contained along with the dates of the inspecting officers and the inspection dates, a description of the "Defects" observed as well as the "Elapsed time and Mileage". This last item is included to indicate to the reviewer of the document the probability or lack thereof of the observed defect coming into existence after the inspection date. In short the regulator has made it a practice to preempt the defence of subsequent occurrence being raised at the trial of the issue.

On cross-examination Mr. Dodwell stated that there were perhaps thousands of certificates issued through the Applicant as much as ten per day with one mechanic. He stated, however, that one cannot draw the conclusion that those inspections that did not result in complaints were therefore within the requirements of the legislation.

Obviously it would be to the advantage of an owner who wanted to keep his vehicle on the road without paying the amount needed to bring it up to the standards of the Act, to keep silent about defects as long as he had his SSC.

DECISION:

Counsel for the Director submitted that the unchallenged evidence of the convictions and other breaches of the Act are sufficient to allow for a finding by the Tribunal that the regulator was well within the bounds of his authority under the Act in taking the administrative action that he did.

The legislature has enacted the sections under the Act relevant to this appeal for the purposes of ensuring that motor vehicles licensed in Ontario can be operated safely. To that end, the Act and regulations set out bounds of operational fitness and grant licences to inspection stations and mechanics to ensure that vehicles fall within these bounds. If the licensees do not carry out the required inspections adequately the entire legislated scheme goes for naught. To ensure compliance by licensees the Director is authorized to have inspections done on their operations. Mr. Dodwell testified as to these inspections.

The unchallenged evidence of Mr. Dodwell indicated to the Tribunal that a thorough and accurate investigation of the Applicant was carried out by the regulator. His evidence was given in a straightforward manner such that the Tribunal understood both the factual basis of his investigation and how that factual basis resulted in the stipulated contraventions of the Act.

There do not appear to be extenuating circumstances that would lead the Tribunal to alter or modify the intentions of the Director as set forth in the Notice which is the subject of this appeal.

ORDER:

Therefore, by virtue of the authority vested in it under the Act, the Tribunal orders the Director to carry out his Proposal to revoke the Applicant's licence as a Motor vehicle Inspection Station.

LICENCE APPEAL TRIBUNAL

William M. McIntosh, Vice Chair

RELEASED: January 23, 2006

FILE NAME: 3033.gar.Auto Rally 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.

This decision will also be available on Quicklaw at a later date.



AZAM KHAN DBA KHAN AUTO AND TRUCK REPAIRS
AZAM KHAN

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO SECTION 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 LICENCES TO AZAM KHAN DBA KHAN AUTO
AND TRUCK REPAIRS

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: AHMAD A. KHAN, Agent, representing AZAM KHAN dba KHAN
AUTO AND TRUCK REPAIRS

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

DATES OF
HEARING

September 19, 20, 21 and 22, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal by the Applicants Azam Khan dba Khan Auto and Truck Repairs and Azam Khan is taken from a Notice dated November 17, 2004 issued by the Director Motor Vehicle Inspection Standards (the Director) pursuant to sections 91(3) (a) and 92(4) (a) (b) of the *Highway Traffic Act* R.S.O. 1990 H.8 ("the Act"). Azam Khan was thereby notified that both his Applications for a Motor Vehicle Inspection Station (MVIS) license and Motor Vehicle Inspection Mechanic license dated August 26, 2004 were denied.

ISSUES:

It was the position of the Director that the application for registration as a Motor Vehicle Inspection Station (MVIS) under the Act submitted by the Applicants Khan Auto and Truck Repairs should be refused on grounds that it would not be operated to the standard required by the Act nor honestly. The Applicants' application, it was contended, was being submitted as a ruse under which previously de registered family members could re enter the MVIS business. In support of this contention the Director

cited a previous decision of the Licence Suspension Appeal Board of September 8, 1998 in which the Board directed the Director not to issue an MVIS to Azam Khan and not to register the father Ahmad Khan as a motor vehicle inspection mechanic. The matter was taken to the Divisional Court on Motion to adduce new evidence. The matter was dismissed on March 23, 2004. In addition he cited the Notice to Amzad Khan November 24, 2001 to revoke both Amzad's MVIS station and MVIS mechanics licenses; the notice to refuse registration of Ahmad Khan as MVIS mechanic December 24, 1999, Appealed but withdrawn on July 2002, and the Application by Rozanna Khan July 1, 2002 upon which mandamus was sought to compel the Director to refrain from insisting upon a videotaped interview and which relief was refused by ruling dated January 23, 2004.

The Director cites these past rulings and procedures as grounds for asserting issue estoppel and to demonstrate past behavior. Counsel directed the Tribunal to the provision of the Act, which requires that an Applicant seeking what amounts to a reinstatement of his registration to show changed circumstances upon which the Registrar could be persuaded to alter his position regarding registration.

The Applicant in his opening stated that the real target of what he described as Ministerial persecution is himself and his family. As a result of his taking action against the Ministry and its employees they in turn have sought to discredit him and his business through administrative action. He further stated that the grounds for the refusal of registration were insufficient in the circumstances.

EVIDENCE:

Counsel for the Ministry put in the case for the MTO through the testimony of Mr. Williams a supervisor of Amzad Khan while employed as a mechanic at Sherway Nissan. As well as he relied upon the record to date of the Applicants and the Ministry testimony of Mr. Larry Grimaldi Senior Enforcement Policy Advisor and Mr. John Gee an MVIS inspector.

Mr. Grimaldi was called to testify regarding his review of the Applicant's record and his recommendations to the Registrar as to the Applicant's suitability for registration. Mr. Grimaldi has been a licensed mechanic since 1981, and has had experience at both work and inspections of MVISs. He has managed fleets of vehicles and has supervised mechanics. As well as he was an instructor of mechanics at Niagara College for three years.

He was assigned to look over the Azam Khan's application for an MVIS at 211 Wilkinson license dated August 26, 2004, and accompanying file and to report with recommendations to the Director, Carrier and Safety Branch of the Ministry. It is unusual for a person at Mr. Grimaldi's level to become involved in an application unless there is a history of non-compliance. An audit of the facility was carried out and passed and an interview of Azam was conducted September 24, 2004. Inquiries into Azam's license were declined on the basis of privacy; access to this information is not available without consent. During the interview Azam was asked to perform the measurement of

a brake rotor as an indication of his competence to carry out a proper safety inspection, he refused.

He described for the Tribunal the history of the Applicant's involvement with the Ministry. The history of the Applicant in the area of MVIS applications began in November 1995, when Azam then 20 was licensed to operate an MVIS at 18 Melanie Drive, Brampton. His father Ahmad Khan was registered as the Motor Vehicle Inspection Mechanic at that location. The business moved to 211 Wilkinson Road, Brampton. The application for a MVIS licence for this new location was refused by the Director on September 24, 1997 as well as the license of Ahmad Khan as mechanic. The appeal was heard and dismissed by the License Appeal Suspension Board September 8, 1998. The matter went on Judicial Review March 23, 2004 and was dismissed.

The Divisional Court per Swinton J. quoted from the Board's decision:

"The Board accepts the testimony of the inspectors and finds that the defects on the eight vehicles inspected and listed in the Notice of Refusal dated September 24, 1997, did in fact exist at the time of the Safety Certificate inspections and Certificate issuances by the Applicants. The Appellants did not offer any reliable or credible testimony to refute the testimony of the inspectors, and in no way acknowledged responsibility or offered reasonable explanation for issuing safety certificates for defective vehicles."

The court went on to hold that there was no appeal perfected to the Divisional Court and the attempt to go by way of the discretionary remedy of Judicial Review was inappropriate.

Ahmad Khan had applied for registration as an MVIS mechanic (as all mechanics must do annually) and was refused in December 1999. He appealed by Notice of January 13, 2000 but withdrew the appeal by Notice received by the Director March 1, 2000.

Mr. Grimaldi as part of his review noted that the uncle Amzad opened a MVIS station at 211 Wilkinson Road on August 6, 1997. This license was revoked on June 26, 2002. The basis for the revocation was the fact of 20 convictions recorded. Ahmad made application to be the mechanic at this facility but was refused on the basis of a false answer on the application form. Ahmad according to Ministry records had 7 convictions for MVIS offences. The record and the testimony of MVIS inspector Gee demonstrated that, by the Ministry's reckoning, Amzad was rarely on the premises and that a great number of certificates were being issued improperly causing complaints within the Peel region. The number of certificates issued by the Wilkinson MVIS in the opinion of the Ministry could not have proper inspections done on them; there simply would not have been the time or the facilities and personnel available.

The inspection process as explained involves the issuance of Safety Standard Certificates to vehicle owners upon completion of a safety inspection by registered MVIS mechanics. Vehicles cannot be driven without the proper certification and that requires attendance for inspection at an MVIS. The Safety Standard Certificates are first

purchased in lots of twenty by the MVIS from the Ministry and for a fee given to owners upon completion of the safety inspections. The fees for the inspections vary between MVISs but range from \$50.00 to \$100.00. Testimony cited that each inspection properly done should take approximately one hour. Inspections on trucks, which require different certificates, can take an entire morning. The scheme is open to abuse in that the authority to issue safety certificates is entrusted to licensed operators who charge a fee for the service of conducting safety examinations. The temptation to do less than complete checks and garner more fees on the basis of volume is there and is something for which the Ministry inspectors are alert. The obvious extension to this problem is that certain MVISs become known as locations that give out safety certificates easily, which in turn attracts owners who can't get certificates at properly run locations because of safety deficiencies in their vehicles. The Ministry witnesses stated that the vast majority of MVISs are neither the subject of complaints nor the object of extra scrutiny by the Ministry.

Mr. Grimaldi testified that his investigation into the background of the Applicant Azam Khan showed that he was a licensed mechanic who apprenticed under his father. He had a certificate from the Ministry of Colleges and Universities, which was introduced.

Azam was interviewed by videotape on September 24, 2004 by Ministry employees Gee and Grimaldi. In the interview he stated that he was now thirty years old and with a wife, who had accompanied him, and a child.

During the interview Mr. Grimaldi asked whether the operation of a clutch is listed on the safety inspection sheet and the answer was not specifically. He went on to state that the operation of the vehicle after the inspection would require an operable clutch.

When asked about prior past conduct after 1997, which would be of concern to the Ministry, it was conceded that there was none. A conviction forming part of the Notice after 1997 was quashed and no longer was relevant to the Notice.

Officer John Gee was called to explain the relationship between Peel Region's enforcement branch and the MVIS at 211 Wilkinson Road. Officer Gee has been with Transportation Enforcement since the beginning of 2001. Inter alia his job to ensure compliance by MVISs regarding the issuance of safety certificates. In his district there are some 2000 MVIS stations. Depending upon the size of the MVIS he would expect to see no more than 5 complaints in a year from the public. In the case of 211 Wilkinson Road there were some 2 or 3 complaints per week.

He went through the record of the number of certificates, cars and trucks issued to 211 Wilkinson Road. For 2001 there were some 1860 automobile certificates given out plus 350 for trucks. This number of certificates coupled with the fact that the licensee Amzad Khan was rarely at the premises led him to the conclusion that it would not have been possible for the facility to carry out inspections required by the Act. This practice defeats the entire purpose of the scheme as unsafe vehicles are simply passed through and continue to operate at a danger to the public. Officer Gee stated that there were two hoists at 211 Wilkinson and may be room for four cars at a pinch. He could not envisage

a 53-foot trailer getting in.

He also testified with regard to the eventually abandoned application of Ahmad Khan's daughter Rozanna. He attended at 211 Wilkinson on July 11, 2002, in order to interview Rozanna as an applicant. Most of the answers during this time were provided by Terry Singh an employee. Rozanna is not a mechanic nor did she purport to have any such knowledge. The impression left with Officer Gee was that she was merely a conduit to allow Ahmad Khan to remain de facto in business. The lease for the premises was to have her father Ahmad as landlord. The Director insisted on a video taped interview with Rozanna, which was refused. An application for an order prohibiting the Director from requiring a videotaped interview on the grounds of offending procedural fairness and natural justice was brought before the Divisional Court and heard on January 21, 2004. The Court held that the Act was silent either way on the issue of videotaping of interviews and there was no evidence as to the prevalence of the Ministry requiring such interviews. Accordingly there could be no finding of lack of procedural fairness or natural justice; indeed to the contrary such an interview could protect the interests of the parties. Khan Para Legal wrote to the Ministry on March 15, 2004, maintaining the refusal to have Rozanna partake in a videotaped interview. On the basis of the continuing refusal to attend the MTO through its legal branch wrote to Ahmad Khan informing him that the MTO was closing its file on Rozanna's application. Rozanna Khan wrote to the Tribunal on April 19, 2004, requiring a hearing on the basis of the Ministry's position but was notified by the Tribunal that there had been no Notice of Refusal of her application for an MVIS station and therefore nothing from which to appeal.

A civil action for damages followed this refusal issued on November 19, 2003 naming as plaintiffs Ahmad Khan and Rozanna Khan and as Defendants the Crown in Right of Ontario along with the Director and several enforcement officers.

Mr. Gee under cross-examination denied that the interview with Azam and his wife regarding the present application was an attempt at entrapment and maintained that it was for the purpose of garnering information for the Director's eventual decision on the application.

At the time of the application and Notice of Refusal under review Azam Khan the Applicant was employed at Sherway Nissan as a mechanic. Mr. Williams was his supervisor during his time at Sherway, which commenced in June 2004. His employment was terminated by memo of Mr. Williams dated November 17, 2004. In the memo Mr. Williams stated that after review of Azam's record over a period of months there were several shortcomings including "quite a number of comebacks" and in particular an incorrect installation of a clutch assembly which resulted in the assembly being damaged and a very unhappy customer. In fact the dowel pins, which line up the clutch with the bell housing were missing which after 10 days of driving fried the clutch. The work sheets accompanied his testimony.

During his employment at Sherway Azam did safety inspections but was told to desist after the Ministry informed Sherway of the record at the Ministry. This was an error resulting from a computer glitch. Azam Khan had been flagged by the system as an MVIS owner not as an MVIS mechanic. After a week or so the error was recognized and Azam was reinstated to carry out inspections. During cross-examination the Applicant's father Ahmad attempted to establish a conspiracy against the Khan family through this incident.

Ahmad Ali Khan, the Applicant's father put in the case for the Applicant. He testified regarding the dealings between the MTO and 211 Wilkerson Road as well as the 18 Melanie operation. He stated that a Ministry inspector, John Tomasone in May of 1997 had virtually shut down the Melanie street operation by taking signs and logs and telling the then licensee Amzad Khan to cease doing inspections. At this time the operation was being moved to 211 Wilkinson. The application of Amzad Khan to operate an MVIS at the Wilkinson locale was refused by Notice of Refusal dated September 24, 1997. A civil action was commenced against Tomasone and others. Ahmad maintained that Ministry's actions against him and the Khan family were retaliatory.

On cross-examination Ahmad explained the arrangement at 211 Wilkinson. While the 211 shop was under the license of Amzad Khan, the uncle it consisted virtually exclusively as a safety inspection station. The license was in the name of Amzad in that after the refusal of registration to Azam a lease was entered into between Azam and Amzad. Ahmad worked for Amzad under this arrangement and was paid on the basis of certificates issued. Azam would get 10% of Amzad's earnings. He stated that he would put the vehicles on the hoist for Amzad's inspection, Amzad being there for four hours per evening. As stated Amzad was revoked in 2002, and his appeal withdrawn on the basis of convictions. Under the Amzad operation 1997 to 2002, five garages sent cars over to the shop to have inspections done sometimes five vehicles from each shop per week. Ahmad would disassemble the car and Ahmad would do the inspection. The other employee Terry Singh worked exclusively in the Khan Paralegal and Immigration office, which shared 211 Wilkinson with the Khan auto shop.

THE LAW:

The Highway Traffic Act:
Section 91 3 (3) (a)

Subject to section 95 the director may refuse to issue a motor vehicle inspection station licence, where in his or her opinion,

- (a) the past conduct of the applicant or where the applicant is a corporation, of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity

Section 92 (4) Subject to section 95, the Director may refuse to register a motor vehicle inspection mechanic where in his or her opinion,

- (a) the past conduct of the mechanic affords reasonable grounds for belief that the mechanic will not act as a motor vehicle inspection mechanic in accordance with the law and with honesty and integrity; or
- (b) the mechanic is not competent to act as a motor vehicle inspection mechanic.

APPLICATION OF LAW TO FACT:

The law views the granting of licences within regulated industries as both a privilege and a species of property right. In cases where the issue is the revocation of an existing licence the view is more towards that of a right, more particularly the interference with an existing property right. In cases of a refusal to grant a licence the view is towards privilege. The sense in this is plain enough, registration under the governing legislation is necessary within a regulated industry to make a living within that industry. The existing holder of licence in order to conduct business incurs expenses and has typically much more to lose over and above his livelihood if his license is revoked than a person who has yet to be registered. Nevertheless, in either case the loss of a chosen livelihood is in the balance and the law requires a standard of proof commensurate with the seriousness of the result from the administrative decision. In the case of a revocation the standard of proof requires “clear and convincing” evidence; in the case of a refusal the standard is more in line with the standard burden of balance of probabilities.

This is a case of refusal and the task of the Director is to demonstrate that the evidence is more consistent with his position as stated in the Notice of Refusal than not.

Counsel put to the Tribunal the number of Safety Standard Certificates processed through the Applicant's shop at 211 Wilkinson Road and asked that an inference be drawn that this number of certificates could not possibly have been dealt with to the standard required on the basis of the completion time necessary and the resources available. The Director also asserted that to make any sense of the material before it the Tribunal should consider the Wilkinson premises as a family concern regardless in whose name any license was or would be held.

The number of certificates purchased by the Applicant for processing at 211 Wilkinson Road and the large number actually processed did give the Tribunal great pause. The size of the facility coupled with the absence of the licensee while it was operated by the uncle Amzad under lease from Azam was convincing evidence on its own that there could not have been compliance with the required inspection standard.

The Director also adduced considerable evidence dealing with the degree of inevitable involvement in the proposed Wilkinson Road operation by other Khan family members. The Tribunal was taken to decisions showing the previous difficulties between the father Ahmad and Uncle Amzad and the regulator. As well as the attempt at having the daughter Rosanna as a registrant was to the Director a clear attempt to insinuate back into the business the de registered family members. Clearly as insisted by the Director the daughter was not suitable as a registrant and her application was a ruse upon the regulator.

The question of whether it is appropriate for the Director to draw inferences of future non compliance by one member of the Khan family on the basis of the past activities of another is dependent of course upon the evidence regarding the degree of involvement in the proposed new entity. The degree of potential future involvement can best be arrived at through evidence of past involvement. There is ample evidence that the Wilkinson Road MVIS was a Khan family affair. The daughter had applied for an MVIS registration with virtually no knowledge of the business nor any evidence to support a finding that she would be in any way involved. On the same premises there was Khan Para Legal a family business, which has corresponded with the Tribunal on behalf of the MVIS. The Tribunal is satisfied that any registration of the Wilkinson Road facility would involve the uncle, the father and the son all of whom have run afoul of the Ministry.

On the subject specifically of the Applicant Azam, counsel for the Ministry drew to the attention of the Tribunal that although present Azam did not take the stand to defend the assertions against him or to offer a reasonable explanation of the alleged shortcomings in his fitness to operate an MVIS. His silence can only lead the Tribunal to the conclusion that he either feels he has no such obligation or that there are no such limitations on his fitness. As he once held a license and was refused the Tribunal is entitled to both an explanation as to fitness and to what if any changed circumstances from the previous adverse ruling of the Tribunal exist.

The question of whether or not an inference could be drawn from the fact of the interview of the Applicant being videotaped as opposed to being audio must be discarded. The Tribunal upon review of the evidence, including a viewing of the actual interview can draw no such inference either form the method or content of the interview. Indeed the degree of scrutiny of both the Applicant and the Wilkinson Road facility was warranted due to the past history of infractions. The Tribunal was correctly drawn to the decision of the License Suspension Appeal Board of September 1998 to establish issue estoppel.

On the issue of persecution the Tribunal finds that the Director's investigation into this matter squares with dutiful inquiry than harassment. The Director in order to fulfill his mandate under the Act must be allowed to conduct reasonable investigations into applicants for registration. For example given the surrounding facts it was not unusual to look into the apprenticeship of the Applicant as it was supposedly served under his father a deregistered safety inspection mechanic. The evidence of the Applicant's actual work experience from Mr. Williams was also telling.

The Tribunal was shown no convincing evidence that the Ministry had launched a vendetta against the Khan family based upon race or any other considerations. Such assertions cannot simply be made and inferences sought to be drawn from this Tribunal.

ORDER:

The Tribunal orders that the Director carry out his decision in the Notice of Proposal dated November 17, 2004.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: November 30, 2005

FILE NAME: 2707.gar.khan.

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.

This decision will also be available on Quicklaw at a later date.



PRE-HEARING

724718 ONTARIO INC. DBA ROYAL MOTORS AND STEPHEN TRUSZKOWSKI –
GARAGE and MECHANIC

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
Stephen Truszkowski and 724718 Ontario Inc.
dba Royal Motors dated September 19, 2005 for
a hearing before the Licence Appeal Tribunal
pursuant to Section 95 of the *Highway Traffic Act*
appealing the Notice of the Director of Vehicle
Inspection Standards dated August 26, 2005;

AND IN THE MATTER OF Motor Vehicle
Inspection Station Licence Number 21-33539 in
the name of 724718 Ontario Inc. dba Royal
Motors;

AND IN THE MATTER OF the registration of
Motor Vehicle Inspection Mechanic, Stephen
Truszkowski holding Trade Certificate Number
T.C. # 999A-158517.

TRIBUNAL: WILLIAM M. MCINTOSH, Vice-Chair

APPEARANCES: MURRAY G. FORBES
Counsel for the Director of Vehicle Inspection Standards

MICHAEL CZUMA,
Counsel for the Applicant

DATE OF
PRE-HEARING: November 7, 2005

By Teleconference

ORDER

Following attendances on November 7, 2005, at a pre-hearing by teleconference and in person of Murray G. Forbes, Counsel for the Director of Motor Vehicle Standards and Michael Czuma, Counsel, on behalf of the Applicant, 724718 Ontario Inc. dba Royal Motors and Stephen Truszkowski.

The Tribunal makes the following Order with respect to the hearing scheduled to commence at 9:30 a.m, on Friday, the 20th day of January, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties at the hearing are the Director of Motor Vehicle Standards, 724718 Ontario Inc. dba Royal Motors and Stephen Truszkowski.
2. Disclosure of documents will take place pursuant to the Rules of Practice of the Tribunal.
3. It is anticipated that there will be four witnesses called on behalf of the Director and one for the Applicant.
4. The issues remain as are stated in the Notice.

LICENCE APPEAL TRIBUNAL

William M. McIntosh, Vice-Chair

RELEASED: November 8, 2005

FILE NAME: 3176.dba royal motors and Stephen Truszkowski.gar.doc

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website www.lat.gov.on.ca in two weeks time. The decision will also be available on Quicklaw at a later date.



PREHEARING

AUTO RALLY INC. AND ABDOL AZIM ARBAB TAFTI

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO CLAUSES 91(8)(e) AND 92(4)(a)
OF THE *HIGHWAY TRAFFIC ACT*.

TO REVOKE MOTOR VEHICLE INSPECTION STATION
LICENCE No. 21-43027 ISSUED TO AUTO RALLY INC.,
AND TO REFUSE REGISTRATION AS A MOTOR
VEHICLE INSPECTION MECHANIC FOR ABDOL AZIM
ARBAB TAFTI (T.C. 310S-419458).

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: ANTHONY MOUSTACALIS, Counsel, representing Auto
Rally Inc.

MURRAY FORBES, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: September 9, 2005 *in person & teleconference*

ORDER

Following attendances on September 9, 2005 at a pre-hearing before this
Tribunal of Anthony Moustacalis, by teleconference, Counsel for the Applicant
("Applicant") and Murray Forbes, in person, Counsel, for the Director of Vehicle
Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to be
held at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto,
Ontario, commencing at 9:30 a.m. on November 30, 2005.

1. The Parties to the hearing are:
 - (a) Auto Rally Inc.; and
 - (b) The Director of Vehicle Inspection Standards
2. Mr. Forbes advised that as Abdol Azim Arbab Tafti had not appealed the Director's proposal to refuse registering him as a motor vehicle inspection station mechanic, that Proposal is regarded as being final.
3. Mr. Moustacalis confirmed that Auto Rally Inc. was his only client and he did not have any instructions regarding Mr. Tafti.
4. Mr. Forbes advised that he expects to present testimony and evidence from one witness regarding the incidents cited in the Proposal. The Respondent's witness will rely upon notes, Field Inspection Reports, and MTO records.
5. Mr. Moustacalis advised he would be relying upon the testimony of two witnesses and possibly one expert. While he did not have further information regarding the expert witness, Mr. Moustacalis said it was not his intention to dispute past convictions or inspection findings but to present evidence about the current procedures and practices of the business.
6. The Tribunal recorded that there was no resolution of the issues between parties.
7. Mr. Forbes confirmed that he would provide complete disclosure of all documents and things by or before October 17, 2005.
8. Mr. Moustacalis confirmed that he would reply with complete disclosure of all documents and things by or before November 8, 2005.
 - (a) It was agreed that if Mr. Moustacalis planned to call an expert witness, he would provide disclosure regarding the name and qualifications of that expert witness, including any written report, by or before October 17, 2005.

Each party shall deliver to the Tribunal one copy of all documents that the party will produce or tender as evidence at the hearing at least 10 days prior to the hearing.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: September 30, 2005

FILENAME: 3033.gar.Auto Rally Inc.



AZAM KHAN
DBA KHAN AUTO AND TRUCK REPAIRS

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO SECTION 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

AND IN THE MATTER OF THE MOTION BY THE DIRECTOR OF
VEHICLE INSPECTION STANDARDS FOR AN ORDER
QUASHING THE SUMMONS TO THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: AHMAD A. KHAN, Agent, representing AZAM KHAN dba KHAN
AUTO AND TRUCK REPAIRS

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

DATE OF
HEARING

September 9, 2005

Toronto

REASONS FOR RULING AND ORDER

BACKGROUND:

A hearing of a Motion of the Director of Motor Vehicle Inspection Standards (the "Respondent") was heard by the Tribunal on September 9, 2005 and a written Ruling and Order was made on that date with reasons to follow that Ruling and Order. The reasons for the Ruling and Order follow.

The Respondent brought the Motion for an Order to quash the summons to witness issued to Peter Hurst, the Director of Vehicle Inspection Standards ("the Director"). The summons was for Hurst to attend the hearing before the Tribunal commencing on September 19, 2005.

The Respondent under section 91. (3)(a) of the *Highway Traffic Act* (the "Act") issued a Notice dated November 17, 2004 to refuse to issue a Motor Vehicle Inspection Station licence to Azam Khan dba Khan Auto and Truck Repairs (the "Applicant"). The Notice was to refuse the issue of a licence to the Applicant as the past conduct of the Applicant afforded the Respondent reasonable grounds to believe that the Applicant will not operate the inspection station in accordance with law and with honesty and integrity. The Respondent alleged that the Applicant had violated the provisions of the Act as found by the Tribunal in its decision of September 8, 1998 and for other reasons stated in the Notice of the Respondent. Furthermore, the Respondent alleged the Applicant was refused a licence as a registered mechanic and was convicted of permitting the use of an unauthorized dealer plate. It is to the Respondent's Notice of November 17, 2004 that the Applicant appeals and which appeal is due to be heard before the Tribunal commencing September 19, 2005.

A prehearing was heard in this matter and an Order was issued pursuant to such prehearing indicating Hurst will not be called as a witness for the Respondent at the hearing but that one Larry Grimaldi an employee of the Respondent will be a witness for the Respondent. The Respondent filed at the prehearing a memorandum of Grimaldi addressed to Hurst containing information and recommendations regarding the Applicant. (Exhibit 1 on the motion, tab B). At the prehearing the Applicant indicated his intention of obtaining a summons from the Tribunal so as to secure the attendance of Hurst at the hearing. The Tribunal, subsequent to the prehearing and the prehearing Order that the Tribunal issued, received a request from the Applicant for the issuance of a summons to Hurst (Exhibit 1 on the Motion, tab D) and the Tribunal duly issued such summons. In his request for issuance of summons the Applicant contended, inter alia, that Hurst should be compelled to give oral evidence "in the interests of justice and fair play". (Exhibit 1 on motion, tab D).

In the Applicant's submissions in response to the Respondent's motion he stated as follows:

1. The Director of Vehicle Inspection Standards is a competent and compellable witness.
2. There are no provisions in the Rules for squashing of a summons issued by the Tribunal.
3. The Director of Vehicle Inspection Standards is not a member of an administrative tribunal.
4. Rule 1.1. of The Licence Appeal Tribunal Rules of Practice defines a "member" of the Tribunal as an individual appointed by the Lieutenant Governor in Council.
5. Section 89 of the *Highway Traffic Act* makes provision for the appointment, by the Minister, of an officer of the Ministry to be the "Director" for the purposes of sections 88 to 100 of the Act.
6. The Director is a Public Servant/Head of Department and makes decisions relating to his Department only.
7. The Director is not a Tribunal, member of a tribunal, Judge, Justice of the Peace, Lawyer,

or person covered under the Doctrine of Deliberative Secrecy and is therefore compellable to give evidence before this Tribunal.

8. The applicant relies upon the request for issuance of summons filed in the respondent's motion material as Exhibit "D".
9. This Tribunal made a decision to, and issued the summons compelling Mr. Peter Hurst to attend, and give evidence at, the hearing of the proceedings on June 15, 2005.
10. This Tribunal has no jurisdiction to reverse its own decision.
11. Section 9.1 of the Licence Appeal Tribunal Rules of Practice prescribes matters that may be considered by pre-hearing conference. There is no provision therein, or elsewhere in the rules, for the Tribunal to re-visit a decision of the Tribunal and specifically there is no provision therein for the Tribunal to entertain any request for the squashing of a summons issued by the Tribunal.
12. Pursuant to sub-section 96 (9) of the *Highway Traffic Act*, party to the proceedings before the Tribunal may appeal from its decision or order to the Divisional Court in accordance with the rules of court.
13. The summons was issued on June 15, 2005 and Mr. Peter Hurst and or counsel had sufficient and ample time to move to the proper forum to seek the relief now being sought.
14. Counsel for the respondent, Mr. Patrick Moore, and the respondent, Mr. Peter Hurst, are together acting in a conspiracy to obstruct justice and fairness.
15. Counsel for the respondent. Mr. Patrick Moore, and the respondent, Mr. Peter Hurst, have also involved officers Jim Cowan, Larry Grimaldi and John Gee in the conspiracy to refuse to issue a Motor Vehicle Inspection Station Licence and also to obstruct justice and fairness.
16. A Statement of Claim has already been issued against Counsel for the respondent, Mr. Patrick Moore, for damages resulting from his action and or inaction relating to a refusal to issue a Motor Vehicle Inspection Licence and register a Motor Vehicle Inspection Mechanic, among other things.
17. The applicant relies on upon Document 37 - Statement of Claim, filed in applicant's material.
18. The applicant submits that, in the interest of fairness and justice, the Director of Vehicle Inspection Standards, Mr. Peter Hurst, must give evidence, at the hearing of this appeal.

(Exhibit 2 on motion)

REASONS FOR ORDER:

Hurst, in his capacity as Director of Vehicle Inspection Standards, is empowered under section 91(3)(a) of the *Highway Traffic Act*, 1990 to make decisions. The Tribunal finds that in making a decision under the above statutory authority Hurst falls into the definition of a "tribunal" as referred to in section 1 of the *Statutory Powers Procedure Act* which defines a "tribunal" to include "one or more persons, whether or not

incorporated and however described, upon which a statutory power of decision is conferred by or under a statute”.

The Tribunal's Rules of Practice do not deal with the quashing of a summons to a witness. However, the Tribunal does have the jurisdiction to control its own process and “has all the powers that are necessary or expedient for carrying out its duties” as is explicitly stated in section 3.(2) of the *Licence Appeal Tribunal Act*, 1999. While the Tribunal does have the authority under Rule 4.1 of its Rules of Practice to issue a summons to a witness, in doing so the Tribunal is carrying out an administrative function and is not making a decision as to whether the witness is compellable or competent. The Tribunal further finds that the Applicant's contention in his written submissions in response to the motion (Exhibit 2, paragraph 9) that the issue of the summons to Hurst was “a decision” of the Tribunal is not correct, for the issue of the summons was an administrative act and was not an adjudicative act. The Applicant is accordingly incorrect in his assertion that the “Tribunal has no jurisdiction to reverse its own decision”. (Exhibit 2, paragraph 10).

The question of quashing of a summons to a witness has arisen on many occasions in our courts and our courts do have the ability and may permit the quashing of a summons.

The Tribunal finds that just as a Judge may review a Registrar's act regarding the issuance of a summons to a witness, so may a Tribunal review the administrative act taken in this matter to summons Hurst. A Tribunal has inherent jurisdiction to do so. As was stated in the *Agnew and Ontario Association of Architects* 64 O.R. (2d) 8, Campbell J. stated:

“ In a case of a judge subpoenaed to testify about something touching on his decision, a burden of persuasion shifts to the party issuing the subpoena to demonstrate that the evidence sought does not seek to penetrate the mental process by which the judge came to his decision.

The authorities do not make it clear whether this general rule applies equally to members of administrative tribunals. In logic, there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.”

The Respondent's motion record (Exhibit 1, tab A) sets out in some detail the reasons for the Respondent's refusal to issue a licence to the Applicant and the specific grounds for refusal. In addition, Larry Grimaldi's written recommendations to Hurst, are set forth in explicit detail in the aforementioned exhibit at tab B. The Respondent's counsel has in addition stated that Grimaldi will testify at the hearing before the Tribunal and documentation will be available in support of his recommendations.

The Tribunal finds that Hurst is not a compellable witness as apart from the practical consideration that a tribunal member and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions and no decision would be really final until the tribunal

member or judge had been cross-examined about his decision. The Tribunal accordingly finds that Hurst is no more compellable regarding his decision process than is a judge and that the Applicant as the party issuing the summons against Hurst has not persuaded the Tribunal that the purpose of the summons, and the questions to be asked under its authority, would not involve any aspect of the decision process. The Tribunal notes what was stated in the matter of *Noble China Inc. v. Lei* 42 O.R. (3d) 69,

“ It is a hallmark of judicial independence that deliberations are confidential and a judge cannot be compelled to testify about judicial proceedings. This rule of deliberative secrecy also applied to other adjudicators.”

The Applicant in his request for the issuance of summons presented no evidence to support the various bald allegations made therein (Exhibit 1 Tab D). The statements made in the Applicant's request for the issuance of the summons are speculative and the Applicant will have the opportunity at the hearing to test the evidence upon which Hurst, in his statutory capacity as a Director, bases his refusal to issue a Motor Vehicle Inspection Station licence and a Motor Vehicle Inspection Station mechanic's registration to the Applicant.

ORDER:

Accordingly, the Tribunal Orders the quashing of the summons dated June 15, 2005 issued to Peter Hurst, Director of Vehicle Inspection Standards to attend and give evidence at the hearing of proceedings in this matter.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 15, 2005
FILE NAME: 2707. gar. khan.motion.

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.



MOTION HEARING

AZAM KHAN
dba KHAN AUTO AND TRUCK REPAIRS

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO SECTION 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

AND IN THE MATTER OF THE MOTION BY THE DIRECTOR OF
VEHICLE INSPECTIONS STANDARDS FOR AN ORDER
QUASHING THE SUMMONS TO THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: AHMAD A. KHAN, agent, representing the AZAM KHAN dba KHAN
AUTO AND TRUCK REPAIRS

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

DATE OF
HEARING

September 9, 2005

Toronto

DECISION

Whereas an oral hearing was held on September 9, 2005 at Toronto, Ontario to
consider the Director of Vehicle Inspections Standards motion dated July 19, 2005 to
quash the summons to witness issued to Peter Hurst, Director of Vehicle Inspections
Standards.

The Tribunal makes the following Order with Reasons to follow.

THE TRIBUNAL ORDERS quashing the summons to witness Peter Hurst, Director of Vehicle Inspections Standards.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 12, 2005
FILE NAME: 2707. gar. khan.

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



S.B. MOTORS LIMITED

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: SHIQER BAJRAMI, Agent for the Applicant

MURRAY FORBES, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING: May 20, 2005

Toronto

REASONS FOR DECISION

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the Applicant, S.B. Motors Limited, from a proposal dated December 29th, 2004 issued by the Director of Vehicle Inspection Standards to refuse it registration as a Motor Vehicle Inspection Station, licence #46558.

EVIDENCE:

Ministry's Evidence

The Director's Grounds for Refusal, as stipulated in his Notice to the Applicant, are:

...that the Director of the Applicant Corporation, Mr. Shiqer Bajrami

- (1) Issued Safety Standard Certificates from premises located at 11 Shirk Place in Kitchener, Ontario when such premises were not licenced as a motor vehicle inspection station;

- (2) Issued a Safety Standard Certificate number 6638433, dated on or about November 4th, 2004, where the vehicle did not comply with the requirements of the *Act* and Regulations;
- (3) Failure of the applicant's Director in meeting his financial responsibility in the conduct of a business:
 - a) by issuing non-sufficient funds (NSF) cheques to the Ministry of Transportation in January 2002, March 2002 and December 2000;
 - b) in failing to satisfy judgments to the National Bank and other creditors, and the Ministry of Finance in respect to retail sales tax; and
 - c) in failing to pay rent in respect to his business premises at 1212 King St. North, St. Jacobs, Ontario, a previously license (sic) Motor Vehicle Inspection Licence (sic) of the Director.

The Director called one witness, Mr. Andrew Brown. Mr. Brown testified that he has been a licensed technician for cars, trucks and coaches since 1984. He is employed by the Ministry of Transportation as an investigator and works out of its Waterloo detachment. He was advised of the Applicant's move to new premises at 11 Shirk Street on September 15th, 2004, by a telephone call from Mr. Bajrami.

(a) Location

It was not until October 7th that Mr. Brown attended at the premises to complete the inspection. He noted that Mr. Bajrami had a sign displayed for the business although the premises had not, as yet, been approved. The Applicant told Mr. Brown he had moved in August. Mr. Bajrami also disclosed he had become an incorporated business in July, operating under the name S. B. Motors Limited.

Mr. Brown noted that, despite the August move, Safety Standard Certificates had been issued out of the old St. Jacobs address (Exhibit 3, Tab 10). The inspector testified that a Motor Vehicle Inspection license is issued to a specific location due to restrictions on equipment and documentation required to be kept on site. He advised that Mr. Bajrami, licensed under the *Act* since 2000, had already moved locations on at least two occasions. He would therefore have been aware of this requirement. He had moved to St. Clements on February 22nd, 2001. Documentation illustrated the Ministry had earlier investigated this facility on January 11th, 2001 and found it in compliance. The licence for the new premise was only issued on February 28th, 2001 (Exhibit 3, Tabs 5 and 8). There was no evidence as to what address Mr. Bajrami had placed on Safety Certificates he issued between January 11th and February 28th, 2001. Other documents demonstrated the Applicant's move to St. Jacobs, which the Ministry received notification of on May 5th. The inspection did not occur until November 2003 (Exhibit 3, Tab 6). There was no evidence as to the address notation on Safety Certificates issued by the Applicant during those months.

(b) Certification

Mr. Brown further testified Certificates were also improperly completed by failing, in a number of instances, to reference relevant work orders. The Ministry Inspector noted the importance of cross-referencing Work Orders as this describes defects, if any, on the vehicle.

Mr. Brown found two cases of Annual Inspection Certificates issued without the mechanic's designation (Exhibit 3, Tab 14). Mr. Bajrami is the sole mechanic attached to the Station. The Mechanics Designation is important as it serves notice of the mechanic's qualification for work on certain classes of vehicles. Certificates # H084834 and # H084841, issued by the Applicant on September 10th, 2004 and August 9th, 2004 certify a make (HIMO) and model (HIFO) vehicle which the Applicant's designation (S310) does not qualify him to certify.

Mr. Brown submitted an Inspection Report of fellow officer Morissette, dated November 20th, 2003, as evidence that Mr. Bajrami had been previously advised of the correct procedures in filling out Certificates. This Inspection Report (Exhibit 3, Tab 7) includes the Officer's notes, which make no reference to the manner in which either Annual Inspection Certificates, or Safety Standard Certificates are to be completed. Rather, the officer's notes are restricted to recording discussion as to the proper manner of voiding incomplete stickers/Certificates (Exhibit 3, Tab 6).

A review of Safety Standard Certificates produced by the Respondent illustrates inclusion of a box entitled "trade code." In every instance this has been filled in with Mr. Bajrami's mechanic designation, S310 (Exhibit 3, Tab 10). On the other hand, photocopies of every Annual Inspection Certificate show there is no such box on the documents' face, but simply space for "Number." In all instances the Certificates produced correctly included Mr. Bajrami's registration number (Exhibit 3, Tab 14).

During the October inspection Mr. Brown noted a number of vehicles on the Applicant's lot with what appeared to look like dealer licence plates. The Applicant denied he was selling used vehicles, though admitted to having nine or ten vehicles on the lot for sale. Ministry records revealed the Applicant had been refused a Dealer license by the Registrar of Motor Vehicle Dealers, a decision upheld by this Tribunal in May of 2003. The decision, appearing as Exhibit 3, Tab 18, occurred in the absence of the Applicant who failed to attend, and was based on the Tribunal's acceptance of the Registrar's evidence regarding the Applicant's financial conduct. More recently, however, the Applicant has been convicted on 2 counts of curbsiding, dated June and December 2004.

The Applicant issued Safety Standard Certificate # 6638433 to a 1987 Jaguar on November 4, 2004. At the time of inspection by Mr. Brown, 53 days later and the vehicle having traveled under 60 kilometers, the parking brake was ineffective as it could be pulled to an upright position without any resistance. There was also an

exhaust leak from where the muffler had earlier been resealed and the bumper was wired to the frame. (Exhibit 3, Tab 13). The witness advised that charges for this occurrence are pending against the Applicant.

A 1991 Cherokee Jeep was investigated by Mr. Brown 31 days and approximately 3,000 kilometers after being certified by the Applicant on November 16th Certificate #6638440. However, a DriveClean emissions testing receipt, also dated November 16th notes the odometer reads 700 kilometers over that declared on the Certificate. It also notes "no rear brakes".

(c) Financial – Rent

In the course of his investigation Mr. Brown testified he had interviewed two previous landlords of the Applicant. The most recent in St. Jacobs obtained a court order evicting Mr. Bajrami in June 2004. Court records tendered show the Applicant did not attend the hearing. The Court considered evidence of a letter from the Economical Insurance Group disclosing cancellation of S.B. AutoCentre o/b Shiqer Bajrami's insurance, dated December 2003, as well as a Police Occurrence Report, also dated December 2003 whereby the landlord alleged Mr. Bajrami had threatened him, but did not press charges and told police that he did not fear for his safety (see Exhibit 5). The landlord advised Mr. Brown that Mr. Bajrami had failed to leave the premises within the ten days ordered, but had taken twenty days to vacate. As a result, the Applicant continued to owe the last month's rent. He further stated he had determined not to seize property of the tenant, as he feared Mr. Bajrami's temper.

An earlier landlord, located in St. Clements, was also interviewed by Mr. Brown. He advised Bajrami had problems paying rent (17 bounced cheques), keeping up insurance coverage (4 cancellations) and with his temper. Finally, the landlord said that Mr. Bajrami had been locked out of the premises whereupon he had forced his way into the building to remove fixtures.

In conclusion Mr. Brown testified he requested another Ministry officer attend the Applicant's premises with him in December to advise the Applicant that his licence would be refused. Mr. Brown stated he was concerned Mr. Bajrami would be confrontational. Although the Applicant did hand over his books and the Ministry Manual, he refused to let Mr. Brown remove the business signage from the premises. He also told Mr. Brown he had no outstanding Certificates, nor any on order, yet an order for such was received at the Ministry dated the same day (Exhibit 3, Tab 15.)

(c) Financial - Cheques

Mr. Brown completed a background check on the Applicant, which revealed he had bounced numerous cheques to the Ministry in 2000 and 2002.

(c) Financial – Ministry of Revenue

Mr. Brown testified that a consumer, Mr. Gilbert, complained to the Ministry in January of this year about a vehicle he had recently purchased from S.B. Motors. The Safety Certificate for the vehicle was issued by a third party. Inspector Brown's investigation of the van revealed the brake shoes were cracked and the rotors worn. Sales documents provided by Mr. Gilbert included a handwritten bill of sale dated September 10th, 2004 between S.B. Motors Ltd and Mr. Gilbert. It is signed by Mr. Bajrami and Mr. Gilbert.

The documents establish that the vehicle was sold for a purchase price of \$3,600.00 (Exhibit 3, Tab 11, page 139). However the Motor Vehicle Transfer Declaration for the Ministry of Revenue discloses a purchase price of only \$1,450.00. The Declaration also notes the seller as Shiqer Bajrami, not S.B. Motors.

Applicant's Evidence

Mr. Bajrami advised he had been a licenced mechanic in Kosovo for a number of years, as well as in both Switzerland (6 years) and Germany (8 years). On arriving in Canada he had quickly sought mechanic qualification. He is proud he had not been required to rely on any government assistance in providing for his family.

(a) Location

The Applicant testified that on both his prior business moves the Ministry inspected his premises, tools and documents and all had been approved. In this most recent instance, he had notified the Ministry as soon as the details of commencing the operation, including the paperwork and legalities involved in buying his own location and arranging zoning, of getting the business and computers up and running, etc. had all been finalized. He had advised the Ministry of the move in mid-September, although the actual sale of the property to him had closed August 30th. It was the Applicant's understanding from the Ministry that he could continue to operate and issue Certificates while waiting for inspectors to attend his premises. Indeed, Mr. Bajrami testified that he had asked Mr. Brown about this particular issue and had been told that he could continue to issue Certificates from the old address while waiting for clearance for the new premises. Exhibit 3, Tab 7 is Mr. Brown's initial Inspection Audit Report on October 7th. It corroborates this information in Mr. Brown's notes.

(b) Certification

As concerned issuance of Certificates for vehicles outside his mechanic designation range, Mr. Bajrami admitted he had erred on the two occasions noted. He conceded he had probably been advised of his licence restriction when first licensed back in 2000.

Once reminded by Mr. Brown last September he has learned the lesson and has not repeated the error. Similarly, his neglect to reference Work Orders on Safety Certificates has occurred only on the odd occasion when he was busy and distracted. It was unintentional.

The Applicant denied the Director's allegations concerning the Safety Certificate issued for the '87 Jaguar. He testified that at the time he had issued the Certificate the handbrake was intact and operational. He noted that Mr. Brown's inspection took place close to two months later after the vehicle had sat out in winter weather. He opined that the cable perhaps had minor rust at the time of his inspection, which could worsen over the time period and weather conditions, such that a harsh or rapid engagement might easily snap the cable. As for the leak in the exhaust, Mr. Bajrami testified that a small leak may exist and not compromise the safety and this may have been the case given that the muffler had prior sleeve/clamp repair service. He stated that the wiring of the exhaust to the bumper was firm and adequate for the purpose at the time of his inspection and the owner had not wanted to have it more securely repaired.

The Cherokee was a different issue and the Applicant admitted he had erred in issuing it with faulty brakes, though he insisted the mileage recorded by him on the Certificate was correct. Mr. Bajrami testified that the owner of the Cherokee was a do-it-yourself maintenance client known to him who, at the time of the safety, had the brake components with him in the vehicle and promised he would do the repair on returning home. Based on this, Mr. Bajrami had provided the Certificate. The owner reappeared at the Applicant's facility the following day, as promised, to show the brake repair had been completed.

(c) Financial – Rent

Mr. Bajrami denied the hearsay evidence attributed to the landlord in St. Clements. He noted that, after consulting with his lawyer, he had returned to the leased premises using his key to remove electrical fixtures which belonged to him and which he had bought and installed. Mr. Bajrami claimed the landlord had serious problems; in one year he lost six tenants.

Regarding the St. Jacobs landlord, it was the Applicant's evidence he had been negotiating for his own property months prior to leaving that location. Consequently, when the landlord sought termination of the lease in June 2004, Mr. Bajrami had a closing date for his newly purchased property of August 30th. The Applicant testified that the issue of ten days notice to vacate had been renegotiated with the landlord to twenty, but the landlord's wife insisted on a full month's rent, which the Applicant never agreed to pay, opting to leave the premises early instead. Further, he testified that he and the landlord had argued heatedly, but that he had never threatened anyone. Finally, Mr. Bajrami stated he had never operated without insurance, the cancellation of the one policy only occurring once he had purchased insurance elsewhere.

(c) Financial – Cheques

As concerns bounced cheques to the Ministry back in 2000 and 2002, it was Mr. Bajrami's evidence that, on starting up his trade here in Canada, banks had kept client payments to him on hold for clearance such that he often found himself unable to honour cheques he had written on their expected clearance.

(c) Financial – Ministry of Revenue

The Applicant testified that he had sold the BMW to Mr. Gilbert privately. He stated he is free to complete such sales once or twice a year. The sale had been for \$3,600.00. The new purchaser continued to return to Mr. Bajrami for free repairs until the Applicant refused to do any more whereupon Mr. Gilbert became angry and left.

Summary

The Applicant concluded that his licence problems appeared to commence in March 2004. He advised he and his family had been driving to Kitchener one afternoon when they were pulled over by a female Ministry of Transport inspector for towing a truck with inadequate brake and signal lights. Mr. Bajrami stated he knew when he left the shop that the lights were not sufficient, but had been in a hurry to get his family into town. The officer who pulled them over however, was excessively slow in dealing with the infraction. After waiting close to an hour by the side of the road the children were hungry and crying. A half hour later an OPP officer finally arrived, who was able to process the matter immediately by advising Mr. Bajrami he would have to unhitch to trailer and leave it there until he could return with the correct lights. In the meantime he would be given tickets. It was Mr. Brown who attended at the Applicant's business the next day, accompanying the female inspector, to furnish him the tickets. Mr. Bajrami testified he had met with Mr. Brown before on changing business locations and had not had any problems. Since this incident, however, he feels his problems with the Ministry have escalated. He denied being confrontational or threatening with either the female inspector or Mr. Brown. He admitted to anger and frustration. He had been upset and verbal. He had felt similarly when Mr. Brown attempted to remove his signage without establishing his authority to do so. At no time, however, was he abusive or threatening. On receiving notification that the sign removal was in fact valid, Mr. Bajrami acquiesced to it being taken from him without further argument.

The Applicant testified that he had ordered new certificates based on his conversation with a Mr. Blackstone at the Ministry who had advised him Inspector Brown had acted outside his authority and that he would receive proper notification of the Director's decision in due course.

In cross examination Mr. Bajrami stated that the reason for the eviction order last June was because the landlord had not been happy with his using water to clean the 4 or 5 cars he had on the lot for sale, despite the fact that he was paying rent for that sized lot. Mr. Bajrami has the same response to questions concerning his convictions for curbsiding: that he was entitled to sell a number of vehicles annually in his personal capacity.

FACTS AS FOUND:

1. S.B. Motors Limited operated out of 11 Shirk Street without a licence issued for the premises from September through December 2004.
2. S.B. Motors Limited was incorporated in July 2002. Shiqer Bajrami is its sole officer and director. It was not licensed to operate.
3. Shiqer Bajrami, operating as S.B. Motors, had been licensed as a Motor Vehicle Inspection Station since 2000. He had, over the years changed his business location two times. Cheques issued by him for Ministry licensing fees in 2000 and 2002 had been returned NSF.
4. S.B. Motors issued Safety Standard Certificates in September 2004 using the address of his previous location, based on Mr. Bajrami's understanding from Ministry staff that this was allowed pending approval of the new location.
5. Shiqer Bajrami is the mechanic of S.B. Motors Limited. Prior to 2000 he operated as a mechanic for a number of years in eastern and western Europe.
6. A number of Certificates issued by S.B. Motors Limited failed to reference Work Orders.
7. Two Annual Inspection Certificates issued by S.B. Motors Limited did not include the mechanic's license designation. While Safety Standard Certificates do include a box on the form for that purpose, the Annual Inspection Certificate has no such allocated box on its face.
8. Mr. Bajrami was refused a Motor Vehicle Dealer License in May 2003 based on unpaid financial debts. The decision was upheld by the Tribunal. Mr. Bajrami did not attend the hearing.
9. Mr. Bajrami has sold vehicles privately from his licensed premises and continues to do so. He has been convicted of two counts of curbsiding in June and December 2004.
10. Safety Standard Certificates numbered 6638433 and 6638440 were issued by S.B. Motors Limited for vehicles later found to have significant mechanical defects.

11. Mr. Bajrami failed to attend a Court hearing which resulted in his being evicted from the last premises he leased. The eviction was granted, in part, based on evidence that Mr. Bajrami did not have insurance coverage. Mr. Bajrami did in fact have such coverage.
12. Mr. Bajrami denies the landlord's allegation he made death threats. The landlord chose not to lay charges, acknowledging he did not fear for his safety.
13. Mr. Bajrami entered premises previously leased to him by a second landlord to remove fixtures which counsel had advised him he had a right to do.
14. The Ministry inspector found Mr. Bajrami confrontational in his last dealings with him, based on his becoming angry and using profane language.
15. The Gilbert BMW sale from Mr. Bajrami was for \$3,600.00 as noted in the sale documentation. The Retail Tax Disclosure, stating the sale price was \$1,450.00 was completed by the purchaser, Mr. Gilbert.
16. Other than the LAT decision of June 2003, no evidence was provided concerning whether the Applicant remains irresponsible in meeting debt obligations.

THE LAW:

Section 91(1) of the *Highway Traffic Act* states:

91.(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.

Section 91(3) states:

91(3) Subject to section 95, the Director may refuse to issue a motor vehicle inspection station licence where, in his or her opinion,

- (a) the past conduct of the applicant or, where the applicant is a corporation, is of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;
- (b) the proposed motor vehicle inspection stations or its operation would contravene this Act or the regulations or any other Act or regulation or any municipal by-law respecting its establishment or location;
- (c) the applicant is not competent to operate a motor vehicle inspection station in accordance with this Act and the regulations; ...

Section 95 states:

95.(1) Where the Director proposes,

(a) to refuse to issue or renew a licence;...

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

(d) in the case of a proposal to refuse to issue a licence, upon the applicant; ...

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

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

DECISION:

Under section 91(3) of the Act a Director can only refuse to issue a motor vehicle inspection station licence under the four specified circumstances described. Subsection (b) was not alleged in this Hearing. There has been no allegation by the Director that this Applicant is incompetent (subsection c), or that his equipment and premises are unsuitable (subsection (d)). The Director relies rather on the evidence of past conduct to establish the reasonableness of his concluding that the Applicant will not operate in accordance with the laws and with honesty and integrity (subsection (a)).

In reviewing the Director's decision this Tribunal is cognizant of the Divisional Court rulings on its purview. Beginning with *Brenner v. Ontario (Registrar of Motor vehicle Dealer and Salesmen)* 1983 O.J. No. 1017 where the proper test was stated as:

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.

More recently, in *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales and Omar Hassan Rahim*, of February 11th, 2003, the Divisional Court, per Lane J., clarified the *Brenner* test by re-iterating that it remained the proper test but that it "...does not establish a rule that the Registrar must be shown to be wrong in having concluded there

was reason to doubt the registrant would carry on business appropriately.” The Court made clear that the Tribunal's approach be unfettered by that of 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.

The evidence establishes that the Applicant has failed to meet licensing conditions set out in the *Act*. S.B. Motors Limited itself was never licensed, nor was it licensed to operate from the 11 Shirk location. The Applicant does not deny this.

Nonetheless, refusal of a license has grave implications with regard to a person's livelihood and profession. This is particularly so where the livelihood has been a family's sole means of support for many years. Hence, careful consideration must be given to the circumstances involved in the Director's refusal of such licensing.

(a) Location

The Tribunal is not of the opinion that Mr. Bajrami's failure to operate his newly incorporated business out of newly acquired premises under license “...*provides reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity*”.

The evidence demonstrates otherwise. Mr. Bajrami had already been licensed under the name S.B. Motors for close to five years at two different address locations. Other than for Mr. Gilbert, the Respondent has not alleged any complaints or contraventions in this time. There was no indication his altered corporate status and/or location was intended to provide services without benefit of license. While this was a breach of the law and serious in its implications, as an unlicensed service would not provide the consumer protection intended in the legislation, the Tribunal finds the Applicant's ready disclosure to Inspector Brown in the October 7th inspection indicates he felt nothing was amiss in his new address or incorporated status. Mr. Bajrami is a relative newcomer to this jurisdiction and may not realize this implication of his neglect to act promptly in obtaining the proper license. Indeed, despite Respondent claims that earlier moves implied the Applicant knew of the importance of notifying address changes prior to moving, the evidence shows otherwise. In both earlier instances Mr. Bajrami appears to have operated for some weeks out of new premises without being licensed for those addresses. There was no evidence he had been cautioned or reprimanded by Ministry officials for so doing. In fact the evidence demonstrated he was actually advised by Inspector Brown to continue using his old approved address on documentation pending Ministry approval of the new address.

The Tribunal therefore concludes that he believed his newly incorporated and located operation was in compliance. This Tribunal is therefore unable to conclude this evidence indicates that he will not operate in accordance with the law and with honesty and integrity.

(b) Certification

The Tribunal has reached the same conclusion concerning the allegation that the mechanic's designation was omitted from the Vehicle Inspection Stickers. The fact is there was no room on the form provided for such designation, unlike the case with Safety Certificates. The Tribunal concludes the Applicant believed he was in compliance in not including the designation and did not, therefore, intend to mislead anyone.

Other non-compliances that the Director relies on to establish the Applicant's unsuitability for registration include the issuance of the two Certificates for vehicles outside the Applicant's qualifications. In his defence, Mr. Bajrami pled ignorance. This is of concern to the Tribunal given that the Applicant has been operating under licence for the period of time Mr. Bajrami has. The Tribunal is also unsettled by the Applicant's admission of issuing a Safety Certificate to a vehicle with obvious brake defects. It is most clearly not sufficient to rely on the client returning the next day to demonstrate the repair if the brakes have failed in the meantime. The *Act* provides licensees the privilege to issue these certificates in the interest of safety to citizens. By acting in this manner, Mr. Bajrami compromises the very safety he is entrusted with protecting. This does demonstrate a lack of honesty and integrity that has significant implications. Nevertheless, the Tribunal acknowledges the sincerity of Mr. Bajrami's apology for both of these contraventions. Most importantly, he admitted he had erred and made clear he acknowledged responsibility of wrongdoing for both situations. He noted the many years experience he has had in the business in other jurisdictions, the fact he was licensed in Europe for heavier vehicles as mitigating factors for the first contravention. He noted the facts of a known client who returned to demonstrate completion of the brake repair in attempting to explain his contravention of the section. He also spoke of his anxiety to succeed in Canada independently.

The Tribunal found the Applicant credible and convincing. He did not employ self-serving or avoidance rationales for the areas where he had, in fact, contravened the *Act*. English is clearly a second language for him and it may be that this assisted his unclearly comprehension of restrictions such as the strict limitation of the mechanic designation. The Tribunal finds from his demeanour and evidence no intention on his part to deceive respecting vehicles he certified beyond his qualification, nor to the extent he demanded the consumer return to establish he had indeed performed the brake repair. Given this sincere remorse and articulated intention to not so contravene the *Act* in future, this Tribunal is willing to provide the Applicant with a second chance by allowing him to retain his MVIS licence.

The Tribunal finds insufficient evidence of wrongdoing by the Applicant concerning the 1987 Jaguar with the ineffective handbrake and muffler concerns. The fact is that it was parked outside for close to two months between the time the Safety Certificate was issued and the time of the Ministry's inspection.

The Tribunal is not convinced Mr. Bajrami's suitability for license is compromised based on the hearsay evidence of Mr. Brown concerning the Applicant's attitude and behaviour with past landlords. In fact the one landlord specifically admitted he did not fear for his safety and chose not to press charges following his allegations of threatening behaviour on the part of the Applicant. The Tribunal found Mr. Bajrami an honest and open witness. He readily admitted to anger and frustration. He certainly appeared capable of asserting himself where he believed he was being wronged, as occurred when the Ministry Inspector took over an hour to process his traveling with improper lights, or Mr. Brown's attempts to remove his Station's signage. He may well have used colourful language on occasion. These actions are not indicative of an unsuitability or inability to carry on the business of operating a motor vehicle inspection station within the law. The Tribunal has certain sympathy for the circumstances of Mr. Bajrami and is not able to agree with the Director that such evidence supports a conclusion he should be refused the license he seeks.

The Tribunal is, however, concerned with the evidence, readily admitted by the Applicant, of selling used vehicles from his premises. The fact is that Mr. Bajrami has been refused licensing as a motor vehicle dealer. There was also evidence of two convictions last year of curbsiding. This Tribunal has had occasion to consider a similar situation in the decision of *Campbell*, released March, 2004 where Vice-Chair Israel, having found that Campbell, an officer and director of a corporation registered as a Dealer for 6 years and a salesperson for three, had pled guilty to ten counts of curbsiding in contravention of section 3(1)(b) of the *Motor Vehicle Dealers Act*. The Tribunal concluded:

The act of "curbsiding", particularly where the "curbsider" should be familiar with that term or its implications (as would be the case with Campbell due to his having been in the industry) indicates a lack of concern for authority or compliance with the law.

The facts here are somewhat different. There was no evidence presented to this Tribunal as to the circumstances of the conviction, whether Mr. Bajrami pled guilty or was even represented. On the other hand, he readily admitted to having 9 or 10 vehicles on his licensed lot for sale on one occasion. He repeated his right to sell vehicles as a private citizen. In closing he argued there was nothing wrong with his selling vehicles he buys and fixes. All together this evidence strikes the Tribunal as indicative of his being ill-informed as to the extent of his private right to make these sales, rather than a predisposition to act outside the law, honesty and integrity. On the contrary, Mr. Bajrami appears to strongly believe his sales are in compliance with the law. Again the Tribunal is cognizant of his past experience, his recent move to this country and his difficulties in articulating clearly in the language of business - here being English. While Mr. Bajrami would be well advised to seek some expert opinion before continuing this activity, the Tribunal is unable to conclude that his convictions for curbsiding afford reasonable grounds that his motor vehicle inspection station will not be operated in accordance with the law and with integrity and honesty. The Tribunal notes that his recent incorporation will require a clear delineation between his business and personal activity in this regard.

(c) Financial

The Director has also relied on allegations of improper finances to conclude there are reasonable grounds to believe Mr. Bajrami will not operate his business in accordance with the law and with honesty and integrity. The Tribunal disagrees. The evidence relied on by the Director consists of a 2003 decision of the Tribunal which reviewed the financial situation of Mr. Bajrami based on 2002 occurrences. There is no evidence before this Tribunal that these circumstances continue. Further, unlike that Tribunal, this Tribunal has had the benefit of Mr. Bajrami's testimony, which it found credible. In all other instances, and here I refer to the past landlord's allegations and the retail sales tax with Mr. Gilbert, the allegations of improper financial management on Mr. Bajrami's behalf were either refuted or given a reasonable explanation by the Applicant.

Having carefully considered all the evidence, the demeanor and credibility of the Witnesses and examined the intent and purpose of the legislation providing grounds to refuse a license, the Tribunal finds that the Director was not reasonable in concluding the Applicant meets the criteria set out in Section 91 justifying refusal of his license.

ORDER:

The Director is hereby ordered to issue S.B. Motors Ltd its Motor Vehicle Inspection License subject to the following condition:

1. if the Applicant is convicted of curbsiding, or is convicted under the *Criminal Code*, the Registrar is directed to issue a new proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Jane Weary,
Vice-Chair

RELEASED: June 21, 2005

File name: 2758.gar.sbmotors

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.

**SHEILA COLE o/a S & R TRUCK AND TRAILER REPAIR
AND RANDLE COLE**

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

AND IN THE MATTER OF an Appeal by Sheila Cole o/a S & R
Truck and Trailer Repair, and Randle Cole, dated October 12th,
2004, from a Proposal dated September 13th, 2004 by the Director
of Vehicle Inspections Standards pursuant to sections 91(8) (b) and
93 (b) and (c) of the *Highway Traffic Act*;

AND IN THE MATTER OF Motor Vehicle Inspection Station
Licence Number 41-40963 issued to Sheila Cole o/a S & R Truck
and Trailer Repair;

AND IN THE MATTER OF the registration of Motor Vehicle
Inspection Station Mechanic Randle Cole, holding Trade Certificate
number 999a-049351.

TRIBUNAL: JANE WEARY, Vice Chair

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

DOUGLAS CALDWELL, Counsel for the Applicants, Sheila
Cole o/a S & R Truck and Trailer Repair, and Randle Cole

**DATES OF
HEARING:**

March 21 and 22, 2005

Kingston

DECISION AND REASONS

BACKGROUND:

This appeal proceeds 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 licence of Sheila Cole o/a S & R Truck and Trailer Repair (the "Licensee") as a licensed Vehicle Inspection Station as well as Randle Cole's licence as a Motor Vehicle Inspection Mechanic. The Director's decision was communicated to the Applicants by Proposal dated September 13th, 2004. The Licensee filed an Appeal of the Proposal with the Tribunal dated October 6, 2005; Randle Cole (the "Mechanic") filed an Appeal to the Licence Appeal Tribunal (the "Tribunal") dated October 12th, 2005.

Both Applicants were represented by Mr. Caldwell. Further to their request for a Pre-Hearing, held November 19th and December 6th, 2004, the Mechanic abandoned his appeal and surrendered his registration as a Motor Vehicle Inspection Mechanic. The Hearing into this Appeal subsequently is limited to the Proposal to revoke the registration of the Licensee as a licensed Motor Vehicle Inspection Station (MVIS) under the Act.

The Director's Proposal to revoke the registration of the Applicant was based on the grounds that the Applicant had, in regards to eighteen separately enumerated incidents:

issued Safety Certificates and Safety Inspection Stickers where inspections were incompetently performed; and

issued Safety Certificates and Safety Inspection Stickers where inspections were not performed in accordance with the Act and Regulations.

The Applicant agreed to the facts alleged in the Proposal, including all eighteen enumerated incidents. She is of the position that remedial actions taken by her demonstrate her commitment to abide by all requirements in the future operation of her business such that revocation of her licence is unduly harsh. In the alternative, she asks that a short suspension of the licence be considered.

ISSUES:

Should the Proposal of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence of the Licensee be carried out? In the alternative, should the license be suspended for a defined time period?

FACTS as FOUND:

Robert Stickkan, a Ministry of Transport Officer since 1988, gave evidence for the Director. He advised he had been stationed in Port Hope during the Ministry investigation into the Applicant's licensed business as his area of responsibility in enforcing Ministry legislation includes the western portion of the Eastern Region such that the Applicant, located in Quinte West, fell under his jurisdiction.

Mr. Stickkan testified that he has held certification as a motor vehicle mechanic since 1981 and is qualified for both cars as well as trucks.

His investigation into the Applicant's business resulted from three primary sources: consumer complaints; random highway inspections performed by Ministry enforcement officers; and follow-up audits of the licensed business. Mr. Stickkan testified as to each of the Director's grounds for revocation of the Applicant's license and, in doing so, provided the following facts:

Proposal Ground #1:

Safety Standard Certificate #8613579 was issued by the Licensee on March 20th, 1998 for a 1980 Ford with an odometer reading of 69,347 kilometers. The vehicle was inspected by Ministry inspectors on November 25, 1998 and found to have the same odometer reading. Exhibit #4, Tab 12 are notes demonstrating the inspectors findings of an incomplete exhaust and perforated holes leading into the trunk from the undercarriage. Exhibits #s 8 and 9, being conviction records for the Licensee and the Mechanic respectively, demonstrate consequent convictions were entered against the Applicant pursuant to section 90(3)(a) of the *Highway Traffic Act* on February 19th, 1999. The same date the Mechanic was convicted on the same set of facts under section 99(2) of the *Act*.

Both the Licensee and the Mechanic were also charged and convicted with failing to meet Regulations concerning keeping proper tools and keeping proper records.

Proposal Ground #2:

Safety Standard Certificate #8575523 was issued by Sheila Cole on July 13th, 1998 for a 1987 Dodge with an odometer reading of 175, 646 kilometers. Ninety days and 252 kilometers later, the vehicle was inspected by Mr. Stickkan and found to have numerous significant defects including a master cylinder brake leak, broken brake case, cracked brake hose, leaking power steering fluid and rust holes into under body of the vehicle – see his notes Exhibit #4, Tab 13. Resulting convictions were entered on February 19th, 1999 against both the Licensee and the Mechanic under section 90(3)(a) of the *Act*.

Proposal Ground #3:

As a consequence of mechanical defects found during a random inspection undertaken on February 5th, 1999 of a 1984 International truck the owner had the vehicle taken to the Licensee. The Mechanic issued Safety Standard Certificate #9039618 and Sticker # E532046 on February 9th, 1999 after allegedly performing the necessary repairs. A subsequent inspection of the truck, Exhibit #4, Tab 14, revealed the loose u-bolts noted in the original inspection had not been adequately serviced, the rear inner wheel hub spoke was broken and filled with debris, a concern at the time when the Province was experiencing significant safety issues with truck wheels loosening on highways, and continuing evidence of excessive front suspension wear. These observations led to a further charge, and August 20th, 1999 conviction, registered against the Mechanic.

Proposal Ground #4:

On May 31st, 2000, Mr. Stickan noted numerous safety issues during his random roadside inspection of a 1979 dump truck issued with an annual inspection Sticker as required by the *Act* some 23 days earlier by the Licensee. Exhibit #4, Tab 15 include Mr. Stickan's observation of some eleven defects with the truck, including brake hose leaks and bulges, inoperative horn, power steering belt loose and slipping, numerous lights inoperative, rear wheel drum bolts loose enough to turn by hand, rear spring assembly leaf broken and filled with rust. A consequent conviction was registered against the Mechanic under section 90(3)(a) of the *Act* in April, 2001; similar charges against the Licensee were withdrawn.

The Ministry Inspector attended at the Licensee's premises to review her books and records. The Mechanic, who had been delegated the authority to sign for the Licensee, was unable to provide Mr. Stickan with the relevant repair and work orders. The Inspector arranged to re-attend and was advised by the Licensee that she would provide the documentation pursuant to his written request which he furnished. On his third visit to the garage he was furnished with the documentation. It was his evidence that the numbering of the documents were not sequenced chronologically, nor in keeping with each other, suggesting to him that the Licensee's book-keeping may have only been completed at his request.

Mr. Stickan noted that the Mechanic became upset and alleged that he and the station were being "picked on" by the Inspector. Mr. Stickan testified that at the time he was the only Ministry Officer doing inspections in the area. He further noted that, for the two years prior to this time, there had been no Ministry Inspector for the area. The Witness testified that he had a number of concerns with the Mechanic prior to his working under the Licensee, but that all his relevant convictions had only occurred since his employment with her began under her licence first issued in October of 1997.

Proposal Grounds #5 and #6:

Mr. Stickan testified that in the summer of 2000 he had worked with the Quinte police on a “taxi blitz” for Safety Standard Certificates of Quinte area taxis. Ground #5 originates from his consequent inspection of a 1988 Ford taxi. He inspected the vehicle 3 days and 149 kilometers after Certificate #1283930 had been issued by the Mechanic and found the lower coil broken from metal fatigue and the brake line rust corroded – see Exhibit #4, Tab 16.

Ground #6 (Exhibit #4, Tab 17) concerns a 1986 Chevrolet taxi inspected 2 days and 575 kilometers after issuance by the Mechanic of Safety Standard Certificate #1283931. Mr. Stickan found that the left front tire was so seriously worn that its indicators were touching the road; the stabilizer bar was displaced; and, the right ball joint seriously worn. Mr. Cole was convicted in October, 2001 under s.90(3)(a) charges arising from both defects.

Proposal Grounds #7 through to #12:

Mr. Stickan testified that he had been contacted on March 4th, 2003 by an official with the local fire department concerning annual inspection certificates recently issued to a number of the municipal vehicles. The employee had told Mr. Stickan that he had arrived at the station to find the Mechanic’s truck parked outside and new decals on his fire trucks with the debris of the old stickers littered on the floor. Mr. Stickan stated he was concerned with this information as the Regulations under the legislation require that all annual inspections take place at licensed premises. He was further concerned to learn that all 6 fire trucks had been inspected in a one-day period. This conflicted with his experience that adequate inspection took an average 1 1/2 hours per vehicle.

He attended at the fire station nine days later to inspect the fleet. Exhibit #4, Tab 18 notes numerous defects on four vehicles, all of which would be used to respond to fire emergency calls, and all of which would not meet the requirements under the legislation. These issues included: incomplete certificates, inoperable dash lights, faulty brake lines, inadequate brake inspection and evidence of seized calipers.

Both the Licensee and the Mechanic were subsequently charged with six offences under section 90(3)(a) of the *Act*. Prior to trial half were withdrawn, but the Mechanic and the Licensee have, each of them, three convictions each registered on March 11th, 2004 based on these circumstances. It is Mr. Stickan’s information that the municipal council no longer has its emergency fleet vehicles serviced by the Licensee.

Proposal Grounds #13, #14, #16 and #17:

As a result of the above, Mr. Stickan was advised by his Supervisor to conduct further inspections into the operation of the Licensee.

It was his evidence that on April 12th, 2003 he inspected a 1986 Chrysler which had been issued Safety Standard Certificate #4664379 on March 21, 2003 by the Mechanic, signed also by Mr. Cole as the Licensee's delegate. Mr. Stickan noted significant rust on the front bumper area as well as an exhaust hole in the rear of the vehicle. In March of 2004 the Mechanic was convicted with issuing the Certificate when the vehicle was not in compliance with the Regulations contrary to section 90(3)(a) of the *Act*.

Mr. Stickan testified as to the investigation of a Ford commercial vehicle found without a commercial sticker fixed to the vehicle as required under the legislation. On request, the driver was able to produce the sticker, numbered G576023, and advised the vehicle had been issued with the sticker in March of 2003 by the Licensee and her Mechanic. Mr. Cole was subsequently charged and convicted with failing to affix the sticker as he is required to do under the legislation. Mr. Stickan stated the requirement was necessary to ensure uninspected vehicles are not able to get and use such stickers.

On March 20th, 2003 a 1989 Oldsmobile was issued with a Safety Standard Certificate #4664369 by the Licensee through her Mechanic. One kilometer and 22 days later the same vehicle was inspected by the Witness. He testified that he found a major hole in the main gas line of the vehicle such that gas was spraying freely. He also found visible rust perforations including one into the truck area. The Mechanic was consequently charged and convicted of issuing false statements under section 99(2) of the legislation. Charges against the Licensee were withdrawn.

On March 30th, 2004 Randle Cole was also convicted under section 90(3)9a) for a faulty speedometer and cracked frame on a 1987 dump truck for which he had issued Sticker #G576031 on March 21st, 2003. Again, charges against the Licensee had been withdrawn.

No evidence was tendered with regard to the Proposal grounds numbered 15 and 18.

In total, the Mechanic has 15 convictions spanning the years 1999-2005 for contraventions of the *Act* while operating in his capacity as a licensed mechanic to the Licensee. The Applicant herself has seven similar convictions arising out of the same circumstances over the same time frame – see Exhibits 7 and 8.

In March, 2004 Mr. Stickan met with the Mechanic, the Applicant and their lawyer to discuss the issues of non-compliance arising out of the numerous convictions. According to the witness, Ministry legislation, operational manuals, record-keeping procedures and office administration were all canvassed with Mr. Stickan advising that he and other MTO officers were available for consultation if needed.

Despite these efforts Mr. Stickan testified that in August, 2004 the municipality of Brighton requested he inspect one of their dump trucks which had received an annual inspection sticker from the Applicant's service station on July 31st, 2004, signed by the Mechanic in his capacity as delegate for the Licensee – see Exhibit #4, Tab 8.

The inspection revealed the sticker did not include on its face the odometer reading of the vehicle contrary to the *Act*. Further inspection revealed a defective tie rod with implications to the integrity of the steering mechanism, oil saturation on the brake shoes compromising the brake function, and defects with the rear traction control. Mr. Stickan noted that the truck had been infrequently operated for only 14 days since the sticker had been issued leading him to conclude these problems had existed at the time of the issuance of the sticker. He attended at the garage where the Applicant was unable to locate the relevant work orders and invoices. A resulting charge against Robert Spencer, the mechanic, was later withdrawn due to technical error on the Information.

A second investigation in early September concerning a Safety Standard Certificate issued a month earlier by the Applicant, and signed by Randle Cole as the Licensee's delegate, for a 1980 GMC pickup revealed rust caused perforations causing exhaust leaks as well as power steering defects which Mr. Stickan determined had been existent for some time prior – see Exhibit #4, Tab 7. When requested, Ms. Cole again could not find the supporting documentation for the Certificate. It was Mr. Stickan's evidence that no charges were laid in this instance as the Proposal to revoke was already in preparation.

William Haines appeared as a Witness for the Applicant. He has been a licensed mechanic since 1991 and has, in that capacity, worked for his father's licensed service station for a number of years in Oshawa. Mr. Haines has also owned his own licensed station in Brighton. He is currently the licensed mechanic at the Applicant's Station; Mr. Randle Cole having surrendered his license last November.

Mr. Haines testified that Ms. Cole has explained the strict need for careful documentation of all documentation when issuing Safety Certificates or Stickers under the legislation. He testified such demands were more onerous than has been his prior experience in the profession.

Mr. Haines stated that Randle Cole is at the Station daily, but will not be able to influence him to neglect the procedures Ms Cole has stressed are now necessary. Mr. Cole advises him as to parts availability and scheduling, but he has no responsibility for the mechanical aspects of any inspections. Mr. Cole no longer has signing authority for the MVIS; Ms. Cole having given this to Mr. Haines exclusively. Mr. Haines advised that he sees Ms. Cole daily in the morning when she comes into the Station before going to her job.

It was the witness' evidence that he had not notified the Ministry of closing up his Station as he had believed this was only required were there Certificates or Stickers unused which needed to be returned. This had not been the case.

He advised that he had contacted Mr. Cole for a position with the Applicant's Station last fall, but had been told there was no such need.

In February of this year Mr. Cole had called to see if he was still interested whereupon he had an extensive interview with Ms Cole and started work soon after. He had spent a full day last week with a Mr. Fred Laughlin who had attended at the Station for training purposes.

Mr. Frederick Laughlin gave evidence that he currently operated his own consulting business but had been employed by the Ministry of Transport for twenty-six years as an enforcement officer and driver examiner. He is certified under the Ministry as a critical defect inspector. Mr. Laughlin has held Class S and T Mechanic certification since 1965 and has extensive experience and qualification in vehicle maintenance and operation as well as audit training with the Ministry.

On March 17th of this year he attended at the Licensee's MVIS where he observed the mechanic, Mr. Haines, perform a safety standard certificate inspection on a minivan, tractor and three axle trailer. After, he and the mechanic discussed the Ministry's legislative requirements. Mr. Laughlin stated that Randle Cole had been present and was included in the discussions where Mr. Laughlin had been impressed with the extent of his knowledge. The witness testified that the Mr. Haines had done a competent job of the inspections such that he had no concern the legislative requirements were not being met. Mr. Laughlin's only suggestion had been that the MVIS might consider updating one particular diagnostic tool. He had offered to re-attend at anytime his assistance might be required.

In cross examination Mr. Laughlin stated that the Applicant's Counsel had called to request he attend for the observation some 2-3 weeks prior to his attendance. His purpose was to observe the mechanic perform the work required and he did not inspect or discuss the book-keeping or MVIS records. He advised that Ms. Cole did not participate in the training.

Sheila Cole testified that she has been employed as a Case Worker for Hastings Social Services for seven years. Before that she was with the Ministry of Social Services for eleven years.

Ms. Cole testified that she had taken on sole proprietorship of the licensed MVIS as she was able to get financial backing to start up the business. Mr. Cole had the extensive training, experience and skills in the mechanics required. He had worked as a mechanic for many years with other people at the same location. Mr. Cole has had his certification since 1966 and brought all the equipment as well as many clients to the new business which they began to operate under Ministry license in late 1997.

The Applicant admitted the previous convictions and gave extensive evidence concerning her efforts to ensure such did not re-occur. Ms. Cole stated that she calls into the MVIS at infrequent intervals such that the employees are becoming tired of her calling; she spent the majority of her recent holiday time at the garage so that she could follow-up on paperwork.

She testified that she has taken the advice of her Counsel and Mr. Stickan at their meeting together last March and has correlated all Work Order numbers to Certificates and Invoices. Ms. Cole made reference to Exhibit #3 being her Notice of Appeal pages 3 and 4 being the new and extensive Work Order she has created to replace the earlier Work Order (page 2) used by her MVIS. She testified that she has two different Inspection Books now kept at the shop; one of which contains a photocopy of each Safety Standard Certificate issued; the other a photocopy of each commercial Sticker.

Ms. Cole allowed that Mr. Cole does do some of the customer billing, but has been instructed by her to closely follow the new paper requirements and cross-referencing system.

The Applicant noted that she released her husband from his mechanic position with the MVIS last June. It was an extremely difficult decision which strained the marriage. As a result, Mr. Spencer and now Mr. Haines, was hired. Mr. Cole remained the delegated signing authority in part to ensure his dignity was kept intact; in part because it was not her impression from discussions with Mr. Stickan that such was inadvisable. After the December pre-hearing into this matter, Mr. Cole was removed as signing authority on her lawyer's advice and now Ms. Cole and Mr. Haines share this responsibility.

Ms. Cole concluded that the only incident since cleaning up the office procedures occurred under Mr. Spencer's time as a mechanic with the Brighton dump truck. The fact that no paperwork was ever found was extremely upsetting to her. It led to the resignation of Mr. Spencer and eventual employment of Mr. Haines. She testified that she is actively involved on a daily basis in the running of the MVIS, trusts Mr. Haines ability to follow her directions and believes her husband will follow her instructions as to authorization over Ministry Certificates. Ms. Cole concluded she has chosen to keep the business, at great stress to her marriage, and has learnt the importance of the paperwork and its relevance to public safety.

In cross examination Ms. Cole admitted that she had been charged and convicted with failure to keep required records back in 1999 but still, in 2004, agreed that there were more than two instances where she had been unable to locate paperwork requested by Mr. Stickan concerning investigations into her MVIS issuing Ministry safety certificates. Ms. Cole explained that she had been extremely upset with Robert Spencer concerning the lack of documentation in the 2004 incidents for the Certificates issued for the Brighton dump truck and the 1980 pickup. However, despite the fact that Mr. Cole had signed both documents as her delegate, she allowed him to continue to exercise this authority until her Counsel suggested otherwise at the end of that year because she "...was not concerned (because) the Ministry had advised her anyone could sign as her delegate." When asked by Mr. Moore if she wasn't concerned about Mr. Cole's past record, the Applicant responded that she: "Had never thought of it like that." Ms. Cole added that she eventually had him removed because "...the Ministry didn't want him", but that she "...personally thought there was no harm in it."

She allowed that she had not, regardless of her 1999 conviction for improper record keeping, made attempts to improve her business' record keeping or administration until advised to do so by Mr. Stickan in March 2004 which, in turn, had led to the improved records illustrated in Exhibit 3. Ms. Cole admitted however, that the form she supplied as evidence of new and improved record keeping was not properly completed and included missing data important for follow-up purposes concerning the brakes on the vehicle. Her reasoning was that Mr. Spencer, the mechanic responsible for completing the form, kept using the old forms although informed that the new ones were required.

The Applicant advised that she has initiated improvements in the day-to-day running of the business although she allowed that she remained in Hastings most of the day whilst her husband, Randle, remains at the MVIS.

Ms. Cole did not admit that Mr. Laughlin had only been contracted to observe inspections undertaken by her garage in order to meet allegations against her at this Hearing. She explained the one-year delay from Mr. Stickan's advice last March, was a result of busy timetables.

THE LAW:

Highway Traffic Act section 91(1), and 91(8) (b) and (e), and 95 (1)(c) and (g) and (4). The Act's Regulation O Reg 601 section 4(1)(c) and 4(2). Also sections 5 (d) and 10.

DECISION AND ORDER:

The evidence presented and facts admitted demonstrate that the Licensee has, beginning a few months after first being issued her license under the *Act*, numerous convictions for contraventions of safety standards and licensing conditions set out in the *Act*. The evidence also demonstrates that, despite these on-going and repetitive convictions, the Applicant continued to maintain what were demonstrably insufficient and inadequate administrative procedures in operation at her licensed business. She also continued to authorize an individual with repetitive convictions for improper and illegal activities under the legislation to act as her delegate for signing purposes.

Ms. Cole under cross examination did not appear to understand the significance of her on-going confidence in her husband's integrity to act within the confines of the legislation in issuing safety certificates on her behalf. She "...didn't see the harm in it" despite her licensed business having more than a half dozen convictions – over its 6 years of operation - as a direct result of his actions. Indeed, Ms. Cole admitted that she only removed her husband as an authorized delegate after being advised to do so by her Counsel.

The Tribunal further notes that the Applicant continues to defer to the expertise and mechanical knowledge which she insists Mr. Cole brings to the Station.

Ms. Cole and Mr. Haines both testified that Mr. Cole would not influence them to act improperly when it came to the signing of safety certificates and yet, at the same time, both testified as to their deference to Mr. Cole's mechanical knowledge and expertise. Added to this is the fact that, notwithstanding his on-going chronic inability to properly perform inspections and issue safety certificates in the past, the Applicant maintains Mr. Cole at the business on a fulltime basis whilst she is present for a few moments only in the early morning given her fulltime employment elsewhere. She has in the last month hired Mr. Haines, a mechanic junior to Mr. Cole and contacted by Mr. Cole for the position. Such facts do not demonstrate an adequate attempt on the part of the Licensee to ensure future compliance.

The evidence before the Tribunal establishes eighteen inspections carried out over the 6 years of licence - all of which resulted in findings of defects. This is an extraordinarily high number and amply justifies concern for the Applicant's ability to meet concerns of public safety from which the Act's licensing provisions stem. The Director has noted further the nature of the violations, including as they do public transport vehicles, emergency response vehicles and defects involving loose hoses, gas leaks, exhaust leaks and loosened wheel bolts – a number of which entered Ms. Cole's Station with the same serious concerns with which they later exited, falsely said to have been corrected.

The Tribunal notes its 2004 decision: Brent J. Campbell dba Brain's Auto Centre and Sales where Vice Chair McIntosh noted:

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 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.

In the decision the Applicant was both the Mechanic as well as the Licensee and suggested that revocation of the mechanic licence should be sufficient to satisfy the Director. Vice-Chair McIntosh concluded such *"seemed a most inappropriate resolution from a consumer protection viewpoint as it would still result in Mr. Campbell's defacto involvement in the issuance of "vehicle inspection stickers", and as consumer protection is the guiding force behind the legislation the submission must be respectively viewed as sticks without straw."*

The Tribunal accepts that public safety is the rationale behind the legislation and, to this end, the Director and, ultimately the Tribunal, share a responsibility to the public in the licensing of individuals to perform inspections and provide the subsequent safety stickers and certificates. As with the *Campbell* decision, it is clear to this Tribunal that the facts here establish the Applicant has demonstrated ample reason for the revocation of her licence.

This is seen not only in terms of her past convictions, but also in her on-going reliance on Mr. Cole in the operation of the business, in the face of his continuous inability to abide by the protective requirements set out under the *Act*, no less than her inadequate records exhibited as examples of improved record keeping; her last minute hiring of a consultant.

Most significantly however, the Tribunal notes that she neglected to introduce any changes in administration or personnel despite numerous convictions over the years and clear evidence of shoddy and inadequate inspections. Indeed, the evidence clearly establishes no action to improve or change was initiated until the Proposal was issued, in other words, until her license was threatened. It is hard to conclude from this that the Licensee is truly motivated to improve by her concern for public safety. Rather, her motivation would appear to arise from the threat of losing her husband's work.

The decision of the Tribunal in 2001 of Don Fournier Service Centre Inc and Donald Fournier was referenced by the Director as a case similar in facts, albeit Mr. Fournier had been convicted of less charges under the *Act* than had either the Applicant or Mr. Cole here.. Nonetheless the Tribunal found that, by issuing inaccurate safety certificates Mr. Fournier *"...acted in a manner that defeats the integrity of the MVIS system and misled the public. This compromised the very essence of the system for which the Applicants were licensed and registered."*

As regards the request by the Applicant for consideration of terms and conditions whereby the licensee would be subject to continuous monitoring by the Ministry, the Fournier decision rejected a similar request on the grounds that: *"It would be inappropriate for the public purse to continually monitor Applicants who have already demonstrated a total lack of respect for the obligations imposed by law on a licensee and a registrant."*

The Tribunal is in complete accordance with the sentiments above as to the impropriety of placing a condition which would require the expenditure of greater public funds than currently occurs in order to allow Ms. Cole what is, in effect, a "second chance" of license. The privileged attached to licensing must have meaning beyond that of a learning experience. The public should not be required to pay for ongoing inadequacies of any one particular licensee. Ms. Cole has had her chance. In fact, she has been given numerous chances. The evidence of which demonstrated numerous opportunities for reform over the years of her operation of the business.

No other potential conditions were suggested by the Applicant such that I need not determine whether the Tribunal has jurisdiction to reject the Director's Proposal to Revoke and issue terms and conditions instead.

The Applicant submitted that she has presented *"independent, credible evidence to establish that (she) has in fact changed (her) practice of inspection and issuance of safety certificates."* – see the Tribunal's position concerning the possibility of a "second chance" registration as expressed by Vice-Chair Turk in the 2004 decision of 1146775

Ontario Inc. (c.o.b. Gary's Auto Repair). The fact that her Work Orders as presented into evidence support her admission that she has not received compliance by staff in the filling out of her newly formatted Work Orders as well as the continued daily presence of Mr. Cole at the Station belie other apparent efforts by Ms. Cole to truly ensure proper issuance by her facility of such certificates.

From the evidence and testimony presented this Tribunal is not convinced the Applicant truly understands the significance of her being licensed; the important public safety nature of what she is licensed to issue; the impact of Mr. Cole's continued presence in terms of integrity of her license; nor, her own role as licensee.

As regards the submission that the Tribunal should issue a suspension of her license, the Tribunal finds that section 95(4) of the *Act* clearly specifies the extent of the Tribunal's jurisdiction over the Director. This jurisdiction is limited to acting in place of the Director *in accordance with this Act and the regulations*. Under section 95(1) (a) to (c) the Director's authority is limited to the defined actions of refusing to issue or renew; refusing to make, and revoking a licence or registration. There is no authority given the Director to suspend a license or registration for any particular time period. As a consequence, the Tribunal has no authority to itself issue such a suspension.

For all these reasons, Sheila Cole's appeal is rejected. And the Director's Proposal to revoke her license is upheld.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

Released: April 28, 2005

File name: 2644.gar.Sheila Cole.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

S.B. MOTORS LIMITED

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE

TRIBUNAL: IRVIN H. SHERMAN Q.C., VICE-CHAIR

APPEARANCES: PETER MILLER, Counsel, representing the Applicant

MURRAY G. FORBES, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: March 23, 2005

Toronto

ORDER

Following attendances on March 23, 2005 at a pre-hearing before this Tribunal of Peter Miller, Counsel appearing on behalf of S.B. Motors Limited (the "Applicant"), and Murray G. Forbes, Counsel appearing on behalf of the Director of Vehicle Inspection Standards (the "Director");

1. It is ordered that the hearing of this appeal be scheduled for May 20, 2005, commencing at 10:00 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C.,
Vice-Chair

Released: April 26, 2005

File name: 2758.gar.SB_Motors.prehrg.doc



MOTION HEARING

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

APPEARANCES: AHMAD A. KHAN, Agent for the Applicant
AZAM KHAN, the Applicant

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

NAZLI BUHARY, Student-at-Law, representing John
Tomasone
as to the first issue only

DATE OF
MOTION
HEARING

April 15, 2005

Toronto

REASONS FOR DECISION

These are the reasons for decision on a motion brought by the Respondent (a) for an order prohibiting the Applicant from using the transcript of the examination for discovery of John Tomasone, an inspection officer, at the hearing of the Applicant's appeal and (b) for an order to refuse to issue a summons requiring the attendance of Peter Hurst, the Director of Vehicle Inspection Standards (the "Director") at the hearing.

BACKGROUND

By Notice dated November 17, 2004, the Director, acting pursuant to paragraph 91(3)(a) of the Highway Traffic Act (the Act) refused to issue a Motor Vehicle Inspection Station licence to the Applicant on the grounds that the Applicant's past conduct afforded reasonable grounds to believe that the Applicant will not act in accordance with law and with honesty and integrity because (a) the Applicant violated the provisions of the Act in the issuance of safety standard certificates and vehicle inspection certificates in seven enumerated cases as determined by the former Licence Suspension Appeal Board in its decision dated September 8, 1998 and (b) because the Applicant shares space with Ahmad Khan, a person who has been found to have violated the Act on several occasions with respect to safety standards certificates. Ahmad Khan was refused admission as a registered mechanic on September 24, 1997 and on December 24, 1997 and (c) because the Applicant was convicted of having permitted the use of a dealer and service number plate not authorized for a vehicle on May 25, 2004.

The Director, acting under paragraphs 92(4)(a) and (b) of the Act, also refused to register the Applicant as a motor vehicle inspection station mechanic because the Applicant's past conduct afforded the Director with reasonable grounds for belief that the Applicant would not act in accordance with the law and with honesty and integrity and that the Applicant is not competent to act as a motor vehicle inspection mechanic. The Director cited incidents (a) and (c) in the preceding paragraph in support of his reasonable grounds of belief.

On December 3, 2004, the Applicant availed himself of his statutory right to appeal the Director's Proposal to the Licence Appeal Tribunal (the "Tribunal").

A pre-hearing conference took place on March 1, 2005, before Vice-Chair Weary, who *inter alia*, directed that the hearing of this motion be heard on April 15, 2005.

Ahmad Khan is the Applicant's father. He acted for agent for the Applicant at this motion hearing.

Ahmad Khan and the Applicant have sued John Tomasone in separate actions in the Superior Court of Ontario in Brampton. Mr. Tomasone was examined for discovery during the currency of this litigation. The Applicant now wishes to introduce a copy of the transcript of the Tomasone discovery at his hearing.

The Applicant has further advised that it is his intention to obtain a summons from the Tribunal in order to secure the attendance of the Director at his appeal.

ISSUE ONE

DEEMED UNDERTAKING RULE

The Respondent seeks an order from the Tribunal prohibiting the disclosure of the

Tomasone discovery transcript at the hearing because the disclosure of this transcript would be violative of the deemed undertaking rule. The Applicant was so advised by Mr. Tomasone's solicitors by letter to him dated February 28, 2005.

It has been the law since the *Goodman v. Rossi* case (1995), 24 O.R. (3d) 359 (C.A.) was decided by the Court of Appeal that the deemed undertaking rule should be recognized in Ontario. Under this rule, a party who obtains a document from the other party under the discovery process is subject to an implied undertaking not to use the document for a collateral or ulterior purpose without either obtaining the consent of the other party or the leave of the court. The undertaking given the party is to the Court. Deliberate breach of that undertaking may constitute contempt of court and may subject the party in breach to other remedies. *Logan v. Harper* (2005), 72 O.R. (3d) 706

In the *Goodman* case, supra, Associate Chief Justice Morden, writing for a unanimous court, thought that it would be preferable if the deemed undertaking rule formed part of the discovery rules in the Rules of Civil Procedure. The rule was in fact incorporated into the Rules of Civil Procedure in 1996.

Under Rule 30.1.01 (a) the deemed undertaking rule applies to evidence obtained at an examination for discovery. Under Rule 30.1.01 (3) all parties and their counsel are deemed to undertake not to use evidence or information to which the rule applies for any purpose other than those of the proceeding in which the evidence was obtained. The court has an overriding discretion as to the application of the deemed undertaking rule. This is found in Rule 30.1.01 (8), which provides:

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that sub rule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

The Applicant has submitted that it is in the interest of justice and fairness that the Tomasone discovery transcript be introduced into evidence at the hearing because this evidence would be relevant to the issues before the Tribunal. Either the Respondent or Mr. Tomasone should seek the order of court under Rule 30.1.01 (8).

Nazli Buhary, student-at-law, appearing on behalf of John Tomasone, concurred with the Respondent's submissions on the applicability of the deemed undertaking rule to this case. Ms Buhary stated that the rule applies unless and until the court orders otherwise. It is the Applicant who must seek the court order permitting disclosure of the Tomasone discovery transcript at the hearing.

The Tribunal agrees with the submissions made by counsel for the Respondent and Mr. Tomasone on this issue. The Applicant has sued Mr. Tomasone in Superior Court and now wishes to use a copy of the Tomasone discovery transcript at this hearing. The Tribunal holds that the deemed undertaking rule applies in this case. Mr. Tomasone has not consented to the use of his discovery transcript for a collateral purpose, namely for use at Applicant's appeal hearing. The Superior Court litigation and the hearing are

separate matters involving different issues. The Tomasone discovery transcript is not permitted to be received into evidence at the hearing until the Court orders its reception at the hearing. If the Applicant wishes to introduce this transcript at his hearing, then he must obtain a court order to do so.

ISSUE TWO

DELIBERATIVE SECRECY

At the pre-hearing conference the Applicant indicated his intention of obtaining a summons from the Tribunal in order to secure the attendance of the Director at his hearing. Assumedly the Director would be examined in chief by the Applicant at the hearing. The Director's counsel wrote to the Applicant's agent on two occasions requesting reasons why the Applicant intended to call the Director as a witness. The agent did not provide the counsel with his reasons for intending to call the Director. He stated that he would address the issue of the director's compellability to give evidence at the motion hearing. The agent did not file a motion record and therefore offered no evidence as to why he wished to compel the attendance of the Director at the hearing.

The Director, through his counsel, admitted that the Director is a competent witness but not a compellable one. The Director's giving evidence at the hearing would violate the principle of deliberative secrecy. There is no right in law to examine a tribunal member or senior tribunal official privy to the decision making process unless the party proposing to call the witness presents some basis for a clearly articulated and objectively reasonable concern that a relevant legal right, such as the right to a fair hearing, may have been infringed. *Agnew v. Ontario Assn. of Architects* (1988), 64 O.R. (2d) 8 (Divisional Court) *Payne v. Ontario Human Rights Commission* (2000), 192 D.L.R. (4th) 316 (Ont. C. A.) *Tremblay v Quebec (Commission des Affaires Sociales)* [1992] 1 S.C.R. 952.

The Director also submitted that the Director is a Tribunal under section 1 of the *Statutory Powers Procedure Act* R.S.O. 1990 c.S.22, which refers to one or more persons, incorporated or however described upon whom a statutory power of decision is conferred. The principle of deliberative secrecy must therefore apply to the decisions made by the Director.

The Director has provided the Applicant with the Notice of Proposal (the decision from which the appeal is derived) which is a comprehensive document stating with particularity the facts upon which the Director had reasonable grounds to believe that the Applicant would be volatile of the Act were he given the licences he seeks.

In response to a question put to him by the Tribunal, the Director's counsel submitted that the most appropriate time to address the issue of the Director's compellability to give evidence at the hearing was at this motion hearing.

The Applicant submitted that it is in the interest of justice and fair play that that Director be compelled to give evidence at the hearing. The Director is both a competent and compellable witness. The Director is not a tribunal. He is neither a judge, a justice of the peace nor a lawyer who are covered under the doctrine of deliberative secrecy. The Director must therefore give evidence at the hearing.

At this hearing the Respondent has been asked to respond to something that he may or may not do. Tribunals, like courts, do not adjudicate upon speculation. There must be an evidentiary base for a tribunal or court to adjudicate. It is premature for the Tribunal to adjudicate upon the issue of the Director's compellability as a witness. The Applicant must first apply to the Tribunal for a summons. While there are no written standards found in the Tribunal's Rules of Procedure relating to the issuance of a summons, the Tribunal may, in the exercise of its discretion, issue a summons to a witness who has knowledge of the issues before the Tribunal and whose evidence would be necessary and relevant to the matter before the Tribunal. A party to the hearing may challenge the decision regarding the issuance of a summons only after the Tribunal has decided whether or not to issue the summons.

The Tribunal therefore dismisses the Respondent's motion for an order refusing to issue a summons to the Director as being premature without prejudice to the right of the Respondent to challenge this issue further should the Applicant apply to the Tribunal at some future date for a summons to be issued to the Director.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C. Vice-Chair

RELEASED: April 21, 2005
FILE NAME: 2707. gar. khan.

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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2921-MVIA-Consent Order

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order #5500320 OWNED BY: the Applicant made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: April 4, 2005.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 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 Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 25, 2005

FILE NAME: 2921.mvia.consent.doc

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

THE APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. On April 4, 2005, the motor vehicle described in Order to Impound #5500320 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, R.S.O. 1990, c. H. 8 as amended.
2. The Applicant is the owner of the said vehicle.
3. The Applicant filed an appeal of the Order to Impound, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
4. Having investigated this matter and receiving the appropriate information from the police service, the Registrar is satisfied that the motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.
5. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or Consent Orders.

JOINT SUBMISSION

Accordingly, the parties consent to an Order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the Order to Impound.

The Applicant

**Authorized Delegate for
Registrar of Motor Vehicles**

(signature of Applicant)

(signature of Respondent)

(date)

(date)

2894-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: APPLICANT, unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 25, 2005

DECISION RELEASED: April 29, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 25, 2005, 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:	1989 GMC SIE, (the “vehicle”)
Date of Appeal:	April 7, 2005

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 25, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I (name of Applicant deleted) am appealing this on the grounds that I and my wife (name of Applicant's wife deleted) are in a real bad bind without my vehicle. My wife is handicap with a cane and myself I am a Diabetic with Heart problems and other Health issues. We have a hard time getting around as it is. We are both elderly and have a lot of Medical Appts, to attend. Our children live out of town, them & their spouses work full time as well. They can't be here to help. We also live in a residencial area where our own neighbours are elderly as well. With this matter in hand we have no way to get anywhere. We both have Wheel Chair Permits in the vehicle which we cannot gain access to either. I am pleading with the board to please understand our possition. Our Vehicle Permit no's are (Applicant's wife's name and vehicle number deleted) and mine is (Applicant's vehicle number deleted).¹

(sic)

The Applicant was affirmed and gave the following testimony. He confirmed that his vehicle was impounded and that the driver of the vehicle at the time of the impoundment was his grandson who was driving while his licence was suspended. The Applicant stated that he was not feeling well that day nor was he thinking clearly due to his medication. He testified he knew his grandson's licence was under suspension but he needed him to go to the grocery store.

The Applicant testified that both he and his wife have numerous medical problems. He stated their children live outside of town and they have a busy schedule. He continued stating they are not able to help out but the grandson is available to assist him, as he is not working at the present time.

The Applicant testified that he lives in a central area of town and since the impoundment of his vehicle when he needs something he either walks or calls on a neighbour for transportation. He stated they have driven him and his wife to appointments. He testified that he has very willing neighbours but he does not want to bother them and it is his opinion this is a private matter and he prefers to keep it that way.

On cross-examination the Applicant testified that there is public transportation including bus, taxi, handicap-van and 911 services available where he lives. He stated that although he has not used these services neither he nor his wife have missed any medical appointments and did not feel any threat to his health or safety. Yet he testified he finds this situation stressful.

The Applicant called his daughter as a witness. She was sworn and testified that her mother and father have very willing to help neighbours who will drive them during this time even though it is difficult and inconvenient for all involved. She confirmed that her brother and sister live out of town and can't help as much as they would like.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

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 Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until March 29, 2007.(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 Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d) of the HTA. Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if, in fact, exceptional hardship will result from the impoundment.

In order for the Applicant's claim to be considered under Section 22(2)(a), (b) and (c) of the Regulation, the Applicant must have demonstrated that all of Section 22(3) has been met. Furthermore Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered regarding an alternative vehicle.

The Applicant in his testimony stated that he has neighbors who drive him and /or his wife to appointments. Although he does not like to bother them when he asks they are willing. This was confirmed by his witness, his daughter. The Applicant in his testimony stated there were other means of transportation available but he had not inquire into them.

The Tribunal finds as a fact on the basis of the testimony of the Applicant that he has alternatives to his impounded vehicle, notably his neighbour's willingness to drive him where he needs to go, provided he ask. Also the Tribunal finds the Applicant did not demonstrate that every reasonable option had been considered regarding any alternative vehicle.

After considering all of the evidence, the Tribunal finds that the Applicant has not met the onus under subsection 22 (3)(a) of the Regulation and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection 22(2) of the Regulation.

The Applicant will therefore be liable for the additional costs of the impoundment. Therefore, the Applicant's appeal is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Member

RELEASED: April 29, 2005

FILE NAME: 2894.mvia.exhp



2889-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: APPLICANT, unrepresented

KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 25, 2005

DECISION RELEASED: April 28, 2005

Toronto

REASONS FOR DECISION

A hearing was held on April 25, 2005, 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:	2004 Pontiac Grand Am, (the “vehicle”)
Date of Appeal:	April 5, 2005

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 25, 2005 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I am a twenty-year-old woman with 2 small children, my son is one year old and my daughter is 2 and a half years old.

My daughter is anemic and requires several doctors appointments at our family doctor and her paediatrician, which are both in Orangeville approximately 10 miles away. She also has to get blood work done on a regular basis at the Medical Building in Orangeville.

We live in the country approximately 2 miles from the closest town of Erin. Without my car even grocery shopping will be a chore.

My fiancé depends on me for transportation leaving home at 5AM and going to Orangeville where he meets his ride to work in Tottenham. He works shift work so that means I also have to pick him up at 1:30 in the morning in Orangeville. Working these shifts makes it VERY hard to depend on friends and family for an extended amount of time.

I also work and being without a car could jeopardize BOTH of our jobs and then we would have no recourse other than to apply for welfare. This is something that I would really hate to have to do.

Please feel free to call me. (Applicant's phone number deleted)¹

(sic)

The Applicant was sworn and gave the following testimony. She confirmed that the vehicle was impounded and that the driver at the time of the impoundment was her fiancé who was driving while his licence was suspended. She testified that she was aware his licence was previously suspended but she thought he had received it back. She stated she did not know it was suspended for life until she received the package of documents from the Registrar.

The Applicant testified that she requires her vehicle to drive her fiancé to catch his ride to work. She continued stating she needs it to drive herself to work on the weekends. In addition she testified that she needs her vehicle to drive her daughter, who has some medical concerns to doctor appointments as well as picking up groceries and prescriptions when required. The Applicant testified that she lives two miles from a small village and ten miles to the doctor and the hospital.

The Applicant in her testimony stated that her grandfather is presently driving her fiancé to and from work, even though his schedule is either early in the morning or if on afternoon shift they do not return until around 1:00 a.m. She continued stating that although her grandfather is retired, these hours are very difficult for him. The Applicant testified that on occasion her mother or the mother of her fiancé has driven them to their ride or work. When asked by the Respondent how she gets back and forth to her weekend place of employment the Applicant testified that her grandfather helps out.

The Applicant on cross-examination testified that she owed a lot of money to various people and institutions but agreed with the Respondent when it was stated this concern was there before the impoundment occurred.

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

The Applicant did not call any witnesses.

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 Driving with More Than 80 MGS in Blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life, (Exhibit # 3).

The respondent did not call any witnesses.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 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 of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

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

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d) of the HTA. Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if, in fact, exceptional hardship will result from the impoundment.

In order for the Applicant's claim to be considered under Section 22 (2)(a), (b) and (c) of the Regulation the Applicant must have demonstrated that all of Section 22(3) has been met. Furthermore Section 22 (4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered regarding an alternative vehicle.

The Applicant in her testimony stated that her grandfather drives her fiancé to and from his ride to work. In addition her grandfather drives her to any medical appointments and to her weekend place of employment. He has had some relief, on rare occasions, when either her mother or the mother of her fiancé has driven them to the required destination. As a result neither her fiancé nor her have missed work and she has been able to make any medical appointments for her children.

The Tribunal finds as a fact on the basis of the testimony of the Applicant that she has alternatives to her impounded vehicle notably her grandfather's generosity to drive both her and her fiancé to and from work. In addition, thanks again to family members she has not missed any medical appointments as a result of this impoundment.

Although the Tribunal is sympathetic toward the Applicant's situation and the resulting additional responsibilities of the grandfather, the Applicant has an alternative to the impounded vehicle. Thus the Tribunal cannot consider the grounds as set out in subsection 22 (2).

The Applicant has the onus, on the balance of probabilities, to prove her case. For the reasons given above, this Tribunal concludes that the Applicant in this case has not done so.

The Applicant will therefore be liable for the additional costs of the impoundment.
Therefore the Applicant's appeal is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Member

RELEASED: April 28, 2005

FILE NAME: 2889.mvia.exhp



2888-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: APPLICANT, unrepresented

KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 25, 2005

DECISION RELEASED: April 29, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 25, 2005, 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:	1991 Honda Civic, (the “vehicle”)
Date of Appeal:	April 5, 2005

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 25, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I, <name of Applicant deleted>, understand that choosing my option to Appeal my Vehicle Impoundment due to Hardship, is only allowed once per vehicle owner. I understand I made a wrong decision, without having a full understanding of the consequences.

I, <name of Applicant deleted>, am requesting an Oral hearing due to exceptional hardship. My reason for my decision is based on the facts that both of my jobs rely on the use of my vehicle. I have enclosed 2 letters, both from the companies I have been working with for the past 2 years. Both jobs require me to drive on a daily basis. I am a District Carrier Representative for <name of business deleted>, which my job requires me to be prepared to visit with clients, customers, carriers, and parents. I am also required to do visuals on "problem areas" within my District, as well as deliver papers routes if need be. My other occupation is working for another newspaper, <name of business deleted>. With this position I am required to drive a total of 100+ kilometres per day, to ensure customers receive their subscribed copy of the newspaper, in a certain time frame, 9am-12pm. Without a vehicle I am unable to complete my daily job functions, and fear it may result in termination if I do not try to resolve the predicament I have found myself to be in.

My third and main reason for requesting an Appeal is based solely on the facts that I am a single mother, and I reside in a rural area, where there is no access to any facilities if need be. I live approx 20minutes from hospitals, clinics, grocery stores etc.

I would like to explain the reason for my actions. I allowed <name of driver at time of impoundment deleted> to have use of my vehicle to drive to his house, which is 8km away from where I reside. The reason why <name of driver at time of impoundment deleted> needed to go to his family's house is because he needed to tend to his parents who had been calling that particular evening and I had been on flu/cold medications and sick in bed at the time(s) of calls. Knowing that <name of driver at time of impoundment deleted>'s parents are in their late 60's early 70's and that <name of driver at time of impoundment deleted> is their only child, it left me in an awkward situation where I wanted to make sure that everything was alright, knowing that <name of driver at time of impoundment deleted>'s father is ill and <name of driver at time of impoundment deleted>'s mother is diabetic. Therefore, knowing that <name of driver at time of impoundment deleted> had not consumed any alcohol and had guaranteed it was a "there and back" situation I allowed <name of driver at time of impoundment deleted> use of my vehicle as I was unable to drive myself due to the effects of the medication I was on. <name of driver at time of impoundment deleted> left my house at approx. 10:00pm on March 26, 2005, and the time of Incident, which occurred approx 1km. From where I reside was 10:24pm, as shown on my Notice to Registrar.

Please accept this Appeal for your consideration and my apologies for the occurrence of this incident.¹

(sic)

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

The Applicant gave sworn testimony that her vehicle was impounded and that the driver of the vehicle at the time of the impoundment was her friend who was driving while his licence was suspended. She stated that she knew his licence was suspended about a year ago but she did not know the outcome of his charges. She testified that earlier in the evening she was ill and had taken medication and thought she should not drive. She continued, stating that she allowed her friend to drive her vehicle to go to visit his parents who were ill and had been calling him for assistance.

The Applicant explained her two reference letters and the hours she works at each of them. She testified that she works for her mother and needs her vehicle to deliver papers to customers. She testified that since the impoundment she has been getting people to cover for her and that her sister has assisted her by covering her route and also delivers papers in her own route as well. She stated her sister's route requires her to drive in excess of 100kms and that the additional route is too much. The Applicant testified that her father has also used his vehicle to assist her on her route.

The Applicant, during the cross-examination, stated that she has two carrier assistants at her other job but they have a heavy workload and they do what they can to help her. The Applicant testified that she fears the assistants will become frustrated with her because she can't complete her work.

The Applicant testified that the driver has tried to help her by purchasing another vehicle but she thought it was not roadworthy and he returned it for a refund. She stated that the funds from the refund were spent to cover gasoline and other family expenses.

The Applicant testified her grandmother has a vehicle and allows her to use it on occasion. Since she lives on her own she prefers her vehicle to be in her driveway for personal reasons.

The Applicant stated that she lives in the country and requires her vehicle to take care of her son on short notice.

The Applicant did not call any witnesses.

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 Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until June 14, 2005.(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 Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d) of the HTA. Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if, in fact, exceptional hardship will result from the impoundment.

In order for the Applicant's claim to be considered under subsection 22(2) of the Regulation, the Applicant must have demonstrated that all of subsection 22(3) has been met, that is to say no alternative to the impounded vehicle is available. Further more, subsection 22(4) of the Regulation provides that every reasonable option has been considered regarding any alternative vehicle.

The Applicant in her testimony stated that her sister has covered her route. Also she testified that her father, even though it is a struggle, sometimes has used his vehicle to assist her. She stated that she has used her grandmother's vehicle. The Applicant also testified that her co-workers have assisted her attend to some of her duties that may require a vehicle.

Although the Applicant testified that she needed her vehicle to provide care for her son she did not identify any special need requirements.

The Tribunal finds as a fact on the basis of the testimony of the Applicant that she has, even though difficult and inconvenient, alternatives to her impounded vehicle.

After considering all of the evidence, the Tribunal finds that the Applicant has not met the onus under subsection 22(3)(a) of the Regulation and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under subsection 22(2) of the Regulation.

The Applicant will therefore be liable for the additional costs of the impoundment.

Therefore, the Applicant's Appeal is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Member

RELEASED: April 29, 2005

FILE NAME: 2888.mvia.exhp

2886-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: VICTOR BRANEY, presiding Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 20, 2005

DECISION RELEASED: April 28, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 20, 2005, 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. The owner has appealed that order. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1999 Oldsmobile Intrigue, (the “vehicle”)
Date of Appeal:	April 04, 2005

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 20, 2005 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:

My name is <name of Applicant deleted>. I was asked to lend my car to my brother. I was shown his licence and it appeared to be valid. I did not know that his licence was under suspension. I was at work in Cornwall at the time of the incident. I rely on my car to get to and from work. Also I have 2 children that I pick after work during the week, for visitation and to bring to their activities outside of school (ex: bowling, gymnastics, dance and martial arts). Their mother and I are separated. She does not have a vehicle of her own, also currently has a learner's permit to drive. I've also just moved on April 1st and need to pay deposits for rental and utilities.¹

(sic)

At the hearing the Applicant confirmed he was appealing on the basis of Exceptional Hardship.

The Applicant reviewed the information that was in the written submission. He explained he has expenses and it would be too costly to consider a rental. He can get to work by taxi, but it will cost around twelve dollars for a one-way trip.

The Applicant had no closing remarks.

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 March 20, 2006.

Ms. Adelaide Pinder the Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant.

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

The Applicant stated that on the day the involved vehicle was impounded he had driven to work. He had received a call from his brother who stated he needed a vehicle. His brother went to the Applicant's place of work and was given permission to drive the vehicle. The Applicant explained that he had seen the driver licence of his brother, but had not studied the document. The Applicant was advised the licence had expired in 2003.

The Applicant has registered in his name a 1995 Neon. He is separated from his wife who uses the Neon for her purposes. His wife had been able to drive him to work most of the time. He is now experiencing mechanical problems with the Neon and it needs to go into a garage for a day for repairs. He requires the impounded vehicle to get to work and to transport his children to after school activities. He has two children aged eight to ten who live with their mother.

The Applicant has not missed any working days and states he was late on one occasion while waiting for a ride to work. At the present time he works at a call center full time and is paid twelve dollars an hour. He is looking for a second job and needs the car to get himself to potential opportunities. Buses and taxis are available. There have been no health or safety issues. Financially there would be no lasting effects. The involved driver doesn't have a job and can't help.

In closing the Hearing Officer requested the impoundment be confirmed. She explained the Applicant had not demonstrated Exceptional Hardship. The Applicant owns a second vehicle and has alternatives for the impounded vehicle. There are no threats to health or safety. The Applicant will not suffer any lasting effects and his expenses and bills were pre-existing.

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:

EXCEPTIONAL HARDSHIP

As to whether the loss of the vehicle will result in exceptional hardship the Tribunal finds as a fact the following:

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 first establish 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 Braney
Member

RELEASED: April 28, 2005

FILE NAME: 2886.mvia.exhp

2877-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: VICTOR BRANEY,
Presiding member

APPEARANCES: APPLICANT,
Unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 20, 2005

DECISION RELEASED: April 26, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 20, 2005, 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:	1998 Honda Civic DX (the “vehicle”)
Date of Appeal:	March 31, 2005

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 20, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I am a 28 year old mother of two age 2 and 5. I am also the sole provider for my children. The night my car was impounded my vehicle was taken without my knowledge. I recently applied for a job w a pay increase from my current employment. I will start this job on Mon Apr 4.05 and will have to commute 40 min each way. I cannot afford to rent or purchase another vehicle. If I am unable to get back & forth from work this will leave me without a job.

Thank you for the consideration.

At this hearing the Applicant confirmed her appeal on the basis of Exceptional Hardship.

The Applicant stated that she was aware the involved driver did not have a valid licence and that it was under suspension. The involved driver is the father to her two children and had been living together when the vehicle was impounded. The driver did not have her permission to drive her vehicle. He had taken her keys without her knowledge and it was not until the police phoned her at 3:00 a.m. that she became aware the vehicle was gone. She didn't wish to have the driver charged with theft. The involved driver has no employment.

The Applicant has just started a new job with the Honda plant and she has to have her vehicle to drive the 40 km to her work. The new job is for three months with the possibility of an extension. By having this new opportunity at Honda her wages have increased. Since the vehicle was impounded the Applicant has to depend on her mother to get her to work along with the help of friends and family members.

The Applicant had no closing statement.

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 February 8, 2006.

Ms. Adelaide Pinder, Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant.

The Applicant stated she did not know why the driver had been stopped. She did know that his licence was under suspension and had made very clear that he was not to drive her vehicle. She could not afford to have the involved driver use the vehicle, because it is financed.

The Applicant needs her vehicle to get to work, grocery shopping and picking her children up from school. She has not missed any shifts since the vehicle was impounded. Her mother and mother-in-law have assisted in picking the children up at school when her work shifts do not allow her to do so. There are no buses that she could take to get to work. She could take a taxi to work, but the cost is \$50.00 one way and she could not pay this amount.

The Applicant stated she has not suffered any lasting financial loss and has been fortunate to have family members assist with the children and getting her to work.

In closing the Hearing Officer stated the impoundment should be confirmed. The Applicant has not illustrated Exceptional Hardship. She has not lost any work and her family has assisted with the children.

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:

EXCEPTIONAL HARDSHIP

As to whether the loss of the vehicle will result in exceptional hardship, the Tribunal finds as a fact the following.

The Applicant did not demonstrate that no alternative to the impounded vehicle is available.

The Applicant has the burden of proving the basis for her appeal. The Applicant to establish exceptional hardship must first establish 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 Braney,
Presiding Member

RELEASED: April 26, 2005

FILE NAME: 2877.mvia.exhp

2868-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: WILLIAM SETTATREE, presiding Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 14, 2005

DECISION RELEASED: April 20, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 14, 2005, 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:	1993 Mazda B22, (the “vehicle”)
Date of Appeal:	March 22, 2005

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 14, 2005 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.

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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 <name of Applicant deleted> was unaware that the driver of my vehicle on March 18, 2005 was a non-qualified driver due to a suspension of his license. He used my vehicle during the time of the accident; I was not in the truck during the accident, he was alone. I would like to appeal this impoundment due to the nature of my situation. I have only one vehicle. I own and operate my own business, "<name of Applicant's business deleted>". The company is the only way that I can support myself and my son, whom I'm pay child support to. I need this vehicle to keep my clients and business operating.¹

(sic)

In oral testimony the Applicant said he and a friend had gone to a bar for a few drinks and, anticipating that he might have too much to drink, he gave his friend the keys to his vehicle. He said that the friend had also indicated he would not drive the vehicle.

As the evening wore on the friend excused himself at about 11 o'clock and went outside but when he did not return the Applicant became concerned and about 12:30 went looking for him and noticed the truck had gone. He called police and asked if they had seen his truck and they advised him that they had pursued the driver who eventually drove into a post and tried to get away. He was over the legal limit and the vehicle was impounded because he was under suspension.

Under questioning, the Applicant said he does have a small car but needs the truck for his concrete business where he pulls a trailer with heavy equipment. His car had been out in Western Canada but when the truck was impounded he flew out to drive the car back so he would not be without transportation. The car is only useful for personal transport and to estimate jobs. He said he has secured several contracts but cannot begin the work until his truck is returned. He does most of his work in spring and summer months but has had work all year round.

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;

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

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 was then under suspension until April 1, 2005.

The Respondent argued that the Applicant had not met the burden of exceptional hardship inasmuch as he had a car to use, was still able to seek out contracts and had indeed secured work which he can begin when his vehicle is released.

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 the issue raised of Exceptional Hardship, the Tribunal is mindful that the Applicant's business requires the use of a truck and while he has the use of a small car to estimate jobs, the truck in itself has advertising value for his concrete business. That being said, the Applicant confirmed that he has not lost work without his truck but it has been delayed. He also indicated that the driver who took his vehicle has agreed to help with the recovery

costs. In any event, the cost of impoundment cannot be considered as part of the exceptional hardship claim.

While no appeal was launched on the basis of theft, the Tribunal believes the Applicant when he said he telephoned the police when he noticed his truck missing. It is the Tribunal's view though that the Applicant may have had difficulty even if he had appealed on the basis of theft since it was he who had personally handed the keys to the person who was stopped driving his vehicle.

It must be emphasized that the owner of any motor vehicle has the responsibility to determine if persons given access to that vehicle have a valid licence. In this case the driver was under suspension, hence the impound.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

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LICENCE APPEAL TRIBUNAL

William Settatree
Member

RELEASED: April 20, 2005

FILE NAME: 2824.mvia.exhp

2859-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: WILLIAM E. SETTATREE, presiding Member

APPEARANCES: APPLICANT, unrepresented

ADELAIDE PINDER,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 14, 2005

DECISION RELEASED: April 19, 2005 *by teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 14, 2005, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1990 GMC Van, (the “vehicle”)
Date of Appeal:	February 25, 2005

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 14, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I'm the owner of <name of business deleted> for 23 years. It's a small business. I only have the one vehicle. I live by myself. Without the vehicle I can not conduct my business & living. I regret what I've done was wrong. My driver did not show up on the Friday and I promised customers I would be there that day. I tried to get someone at the last minute to drive me but was not successful. I called and tried to put off calls to a later date but had to do 1 heating since they hand no heat and they couldn't get no one else to do it on such a short notice. So I took a chance to help the customer out. I know that's no excuse & I'm sorry for it. But to keep a living going I need my van and could appreciate it if possible.¹

(sic)

The Applicant, under oath, stated that he had used various drivers when need be to take him to jobs for his business since having his licence suspended and tried to organize his appointments in such a way that he could do several in a day. He said that during the period of the impound he may have lost about \$20,000 in business and needs his van to keep his business going. He lives alone in the country and finds it difficult without his vehicle and plans to appeal his suspension in hopes of being allowed to drive for work only. He has since recovered the vehicle from the impound and his son will be coming home to be with him for a month to help him by driving him to jobs.

He stated that the day the vehicle was impounded he had tried to help an elderly couple who had no heat. He took a chance when his driver did not show up and was stopped. It was his view that police targeted him.

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;

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

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 20, 2006.

The Respondent asked several questions of the Applicant relative to his business and asked if he could hire a driver on a regular basis rather than various people as needed. It was the Respondent's position that the Applicant knew full well his suspension, which the Applicant had confirmed in his statement. The Respondent said that the 45 day impoundment should stand. The vehicle has already been released since the 45 days have expired. The Applicant should not expect the government to pick up the impound fees when he himself was responsible for the impound by knowingly driving while suspended. The Respondent also advised the Applicant that any further impound would be for 90 days.

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 the issue filed, the evidence established that the Applicant has put himself in a very difficult situation which will no doubt hamper his business and may well cause him exceptional financial hardship. However, the Act states clearly in Section 55.1 paragraph 3(d) that the impact must be on someone other than the driver whose licence was suspended.

This reason alone is sufficient to confirm the impound. It must also be stated that the Applicant's own actions at the time he chose to drive while suspended and statements before this Tribunal suggest a pattern of disrespect for the legislation and the punishment meted out. The licence suspension is tough medicine and living alone in the country makes it that much tougher but the Applicant must face up to the facts and rearrange his life in such a way that he can handle his business affairs without driving his vehicle. He stated that in the period of the impound he may have lost \$20,000 in business. At that rate he should be able to hire regular help to keep his business going and manage until his suspension is lifted. Living alone in the country presents a real danger that he may be tempted again and he needs to take steps now to make sure that doesn't happen.

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

William E. Settatree,
Member

RELEASED: April 19, 2005

FILE NAME: 2859.mvia.exhp

NATIONAL CAR RENTAL (CANADA) INC.

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: ERIC WOODBURN,
Agent for the Applicant

KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 15, 2005

DECISION RELEASED: April 20, 2005 Toronto

REASONS FOR DECISION

A hearing was held on April 15, 2005, 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:	2005 Chevrolet Impala (the “vehicle”)
Date of Appeal:	March 24, 2005

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

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

This matter came before this Tribunal on April 15, 2005 and proceeded as an oral hearing.

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

The Respondent submitted a set of original certified documents, copies of which had 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?

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 customer gave a Bermuda license when he rented the vehicle and did not tell the rental agent that he had an Ontario license.

If the vehicle remains impounded, National Car Rental will be at a serious loss of revenue due to the fact that there will be no possibility of renting the vehicle. Based on the rental costing \$60 per day, the total loss in revenue for the 45 days will be \$2,700.00

National Car Rental understands that they are liable to pay all towing and storage fees for the time of impoundment.

The Agent was sworn in before giving testimony.

The Applicant is located at Yonge Street and Sheppard Avenue. It employs 4 employees and has approximately 50 fleet vehicles on its lot, which obviously fluctuates due to their being rented.

The Agent for the Applicant is an employee not from the aforementioned location, but from head office. He has very limited knowledge as to what transpired during the rental process and circumstances surrounding the impoundment.

The impoundment vehicle was rented on March 11, 2005 and impounded in London, Ontario on March 12, 2005. The driver at the time the vehicle was impounded provided an address in North York, a Visa card and a Bermuda driver's licence. After the vehicle was impounded, it was determined that the suspended driver, did have a suspended Ontario driver's licence.

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 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things,

the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by 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 September 8, 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 sections 50.2(3)(c)(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:

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 its 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.

In this regard, the Applicant is a car rental company and therefore immediately fails on this ground. The Tribunal cannot consider the potential loss of the impounded vehicle when it has approximately 49 other alternatives available to be rented.

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.

The Agent for the Applicant requested the Tribunal to possibly reduce the timeframe in which the vehicle remains impounded. The Tribunal has no authority to alter or reduce the impoundment period as set out in the Act, unless it is of the view that the Applicant has met all of its criteria.

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 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.

Ms. Beintema asked the Applicant's agent a number of significant questions regarding the policies and procedures of renting a vehicle, and what measures were taken or questions asked regarding this particular vehicle rental. For example:

1. When renting a vehicle, does the clerk merely view and write down the driver's licence number and its expiry date or is a photocopy taken?
2. Since the suspended driver provided a driver's licence from Bermuda, what steps, if any, were taken to ensure or verify its validity?
3. The suspended driver provided an address in the GTA and a Visa card, was the Visa card from an Ontario institution? If so, was the suspended driver questioned as to why he had a driver's licence from a different jurisdiction when he resides and has possession of a Canadian Visa card; why he required the vehicle; where was he going and for how long?
4. Does the I.D. number on the Rental Agreement mean the suspended driver has rented a vehicle from the Applicant before?

Unfortunately the Agent for the Applicant could not answer any of the foregoing questions decisively since he is not employed at the location in question and/or was not able to speak to or obtain pertinent information from anyone at that location prior to today's hearing.

Due diligence requires that the Applicant to take further steps to verify the validity of the driver's licence. Viewing does not constitute validity. The Tribunal is unclear as to what measures the Applicant took to safeguard itself against such circumstances and assumed the risk of renting a vehicle to someone whose driver's licence was from a jurisdiction

(Bermuda) where it may be impossible or extremely difficult to check its validity.

Verifying an Ontario driver's licence 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 or information from the Applicant that it exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 20, 2005

FILE NAME: 2872.mvia.dudi.exhp

2884-MVIA-Consent Order

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order #5500295 OWNED BY: the Applicant made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: March 25, 2005.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 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 Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 8, 2005

FILE NAME: 2884.mvia.consent.doc

LICENCE APPEAL TRIBUNAL

Between:

APPLICANT

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

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

AGREED STATEMENT OF FACTS

1. On October 11th, 2004, the motor vehicle described in **Order to Impound #4500872** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant whose name is shown on the vehicle and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that exceptional hardship will result from the impoundment of the motor vehicle as defined by Regulation 632/98 of the *Highway Traffic Act*.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Applicant

Authorized Delegate for the Registrar of Motor Vehicles

(signature of Applicant)

(signature of Respondent)

(date)

(date)

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2879-MVIA-EXHP-STLN- 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
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

APPLICANT and Applicant's Wife
unrepresented

DATE OF HEARING: April 15, 2005 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 15, 2005, 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:	2001, Ford Tarus (the “vehicle”)
Date of Appeal:	March 31, 2005

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in section(s) 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on April 15, 2005, and proceeded as a teleconference hearing.

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

The Respondent 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:

The loss of the vehicle is of great hardship to my wife and I as we have to attend hospital at McMaster/Hamilton General/ & St. Joseph's rest home where my wife's mother (94) is resident. My wife cannot drive at present due to shoulder surgery necessitated by a fall.

Since the Applicant is hard of hearing, his wife asked if she could partake in today's hearing. Both the Applicant and his wife were sworn in before giving testimony.

The Applicant, who is 82 years old and his wife, who is in her mid-60s, are both retired and live alone.

On or about March 18, 2005, the Applicant drove to Oakville to pick up his stepson so that he could be with his mother, the Applicant's wife, when she went for surgery.

On March 22, 2005, the Applicant's wife was released from hospital after shoulder surgery. During the course of the day, after her release from hospital, she was having difficulty breathing and was subsequently returned to the hospital wherein it was determined she had double pneumonia. She was given a prescription to fill and once again released from hospital. They arrived home at about 11 p.m.

During the next few hours, the Applicant's wife was having difficulty breathing and asked her husband to attend the all-night pharmacy to have her prescription filled. It was then that the Applicant realized his vehicle was gone.

In the morning, the police arrived at the Applicant's home to advise that his vehicle had been impounded and served the Applicant with the Notice to Registrar form.

Neither the Applicant nor his wife could provide the Tribunal with details surrounding the vehicle's impoundment.

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 ability impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until October 14, 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 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 section(s) 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 first issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

The Tribunal found no proof that the driver's intent was to permanently deprive the Applicant of his vehicle, but he may have taken the vehicle without the Applicant's consent.

The Applicant and his wife were aware that their son was under suspension. No measures were taken by the Applicant or his wife to deny access to the driver of the vehicle's keys.

The Applicant did not go to the police station and express to them that he wished to press charges, but advised the Tribunal that the "*charges are in the hands of the police*". The Applicant is relying on the actions of others. The Applicant did advise the police officer who came to serve the Applicant with the Notice to Registrar that the vehicle "*had been taken*".

Although this issue may be mute since the Applicant and his wife have financially supported their son over the past few years, they 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.

Therefore, the Tribunal is of the view that the impounded vehicle was not, in fact, stolen from the Applicant within the meaning of section 50.2(3)(a) of the Act.

Appeal – Exceptional Hardship

The second 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.

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 Tribunal’s consideration of subsections 22(3)(a), (b) and (c) follows:

(a) “**no alternative to the impounded motor vehicle is available**”.

The Applicant in his testimony indicated that he has rented a vehicle during the impoundment period.

There is also a community service which is available to them. Should they require to be driven anywhere, they must call 2-3 days in advance and someone would come to pick them up at less than half the cost of a taxi ride.

Although quite expensive, the Applicant does have access to taxis which come from Hamilton. The cost to travel from their home to Hamilton equals \$40 each way. There is no public transit available to them in their community.

The Applicant also testified that their neighbour has provided transportation on a few occasions.

(b) “**the loss will be immediate, significant and lasting**”

The Applicant testified that (i); his wife has been to all her doctor’s appointments; (ii) he was provided transportation by the community service when he had a colonoscopy appointment; and (iii) the Applicant’s residence is 911 accessible in the event of an emergency. 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 has been able to pick up groceries, prescriptions and drive his wife to all her doctor’s appointments, with the use of the rental vehicle.

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. 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. The Tribunal finds that the Applicant does not meet the requirements under this regulation.

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 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 18, 2005

FILE NAME: 2879.mvia. exhp.stolen.doc

2851-MIVA-DUDI-EXHP-Due Diligence-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 1, 2005

DECISION RELEASED: April 4, 2005 *Toronto*

REASONS FOR DECISION

A hearing was held on April 1, 2005, 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:	2000 Ford Taurus (the “vehicle”)
Date of Appeal:	March 15, 2005

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 1, 2005 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

To whom it may concern:

There are two reasons why I feel that I, _____ <Applicant's name deleted>, should appeal the impoundment of my vehicle, 2000 Ford Taurus, _____ <vehicle identification number deleted>, impoundment # _____ <impoundment number deleted>. They are as follows:

1. According to section 50.2 of the *Highway Traffic Act*, I as the vehicle owner exercised due diligence to determine that the driver's licence was not suspended.

This vehicle was provided by my daughter, _____ <Applicant's daughter's name deleted>, use to transport her from Toronto to the University of Guelph, where she is a student and back to Toronto for her weekend job at the National Ballet School. On this particular day, Wednesday March 2, 2005, I was not aware that she had an appointment with an optometrist, Dr. J. Patterson and that her acquaintance, _____ <Driver's name deleted> would be with her. I was also unaware, at that time that _____ <Driver's name deleted>'s licence was under suspension. She also had to return to the University due to pressing matters there. Had I know of these matters I would have counselled her to find alternative transportation or I would have taken time off work and driven her myself.

2. Secondly, the loss of the vehicle will result in exceptional hardship.

I am a single working parent have provided an automobile for my daughter, _____ <Applicant's daughter's name deleted> for several reasons. My daughter has employment at the National Ballet School, a position she has had for nearly five years and it is her only source of income, other than what I can provide her with. _____ <Applicant's daughter's name deleted> has a sister who attends the University of Western Ontario. Public transportation is very expensive (\$22.00) and would greatly deplete the money she earns. Secondly, she lives off campus, in such a place, that getting to the campus and to do grocery shopping is very difficult. Her roommate does not have an automobile.

Please contact me as soon as possible as I have to make arrangements to be released from my commitments at work.

The following is a summary of the Applicant's sworn testimony.

The Applicant confirmed that the driver of the subject vehicle was a friend of her daughter and her daughter allowed him to drive the vehicle. The Applicant stated that she did not know the daughter's friend was driving and she did not know her daughter who is attending university in Guelph, had to attend a medical eye appointment in Toronto on March 2,

2005. The Applicant testified that she did not know her daughter's friend had his driver's licence suspended. But if she did know she would not allow him to drive her vehicle. The Applicant stated that the subject vehicle was provided by her in order for her daughter to attend university in Guelph during the week and to travel to Toronto every weekend to her place of part time employment. The Applicant testified that she has her own vehicle that she requires to attend her teaching places of employment and to assist in providing care to her elderly parents who each have some medical problems.

With regard to due diligence the Applicant testified that she had ensured her daughter had her licence in a current state and the vehicle had a proper licence and was fully fit and abiding by the law. During cross-examination the Applicant agreed that if she did not know her daughter's friend was driving, she could not possibly meet the criteria to make the necessary checks to ensure the driver's licence of the driver at the time of the impoundment was valid.

With regard to exceptional hardship the Applicant testified that her daughter was an attractive 23 year old who she feared might be attacked if using public transit or walking on a university campus. She stated her daughter had some classes that ended at around 10 p.m. and that she required her vehicle for her health and safety reasons.

The Applicant testified that since the subject vehicle has been impounded she has driven her daughter to and from Guelph and Toronto to attend university and employment. She continued by stating that these weekly round trips have been affecting her arthritis. She acknowledged on cross-examination that her daughter could take the bus back and forth but it is costly (\$22.00 round trip) and inconvenient.

The Applicant testified that there are no grocery stores near her daughter's residence so it is difficult and inconvenient for her daughter to obtain groceries. However, she stated that there is a convenience store within walking distance for many articles but not fresh vegetables.

During the Applicant's testimony she expressed her greatest upset due to the impoundment of the subject vehicle was that her daughter could not attend her uncle's funeral and was also unable to see her Godparent who had travelled from out west for the funeral.

The Applicant's daughter was called as a witness and gave the following affirmed testimony.

The witness testified she attended university in Guelph and that she had an eye appointment on March 2, 2005 in Toronto. She confirmed her friend was driving the subject vehicle with her permission as she was doing homework in the vehicle as they drove to Toronto. When asked if she was previously aware that the driver's licence of her friend, the driver, was suspended she responded "yes".

With regard to undue hardship the witness testified that she recently missed her uncle's funeral and the opportunity to visit her Godparent. She stated she lives in three houses, Moms, Dads and the one she has in Guelph. She continued by stating all her belongings are in her vehicle, "my car is my life".

The witness testified that she is not comfortable travelling on public transit but she does so now both in Guelph to get to classes and in Toronto to get to work. She also stated she does not live in a safe neighbourhood in Guelph and walking in this area after late night classes is uncomfortable but she does it now as she has no vehicle and no bus service after 5:00 p.m. on a Sunday evening. The witness testified that she does not find the bus schedule in Guelph fits well with her schedule. If she catches one bus she arrives around 10 minutes too late for her classes. If she travels on another bus it arrives too early and she then wastes one half hour sitting in a noisy area when she could spend her time better studying or working on her computer at home. She stated this was not convenient for her.

On cross examination when asked about other means of weekend bus travel the witness stated she had not looked into them as her mother had picked her up on Fridays and returned her to Guelph on Sundays. She stated that during the week she and her roommate have the same classes and they travel on the public transit together. The witness stated when she does have research or group work that continues late into the evening or early night she has walked home multiple times. She stated there is taxi service available but they are too expensive (\$10.00).

On cross-examination the witness stated that her mother brings groceries including vegetables with her when she returns her to her residence in Guelph. The Applicant concurred.

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 impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until April 27, 2005,(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 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:

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the driver's licence of the driver at the time in respect of which the order was made was not then under suspension.

The Applicant in her testimony stated that she did not know her daughter's friend was driving the vehicle nor did she know his licence was suspended. On cross-examination the Applicant concurred that since she did not know the driver was driving she could not possibly ask to see his licence, telephone the police or contact M.T.O. to ensure the licence was valid and thus meet the test required to demonstrate due diligence.

Her daughter testified that she knew the driver's licence of her friend was under suspension but she allowed her friend to drive. Thus, she did not even attempt to meet the due diligence test. Based on what she knew she made a poor decision by allowing her friend to drive.

The Tribunal finds that neither the Applicant nor her daughter exercised due diligence to determine that the driver's licence of the driver at the time in respect of which the order was made was not then under suspension.

The second issue to consider is the Applicant's request to appeal on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d) of the Highway Traffic Act. Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 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 and the witness testified that they had found a couple of alternatives to the impounded vehicle by using public transit. Also although tiring and inconvenient for both the Applicant and her daughter the Applicant drives to Guelph and Toronto twice every weekend to enable her daughter to maintain her employment. Both the Applicant and the witness agreed with the Respondent that there is bus service between Guelph and Toronto that could be used but they were of the opinion that it was inconvenient and costly.

Although there was no bus service in Guelph late at night or after 5:00 p.m. on Sundays the witness testified that she had walked home on multiple occasions.

After considering all of the evidence, 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 and the witness, that although inconvenient, they have found some alternatives to the impounded vehicle and they have not sufficiently considered or inquired into other options to the impounded vehicle. The Applicant therefore does not meet the criteria of section 22(4) of the Regulation and has not established hardship as set out in section 50.2(3)(d) of the Act.

The Applicant will therefore be liable for the additional cost of the impoundment. Therefore these appeals are dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Presiding Member

RELEASED: April 4, 2005

FILE NAME: 2851.mvia.dudi.exhp



2848-MVIA-DUDI-EXHP-Due Diligence-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 BRANEY
Presiding member

APPEARANCES: MS. KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: March 29, 2005

DECISION RELEASED: April 4, 2005 *By Teleconference*

REASONS FOR DECISION

A hearing was held on March 29, 2005, 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:	1994 Plym Sundance (the "vehicle")
Date of Appeal:	March 10, 2005

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

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

This matter came before this Tribunal on March 29, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Dear Sir, Madam,

I am _____ <Applicant's name deleted>. I am the owner of the vehicle and have a clean and perfect valuable drivers licence for 53 years. My son _____ <Applicant's son name deleted> was driving the vehicle of the time that it was impounded he had no valid drivers licence since I am very much in need of my car for transport badly needed for medication doctors app. ie. I have two heart attacks and need the vehicle very badly.

So please put in an effort on my behalf. Since I was not in the vehicle. I hope to get my vehicle back as soon as possible. I can not afford to pay much money. Since I survive on a small pension.

Thank you very much.¹

(sic)

At this teleconference hearing the Applicant explained the reasons for her appeal to have the vehicle released. She confirmed the reasons for her appeal are she exercised due diligence and the loss of the vehicle has resulted in exceptional hardship.

The driver of the involved vehicle is the son of the Applicant. He lives with his mother and on the day the vehicle was impounded he had removed the car keys to take the vehicle to shop at a local store. The Applicant was aware her son could not drive because his licence was suspended.

The Applicant stated that she has always had a car and depends on it to carry out her daily routines. She is finding that with no car has been hard on her and she has to depend on neighbours and family.

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

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

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 April 17, 2006.

Ms. Kim Beintema, hearing officer for the registrar of Motor Vehicles, cross-examined the Applicant. The Applicant stated that the police report indicated the Applicant had been seen in the involved vehicle with her son driving and this was not the truth. She stated that she did all the driving. When her son removed the car keys it was too late to stop him. She should have taken the keys away from him.

The Applicant lives on a small pension and her son is on welfare. She has six children and they help when they can along with her neighbors. There is a hospital in the area and 911 can be called if required. During the period of time the vehicle has been impounded, she has not missed any appointments. Her family may be able to help with the cost in having the vehicle released.

In closing the Applicant stated that she was partly to blame and she would not let this happen again.

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)(c)(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 vehicle to establish that due diligence was exercised in attempting to determine that the driver's licence of a motor vehicle was not under suspension.

The Tribunal finds that the Applicant was not duly diligent. The Applicant when first having knowledge the vehicle had been driven by a unlicensed driver should have reported the vehicle stolen.

Exceptional Hardship

As to whether the loss of the vehicle will result in exceptional hardship, the Tribunal finds as a fact the following.

The Applicant did not demonstrate that no alternative to the impounded vehicle is available.

The Applicant has the burden of proving the basis for her appeal. The Applicant to establish exceptional hardship must first establish 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 Braney, Presiding Member

RELEASED: April 4, 2005

FILE NAME: 2848.mvia.dudi.exhp

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2843-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: VICTOR BRANEY, Member

APPEARANCES: APPLICANT, unrepresented

KIM BEINTEMA, Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 29, 2005

DECISION RELEASED: April 5, 2005

Toronto

REASONS FOR DECISION

A hearing was held on March 29, 2005, 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:	2001 Lexus IS300 (the "vehicle")
Date of Appeal:	March 8, 2005

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

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

This matter came before this Tribunal on March 29, 2005 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 loss of vehicle will cost for me an "exceptional hardship"
- as lost of employment or employment opportunity, also financial and economic loss
The car belongs to me and it serves to make a living, bring food for my family! Even could
cause bankruptcy!
I work as a sale person for company's in food industry!

(sic)

The Applicant confirmed his appeal for the impoundment on the basis that it will result in exceptional hardship.

He stated that his leased vehicle was a requirement in making his living. He is self-employed as a sales person. The vehicle is needed to allow him to make personal sales calls to his clients. He has been in business for the past two years. His sales territory includes Toronto, Hamilton and Kitchener. It would not be practical to use a bus or taxi.

His son had taken the vehicle with out his knowledge. He had been sleeping when the son was stopped and the vehicle impounded.

In closing he stated he would like to have his vehicle released.

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 registered plate 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 September 22, 2005.

Ms. Kim Beintema, hearing officer for the Registrar of Motor Vehicles cross-examined the Applicant. The Applicant stated he is the owner of a wholesale goods business and employs three men in his warehouse. These employees make up the orders and the Applicant hires an independent truck for delivery. He needs his vehicle to make sales calls to his clients and to obtain new clients.

His son is a student and can't assist his father with the client contacts. He has depended on buses and friends to get him to his calls. Since the vehicle has been impounded his business has just been breaking even. He doesn't wish to rent a vehicle while his car is impounded because of the cost.

The Applicant is the registered owner of two other vehicles. A 1992 Mazda plated to August 2005 and a 1995 Ford Econoline plated to August 2005. He explained that both vehicles are not working and need repairs.

In closing Ms. Beintema stated the Applicant did not look for alternatives for the impounded vehicle. Public transit is available and he could have relied on this form of transportation to do his work. The Applicant has not had to lay off his staff and the business continues to operate. Ms. Beintema said the Applicant has not demonstrated exceptional hardship.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

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.

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 Braney, Member

RELEASED: April 5, 2005

FILE NAME: 2843.mvia.exhp.doc

2841-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:

GRAEME GOEBELLE
Presiding member

APPEARANCES:

KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

APPLICANT
unrepresented

DATE OF HEARING:

March 31, 2005

DECISION RELEASED:

April 5, 2005

By teleconference

REASONS FOR DECISION

A hearing was held on March 31, 2005, 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:	1995 CHEV LLS (the "vehicle")
Date of Appeal:	March 8, 2005

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 31, 2005 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

To whom it may concern:

On the night of Sunday February 27, 2005, I _____ <Applicant's name deleted> let an old friend _____ <driver's name deleted> drive my car. I did not know that his licence was under suspension, and he got into an accident at the corner of Parkedale Ave and Ormond St. in Brockville Ontario. I did not hesitate to report the accident and was very co-operative with the police. I feel that without knowing that _____ <driver's name deleted> did not have a licence and being co-operative with the Brockville Police my car should be returned to me. I am the owner of the car and I live in Kingston, Ontario where it is a larger area and the use of my car is needed for me to get back and forth to work. I was not driving the car the night of the accident and there was no property damage or any other vehicle involved. I feel that I was not at fault and deserve to have the vehicle returned to me. Thank you very much for your time.¹

(sic)

The Tribunal member briefly summarizes the evidence of the Applicant and acknowledged the co-operation and integrity of the Applicant in his reporting the accident to the Brockville Police.

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;

¹ Names and items of identifying information have been deleted in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

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 more than 80 mgs alcohol in blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until May 22, 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 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 the driver's licence of his very good friend who was the driver of the impounded vehicle at the time in respect of which the order was made was not under suspension. The Tribunal finds that the Applicant, in his own testimony, stated that he was unaware of the process to check the validity with the Ministry of Transportation, even though the Applicant had no reason to believe otherwise. Therefore the Applicant did not exercise the due diligence required under the Act at the time he turned the vehicle over to his friend.

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

Graeme Goebelle,
Presiding Member

RELEASED: April 5, 2005

FILE NAME: 2841.mvia.dudi

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2840-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: GRAEME GOEBELLE
Presiding member

APPEARANCES: ADELAIDE PINDER
Representative for the Registrar of Motor Vehicles

APPLICANT
unrepresented

DATE OF HEARING: March 31, 2005

DECISION RELEASED: April 14, 2005

Electronic

REASONS FOR DECISION

A hearing was held on March 31, 2005, 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 (the “Applicant”)
Motor Vehicle:	1993 Ford TLX (the “vehicle”)
Date of Appeal:	March 7, 2005

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

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

This matter came before this Tribunal on March 31, 2005 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:

Please consider this note a written appeal to have my vehicle returned from Impound.

From time to time, I do lend my vehicle to my niece, <name deleted>, with the understanding the car was for her use only. I have never given <name deleted> permission to lend my car to anyone, nevertheless, for reasons I will never understand, <name deleted> allowed her unlicensed boyfriend, <name deleted> to drive my car without my knowledge. From what I understand, the police recognized <name deleted> driving, arrested him and impounded my car.

I work for a company assisting elderly clients in their home (preparing meals, shopping, cleaning etc.). I need my car each and every day for my job. (I will most certainly lose my job if I cannot get my car back.)

I do understand that it is necessary to punish people that drive illegally, however, I don't believe I should be punished for trusting my niece. My niece will try to reimburse me for my expenses, but she does not have the means to replace my pay cheque.

I sincerely apologize for this unfortunate situation and I thank you for your time. You will find enclosed a Money Order in the amount of \$100.00 to pay for this appeal process.¹

Tribunal member briefly summarizes the evidence of the Applicant.

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 <name deleted>;¹

¹ Names and items of identifying information have been deleted in accordance with the requirements of the Freedom of *Information and Protection of Privacy Act*

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 September 4, 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 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 is whether the Applicant was suffering from hardship. The Tribunal finds that the Applicant, in her own testimony, stated that in fact she had other means of transportation. Therefore the Applicant is not suffering from hardship that even comes close to the definition of “exceptional hardship” during the time of 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

Graeme Goebelle
Presiding Member

RELEASED: April 14, 2005

FILE NAME: .2840.mvia.exhp.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2832-MVIA-EXTENSION OF TIME

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

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

TRIBUNAL: DONALD BENNINGER
Presiding member

APPEARANCES: APPLICANT

JULIE ANN DANTON, Agent for the Applicant

KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

DATE OF MOTION: April 1, 2005 *By teleconference*

ORDER

A motion was heard by teleconference on April 1, 2005, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. C.H.8 amended ("HTA").

The Tribunal granted the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Notice of Appeal form, including Owner's Position on appeal, dated February 18, 2005 received by the Tribunal on March 3, 2005 (Exhibit #1);
2. Order to Impound effective February 4, 2005, issued by the Registrar of Motor Vehicles (Exhibit #2);
3. Letter received March 11, 2005, addressed to the Tribunal to the attention of the Chief Administrative Officer and Registrar, requesting an extension of time (Exhibit #3).

THE FACTS:

The Agent for the Applicant was affirmed and gave the following testimony:

The Agent testified that the Applicant was an eighty seven year old woman who has Alzheimer's disease and requires a caregiver. This caregiver is her son who uses the vehicle to drive the Applicant to medical appointments, banking and other necessary appointments including getting groceries and medication.

The Agent stated that on February 4, 2005 the caregiver was very ill and had his friend who had his licence suspended drive him to pick up food for the Applicant and then to the hospital but on route was stopped by the police and the vehicle was impounded. She continued by testifying that the caregiver did go to the Emergency Department of the hospital on that date and produced a medical certificate as proof. She testified that since that date the caregiver has been in and out of hospital but has been in hospital continually for the last six weeks and presently is recovering from a very serious operation. The Agent testified that this Appeal was not a high priority to the Applicant, who was unable to complete the required document, or, to the caregiver who was too ill to act.

On cross examination the Agent for the Applicant did agree that the Appeal document had been worked on then set aside for a time then worked on again. She testified that she was aware of the Appeal two days before the expiry date to appeal. When questioned regarding the money order not being purchased until February 24, 2005 the Agent stated they had to wait for a good day to take the Applicant to the bank to obtain the money from her bank account and then purchase the money order.

THE LAW:

Section 50.2(3) of the *Highway Traffic Act* states:

(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.

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

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

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that it, acting in good faith through its servants, was unable through accident, illness or other cause beyond their control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time.

The criteria listed in Section 20(7), which the Tribunal should consider in granting an extension, are matters outside the Applicant's control.

The Agent for the Applicant testified that the Applicant in her medical condition was unable to complete the required documentation to appeal or to attend the bank to obtain a money order in a timely manner. The Agent stated that the caregiver was in and out of hospital during this time with a serious medical condition that resulted in a very serious operation and he is still in the hospital. She continued by stating that due to the medical condition of the Applicant and the caregiver this appeal was not high priority during this time period. It is the Tribunal's opinion that the Applicant through the caregiver did intend to appeal since a medical certificate was obtained on February 11, 2005 proving the caregiver's need to attend the hospital for emergency attention. It is also the Tribunal's opinion that the medical conditions of the Applicant and the caregiver had appropriate priority over processing this appeal.

Thus the above matters were outside the Applicant's control.

ORDER:

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Presiding Member

Released: April 7, 2005

File: 2832.mvia.ext.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



2830-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 BRANEY
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

APPLICANT
unrepresented

DATE OF HEARING: March 29, 2005

DECISION RELEASED: April 5, 2005 by teleconference

REASONS FOR DECISION

A hearing was held on March 29, 2005 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:	1990 PLYM VOF (the “vehicle”)
Date of Appeal:	March 1, 2005

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

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

This matter came before this Tribunal on March 1, 2005 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:

My grounds for asking for an appeal are on hardships it will cost me. I have 10 children the vehicle helps me to get my kids to school to doctor's appointments. One of my kid have kidney problems and have to go sick kids for appointments. My mother is sick and everyday I go to Mississauga to take care of her and to take a bus up there it will take me 2 hours and I have to be back in time to pick up my kid from school. I do work but I am on maternity leave from have a baby on the February 14th, 2005 and it will have a big cost on me to take taxi everywhere I go with the kids if I have to go shopping.

At this hearing the Applicant explained the reasons for her appeal.

The Applicant is the single mother of ten children. The two oldest children aged nineteen and eighteen do not live at home. The remaining children have ages ranging from sixteen to a newborn live with the Applicant mother. Of the children who live at home two are the natural children of the involved driver. The Applicant stated her vehicle is needed for the transportation of the children who are school age to and from school. Three of the children attend day care. Also, the vehicle is needed for grocery shopping.

In addition to caring for her immediate family the Applicant has to travel to Mississauga to assist her mother who suffers with physical difficulties. She attempts to visit her mother at least every second day. To travel to her mothers home the Applicant requires taking the bus. NOTE: Please see letter submitted with the appeal written by the Applicants' mother.

At the present time the Applicant is on Maternity leave from her part time job as a baker with the Dominion Stores. She is receiving assistance from Ms. Dorothea Jakob, R.N., M.A. who is a Public Health Nurse. NOTE: Please see letter submitted in support of the appeal written by Ms. Jakob. Also, Ms. Jakob spoke during the hearing on behalf of the Applicant explaining the importance of having the Applicants vehicle returned for the welfare of the family and the exceptional hardship the family has and will have financially when the vehicle is released from the impoundment.

In closing the Applicant had no further statements to make in support of her appeal.

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 <name deleted>;
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 November 5, 2005.

Ms. Kim Beintema, Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant. The Applicant stated that the driver of the involved vehicle was the father of two of the children. He doesn't live with the mother and has no employment that could provide financial assistance to the family. He has been assisting by walking his two children to day care.

The Applicant has three siblings and they are not in a position to help the Applicant or the elderly mother. The two oldest children do not live at home and do not have the resources to assist the Applicant.

The Applicant was aware the licence of the involved driver was under suspension prior to the impoundment. However, on the day the vehicle was impounded the Applicant was in her home having a sleep when the driver entered the premise and removed the keys for the vehicle. The Applicant was not aware the vehicle was taken until the driver called her to advise the vehicle was impounded. The Applicant had not requested the police to charge the driver with theft.

In closing the Hearing Officers stated the Applicant had the benefit of public transit and taxi to get to and from her shopping and traveling to assist her mother. There are options in being able to get the school aged children to school and to day care. The Applicant has been able to function as a mother to her children and caregiver to her mother with out the vehicle. Also, there are two older children who could assist the family. The Applicant has suffered an inconvenience, but not Exceptional Hardship.

LAW:

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

subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

EXCEPTIONAL HARDSHIP

As to whether the loss of the vehicle will result in exceptional hardship, the Tribunal finds as a fact the following.

- 1) The Applicant, a single mother of ten children and who is presently on maternity leave from her part time job, requires her vehicle to provide for her family and to assist her elderly mother.
- 2) The Applicant's siblings can't assist her with transportation.
- 3) Due to her limited financial circumstances she does not have the means to afford an alternative vehicle.
- 4) The cost of the impoundment fee alone will bring exceptional hardship on this family.

For the reasons stated, the Tribunal finds that the Applicant has established 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 sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Victor Braney, Presiding Member

RELEASED: April 5, 2005

FILE NAME: .2830.mvia.exhp



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PRE-HEARING

IN THE MATTER OF THE MOTOR VEHICLES DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42,

AND IN THE MATTER OF a Notice of Proposal issued
by the **Registrar under the Motor Vehicles Dealers Act** to revoke
the registration of **Beverly Ann Jacobs, operating as K W Good
Wheel Motors**, as a dealer.

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

APPEARANCES: MALCOLM BENNETT, Counsel for
Beverly Ann Jacobs, Applicant,

AVIVA R. HARARI, Counsel for
the Registrar, *Motor Vehicles Dealers Act*, Respondent

DATE OF
HEARING: April 7, 2005 Toronto

REASONS FOR DECISION AND ORDER

Background:

This pre-hearing conference arises from a Notice of Proposal dated January 13, 2005, (the "Proposal"), issued by the *Registrar of Motor Vehicles Dealers* (the "Registrar"), to revoke the registration of *Beverly Ann Jacobs, operating as K W Good Wheel Motors* (the "Applicant"), as a dealer under the provisions of the *Motor Vehicles Dealers Act* R.S.O. 1990. Ch. M.42 (the "Act"). The Registrar is appointed pursuant to Section 2 of the Act to exercise the powers and perform the duties conferred or imposed under the Act.

The Applicant, by a Notice of Appeal (the "Appeal") dated January 26, 2005, requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of the Act.

Issues:

The Registrar issued the Proposal under the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a dealer, and alleges that the past conduct of the Applicant is inconsistent with the intention and objective of the Act and that the Applicant has failed to act with honesty and integrity. The Applicant in the Appeal denies any such inconsistency, dishonesty or lack of integrity, and attempts to limit the Appeal to two issues as stated in the Appeal. The Applicant states that the past conduct as alleged by the Registrar was not such as would disentitle the Applicant to be registered as a dealer under the Act and offered reasons why the Registrar reached a wrong conclusion and decision. The Applicant also disputed the alleged facts contained in the Proposal. The Registrar has given notice in the Proposal that the Registrar is claiming costs of the Appeal in accordance with the Rules of Practice of the Tribunal.

It would appear that there is a long history in this matter which must be considered and understood fully, including a previous proposal by the Registrar involving **Jacobs Sales & Service operating as K W Good Wheel Motors**, a decision of the Tribunal respecting that earlier proposal, a decision of the Divisional Court respecting the matter and the registration of the Applicant upon certain terms and conditions agreed to by the Applicant. The main issue, therefore, is whether or not the Applicant is in breach of such terms and conditions including the spirit and intent thereof.

By a notice of the Registrar of the Tribunal dated February 23rd, 2005, a pre-hearing conference respecting this matter was ordered to be held **commencing at 9:30 a.m. on the 7th day of April, 2005.**

By a notice of the Registrar of the Tribunal also dated February 23rd, 2005, (the "Hearing Notice"), the hearing of this matter by the Tribunal was scheduled to be held **at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m. on Monday, the 30th day of May, 2005, and continuing on Tuesday, the 31st day of May, 2005.**

This pre-hearing conference, upon the consent of all Parties was conducted by telecommunication 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.

Order:

Upon agreement between the Parties, the dates of the hearing as set forth in the Hearing Notice were inappropriate and were postponed/adjourned to Monday, Tuesday and Wednesday, the 13th, 14th and 15th days of June, 2005.

Furthermore, the matter was not only unready for a hearing at this time, but also incomplete for a meaningful pre-hearing conference, and as such it was agreed to

adjourn this conference to Wednesday, May 4th, 2005, to be held by personal attendance **at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m.**

Counsel for the Applicant undertook to provide all particulars of the Applicant's case to the Respondent and the Tribunal on or prior to Friday, April 29, 2005, in order that the necessary work of the pre-hearing conference could be concluded at that time.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C., Vice Chair

RELEASED: April 28, 2005

FILENAME: 2783.mvda.Beverly Ann Jacobs



PREHEARING

1619045 ONTARIO INC. o/a ONTARIO AUTO PALACE
& MOHABALI MOJARRAB

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: FREDERICK A. YACK, appearing on behalf of
1619045 Ontario Inc. o/a Ontario Auto Palace &
Mohabali Mojarrab

AVIVA HARARI, Counsel, appearing on behalf of the
Registrar, under the *Motor Vehicle Dealers Act*

DATE OF PREHEARING: April 11, 2005

Toronto

ORDER

Following attendances on April 11, 2005 at a prehearing before this Tribunal of Frederick A. Yack, Counsel, who appeared on behalf of 1619045 Ontario Inc. o/a Ontario Auto Palace & Mohabali Mojarrab (the "Applicant") and Aviva Harari, Counsel, who appeared on behalf of the Registrar, under the *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, May 19, 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 Parties' Counsel noted their interest in resolving the issue raised in the Registrar's Proposal and to thereby dispense with the hearing of this matter before

the Tribunal and agreed on the following for the Applicant to consider:

- that the Registrar remained unwilling to register 1619045 Ontario Incorporated o/a Ontario Auto Palace as a motor vehicle dealer;
- that the Registrar is willing to register Mohabali Mojarab as a motor vehicle salesperson on terms and conditions including:
 - i. that he obtain an offer of employment with a dealership satisfactory to the Registrar;
 - ii. that he submit a new application for registration as a motor vehicle salesperson;
 - iii. that the registration for employment as a motor vehicle salesperson, upon approval of the application, would be registered with the approved dealership;
 - iv. that agreement on repayment terms to the Motor Vehicle Dealers Compensation Fund would be arrived at between Mohabali Mojarab and the Registrar as a precondition to registration.
- 3. In the event of this matter being resolved to the satisfaction of the Applicant and the Registrar prior to 4:00 p.m., Friday, May 6, 2005, Counsel for the Registrar shall immediately advise the Tribunal and shall withdraw the Proposal issued in this matter as will Counsel for the Applicant in advising on the withdrawal of their Appeal.
- 4. In the event of this matter not having been resolved by or before May 6, 2005, both parties shall have complied with Rule 6 of the Tribunal's Rules of Practice dated November 3, 2003, in providing disclosure of all documents to the other Party and filed with the Tribunal by or before 4:00 p.m. on Friday, May 6, 2005.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: April 28, 2005

Filename: 2772.mvda.1619045 Ontario Incorporated



1. The Parties to the hearing are the Applicant and the Registrar.

2. The Parties recorded that there was no resolution of the issue in this matter.
3. The Parties agreed and undertook to arrange further discussion as soon as possible in order to attempt to resolve the issue raised in the Registrar's Proposal and to thereby dispense with the hearing of this matter before the Tribunal.
4. In the event of this matter being resolved to the satisfaction of the Applicant and the Registrar, Counsel for the Registrar shall immediately advise the Tribunal and shall withdraw the Proposal issued in this matter.
5. In the event of this matter not being resolved prior to the hearing both parties shall comply with Rule 6 of the Tribunal's Rules of Practice dated November 3, 2003 with disclosure of all documents and things to be completed by or before 4:30 PM on May 13, 2005.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: April 19, 2005

File: 2773.mvda.Faroni.prehrg

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

IN THE MATTER OF
1052328 ONTARIO INC. o/a TEATERO MOTOR PRODUCTS AND
LEONARD TEATERO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: December 14, 2004

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

1052328 ONTARIO INC. o/a TEATERO MOTOR PRODUCTS AND
LEONARD TEATERO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1052328 Ontario Inc. o/a Teatero Motor Products and Leonard Teatero, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "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 27, 2005

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: 1052328 Ontario Inc. o/a Teatero Motor Products
220 Main Street
Seaforth, ON N0K 1W0

AND FROM: Leonard Teatero
39 Goderich Street
Seaforth, ON N0K 1W0

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, 1052328 Ontario Inc. o/a Teatero Motor Products and Leonard Teatero (the "Applicants"), 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 Applicants agree, if they are charged criminally or with an industry specific offence under any law in the future, they will immediately notify the Registrar, in writing of the charges against them forthwith.
2. The Applicants agree to provide full and complete disclosure on all future applications, correspondence and in all discussions with the Registrar regardless of whether or not disclosure has been made previously to the Registrar.
3. The Applicants confirm that the particulars and circumstances regarding the November 18, 2003 charge for fraud, now withdrawn, are substantially as disclosed to the Registrar and further acknowledge that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.

Initials (Leonard Teatero)

4. The Applicants will not conduct any purchases with anyone who is in the business of buying, selling or leasing motor vehicles without first confirming that the person is registered as a dealer under the Act.
5. The Applicants understand that all their books and records must accurately reflect the true nature of the Applicant's transactions in the purchase and sale of all motor vehicles.
6. The Applicants will ensure that any vehicles sold are registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
7. The Applicants will not purchase a vehicle without ensuring the vehicle is registered to the seller in the records of the Ministry of Transportation.
8. The Applicants agrees to register all vehicles purchased within 6 days in accordance with the *Highway Traffic Act*.
9. The Applicants acknowledges and understands that its registration will not be used to buy, sell or lease motor vehicles where the Registrant knows or ought to know the purchase, sale or lease of those vehicles will facilitate an illegal practice.
10. The Applicants will comply with OMVIC's Code of Ethics and Standards of Business Practices as may be amended from time to time.
11. 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 Registrants application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Registrant'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.
12. The Applicant acknowledges that the Registrar may take further administrative action, including a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
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.

Initials (Leonard Teatero)

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 _____ 2005.

Name of Authorized Representative (please print)

(Signature) I have authority to bind
1052328 Ontario Inc. o/a Teatero Motor Products

(Signature) Leonard Teatero

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

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

COLIN JOHNSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: COLIN JOHNSON, appearing on his own behalf

A. MICHAEL ROTHE, Counsel, appearing for the Registrar, *Motor
Vehicle Dealers Act*

DATES OF
HEARING:

April 7, 2005

Toronto

ORDER

WHEREAS the Registrar under the *Motor Vehicle Dealers Act* (the “Registrar”) issued a Proposal to Refuse Registration dated November 26, 2004 to Colin Johnson (the “Applicant”);

AND WHEREAS the Applicant has appealed the Proposal to the Tribunal;

AND WHEREAS the hearing by the Tribunal commenced and proceeded on April 7, 2005;

AND WHEREAS the Applicant was not represented at the hearing on April 7, 2005 and during the course of the hearing requested an adjournment so as to retain Counsel to represent him, to which request Counsel for the Registrar consented;

NOW THEREFORE the Tribunal orders that:

The hearing of this matter shall by consent of the parties be adjourned peremptorily against the Applicant to commence at 9:30 a.m. on Wednesday, July 6, 2005 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice Chair

Released: April 19, 2005

Filename: 2745.mvda.C_Johnson.interim.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.



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

IN THE MATTER OF
BINH XUAN LAM

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE A REGISTRATION
- Proposal dated: October 28, 2004

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

BINH XUAN LAM

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Binh Xuan Lam, 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 22, 2005

FILE NAME: 2696.mvda.lam.consent

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: Binh Xuan Lam
77 Dawes Road
Toronto, ON M4C 5B2

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, Binh Xuan Lam (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 applications, correspondence and in all 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 the circumstances regarding the withdrawn charges for fraudulent use of credit card data and fraud over \$5000.00 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 that he will provide written notification from his employer forthwith, stating that the Applicant has provided him with a copy this Consent Order and that he accepts responsibility for ensuring the Applicant’s compliance with same.
5. The Applicant agrees not to be a partner, shareholder, officer, director or controlling mind or manager of a dealer for a period of 4 (FOUR) years from the date of these terms and conditions.
6. The Applicant agrees not to transfer his registration as a salesperson under the Act to another Applicant without having first obtained prior written consent of the Registrar which will not be unreasonably withheld by the Registrar.
7. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.

(Initials) Binh Xuan Lam

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 Registrants application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Registrant'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 his 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 _____ 2005.

(Signature) Bihn Xuan Lam

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

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

TARGET AUTOZONE INC. AND RICHARD CROOKE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ANTHONY E. BAK, Counsel, representing Target Autozone Inc.
and Richard Crooke

AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATES OF
HEARING: November 2, 2004, February 10 - 11, 2005, April 1, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the "proposal") dated July 20, 2004 issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively) to revoke the registrations of Target Autozone Inc. ("Target") and Richard Crooke ("Crooke") as motor vehicle dealer and motor vehicle salesperson respectively under the Act.

The Registrar bases his proposal to revoke the aforementioned registrations under section 7 of the Act as read with section 5.(1)(b), (c)(ii) and (d) and section 6.(2).

In support of his proposal the Registrar furnished the following reasons and particulars.

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 Registrant's past conduct is inconsistent with the intention and objective of the Act, and

therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Target Autozone Inc. and Richard Crooke under the *Motor Vehicle Dealers Act*.

PARTICULARS

The reasons for this proposal are:

1. Target Autozone Inc. has been registered as a motor vehicle dealer since on or about July 5, 1997.
2. Richard Crooke is the sole officer and director of the corporate dealership. Crooke is registered as a motor vehicle salesperson.
3. The Dealer retained the services of an unregistered salesperson, Brian (Moe) O'Neill.
4. The Dealer failed to comply with the OMVIC Code of Ethics, Standards of Business Practice. In particular the dealer did not obtain safety standards certificates for vehicles that it leased.
5. The Registrar, MVDA, has received numerous complaints about the dealer.
6. The Dealer has misrepresented the actual purchase price of vehicles on bills of sale.

(Exhibit 3, Tab 1)

By written Notice of Appeal dated July 23, 2004 Target and Crooke conceded the correctness of the contents of paragraphs 1 and 2 in the Registrar's proposal.

(Exhibit 3, Tab 2)

At the commencement of the hearing, the Tribunal made an order excluding witnesses.

EVIDENCE:

The evidence presented by the Registrar at the hearing consisted of the testimony of various consumers as well as the Deputy Registrar, Mary Jane South, and certain employees of OMVIC as well as Stephen Douglas Langford and Brian Edward O'Neill. In addition, the Registrar relied on documents as disclosed and contained in his Book of Documents (Exhibit 3). Target and Crooke relied on the latter's testimony and documents as disclosed and contained in their Book of Documents (Exhibit 6).

A summary of the testimonies of the various persons who testified follows:

CONSUMER #1

Consumer #1 testified that she observed a 1998 Mazda pick up on Target's lot. There she met with and talked to Brian O'Neill whom she also referred to as Moses O'Neill. At that time, she was accompanied by her husband. The price asked by O'Neill for the Mazda was \$1200.00 and she paid a deposit of \$1000.00 in cash to O'Neill. She further stated that she wanted her mechanic to inspect the Mazda. O'Neill agreed to permit her mechanic to inspect the vehicle. When her mechanic inspected the vehicle later that day he advised Consumer #1 not to purchase the vehicle. A couple of days after speaking with her mechanic she requested the return of her deposit and this request was denied by O'Neill who told her "he didn't think Crooke would refund it."

The following day she was told by O'Neill that she could not get her deposit back but could have it applied to another vehicle and that "this was the way Crooke works." When Consumer #1 paid the deposit to O'Neill she was given a "Bill of Sale" upon which was written in handwriting "Paid \$1000.00" (Exhibit 5). Other than this document she received no papers from Target or O'Neill. She consulted a lawyer who then wrote a letter dated July 23, 2003, to Target demanding the return of her deposit (Exhibit 5, last page).

Under cross-examination Consumer #1 stated she had no dealings with Crooke, only with O'Neill. She stated that she received a cheque from Target dated July 23, 2003 for \$1020.00 in refund of her deposit (Exhibit 6, Tab 9). She also stated that she signed a "release" when she received the refund cheque from Target (Exhibit 6, Tab 9, page 66). At no time did Crook advise her that he would not refund the deposit.

CONSUMER #2

This consumer stated in his testimony that he purchased a 1990 Toyota Celica from Target in January 2003. He dealt with O'Neill at Target when he purchased the Toyota for \$5,995.00 and traded in his 2000 Chevrolet Cavalier vehicle for \$7,500.00 resulting in his receiving some \$1500.00 from Target as well as the Toyota. Crooke was not involved in the transaction of purchase. Consumer #2 went on to state that he received a "30 day/1000 km 100% Powertrain Labour Warranty" at time of purchase. The warranty covered:

Transmission: (Automatic or Standard) Transmission case/housing (if damaged from with); all internal lubricated parts; torque converter, modulator valve. Excluding all manual clutch/clutch related components, flexplates, flywheels, ring gears, linkages and electronic components. Internal electronic transmission components are covered if the Hi-Tech Component Coverage Option is selected and paid for on an eligible vehicle.

(Exhibit 3, Tab 5c)

The bill of sale dated January 13, 2003, prepared by O'Neill, indicated the consumer's father as the purchaser of the Toyota as the consumer wanted the vehicle to be in his father's name for insurance purposes (Exhibit 3, Tab 5c). After taking delivery of the Toyota the consumer noticed the vehicle's transmission was not shifting smoothly and he took it back to Target where another salesperson, by name Larry, refused to have any repairs made to the transmission after test-driving the vehicle. The consumer then took the vehicle to a Toyota dealership who gave a quotation, dated February 17, 2003, for repairs to the transmission in the sum of \$1,711.95 (Exhibit 3, Tab 5c). The consumer went back to Target and spoke with Crooke regarding the transmission and the quotation he had received. He also complained to Crooke regarding the vehicle's air conditioning not working. Crooke informed the consumer that he wanted to take the vehicle to "his mechanic" and although the consumer left the vehicle at Target for the day it was not taken to Target's mechanic. Later, Crooke offered to have his mechanic do repairs to the transmission but the consumer refused to permit Target to do the repairs as he "had no confidence" in Target. The vehicle is now off the road.

CONSUMER #3

Both the consumer and his mother testified at the hearing. The consumer was just eighteen years of age when he purchased a 1997 Pontiac Sunfire from Target. Consumer's mother was not present during negotiations between her son and Target's salesperson Larry. Upon taking delivery of the vehicle problems with the vehicle were noticed by the consumer. The vehicle's horn and headlights were not operating. The consumer called Larry and told him of the problems. Consumer was told by Larry to take the vehicle to Tom Smith Chev Olds in Midland for the headlights to be attended to. Consumer took the vehicle to the Midland dealer within 30 days of delivery of the vehicle and obtained an estimate regarding the repair costs of the headlights. This estimate was \$800.00 to \$900.00. Larry, when advised by the consumer of the estimate, told the consumer to bring the vehicle to Target. He did so and left the vehicle at Target where the latter fixed the vehicle's horn but not the headlights. Target was only prepared to pay \$100.00 towards the repair costs of the headlights. At this stage he spoke with an employee of OMVIC in an effort to have the headlight problem resolved.

Under cross-examination the consumer stated he drove the vehicle for about one month before complaining of the problems to Target. He dealt with Larry throughout and at no time dealt with Crooke. Consumer identified a photocopy of the bill of sale regarding the vehicle (Exhibit 6, tab 3 page 18) and confirmed the vehicle had as the recorded distance travelled by it at time of his purchase some 206,550 kms. The bill of sale also noted on its face that the vehicle was sold to the consumer with a "100% Powertrain Labour Warranty for 90 days or 3000 kms whichever comes first".

CONSUMER #4

This consumer, who resides in Parry Sound, stated in her testimony that she purchased a 1996 Ford Windstar from Target under a bill of sale dated May 22, 2004. At the time of purchase she was given a 30-day/1000 km powertrain labour warranty on the vehicle. When she took delivery of the vehicle she noted the ABS brakes "made a noise", as well as the vehicle's motor making "a grating noise" and "goes warm." She reported by telephone to Target regarding her complaints. Rob, the person at Target with whom she spoke, told her he would speak with Crooke and have Crooke call the consumer. No one did call the consumer and she took the vehicle to L & H Motors, a Parry Sound Ford dealership. The latter dealership looked at the vehicle and told her the motor was "in bad condition" and advised her to buy a new engine. Again, Crooke was called by the consumer but he never returned the consumer's call. Accordingly, she wrote to Target on July 29, 2004 in which she stated, in part, as follows:

On May 22nd, 2004 I have purchase a vehicle from you (Ford Windstar 1996).

Ever since I have bought this care the engine light has been coming on every time I start the vehicle and the motor is making a grating noise, which I have been told is coming form the crankshaft.

Also, the ABS system does not seem to be working and 10 days after the purchase of this vehicle it started loosing oil (I had to refill about 2 – 3 liters of oil approx. every 2 days).

Subsequently, I took the car to L&H Motors (in Parry Sound) who seemed to be concerned about the state of the whole engine. (Just for your information we had to replace the door opener for the passenger door as well as alternator belt which we paid for ourselves.)

On Thursday, June 24th I brought the car back to you (which by the way took me 2-3 hours since I had to stop and shut off the vehicle every 10 minutes because the motor became too hot and I had to refill it with oil) and I was not able to pick it up again until July 10th due to the holiday, the fact that your mechanic was on vacation and that you were short staffed

During all this time you made no efforts to keep me updated as to the state of repair of my vehicle and if I had not contacted you I might have had to wait even longer to pick the car up.

During my trip home on July 10th the engine light kept coming on again, the ABS system still did not work, the battery light came on periodically and also the oil light kept coming on.

(By the way, the indoor car light has been on ever since we bought the car and even though we checked that all doors are closed we cannot figure out why it does not go out - you should have noticed this).

As well, the motor is still making this grating noise.

On July 13th I informed Rob at your company of the continued problem and asked for a return call from you, but you never contacted us.

On July 22nd I took the car back to L&H Motors in Parry Sound, because I did not feel safe driving the vehicle (the grating noise of the motor became increasingly louder, the ABS system also made loud noises, the engine temperature rose dramatically and the car continued to loose (*sic*) a lot of oil), and the next day I was told that I could not continue driving the car since it was unsafe (apparently, there is a chance of a motor part bursting which could ruin the entire motor).

The estimated repair costs amount to a minimum of \$ 1,500.00 (as per L&H Motors).

I would appreciate if YOU could provide me with a solution as soon as possible since I am in need of a vehicle (out of the 8 weeks we have had this vehicle we have only been able to drive it for approx. 3 weeks).

I have lost the opportunity of a job due to the fact that I did not have a vehicle.

(Exhibit 3, Tab 11c)

Target's employee, Rob, advised the consumer that he had placed the above letter on Crooke's desk for the latter's attention but Crooke never contacted the consumer. The consumer then contacted OMVIC. The consumer further stated that Crooke at no time stated that Target would replace the vehicle's motor but would only repair it. The consumer was not met with a charge when on July 10, she picked up the vehicle from Target.

Under cross-examination the consumer stated that the bill of sale (Exhibit 6, Tab 8, page 60) was signed by her and was dated May 22, 2004. The powertrain labour warranty mentioned in that bill of sale was for "30 days/1000 kms." Not only did Rob inform the consumer that he had made sure that Crooke received her messages but she had also been advised by other persons at Target that Crooke had been informed of her numerous messages that she had left for Crooke to call the consumer. She conceded that Target "did some repairs" to the vehicle and that Target paid for the cost of the bearings in the

vehicle's motor. She further stated that after purchasing the vehicle a hitch was affixed to the vehicle by her husband so as to enable them to tow a little boat when they went fishing. However, the consumer stated neither she nor her husband used the vehicle to tow the little boat and that they used a Mazda vehicle to tow the boat.

STEPHEN DOUGLAS LANGFORD

Langford testified that he is the service manager at L&H Motors Ltd. of Parry Sound and is also a licenced motor mechanic. L&H Motors Ltd. is a Ford dealer.

Langford met Consumer #4 when she brought the Windstar vehicle to L&H Motors on June 21, 2004. The vehicle had a "bottom end noise in the engine like a bearing noise." When he saw the vehicle at that time he had the engine light replaced and advised the consumer regarding the ABS braking system. The consumer informed Langford that she had a warranty on the vehicle and would take it back to the motor dealer who had issued the warranty. Langford again saw the vehicle when the consumer returned to L&H Motors Ltd. a short while later when he then noted that the vehicle was leaking oil and also noted a "terrible noise" from the motor. He noted that the "oil pan had been off and that the bottom half of the crankshaft bearing had been changed."

In cross-examination Langford stated he has been sales manager at L&H Motors for about twenty years and that the noise he heard in the vehicle's motor indicated a bearing problem. Shown by Target's Counsel an invoice dated July 6, 2004 from a certain engine rebuilder issued to Target (Exhibit 6, Tab 8, page 61) Langford identified that bearing parts were supplied for a 1996 Windstar in the sum of \$179.76. Langford also noted that he noted nothing serious or dangerous regarding the vehicle's ABS brakes. Bearing problems could be, according to Langford, due to lack of engine oil, lack of service, incorrect motor oil being used or a coolant leak leading to overheating and engine damage.

CONSUMER #5

Consumer #5's father testified that he paid for the purchase of a 1997 GMC Sonoma vehicle which his son purchased from Target under a bill of sale (Exhibit 6, tab 5, page 33). The Consumer himself also testified at the hearing and confirmed that he signed the bill of sale dated February 22, 2003. He stated that he obtained delivery of the vehicle on February 26, 2003. The day after he obtained delivery, the vehicle started to leak anti-freeze from the engine and he took the vehicle to Target and there he spoke to salesperson Larry regarding the leak. The consumer was told by Larry to take the vehicle "down the street" to a mechanic which he duly did. When he spoke to that mechanic the consumer was told his repair shop no longer dealt with Target and the consumer returned to Target where he told Larry of what he had been told by the mechanic. Larry merely told the consumer to keep "topping up" the anti-freeze.

The consumer, on March 3, 2003, then took the car to Lockhart Motor Sales in Collingwood who inspected the vehicle and spoke with Target regarding the leaking anti-freeze.

Lockhart Motor Sales worked on the consumer's vehicle and gave him a bill which he took to Larry at Target. The bill was for \$520.49. (Exhibit 6, tab 5, page 33) Larry refused to pay the bill and told the consumer Target would only pay \$128.40 of that bill and that the consumer "had to pay the balance".

Under cross-examination the Consumer stated he only spoke with Larry at Target and "never spoke to Crooke". He was aware that Larry was a salesperson at Target and never asked to speak with "the owner" of Target. Target paid the Consumer the sum of \$128.40 by way of cheque dated April 7, 2003. (Exhibit 6, tab 5, page 34)

CONSUMER #6

Consumer #6 stated in her testimony that she purchased a 1998 Ford Taurus from Target on August 1, 2003 under a bill of sale which she signed (Exhibit 3, tab 8c). She stated that she never received a copy of this bill of sale from Target but she later obtained a copy from OMVIC.

On the first morning after she took delivery of the vehicle from Target it would not go into gear. She spoke with O'Neill at Target and was told by him to have the filters and fluid in the transmission changed. She did this but it did not cure the problem. Again she complained to O'Neill who told her to bring the vehicle to Target, which her husband did. When he arrived at Target there was no one there to help him and he left without being attended to. When the consumer complained to O'Neill he told her the vehicle was covered by a "Peoples Choice Warranty" (PCW). She told O'Neill she had not been given the warranty document and it was only then that she obtained the warranty document from Target (Exhibit 3, tab 8, pages 4 and 5). Armed with the PCW warranty she took the vehicle to Mr. Transmission who then repaired the vehicle at a cost of \$1906.00 (Exhibit 3, tab 8, pages 6 & 7). PCW only reimbursed her for \$900.00 leaving her to pay the difference of \$1006.00. The latter sum together with \$114.98 which she expended on transmission fluid and filters meant she was out of pocket for about \$1120.00 (Exhibit 4, tab 8, page 2). Target refused to compensate the consumer for this sum.

The consumer went on to state that the bill of sale does not reflect the true purchase price she paid for the vehicle. The true purchase price paid by the consumer was \$7000.00 not \$5000.00 as reflected in Exhibit 3, tab 8c. The consumer confirmed her signature appears on the bill of sale which she contends was executed on the same date as the PCW warranty. The consumer stated that the true purchase price for the vehicle was \$7000.00, which she paid by way of a \$5000.00 Scotiabank cheque in favour of Target Auto (Exhibit 3, tab 8(d), page 8) and \$200.00 in cash, which she withdrew on her VISA credit card (Exhibit 3, tab 8(d), page 8). Both cheque and cash were handed to O'Neill at Target.

Under cross-examination the consumer stated she dealt with O'Neill in regard to the bill of sale while only Crooke was present when she took delivery of the vehicle.

BRIAN EDWARD O'NEILL

O'Neill testified that he has worked in the industry for the past four years and worked for Target from the fall of 2002 until April 2004 when he moved to Orillia Mazda. He stated that his role at Target was as "closer of deals" and he was paid \$1,000.00 per week plus bonuses but no commissions. When he left Target Crooke wished him good luck and complimented him on "a good job". Customer complaints were dealt with by Crooke. All complaints were entered into a book kept by Target.

Insofar as consumer #6 is concerned O'Neill stated that he negotiated the sale of the 1998 Taurus vehicle to her. Crooke completed the bill of sale. O'Neill received cash and a cheque from consumer #6 and would have given the cheque and cash to Crooke who had to review and approve all transactions.

Under cross-examination O'Neill stated he had a salesperson's registration. He had done business with consumer #6 prior to the transaction with Target regarding the Taurus vehicle and that the consumer had come back to O'Neill in order to do the Taurus deal through him. Target was the third dealership O'Neill had worked for having started with Barrie Honda and then Blue Mountain Chrysler. Upon commencing to work with Target, O'Neill was a registered motor vehicle salesperson. He stated that he was "ignorant of the fact that I had to renew my registration". On starting to work for Orillia Mazda he learned his registration had lapsed, although could not say when his registration had lapsed. Shown the warranty that consumer #6 received at the time of concluding the Taurus bill of sale, O'Neill stated that Crooke bore the cost of such warranty.

Insofar as the transaction with Consumer #1 is concerned, O'Neill stated that the document titled "Used Vehicle Bill of Sale" (Exhibit 5) contains his handwriting.

In re examination O'Neill went on to state that the aforementioned "Used Vehicle Bill of Sale" is not a contract. The \$1000.00 deposit was given to Crooke. He also stated that he signed "Terms and Conditions" when he was granted registration as a salesperson after that registration had lapsed.

TIMOTHY HINES

Hines stated in his testimony that he is complaints handler at OMVIC and dealt with the complaints made against Target by the various consumers in this matter. He went on to state that he dealt with the consumers as hereunder stated.

Consumer #3

Hines received this complaint from the above consumer and he then contacted Crooke at Target. He informed Crooke of the consumer's complaints and enquired of Crooke what he would do regarding the consumer's complaints. Crooke told Hines that he would attend to the complaint regarding the vehicle's high beam lights but would not provide the consumer with a loan vehicle during repairs.

Crooke stated that he would choose the repair shop to repair the high beam lights. When Hines contacted the consumer's mother and told her what Crooke was prepared to do she advised Hines that her son was also looking for reimbursement of some \$150.00 regarding monies her son had paid for repair estimates and that failing this payment by Target and the repair of the high beam lights her son would proceed with action in a Small Claims Court. Crooke, when advised by Hines of the consumer's position, stated that he would not pay for the repair estimates and when the consumer's mother was informed of this she said she would proceed by way of the Small Claims Court. Hines closed his file at that point in time.

Consumer #2

Hines stated that after he was contacted by consumer #2's father he spoke to Crooke and went over the consumer's complaints with Crooke. Hines went on to state that the consumer had a "30 day/1000 kms power train labour warranty" on the vehicle and when he spoke to Crooke on February 18, 2003 he was told by Crooke that the vehicle had exceeded the mileage during which the vehicle was under warranty. Upon Hines informing the consumer of Crooke's position Hines was told by the consumer that Target had caused the delay by putting off the consumer regarding repairs hence the consumer was beyond the mileage limit. Crooke, however, took the position on the February 18, 2003 discussion with Hines that Target was still prepared to honour the labour warranty given to the consumer. Hines spoke to the consumer and told the latter that Target would honour the labour warranty provided the consumer provided a replacement transmission for installation. When the consumer was advised by Hines of this, the consumer told Hines he was not prepared to accept Crooke's offer and would look into other methods of resolving the matter. Nothing further was heard from the consumer.

Consumer #5

Hines received Consumer #5's complaint by e-mail on April 2, 2003 regarding antifreeze leaking from the engine of the GMC Sonoma vehicle he has purchased from Target.

Hines contacted Crooke and told Crooke of the complaint he had received from consumer regarding the antifreeze leak. Crooke took the attitude that the vehicle had passed the emissions test and it could not therefore require repairs. A discussion took place and at the end of the discussion Crooke suggested that the consumer contact Target. In the course of the discussion Hines pointed out to Crooke that this was the third complaint made to OMVIC in 2003 and suggested that a less aggressive stand by Crooke would assist in resolving issues. The consumer was then contacted by Hines and the former suggested to Hines that he would speak to Crooke. The matter was resolved and both Crooke and the consumer contacted Hines to so inform him.

JOHN BERECKZI

Bereczki testified that he is an inspector with OMVIC and in the course of his duties he held an inspection at Target on May 6, 2004.

He was accompanied by Hines during this inspection. Bereczki drew the Tribunal's attention to his handwritten inspection report (Exhibit 3, tab 9 A) completed after his inspection although he took full notes during the inspection. Bereczki met with Crooke and commenced to review the salespersons.

"Moe" O'Neill was discussed with Crooke. O'Neill was not listed as a salesperson although Crooke stated that O'Neill had transferred to Target as a salesperson. Bereczki ascertained that O'Neill's registration had lapsed during December 2002 and he told Crooke of this fact and handed Crooke an application form for renewal purposes. He reviewed some 30 transactions plus 5 lease transactions. He also observed that Target was using uninsured warranty companies and pointed out to Crooke that the dealer had the obligation to honour a warranty should the uninsured issuer of the warranty fail to do so.

Bereczki also reviewed copies of cheques issued from December 2003 to March 2004 to O'Neill by Target. All such cheques were in the amount of \$1000.00 each, (Exhibit 3, tab B) Crooke told him the cheques were for consulting services. At the conclusion of the inspection Crooke told Bereczki that he was severing all ties with O'Neill and handed Bereczki a letter to that effect. (Exhibit 3, tab 9 B) Also at the conclusion of the inspection Crooke was handed the "inspection findings" (Exhibit 3 Tab 9 B).

In cross-examination by Target's Counsel, Bereczki stated there was no question of financial impropriety by Target. He went on to state that a dealer has the obligation to ascertain a salesperson working for the dealer had a valid registration.

Bereczki pointed out to the Tribunal that Target was not in compliance with section 15 of Regulation 801 to the Act in that Target was not keeping proper records. He also pointed out that OMVIC's Standards of Business Practice require emission tests to be carried out on leased vehicles.

He also pointed out that he found, arising out of his inspection, that Target was not in compliance with section 17.(c) of the Act in that Target had not notified the Registrar in writing of the commencement of employment of O'Neill as its salesperson. He concluded by saying that since May 6, 2003, O'Neill does not appear to have been employed as salesperson with Target.

MARY JANE SOUTH

South testified that she has been with OMVIC since 1997 and has held the position of Deputy Registrar since then. South went on to explain the functions of OMVIC which was created as a non-profit organization with delegated authority to administer the Act and its Regulations and described the Act as a public protection statute.

South went on to state that she would expect prompt and courteous response by a dealer in regard to a consumer's complaints and that consumers should not have to run back and

forth to the dealer in order to have complaints addressed. South also stated that Crooke is the sole Officer and Director of Target (Exhibit 3, tab 3).

O'Neill was not at any time registered to Target as a salesperson. O'Neill was registered as a salesperson in late 2000 and that registration expired in late 2002 from which date he was not registered until late 2004. She met with O'Neill on August 6, 2004 to discuss her concerns with his registration and his financial difficulties (Exhibit 3, tab 10). Following this meeting O'Neill was registered as a salesperson subject to terms and conditions.

South went on to state that there are presently approximately 8,000 registered motor vehicle dealer in Ontario and of that total only about 50 dealers have more than 5 consumer complaints per year registered with OMVIC against them. Since O'Neill left Target the only complaint directed to OMVIC was that brought by Consumer #4. O'Neill, according to South, had nothing to do with the consumer #4 transaction.

Under cross-examination South stated that a salesperson's registration is for a two-year period. At the expiry of that period a renewal is required and a renewal fee is to be paid by the salesperson.

South went on to state that 5 or more complaints per year against a dealer are not the only factors that trigger OMVIC's concern regarding such dealer.

South was not able to say how many complaints were received by OMVIC against Target during the period of 1997 to 2005 although there have been 8 complaints received since 1999. The responsibility to register transfer of ownership with the Ministry of Transportation within 6 days of the transaction rests upon the purchaser not upon the dealer according to South.

RICHARD WAYNE CROOKE

Crooke stated in his testimony that he is 44 years of age and has been the sole Officer and Director of Target since 1997 when Target was first registered as a motor vehicle dealer. He went on to state that he has been registered as a salesperson under the Act "on and off" for the past twenty years.

He further stated that O'Neill started to work for Target in October 2002 and was paid \$1,000.00 per week. Upon O'Neill commencing to work for Target, Crooke gave him a cheque drawn on Target's bank account payable to OMVIC for \$75.00 and also gave O'Neill a signed transfer form of O'Neill's salesperson registration to Target. Crooke assumed that O'Neill would mail the cheque and transfer form to OMVIC.

When Crooke met with OMVIC's Bereczki he learned from the latter that O'Neill's registration had lapsed in 2002. After O'Neill left Target he went to work for Orillia Mazda. At the latter's request Crooke signed a letter dated August 5, 2004 which was prepared by Orillia Mazda for Crooke's signature. (Exhibit 6 page 6). This letter which was addressed to "whom it may concern" stated as follows:

“Mr. O’Neill was retained as a consultant at Target Autozone Inc. from October 2002 until April 2004. Mr. O’Neill operates a communication business known as BEO Global Communications. It was my intention to have Mr. O’Neill train my sales staff how to properly meet, greet and present a used vehicle to potential customers. Mr. O’Neill had a valid licence at the time he started consulting for Target Autozone and I think that I applied for a transfer but may have misplaced the forms. I sincerely regret any inconvenience caused by any oversight on my behalf.”

Crooke went on to state that Target carries on business in Barrie, Ontario and it sell about 250 – 300 used vehicles per year. Generally such vehicles sell for less than \$6,000.00 and have travelled an average between 170,000 kms and 220,000 kms at time of sale, being 8 or 9 years old. Crooke offers purchasers a warranty when he sells vehicles.

Crooke proceed to testify regarding the following consumers and their complaints.

Consumer #2

Crooke stated that he met with this consumer on a number of occasions the first being in January 2003. He did the final negotiations with the consumer’s father. When the Consumer came with his complaint to Target, Crooke offered to install a replacement transmission in the consumer’s car without charge provided the consumer supplied Target with the replacement transmission. If the consumer was not prepared to accept Crooke’s offer then Crooke would take back the vehicle and refund the monies paid by the consumer to Target. This offer by Crooke was made despite the warranty having expired. The consumer never contacted Crooke again. Crooke stated that O’Neill transacted the sale of the vehicle to the consumer.

Consumer #3

Crooke stated that Larry was involved in the sale of this vehicle to the consumer. At the time of the sale Target had installed a replacement clutch on the vehicle. The bill of sale provided for a “30 day/1000 km power train labour warranty” which Target supplied at its cost. The problem was with the vehicle’s horn and high beam headlights the latter relating to the wiring system. The vehicle’s horn was repaired by Target but the vehicle had to be left at Target for Target to attend to the headlights. The consumer demanded a “loaner” while the vehicle was being attended to. Crooke would not supply the consumer with a loan vehicle as the consumer was only 17 years of age and there were concerns regarding insurance to a 17 year old. When the consumer’s mother was provided with this explanation, Crooke offered, in place of a headlight repair, to give the consumer \$100.00. This was refused and the consumer refused to leave the vehicle with Target. The consumer removed the vehicle from Target’s premises. Nothing further was heard from the consumer.

Consumer #4

Crooke referred to the bill of sale regarding this vehicle (Exhibit 6, tab 8, page 60) and noted that the warranty given to the consumer was a 30 day or 1000 km powertrain labour warranty. After taking the vehicle to a Ford dealer in Parry Sound the consumer brought the vehicle back to Target. Target at its cost of \$600.00 to \$700.00 made certain repairs to the vehicle's engine bearings.

Consumer #5

Crooke stated that the consumer's father bought the vehicle involved in this complaint on behalf of his son. Some 5 days after the delivery of the vehicle the consumer brought the vehicle back to Target with the engine leaking anti-freeze liquid. The consumer was sent by Target to a repair shop nearby. The repair shop did not do any repairs and the consumer then took the vehicle to a friend who fixed the leakage problem. The bill that the consumer received from his friend regarding the repair was faxed to Target. (Exhibit 6, tab 5 page 33). When Crooke received the repair bill he spoke with the consumer's father and arrived at a settlement in terms of which Target agreed to pay \$128.40 to the consumer. This payment referred to the labour charge under the warranty. The consumer accepted this payment.

Consumer #1

Crooke stated that the document titled "Used Vehicle Bill of Sale" (Exhibit 5) was drawn up by O'Neill. The consumer had agreed to purchase the Mazda vehicle from Target, the latter being the registered owner of the Mazda. The consumer had paid Target a deposit of \$1,020.00 and when she decided not to proceed with the purchase Crooke repaid her the deposit. Under cross-examination as to why it took Target some 30 days to refund the consumer's deposit Crooke stated that he had to check out details of the consumer's claim. On checking the claim he "fired" the salesperson who handled the transaction and repaid the consumer's deposit.

Consumer #6

Crooke stated that consumer who purchased the Taurus vehicle was a friend of O'Neill. He stated further that the vehicle was sold to the consumer for \$5,000.00 and that Target received a Scotiabank cheque for this amount. (Exhibit 3, tab 8 D). There was no warranty given on the bill of sale (Exhibit 3, tab 8 D page 4) which is dated August 7, 2003 and is in O'Neill's handwriting. Crooke went on to state that \$2,000.00 in cash was not given to him by O'Neill. There was however a warranty given by Peoples Choice Warranty (PCW) and this warranty was for 12 months/12000 km subject to a maximum claim of \$1,000.00 (Exhibit 3, tab 8 page 4). The transmission problem that developed with this vehicle was repaired by Mr. Transmission who charged the repair costs to the consumer less the \$1,000.00 warranty. Crooke did not know that the consumer had obtained a warranty from PCW at the time sale of the vehicle.

The \$100.00 cost of the warranty was not paid by the consumer but by Target and the repair costs after deduction of the \$1,000.00 warranty left the consumer with having to pay about \$900.00 to Mr. Transmission after a \$50.00 deductible.

When he discussed this transaction with O'Neill the latter denied that the consumer paid any cash to him and that he only received the Scotiabank \$5,000.00 cheque from the consumer.

Under questioning by OMVIC's Counsel relating to matters generally, Crooke stated that Target had between two and six employees depending on the times. He also stated that he is in the course of winding down Target's business and that the reason "I am here today is because of my name and reputation". It was O'Neill that looked after the Target's business although Crooke had sole signing authority regarding cheques drawn on Target's banking account.

Crooke stated further that the salesperson responsible for a sale would sign as salesperson and Crooke's signature would appear as Target's representative. Crooke stated that he presigned bills of sale forms despite having no knowledge of the future transaction(s) "as I trusted my employees." He also stated that he signed cheques drawn on Target's bank account with the body of the cheque being left entirely blank. In Crooke's absence from Target's business his "staff" approve sale transactions.

Crooke also stated that in regard to the Applicants cheque for \$75.00 which he gave to O'Neill to forward to OMVIC pertaining to O'Neill's registration he assumed that cheque had gone through but "I did nothing to check if the cheque went through" and made no enquiries so as to ascertain what cheques were outstanding. While his wife does the Applicant's books, Crooke stated that "I balance the cheque book". He also stated that in late 2002 O'Neill's registration fell due for renewal.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal.

1. Target has been a registered dealer under the Act since July 1997.
2. Crooke was at all material times the sole officer and director of Target and its controlling mind.
3. Crooke has been registered under the Act as a motor vehicle salesperson for some twenty years.
4. O'Neill commenced to work for Target as a motor vehicle salesperson and as such he was retained as an unregistered motor vehicle salesperson by Target from approximately October 2002 until April 2004.

THE LAW:

The *Motor Vehicle Dealers Act* (the 'Act'), states as follows;

4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.
- 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 law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

Regulation 801 to the *Motor Vehicle Dealers Act* states as follows:

15. Every motor vehicle dealer shall, with respect to the purchase or sale of a motor vehicle, maintain for a period of two years from the date of expiry of any warranty or service plan covering the vehicle all purchase orders, sales orders and written records of all transactions resulting in the purchase or sale of the motor vehicle and in the case of a used motor vehicle,
16. (7) A duplicate original copy of the sales order of a motor vehicle with the original signature of the purchaser on it shall be given to the purchaser when the order is accepted by the motor vehicle dealer.

The *Highway Traffic Act* states as follows:

- 11.1 (1) Every person who sells, offers for sale or transfers a used motor vehicle shall provide a valid used vehicle information package in respect of the vehicle for inspection by proposed purchasers or transferees and shall deliver the package to the purchaser or transferee at the time of sale or transfer of the vehicle
60. (1) Every person who buys, sells, wrecks or otherwise deals in second-hand motor vehicles, trailers or bicycles shall keep a complete record of all motor vehicles, trailers and bicycles bought, sold or wrecked and of the information that will enable the motor vehicles, trailers and bicycles to be readily identified, and shall transmit to the Ministry, within six days after the event, on forms furnished by the Ministry, a statement of each motor vehicle or trailer bought, sold or wrecked by the person and the information with reference thereto that may be required by the Ministry.

DECISION AND REASONS:

The onus rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registrations of Target and Crooke ought to be revoked due to contraventions under the Act, Regulations and the Standards of Business Practice issued in November 2000 and that their past conduct affords reasonable grounds for belief that Target and Crooke will not carry on business in compliance with Section 5 of the Act.

The following is an analysis of the evidence placed before the Tribunal and the conclusions pursuant to such analysis.

THE MATTER OF CONSUMER #1

The facts are straight forward and not in dispute. The consumer placed a deposit with Target subject to her mechanic examining the vehicle she proposed to purchase and being satisfied that the consumer should purchase the vehicle. After examination of the vehicle the consumer's mechanic advised her not to purchase the vehicle. This was communicated to the salesperson at Target with whom the consumer had dealt and the consumer requested her deposit be refunded to her. This request was referred by the salesperson to Crooke who, albeit not making refund immediately, agreed to refund the deposit and did so within about a month of the request for refund having been made to Target's salesperson. The conduct of Target may have been somewhat tardy in making refund to the consumer but can by no stretch of the imagination be termed a violation of Section 5 of the Act.

THE MATTER OF CONSUMER #2

The main complaint of this consumer related to the vehicle's transmission in respect of which the consumer had received a "30 day/1000km 100% Powertrain Labour Warranty". After taking delivery of the vehicle the consumer noticed that the transmission was not shifting smoothly and approached the salesperson at Target with whom he had dealt when purchasing the vehicle. This salesperson was not receptive to the consumer's complaint and the consumer then took the vehicle to a dealership dealing with vehicles of the make that the consumer had purchased and received a quotation from that dealership for some \$1,700.00 for repairs to the transmission. The consumer then returned to Target and spoke with Crooke. This was the first time Crooke was made aware of that problem as well as another problem with the vehicle's air-conditioning. Crooke informed the consumer that he wished to have his mechanic inspect the vehicle and it was then left with Target. The following day the consumer returned to find the car had not been inspected by Target's mechanic. This delay appears to have displeased the consumer who, when Crooke later agreed to have repairs made to the transmission in terms of the warranty, refused to allow repairs to be made by Target as he had no confidence in Target, removed the vehicle from Target and did not again communicate with Target.

The transmission complaint was initially reported to the salesperson who ineptly dealt with the consumer and his complaint. When Crooke was apprised of the complaint by the

consumer he agreed to have his mechanic look at the transmission but failed to have his mechanic inspect the vehicle immediately. The failure to look at the transmission on the day he promised so to do, while annoying to the consumer, did not justify the latter in removing the vehicle from Target and refusing to allow Target to inspect or repair the vehicle. The vehicle's air conditioning had been attended to by Target and according to the consumer he only made one complaint regarding the vehicle's transmission to Crooke having dealt with a salesperson at Target prior thereto. While the consumer's version of events do not accord with Crooke's version in their entirety there is no doubt, based upon the consumer's own version, that the consumer precipitously broke off communication with Crooke and unreasonably refused to allow Crooke to attend to repairs. The conduct of Crooke cannot be termed as dishonest or lacking in integrity.

THE MATTER OF CONSUMER #3

This complaint related to the horn and the headlights of a vehicle sold by Target to this consumer. The evidence of the consumer was that the horn was fixed by Target but that Target would only pay \$100.00 towards the repair of the vehicle's headlights.

The evidence of Timothy Hines of OMVIC is supportive of Crooke's testimony that Target would attend to the repairs of the vehicle's headlights but would not provide the consumer with a loan vehicle. It was this refusal that led to the breakdown in relations between the consumer and Crooke. Crooke's refusal to supply a loan vehicle was due to the consumer being a minor and whether a loan vehicle could be insured due to the vehicle's driver being a minor. When Hines advised the consumer's mother of the fact that headlight repairs would be made by Target but no loan vehicle would be supplied, consumer's mother advised Hines that her son also wanted reimbursement of repair estimates of \$150.00 which was refused by Crooke. This annoyed the consumer's mother who broke off further contact with Target and refused further dealings with Target.

There was no obligation upon Crooke to supply a loan vehicle to the consumer or to pay for repair estimates. There was an obligation on Target to repair the headlights and this Crooke did not refuse to do. It is noted by the Tribunal that when the Consumer's mother spoke with Hines of OMVIC initially on January 29, 2003 she advised Hines that when she received an estimate of \$800.00 from a Midland repair shop to repair the headlights and communicated this to Target she was advised to drive the vehicle to Target "and they would fix it themselves" (Exhibit 3, tab 4A bottom page 2 of 3). This evidence of Hines is in direct contradiction of the testimony of the Consumer. Crooke agreed to accommodate the consumer insofar as Target's legal obligations were concerned and was entitled to reject the demands for payment of repair estimates and supply a loan vehicle to the consumer. There was nothing in the actions of Crooke to indicate conduct that was lacking in integrity or was in any way dishonest.

THE MATTER OF CONSUMER #4

This vehicle was sold by Target to the consumer with a "30 day/1000km Powertrain Labour Warranty". The vehicle at the time of sale had travelled some 190,000kms and was some

eight years old. The purchase consideration for the vehicle of some \$4,347.83 realistically reflects both the vehicle's age and that it had done a high mileage. Despite this Hines was told by Crooke that he was prepared to honour the warranty. The warranty was for labour only. When the consumer picked up the vehicle from Target on July 10, 2004 after it had done certain repairs to the vehicle's motor, the consumer was not charged for such repairs. The repairs carried out by Target under the above labour warranty were not successful in that subsequent repairs would have to be carried out to the motor at a minimum of \$1,500.00.

The Tribunal accepts that after the consumer purchased the vehicle from Target the consumer had a trailer hitch affixed to the vehicle. The Tribunal also accepts the consumer's testimony that despite the affixing of the hitch to the vehicle the latter was not used by the consumer to tow any object. The Tribunal accepts the consumer's explanation that she and her husband intended to use the vehicle for towing a boat but had not yet used it for that purpose as they had continued to use another vehicle for towing their boat.

The consumer did purchase an eight year old vehicle that had covered a distance of some 200,000kms and considering the low price paid for the vehicle the Tribunal is of the opinion that the consumer should have been alert to the possibility that the vehicle may give trouble in one manner or another. This possibility, unfortunately, became a reality and the result is an expansive repair being required.

However, in contradiction of what is stated above it is clear that the vehicle had a serious problem when Target sold it to the consumer. While the consumer should have been cognizant to possible problems with the vehicle having regard to its low purchase price, high mileage and age can the consumer be said to have received a vehicle in working condition. The Tribunal believes not. Practically from day one ongoing major repairs were necessary that resulted in the consumer being denied the use of the vehicle for extended periods of time. The reasonable expectation that the vehicle was, at a minimum, fit as basic transportation was denied to the consumer. In short there was a fundamental breach of contract by Target in that Target breached its obligations to the consumer under contract law.

The Tribunal is of the opinion that Crooke, who was no novice within the industry, should have been more responsive in meeting the legitimate concerns of the consumer and had the obligation to ensure, by adequately repairing the vehicle's motor in a timely fashion, that the consumer had a vehicle in working order as was implied in the contract of sale. The Tribunal is of the opinion that the conduct of Crooke regarding this issue showed a lack of integrity in that for a dealer of Crooke's years in the industry, he showed a lack of concern for the situation in which the consumer found herself. She was unduly delayed in having her concerns addressed and when Target did make some repairs they were inadequate or insufficient to rectify the condition found by the consumer regarding the vehicle's motor. Beyond making inadequate or insufficient repairs Target failed to meet a basic implied condition of the sale that the vehicle would be reasonably fit for the purpose for which it was bought. The vehicle as sold by Target was not fit for use as basic

transportation and did not meet within the requirements of section 15.1 of the Sale of Goods Act, nor of common law.

THE MATTER OF CONSUMER #5

This consumer's complaint related to the vehicle sold to him by Target and which manifested an anti-freeze leak one day after the vehicle's delivery. The vehicle was sold with a "30 day/1000km Powertrain Labour Warranty". The salesperson at Target was unhelpful to the consumer when the consumer complained regarding this problem and the consumer took the vehicle to another repair shop to have the leak attended to and was charged \$520.49 for such repair. The consumer presented this bill to the salesperson at Target with whom he had been dealing and requested reimbursement of the repair costs. The salesperson refused the consumer's request and only offered to pay \$128.40. The consumer agreed to accept this amount and received a cheque from Target in the sum of \$128.40. This amount represented the labour costs regarding the repair invoice. At no time did the consumer have contact with Crooke or dealings with him.

The consumer at no stage had dealings with Crooke but only with his salesperson and when Crooke was made aware of the position regarding the leak and the existence of a labour warranty, Target did make reimbursement of the labour portion of the repair costs in an amount of \$128.40. The warranty that the consumer obtained was limited to labour costs relative to the power train of the vehicle. Target met its legal obligations under its warranty. Accordingly the Tribunal does not find there to have been a violation of section 5 of the Act in that there was no dishonesty or lack of integrity on the part of Target relative to this issue.

THE MATTER OF CONSUMER #6

In this matter the consumer stated that she did not receive a copy of the bill of sale from Target but received a copy from OMVIC pursuant to its investigation. This is clearly a breach section 16.(7) of Regulation 801 of the Act.

There was a warranty issued by PCW that was given without charge to the consumer by Target at the time of the vehicle's sale to this consumer. This warranty known as "PCW Bronze" was for "12 months/12,000kms maximum claim \$1,000.00". When the vehicle experienced transmission problems the cost of rectification by Mister Transmission exceeded the \$1,000.00 coverage under the Warranty. The excess not covered by warranty had to be borne by the consumer in the amount of \$1,006.00. Having regard to the free warranty supplied to the consumer, the age of the vehicle, some six years at the time of sale and the not inconsiderable distance it had travelled as well as the minimal purchase price paid for the vehicle, some \$4,339.00, the conduct of Crooke in refusing to reimburse the consumer with \$1,006.00 cannot be considered to be conduct amounting to dishonesty or lack of integrity.

THE MATTER OF THE EMPLOYMENT OF AN UNREGISTERED SALESPERSON

Section 4 of the Act states that a dealer shall not retain the services of a salesperson who is not registered under the Act.

The evidence of Crooke is clear and unambiguous relative to O'Neill's employment as a motor vehicle salesperson with Target from approximately October 2002 until April 2004. The evidence adduced by the Registrar and not disputed by Crooke was that during that period O'Neill was not registered under the Act as a motor vehicle salesperson. The Tribunal finds that O'Neill was therefore employed by Target from October 2002 to the end of April 2004 as an unregistered salesperson.

The evidence of Crooke was that he gave O'Neill upon commencing to work at Target in October 2002 a Target cheque in favour of OMVIC so as to enable O'Neill to accompany his renewal application for registration as a salesperson and to pay the fee due to OMVIC for renewal. That act establishes in the Tribunal's opinion that Crooke was not only aware when O'Neill commenced to work for Target in October 2002 that O'Neill was without registration but that O'Neill had to be registered as a salesperson with Target. Crooke gave further evidence that he and only he signed cheques drawn on Target's banking account and that he reconciled Target's paid cheques with the cheques issued by Target. He made it clear in his evidence that he kept the reins on the finances of Target and yet he conceded that at no time did he check or observe that this cheque had not been cashed by OMVIC. In addition he never checked whether O'Neill had received his renewal of registration despite his statement that he displays on a board on Target's premises all the registrations of Target's salespersons.

Accordingly, the Tribunal finds that Crooke knew or ought to have known that O'Neill was without the requisite registration. At best from Crooke's point of view he was, in the opinion of the Tribunal, wilfully blind to the fact that O'Neill was actively working as a salesperson for Target without the benefit of registration despite O'Neill being paid weekly cheques of \$1000.00.

Crooke is no neophyte in the motor vehicle industry and the Tribunal finds that he was far from forthcoming when he contended that he did not know or realize that O'Neill was working as an unregistered salesperson for Target.

Registration is not considered a minor requirement under the Act and there is an obligation on a dealer to ensure that salespersons are registered under the Act at all times. After all this is a regulated industry operating under a public protection statute. Permitting unregistered persons to act as motor vehicle salespersons encourages the erosion of a fundamental safeguard envisioned by the Act. To have allowed O'Neill's employment by Target, without the benefit of registration, to continue for some nineteen months indicates an ongoing course of misconduct by Crooke and a lack of concern for carrying on business according to law. The testimony of Crooke on the aspect of O'Neill's employment with Target lacked credibility. The Tribunal is satisfied that O'Neill, to the knowledge of Crooke, was retained by Target and worked for Target from October 2002 to the end of April 2004.

as a motor vehicle salesperson without the benefit of registration. Crooke's conduct in this regard was both dishonest and lacking in integrity. The Tribunal does not accept this conduct was due to an oversight on Crooke's part. In addition it was, to Crooke's knowledge not in accord with the requirements of the Act. It is conduct that cannot and should not be sanctioned or condoned by the Registrar whose very duty is to uphold the Act. The Tribunal views this conduct as a serious breach of section 5 of the Act.

The testimony presented by various witnesses left the Tribunal with the opinion that Crooke left a great deal of the business affairs of Target in the hands of Target's salespersons. These included O'Neill and Larry. The salespersons, including O'Neill and Larry made decisions regarding consumers' complaints and in many instances the decisions made by those parties lacked professionalism and a sensitivity to the complaints of consumers. Crooke as the controlling mind of Target was without doubt responsible for Target employees' business conduct and for their maintaining a high quality of sales and services practices. This is a requirement under paragraph 5.2 of OMVIC's Standards of Business Practice besides being good common business sense and exhibiting integrity. Crooke cannot eschew his responsibility for adequately overseeing the conduct of Target's employees and attempting to shelter behind having no knowledge of many of the consumers' complaints. After all, Target was and is not a large corporation that employs many persons. It is a small operation with very few employees whose decisions and actions could and should have been known to Crooke and whose actions could and should have been controlled by Crooke. Crooke adopted a hands off approach to Target's business operations and must take ultimate responsibility when something untoward occurred during the conduct of Target's business. The *laissez-faire* attitude displayed by Crooke regarding attention to Target's daily business contributed to many of the problems that arose in this matter and could have been avoided had he exercised more diligent control and supervision. For this lack of control and supervision, Crooke must bear responsibility.

Having regard to what is stated above and coupled with the Tribunal's findings relating to consumer #4, as well as its findings relating to O'Neill's employment by Target while not registered, the Tribunal is of the opinion that Target should have its registration as dealer revoked. Insofar as Crooke's salespersons registration is concerned the Tribunal believes that he should have the opportunity to continue as such as there will be no management or control obligations imposed upon him as a salesperson as there would be if he were a dealer.

DECISION

Accordingly, the Tribunal pursuant to the authority vested in it by section 7 (4) of the Motor Vehicle Dealers Act directs the Registrar to refrain from carrying out the proposal dated July 20, 2004 revoking Richard Crooke's registration as a Motor Vehicle Salesperson. Insofar as Target Autozone Inc is concerned the Tribunal directs the Registrar to carry out his proposal dated July 20, 2004 to revoke the registration of Target Autozone Inc as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 26, 2005

Filename: 2510.mvda.Autozone

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.

DIEGO MARTIN LUCERO

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: AMEDEO DiCARLO, representing the Applicant, DIEGO MARTIN
LUCERO

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 12, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the AAct@). The Applicant appeals a Notice of Proposal dated March 11, 2004, issued by the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") to refuse the registration of Diego Martin Lucero (the AApplicant@) under the Act.

REGISTRAR'S POSITION

It is the position of the Registrar that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. The Applicant did not provide a truthful answer to question #9 in his application for registration dated January 16, 2004 and received by the Ontario Motor Vehicle Industry Council (AOMVIC@) on January 20, 2004 (the AApplication@).
2. The Applicant answered question # 9 regarding convictions with Ano@;

3. A criminal record check found that the Applicant had been found guilty of A Possession under \$5,000.00" and AUtter Forged Document@ on January 8, 2004.
4. The Applicant has failed to comply with the Act and particularly Section 5 thereof.

Further, pursuant to the Notice of Further and Other Particulars, dated December 30, 2004, the Registrar added the following reasons:

5. The Applicant has acted as a salesperson without the benefit of registration.
6. The Applicant has provided false or misleading information on his application for registration.

APPLICANT=S POSITION

It is the Applicant=s position that:

1. He answered question # 9 in the negative because he had been told by his lawyer, a judge and a probation officer that, because of the conditional discharge, there was no criminal record.
2. When asked about his criminal record he did make disclosure.
3. He did not mislead OMVIC.

THE EVIDENCE:

At the commencement of the hearing the Notice of Further and Other Particulars, dated December 30, 2004, was made Exhibit 3, the Respondent's Book of Documents was entered as Exhibit 4, the Applicant=s documents, consisting of a letter from counsel, a copy of the information, appearance record and a copy of the certified copy of the transcript of the reasons for sentencing of the Honourable Mr. Justice A. Di Zio were entered as Exhibit 5 and the Applicant=s release and discharge form was entered as Exhibit 6 in these proceedings.

TESTIMONY OF MARY JANE SOUTH

The only witness called by the Registrar was Mary Jane South who identified herself as being the Deputy Registrar responsible for overseeing registrations and that she had held such position since January 1997 and prior to that she had held a similar position when the responsibility carried on by OMVIC was part of the Ministry of Consumer and Business Services.

Ms. South referred the Tribunal=s attention to the Registrar=s proposal at Tab 1 of Exhibit 4 and the further and other particulars, being Exhibit 3, and stated that the Registrar=s first concern with respect to the Applicant=s application was his failure to make full disclosure.

Ms. South testified that the Applicant was previously registered as a salesperson from May 30, 2001 until on or about September 4, 2002, however in the Application, the Applicant stated that he was working for Collection of Fine Cars as a salesperson until August of 2003, which meant that he was working as a salesperson without registration for approximately one year.

Ms. South stated that the Applicant=s answer to question 3 of the Application referred to the nine terms and conditions which were offered to the Applicant on or about June 20, 2003, but which the Applicant never signed. Also included in Exhibit 3 is the letter from OMVIC to the Applicant dated June 20, 2003, enclosing the terms and conditions.

Ms. South made reference to the notes of a telephone conversation between the Applicant and Yovanka McBean, a law clerk for OMVIC, who sent the June 20, 2003 letter to the Applicant with the terms and conditions, which notes indicate that Ms. McBean received a call from the Applicant on June 24, 2003, during which the Applicant advised he wished to dispute certain of the terms and conditions, particularly the one which prohibited him from being a partner/owner in a dealership. The notes of the telephone conversation indicate that Ms. McBean advised the Applicant that this prohibition was inserted because of three allegations against the Applicant and when advised that the Applicant disputed the allegations, Ms. McBean recommended that the Applicant respond in writing. Attached to Exhibit 3 is a copy of a hand-printed letter addressed to Ms. McBean in which the Applicant responded to the allegations that:

1. he attempted to sell a 1993 Celica to a consumer in April 2002 as though it was a private sale on behalf of a friend, took a \$500.00 deposit from the consumer and then demanded \$9,000.00 in cash;
2. he sold a 1999 Volkswagen on December 27, 2002, having acquired the motor vehicle on December 13, 2002, which vehicle was not plated and was sold without being registered; and
3. he sold a 1993 Mazda 626 on November 7, 2002 to Anthony Popadyneec without being registered and further that the odometer reading on the motor vehicle was misrepresented.

Ms. South stated that question #9 of the Application clearly indicates that the question includes Athose instances, where a conditional or absolute discharge has been ordered.@ Ms. South noted that the party signing on behalf of Gravity Auto Sales and Leasing Inc., the dealer with whom the Applicant wished to work, was his brother, Alex Lucero.

In response to being advised by OMVIC that a criminal record check had indicated that the Applicant had a criminal record, the Applicant wrote to OMVIC, by letter dated February 17, 2004, which appears at Tab 4 of Exhibit 4, advising OMVIC that the Applicant had no

intention of lying on the Application and that he answered Ano@ to question #9 because he had a conditional discharge, which he understood meant he did not have a criminal record. Ms. South stated that the record search, the results of which appear at Tab 5 of Exhibit 4, indicate that there were four charges laid against the Applicant, two of which were withdrawn and for two of which he was given a conditional discharge and probation for 12 months. According to the synopsis of the charges appearing in the supplementary record, the charges arose from with respect to the Applicant attending at a Bay store in Toronto and purchased clothing with a Scottish Widow=s Bank VISA card. The Applicant then proceeded to a Retrospecs Inc. store where he attempted to purchase a wrist watch with the same credit card, however, when the card was Aswiped@, the information given back was that the number related to a MasterCard. The store employee contacted security and the police were called and arrested the Applicant.

Ms. South stated that it was the Registrar=s position that the actions of the Applicant indicated past conduct of a dishonest nature, including the forgery, that his failure to answer honestly question #9 on the Application, indicated a lack of integrity and that the Applicant continued to act as a salesperson after his registration had expired was a further example that he would not act with integrity and honesty. Ms. South noted that as a prior registrant the Applicant should have known that such conduct was contrary to the Act.

Under cross-examination Ms. South testified that the Notice of Further and Other Particulars was issued after a further review to include in the reasons for refusing to register the Applicant, that he had worked as a unregistered salesperson and provide false or misleading information to OMVIC. Ms. South stated that the Applicant himself disclosed that he was a salesperson for the period October 2002 to August 2003 in the Application. Ms. South acknowledged that, notwithstanding the complaints, the Registrar was prepared to register the Applicant, subject to the terms and conditions sent to the Applicant in June of 2003. Ms. South confirmed that had the Applicant signed the conditions he would have been registered.

When Ms. South was asked about the written explanation from the Applicant explaining why he objected to certain conditions, Ms. South noted that that written response was not received until January 2004 and that the issue that the Applicant had to address was whether or not to sign the conditions. Having decided to refuse to sign the conditions he was denied registration. Ms. South testified that whether an application is new or a renewal, a criminal record check is done and that the release and disclosure form is now part of the application form as it is required by the Ontario Provincial Police and replaces the consent that had previously been part of the application form.

When asked about the effect of the conditional discharge, Ms. South testified that it was the past conduct of the Applicant, not the criminal record, which gave rise to the refusal to register.

The Applicant testified that he was born on February 3, 1981, was 23 years old, single, with a six year old son, and had lived in the Woodbridge area for five to six years. The Applicant stated that he had started to work in the automobile industry in 2000 to see if he would like the work, decided he did and took the test and obtained his licence. The

Applicant started to work for Venture Ford in Weston when he was 19 years old and worked there for about one year and left to go to International Trading Company Limited when Venture Ford closed.

The Applicant testified that when he went to Collection of Fine Cars he was not aware that his licence had expired. He had reapplied in 2003 and when he was called and told about the three matters referred in the telephone conversation with Ms. McBean, he tried to negotiate with respect to the conditions without success and that is why he lost his licence. The Applicant stated that his licence was taken away due to the three matters, previously referred to, and because he did not sign the conditions. The Applicant testified that he worked in landscaping from the end of 2003 into 2004.

The Applicant stated that he became involved with the police when he was charged with the four counts referred to previously, however the police misunderstood his use of the VISA card. He pleaded guilty and did 80 hours of community work, donated money in the amount of \$300.00 and took courses regarding theft intervention. The community hours were done by the Applicant prior to sentencing. The Applicant reiterated his position that it was his understanding that a conditional discharge was not considered a criminal record.

The Applicant testified that he felt that he had answered question #9 truthfully the first time when he ticked Ano@ and then went on with the rest of the Application. When he was contacted by Marcela Sapulveda from OMVIC she told him to provide a written explanation with regards to the three occurrences and he sent the letter, appearing at Tab 4 of Exhibit 4.

The Applicant referred to the reasons for sentencing forming part of the documents in Exhibit 5 and, in particular, the Judge=s comments that he had done certain things which indicate he should be entitled to such forgiveness and that he had demonstrated by pleading guilty that he is extremely remorseful, which generally indicates a change in attitude. The Applicant stated that it was a dumb decision, but that he had wanted clothes and needed money, but felt that he had paid his debt. The Applicant acknowledged that he told the police, in response to the questions asked, that he was employed by Collection of Fine Cars, but was not asked what his occupation was and that the police officer merely inserted salesperson and that he had not corrected that entry. The Applicant stated that he worked part-time there and did not sell cars in 2004. The Applicant testified that he still wanted to be in the car business and in the family business with his brother and if conditions were to be imposed he would accept them.

Under cross-examination, the Applicant acknowledged that he had first been registered in May 2001 and had taken the course for certification and passed it, which course included a review of the Act and the Code of Ethics. The Applicant acknowledged that he moved to Collection of Fine Cars in 2002, and that when he transferred his licence he filled out something but he could not remember exactly what and how much he paid. The Applicant realized his licence had lapsed when he noticed that everyone else was receiving something from OMVIC and he had yet to receive anything, and upon calling OMVIC, was told that his registration has lapsed. The Applicant acknowledged that in June of 2003 he

knew he did not have a valid registration, but that he could have a licence provided he sign certain conditions, but decided to go into landscaping.

The Applicant acknowledged that the Application was in his handwriting and that he understood he must be truthful. He also confirmed that he did read Section F, which is the notice and consent and undertaking and certification that the information provided is, to the best of his knowledge and belief, true. The Applicant acknowledged that he had pleaded guilty to the two charges and that he provided the answers in the police record appearing at Tab 6 of Exhibit 4. When questioned about his answer to question #9 on the Application, the Applicant again stated that he did not believe that by pleading guilty and obtaining a conditional discharge he had to answer that question yes. The Applicant stated that he understood that a criminal record check would be done when he signed the form of release appearing as Exhibit 6.

The Applicant repeated that it was not his intention to wilfully mislead OMVIC and that it was his understanding that because of the conditional discharge the two matters would not appear on the record check.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant did not answer question # 9 of the Application truthfully.
2. The Applicant was convicted of two criminal offences.
3. The Applicant did not disclose to OMVIC the charges or explain the basis for the charges.
4. The Applicant worked as a salesperson for Collection of Fine Cars from October 2002 to August 2003 at a time when his registration as a salesperson had lapsed and that by March 2003 the Applicant knew that his registration as a salesperson under the Act had lapsed.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to refuse the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

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

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be refused.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, he added in the third last paragraph of the decision:

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

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised its discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision and that the past conduct of the Applicant does not afford reasonable grounds for the Registrar's belief.

APPLICATION OF LAW TO FACTS:

The Applicant=s present situation relates back to his decision not to accept the terms and conditions which were proposed by the Registrar in June 2003. Had the Applicant accepted those terms and conditions he would have been registered and the present situation may not have arisen. The Applicant has admitted that he pleaded guilty to two criminal charges, one for possession of property with a value less than \$5,000.00, which property was obtained by commission of an offence punishable by indictment under the Criminal Code, and secondly, that he knowingly used a forged document contrary to the Criminal Code. Both of these offences clearly indicate past conduct which is contrary to the intention and objectives of the Act. For this reason alone it would be reasonable for the Registrar to refuse registration.

In addition to the past conduct referred to above, the Applicant, when filling out the Application did not truthfully respond to question #9, which clearly states that the question includes instances where a conditional or absolute discharge has been ordered. It has been repeatedly found by this Tribunal that the need for an applicant to complete the application form completely and truthfully is a vital part of the application process and an applicant=s failure to do so is reason to refuse registration.

The Tribunal finds that the Registrar has satisfied the onus of proof that the Registrar was not in error in concluding that the conduct of the Applicant, both past and with respect to completion of the Application afforded reasonable grounds to believe that the Applicant would not carry on business in accordance with law and with integrity and honesty.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carrying out the notice of proposal dated March 11, 2004, to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: April 22, 2005

Filename: 2289.mvda.Lucero

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of

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



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PREHEARING

JEAN-PIERRE POITRAS AND JUDY BURT

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

TO DISALLOW A CLAIM

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

APPEARANCES: SONIA BEAUCHAMP, Counsel for Jean-Pierre Poitras and Judy Burt,
the Applicants

MARIO C. GRAVEL, Counsel, for Tarion Warranty Corporation,
the Respondent

SIMON ROY, Agent for Les Constructions Simon Roy Inc., the Added
Party (did not participate)

DATE OF
PRE-HEARING: April 7, 2005 *by teleconference*

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal comes before this Tribunal at this time as a pre-hearing conference and arises from the Decision dated December 20, 2004, (the "Decision"), issued by Tarion Warranty Corporation (the "Tarion"), to deny the claims of Jean-Pierre Poitras and Judy Burt (the "Applicants"), for breaches of warranties pursuant to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act").

The Applicants, by a notice dated January 7, 2005, (the "Appeal"), requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Decision pursuant to the Act.

This conference, upon the consent of both participating 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.

The main issue to be dealt with respecting the claims by the Applicants was the condition of the residential premises in Bainsville, Ontario, (the "premises") sold to the Applicants by Les Constructions Simon Roy Inc., (the "Vendor") pursuant to an Agreement of Purchase and Sale, with particular reference to the Tarion's Inspection Report dated August 4, 2004, containing 35 items. It became apparent at the conference that the Parties were neither sufficiently prepared to discuss the items nor was a teleconference pre-hearing appropriate to deal effectively with an understanding of the issues in dispute. It was agreed that this pre-hearing conference should be adjourned to a more appropriate date and place in order to deal effectively with this matter prior to a formal hearing of the Appeal.

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

ORDER:

This Tribunal therefore makes the following Order respecting the pre-hearing conference and the hearing to be heard before the Tribunal:

1. The Pre-hearing Conference is adjourned to 9:30 a.m. on Monday, May 2nd, 2005, at the offices of Gillespie Reporting Services, Suite 200, 130 Slater Street, in the City of Ottawa, Ontario;
2. The Parties agree to confer together and complete such investigations and preparations so as to contribute to a meaningful discussion at the time of the adjourned pre-hearing conference prior to the formal hearing of the Appeal; 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: April 27, 2005

File No. 2759.onhwp.a.poitras_burt.pre



PRE-HEARING

Deirdre Paddon

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

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: No appearance by or on behalf of the Applicant

JOEL OLIPHANT, Counsel, for the Tarion Warranty
Corporation, the Respondent

No appearance by or on behalf of the Added Party, The
Brule Properties Inc.

DATE OF
HEARING:

April 4, 2005

Toronto

ORDER and NOTICE OF INTENT TO DISMISS

BACKGROUND:

Following attendance by the above party at a pre-hearing conference before this Tribunal, with no one appearing for the Applicant, the Tribunal makes the following Order and gives Notice of Intention to Dismiss:

1. Pursuant to s.4.6 of the *Statutory Powers Procedure Act* and the Tribunal's Rules of Practice the Tribunal hereby gives notice to the Applicant that it intends to dismiss this proceeding unless within the time frame specified below the Applicant provides sufficient reason why the proceeding should not be dismissed.

The Applicant may, within ten (10) days of the release date of this order, provide written submissions to the Tribunal as to why the appeal should be allowed to continue, including an explanation of the Applicant's failure to attend at the pre-hearing conference. If the Applicant fails to provide sufficient reasons why the appeal should be continued, the Tribunal shall issue a final Order dismissing the appeal.

Reasons for Intent to Dismiss:

The Applicant filed a Notice of Appeal on or about November 29, 2004. On the Notice of Appeal Form, the Applicant checked off a box indicating a request for a pre-hearing conference. The Respondent Tarion consented to the pre-hearing in person. According to Tribunal records, a Notice of Pre-Hearing was delivered to the Applicant on February 15, 2005. It was sent by signature-required courier, and courier-tracking records show successful delivery and a signature obtained.

On November 29, 2004, the Applicant requested a pre-hearing conference in Toronto and was advised on February 2, 2005 that a pre-hearing would be held in person. A reminder voice message was left at the Applicant's contact telephone number by a Tribunal staff member the Friday before the pre-hearing, on Monday, April 4, 2005.

The Applicant did not attend the pre-hearing conference scheduled for 1:30 p.m. At 2:45 p.m. the pre-hearing conference was commenced in the absence of the Applicant.

There is no indication that the Applicant made any attempt to contact the Tribunal. Counsel for Tarion advised they had not been contacted by the Applicant regarding the Applicant's attendance or non-attendance at the pre-hearing conference.

Rule 2.10(d) of the Tribunal's Rules of Practice provides that the Tribunal may dismiss an appeal where it is abandoned. Rule 2.12 provides that where a party fails to attend before the Tribunal the Tribunal may treat the appeal as abandoned.

The Member finds that Rule 2.12 applies to any scheduled proceeding before the Tribunal, and is not restricted to hearings; it applies to pre-hearings as well.

The Tribunal therefore finds this appeal should be treated as abandoned and intends to dismiss the appeal unless sufficient reason is given why it should not be dismissed.

The Tribunal finds that failure to attend at a pre-hearing in the circumstances here is substantially similar to failure to attend at a hearing as set out in 14.2(a). The Applicant had ample and clear notice of the pre-hearing, which they requested. The Tribunal finds that the Applicant acted unreasonably in failing to attend and making no efforts to advise the Tribunal or other parties of anything preventing them from attending.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: April 21, 2005

Filename: 2712.nhw.Deirdre Paddon.Prehrq.Order

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PREHEARING

2781-ONHWP-CLAIM

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

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: PARMANAND POKHAN, representing the Applicant

JOEL OLIPHANT, Counsel, appeared on behalf of Tarion
Warranty Corporation

THERESE MACLEAN, appeared on behalf of the Added
Party, Delpark Homes

DATE

OF HEARING: April 12, 2005

Toronto

ORDER

WHEREAS pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, the Applicant, appealed to the Licence Appeal Tribunal (the "Tribunal") a decision by Tarion Warranty Corporation (the "Respondent") dated January 6, 2005, denying the Applicant's claim;

AND WHEREAS the Applicant filed a Notice of Appeal form dated January 1, 2005, received by the Tribunal on January 25, 2005, requesting a hearing;

AND WHEREAS a pre-hearing conference was held in this matter on April 12, 2005;

And whereas the Applicant and the Respondent have agreed to settle the issue and complaint pertaining to the finish of the bathtub as described in the Decision letter of Tarion Warranty Corporation dated January 6, 2005 as follows:

1. In consideration therefore, the Applicant shall enter into a Settlement and Release Agreement in the standard form of the Respondent and as deemed acceptable by the Respondent and to reflect the agreement arrived at verbally on April 12, 2005.
2. Also in consideration therefore, the Respondent shall pay to the Applicant the all-inclusive amount of Six Hundred Dollars (\$600.00) to be paid as soon as practicable by the Respondent following receipt of the Settlement and Release.

Therefore, the proceedings in this matter are concluded and disposed of without a hearing on the basis of the agreed upon settlement as described above. Accordingly, the hearing previously scheduled for May 30th and 31st 2005 is hereby cancelled.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: April 15, 2005



ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter O.31

BABIS AND CHRISTINA KALDIS-ADJ.-Adjournment

IN THE MATTER OF a CLAIM by
BABIS AND CHRISTINA KALDIS
AND IN THE MATTER OF the DECISION of
Tarion Warranty Corporation
(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)

BABIS AND CHRISTINA KALDIS

Applicants

- and -

TARION WARRANTY CORPORATION

Respondent

- and -

ELMVIEW HOLDINGS INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on April 12, 2005;

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 10:00 a.m. on Wednesday, May 18, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 6, 2005

FILE NAME: 2750.onhwp.kaldis.adj.doc

PRE-HEARING

DAN AND MAGDELENA FLOAREA.

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

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DAN FLOAREA appeared on his own behalf and as Agent for
Magdalena Floarea

JOEL OLIPHANT, Counsel, appeared on behalf of Tarion Warranty
Corporation.

IAN JOHNSON, Agent, appeared on behalf of Oshawa Horizons
Inc.

DATE OF
PRE-HEARING: April 8, 2005

Toronto

ORDER

BACKGROUND:

Following attendances on April 8, 2005 at a pre-hearing before the Tribunal of Dan Floarea acting on his own behalf and as Agent on behalf of Magdalena Floarea ("the Applicants"), Joel Oliphant, Counsel on behalf of Tarion Warranty Corporation ("Tarion") and Ian Johnson, Agent on behalf of Oshawa Horizons Inc. ("the Added Party").

This Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on May 25, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicants, Tarion and the Added Party.
2. There was no resolution of the issue in this matter.
3. In the event of this matter proceeding to hearing all parties shall fully and in a timely fashion comply with the requirements of disclosure of documents or things as set forth in Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: April 11, 2005

File name: 2736.onhwp.Floarea.prehrg.doc



DEBBIE DEANO AND CLAUDETTE BOURDAGES

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

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DEBBIE DEANO, appeared on her own behalf and as Agent for
Claudette Bourdages

MARIO C. GRAVEL, Counsel, appeared on behalf of Tarion
Warranty Corporation

RANDY HEAD, appeared on his own behalf

DATE OF
HEARING: April 4, 2005

Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Debbie Deano and Claudette Bourdages (the "Applicants") from a written decision of Tarion Warranty Corporation ("Tarion") dated November 17, 2004, wherein the Applicants' claim was denied.

Randy Head operating as Prestige Contractors, ("Head") who was added as a party to the hearing in terms of section 9 (6) of the *Ontario New Home Warranties Plan Act* (the "Act"), entered into a written agreement (the "agreement") dated April 14, 2003 in terms whereof Head agreed to construct and erect for the Applicants a single family residential dwelling (the "home") in Ameliasburgh, Ontario (Exhibit 3, tab 1). The home was constructed and completed for possession on September 8, 2003.

By letter dated September 7, 2004 Ms. Deano wrote to Ontario New Home Warranty Program (now known as Tarion) as follows:

In accordance with the Homeowner Information Package regarding warranty, I am forwarding a list of items that should be covered by warranty and therefore completed by our general contractor – Prestige Contractors.

In addition to the outstanding items, I am also including a number of items that are covered by warranty and completed by Prestige Contractors within the last 3-4 weeks. I am including these items so they can be included on the list of items that will have an extended warranty of one year from time of repair.

Finally, I would like to advise you that I will be submitting a letter to address the delayed closing and will be requesting compensation for direct and indirect costs associated with the delay. This letter will be forwarded to your office by the end of this week for your review and action.

Please direct any questions regarding these issues to the undersigned either by sending a letter to the above address or by telephone. I would like to thank you in advance for your assistance in this matter.

(Exhibit 3, tab 2)

Subsequent to the letter of September 7, 2004 the Applicants by notice dated November 2, 2004 notified Tarion of their claim for delayed closing (Exhibit 3, tab 6). In this notification the Applicants claimed the sum of \$5,000.00 for living expenses occasioned by the delay in obtaining possession of their home. They alleged in that notice that they incurred \$2,100.00 in expenses for accommodation, \$1,525.00 for meals and \$1,375.00 in miscellaneous expenses such as gas, telephone calls, laundry and vehicle mileage. The total of the three figures above, namely \$5,000.00 formed their claim. The November 2, 2004 claim filed by the Applicants with Tarion (Exhibit 3, tab 6) claims the date for “closing” the agreement was July 15, 2003 but that they only received possession of the home on September 8, 2003. They alleged that they received no written notice from Head that the July 15, 2003 date of possession was being extended and that they claim compensation for 55 days that they were denied possession of the home. Their claim was made under section 17 of Regulation 892 to the Act.

The written decision of Tarion which the Applicants’ appeal sets out the reason for Tarion denying the Applicants’ appeal (Exhibit 3, tab 8). The reason given by Tarion in its decision letter states as follows:

According to Regulation 892, subsection 17(1) of the *Ontario New Home Warranties Plan Act*; “every vendor of a new home of a type referred to in clause (a) or (b) of the definition of “home” in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond,

(a) the date originally fixed for closing the purchase agreement; or

(b) an extension referred to in clause 3 (a) or (b),

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.”

As there is no original fixed closing date as specified in subsection 17(1)(a) within the contract between Randy Head of Prestige Contractors and Claudette Bourdages and Debbie Deano, the homeowners are not eligible for delayed closing compensation.

Claudette Bourdages did not attend the hearing and the only testimony adduced by the Applicants was that of Ms. Deano.

The Evidence

A summary of the evidence of the various persons who testified follows.

Debbie Deano

Deano testified that she and Bourdages met with Head on January 10, 2003 and in answer to her questions to him, Head stated that he would start construction of the home "as soon as the frost leaves the ground and I can get the trucks in there to your property". He also stated that the home would be completed "at the very latest 15 July 2003". A deposit of \$5,000.00 was requested by Head and paid to him by the Applicants and he was requested to "submit his Purchase and Sale Agreement" to the Applicants. On or about April 14, 2003 Head presented the Agreement to the Applicants. There was no "Addendum" attached to the agreement as required by section 12 of Regulation 894 to the Act.

Deano went on to state that due to this addendum being omitted from the agreement, she did not realize that "Head had an obligation to provide us with a written statement identifying the closing date of the home". She further stated that the delays in construction were not caused by the Applicants and that on September 8, 2003 when possession of the home was taken, she raised the issue of delayed closing with Head who advised her that it was not applicable to the Applicants' situation.

Under cross-examination Deano stated that both Applicants are co-owners of the home. She also stated the agreement was accepted by the Applicants and it does not mention a closing date. She identified the agreement (Exhibit 3, tab 1) as the contract between the Applicants and Head. Deano further stated that when the Applicants, upon the closing of the transaction in September 2003, being handed the Homeowner Information Package by Head, became aware for the first time that they had the right to make a claim for delayed closing. Deano also stated that the deadline for the Applicants moving from their Ottawa residence to the home was August 18, 2003 until which date the Applicants had possession of their Ottawa home.

Deano further stated that construction of the home was not started until May 20, 2003.

Jacque De'Ath

De'Ath testified she is employed by Tarion as a claims service representative whose duties include handling delayed closing claims as well as the assessment of such claims. She stated further that the Applicants' claim for delayed closing was received

by Tarion and that she processed such claim and acknowledged its receipt. Applicants had accompanied their claim with a copy of the agreement. She reviewed the Applicants claim for delayed closing and the agreement with her supervisor and manager and it was noted that the agreement had no "closing date". Her decision letter denying the Applicants' claim was confirmed by the manager and supervisor (Exhibit 3, tab 8).

Randy Head

Head testified that he met with the Applicants on January 10, 2003. At that meeting it was discussed that work should commence on the home of the Applicants in March or beginning of April 2003 and that construction should take three to four months. However Head needed working drawings before he could commence construction. On May 8, 2003 Head was finished with such drawings that had been drawn by a Mr. Gannon, an architect employed by the Applicants. These plans were submitted to the authorities in order for a building permit to be issued. Only on the issuance of a building permit can construction be commenced. On May 20, 2003 Head "broke ground" and the home was completed for possession within 3½ months.

Head confirmed the agreement contained no closing date and stated that until 2004 he never heard mention by the Applicants of any delay in closing.

Kevin Tuttle

Tuttle testified that he was foreman regarding the construction of Applicants' home. During the time of its construction, Bourdages stayed in a cottage near the construction site during 75% to 80% of the time that the home was under construction. Bourdages watched the home's construction take place.

Tuttle also stated that he was present at the home's pre-delivery inspection at which time the Homeowner Information Package was given to the Applicants. He went on to state under cross-examination that there was no deadline for closing other than the home being completed within three to four months of breaking ground.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal:

1. The Applicants and Head entered into a written contract dated April 14, 2003 whereby Head was to construct a home for the Applicants in Ameliasburgh, Ontario.
2. The aforesaid contract contained no reference to either the closing date of the agreement or to the possession or occupation date of the home to be constructed.

3. Construction of the home did not commence until May 20, 2003 due to a building permit not being available until shortly before that date.
4. The Applicants were made aware by Head that construction of the home would take between 3 to 4 months to complete. The Applicants were given occupation and possession of the home on September 8, 2003.
5. There was no delay caused by Head in the home being completed for possession.
6. A building permit to enable Head to commence construction was issued in or about May 2003.
7. There being no closing date fixed for closing of the agreement, there is no compensation due to the Applicants in terms of section 17 of Regulation 892 to the Act.

THE LAW:

The *Ontario New Home Warranties Plan Act* states:

Section 1 "Vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner; ("vendeur")

Regulation 892 under the Act states:

18 (1) Every vendor of a new home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act warrants to the owner that in the event of a delay in closing that is more than five days beyond.

- (a) the date originally fixed for closing the purchase agreement; or
- (b) an extension referred to in clause 3 (a) or (b).

the vendor shall compensate the owner for all direct costs caused by the delay in an amount that does not exceed \$100 a day for living expenses and \$5,000 in total.

REASONS FOR DECISION

The onus of proof rests upon the Applicants.

Having considered the issue in this matter the Tribunal findings and conclusions are set out hereunder.

There is no dispute between the parties that the agreement does not contain any reference as to the closing date, nor does it contain reference to the date of occupation or possession. Deano stated that Head advised her verbally on January 3, 2003 that

the home would be completed “at the very latest July 15, 2003”. Head’s testimony was that he told Deano – without specifying a closing or occupation date – that it would take him three to four months to complete the home. The Tribunal prefers Head’s version of events that took place on January 10, 2003 and accepts his version of what actually occurred on that date.

The evidence clearly indicates that time was not of the essence in so far as the Applicants were concerned regarding completion of the agreement. Bourdages was residing for a major portion of the time during construction at a cottage close by the home under construction. Bourdages was an active spectator of the ongoing construction and on not one occasion did either of the Applicants’ complain to Head regarding a delay in closing or construction. The Ottawa home of the Applicants continued to contain the Applicants’ furniture and effects until August 18, 2003 on which date the Applicants had previously arranged for removal of such furniture and effects. No complaint was made that a construction delay had caused the Applicants to refrain from earlier removal. In fact only when in early September 2003 Deano was handed, during the pre-delivery inspection of the home a Homeowner Information Package, was she alerted to section 17(1) of Regulation 892 to the Act and the aspect of possible delayed closing compensation. It was only after the pre-delivery inspection and Deano’s observation regarding the aspect of compensation for delay in closing that the question of compensation was raised. The Tribunal is satisfied and finds that not only was there no date fixed for completion in the construction agreement but also finds that at no time between January 10, 2003 and September 8, 2003 was there any complaint or suggestion by the Applicants that Head had caused a delay in the closing of the transaction. The Tribunal also finds that Head could not commence construction of the home until the local authority had issued a building permit which was only issued in May 2003. The plans for the home upon which the permit was contingent were to be prepared and were prepared by the Applicants’ architect. If there was a delay in obtaining a building permit, such delay was not caused by Head. The Tribunal further finds that Head commenced construction upon the receipt by him of the necessary building permit and completed construction of the home within the three to four months that he had indicated it would take to complete construction.

The Tribunal accordingly finds that there was no “date originally fixed for closing the purchase agreement” nor was there any oral agreement between Head and the Applicants in regard to a fixed date for the closing. With no “fixed date” for the closing having been established by the Parties there can be no ascertainment of whether or not there had been a violation of section 17(1) of Regulation 892. The reference to “three to four months” for completion is too vague to establish a “fixed date” for completion.

In the absence of a fixed date for closing having been proven by the Applicants, their claim for compensation must fail.

The threshold issue in this matter is whether or not the Applicants have proven that a date was originally fixed by the Applicants and Head for the closing of the construction agreement. Although evidence was heard during the hearing regarding alleged costs

incurred by the Applicants for which they claim compensation, the Tribunal has not dealt with that aspect in this decision as it is moot regard being had to the Applicants' failure to meet the threshold issue.

DECISION:

Accordingly, based on the evidence and by virtue of section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs Tarion Warranty Corporation to disallow the claim by the Applicants under section 17 of Regulation 892 to the above Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 8, 2005

FILE NAME: 2722.onhwp.Deano& Bourdages

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.



ROBERT SMALL AND DENISE CLARKE

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

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROBERT SMALL AND DENISE CLARKE, appeared on their own
behalf

JOEL OLIPHANT, Counsel, appeared on behalf of Tarion Warranty
Corporation

LESLEY BRADSHAW, appeared on behalf of Valleymede (Cachet
Woods) Limited

DATES OF
HEARING: March 29 & 30, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) by Robert Small and Denise Clarke (the “Applicants”) from a written decision of Tarion Warranty Corporation (the “Corporation”) dated November 16, 2004.

Valleymede (Cachet Woods) Limited (the “Builder”) who was added as a party to the hearing in terms of section 9(6) of the *Ontario New Home Warranties Plan Act* (the “Act”), entered into a written agreement of purchase and sale (the “Agreement”) in terms of which the Builder agreed to sell to the Applicants certain lands in the Municipality of Markham, Ontario and to erect a family residential dwelling (the “home”) for an agreed price of \$525,000.00. Pursuant to the agreement the transaction closed on May 30, 2002 and on that date the Applicants took possession of the home. The day prior to the closing a pre-delivery inspection of the home took place and a written report of complaints regarding the home was signed by Robert Small, one of the Applicants (Exhibit 3, tab 1). Subsequently two inspections of the home were conducted by Tarion

(previously known as Ontario New Home Warranty Program) following requests to do so by the Applicants. Pursuant to the inspections Tarion issued written inspection reports dated March 5, 2004 and April 15, 2004 (Exhibit 3, tabs 6 and 9). Certain claims made by the Applicants were rejected by Tarion pursuant to the above inspection reports and at the request of the Applicants, Tarion issued its written decision (Exhibit 3, tab 13). Five claims of the Applicants were dealt with in the decision letter of which three claims were appealed by the Applicants to the Tribunal and form the basis of the hearing and are dealt with in this decision. The three claims related to:

1. Tiles – main hallway, kitchen, cracked.
2. Stairs – basement to second floor – gouge in wood nails sticking out, unfinished areas.
3. Hardwood flooring – throughout – not floor ordered from the Builder.

The reasons given by Tarion in its decision for denying the above claims is stated as follows:

1. Claim:
Tiles – main hallway, kitchen, cracked.

Observation/Comment:

This is item 8 c) and d) of our Warranty Assessment Report dated March 5, 2004 and item 4 of our Warranty Assessment Report dated April 26, 2004.

- There is a two inch long hairline crack in the front left corner of the ceramic floor tile at the front left below the dishwasher in the kitchen. There was no cracking in the floor grout noted nor was there evidence the tile was loose. This damage was not reported on the Pre-Delivery Inspection report or to the Tarion by the owner until their eighth month of the first year.
- The owner indicated a diagonal hairline crack in the ceramic floor tile in the kitchen eating area at the west, south corner of the knee wall. There was no cracking in the floor grout noted nor was there evidence the tile was loose. This damage was not reported on the Pre-Delivery Inspection report or to the Tarion by the owner until their eighth month of the first year.

Reason:

This complaint represents an item of damage. It has not been previously documented on any pre-delivery documents, such as the Certificate of Completion and Possession. Therefore, Tarion is unable to determine the reason or cause or the parties responsible for the damage. There was no

evidence of a defect in the material or workmanship with the tiles that have been installed nor was an Ontario Building Code infraction evident.

2. Claim:
Stairs – basement to second floor – gouge in wood nails sticking out, unfinished areas.

Observation/Comment:

This is item 5 d) of our Warranty Assessment Report dated March 5, 2004 and item 3 e) f) of our Warranty Assessment Report dated April 26, 2004. The main stair maple handrail has been naturally finished. At both inspections you were not happy with the irregularities in the curved maple handrails fourth section (second from the top of the main stairs) and sanding marks along the length of the grain of the main floor left handrail. Differences in the handrail or its alignment varies do occur in the transition of the radius and slope of the handrail. These concerns are evident when viewed from a critical angle. Under normal viewing positions the handrail was found generally uniform. The fine sanding marks in the wood under the natural finish were only visible under close critical viewing.

Reason:

Under sections 13(1)(a)(i) and (iii) of the Act, every vendor of a new home warrants that the home is constructed in a workmanlike manner and is free from defects in material and that it is constructed in accordance with the Ontario Building Code. This complaint does not represent a defect in work or materials, nor is it a violation of the Ontario Building Code. These concerns where not readily available under *normal* viewing positions.

3. Claim:
Hardwood flooring – throughout – not floor ordered from the builder.

Observation/Comment:

This is item 20 of our Warranty Assessment Report dated March 5, 2004 and item 8 of our Warranty Assessment Report dated April 26, 2004.

The Standard Features sheet which is Schedule "A" that forms part of the Agreement of Purchase and Sale (Agreement) makes reference in part that ½" hardwood floors maybe substituted from the standard carpeting in the Living Room, Dining Room, Den and Family Room. Item number 1 of Schedule "E", which forms part of the Agreement states, "Install ¾" x 3¼" oak strip flooring in the Living Room, Dining Room, Family Room, Library, second floor hallway, Master Bedroom and Bedrooms #2, #3 and #4."

You claim that at the time of the signing of the Agreement the builders' representative showed you a sample of red oak of an obvious select or better quality and that the flooring installed is not the same as they were shown. The owner's intent was to choose a hardwood floor with the colouring to closely match the naturally finished maple stairs from the basement to the second floor. While business ethics are important, verbal promises or representations cannot be enforced by Tarion or be considered to be of the same force as a written contract.

The builder has installed a light brown strip hard wood floor in the living room, great room, upper hall and master bedroom. There were visible knots in the wood. However, there were knots in the same colour toning strip hardwood flooring in the dining room, library, front northeast and northwest bedrooms and the north center bedroom.

Reason:

You have not supplied any credible evidence to support your claim that you were to receive red oak of obvious select or better quality flooring. There is no reference in the Agreement or its attachments to specify that you were to receive a red oak hard wood strip floor select or better or to the colour toning of the flooring. Under sections 13(1)(a)(i) and (iii) of the Act, every vendor of a new home warrants that the home is constructed in a workmanlike manner and is free from defects in material and that is constructed in accordance with the Ontario Building Code. This complaint does not represent a defect in work or materials, nor is it a violation of the Ontario Building Code. The item that you were entitled to select under the purchase agreement is not specific enough in regards to your claim and therefore does not fall under the substitution warranties in section 18 of Regulation 892 of the Act.

At the hearing a representative of the Builder was present but advised the Tribunal that she did not wish to take part in the hearing but was merely observing the proceedings.

In her opening address to the Tribunal Denise Clarke stated that the following was the position of the Applicants in respect of the three above claims:

1. Tile – there is one cracked tile in the kitchen of the home which is located at the wall between the kitchen and the family room.
2. Stairs – there are “uneven or hilly gouges” in the right side handrail when descending the stairs. These defects are noticeable to both the touch and in the appearance of the handrail.
3. Hardwood flooring – throughout the home the quality of the hardwood floors is “substandard”, there are excessive amount of putty filled knot holes and there

is a variation in the colour of the hardwood strip flooring while the colour of the hardwood is not the colour “accepted” by the Applicants.

The Evidence

Robert Small, one of the Applicants testified at the hearing as well as Ms. Georgia-Bailey Cotterell, Ms. June Quinn and Gary Luney.

Nelson Lopes testifies for Tarion as did its field claims representative Bruce Stevens. Documentary evidence including photographs were also introduced into evidence by the parties. A summary of the testimony of the above persons follows.

Georgia-Bailey Cotterell

Cotterell testified that she was present at the Builder’s model home when the Applicants chose their “colour selections”.

For the home’s flooring, oak natural hardwood was chosen by the Applicants. The Applicants were shown a sample of the oak flooring to be installed in the home (Exhibit 6). This sample according to Cotterell bears no resemblance to the installed hardwood floors. The Applicants and Cotterell were shown another home constructed by the Builder. Cotterell stated that the Applicants were concerned at the apparent quality of the flooring in the home which she and the Applicants had inspected at the home above. The Applicants were told to discuss their concerns with the Builder.

Under cross-examination Cotterell stated she is the cousin of Denise Clarke, one of the Applicants. Shown the sample of the oak hardwood flooring seen by the Applicants at the model home of the Builder (Exhibit 6), she stated that she is not an expert but that it appeared to be stained and contained no flaws.

June Quinn

Quinn stated in her testimony that, she was the in-house sales representative of the Builder relative to the residential homes in the sub-division where the Applicants’ home is situated.

Quinn went on to state that she drew up the colour selection charts in discussion with the Applicants. Included in this process was the wood flooring selection chosen by the Applicants. The Applicants chose an upgraded oak wood strip flooring for their home. It was to be $\frac{3}{4}$ inch x $3\frac{1}{4}$ inches natural hardwood with a clear, natural and glossy finish (Exhibits 7B). A sample of the flooring was shown to the Applicants at the time (Exhibit 6). This oak sample is a clear natural finish. At no time was red or white oak discussed with the Applicants.

Under cross-examination Quinn stated that the hardwood flooring installed in the home was in accordance with the sample (Exhibit 6). There was no representation made to

the Applicants as to the quality of the chosen hardwood oak flooring. When shown a photograph of the hardwood flooring where it met the staircase wood (Exhibit 3, tab 17, photo Z 2) Quinn stated that the difference in the wood colour of the stairs and the hardwood floor can be expected to be different as indicated in the photograph as the stairs were constructed of maple and the floor of oak.

Gary Luney

Luney was not qualified by the Tribunal as an expert in hardwood flooring but was permitted to testify on what he observed during his inspection of the home's hardwood flooring. He conceded that he had little experience in dealing with hardwood and had no training in hardwood floors.

Luney stated that he observed a cracked tile in the home's kitchen. It was a hairline crack near a low wall and appeared to be above six inches in length. He was not able to observe the crack from a standing position and was obliged to go on hands and knees to see it. When on his hands and knees he photographed the crack from a distance of about six inches (Exhibit 5 photograph marked "lot 48").

Insofar as the oak flooring in the home was concerned he noticed what he termed as "unmatched patches filled with epoxy". He further stated he saw "hundreds of epoxy filled knots" in the oak floors and considered the oak to be of "low grade – leftovers". He then proceeded to state what he observed in the home's various rooms.

Luney described the stair railing complained of by the Applicants. He stated that there was "a gap" which "was difficult to see except when using a ruler" (Exhibit 5 photograph marked lot 48).

In cross-examination Luney conceded he testified from memory and had no notes of his inspection or observations. He conceded, when shown a photograph of the home's dining room floor (Exhibit 3, tab 17 photograph "Y"), that such photograph does not show any knots.

Robert Small

Applicant Robert Small stated that the flooring chosen for the home was an upgrade and measured 3¼ inches by ¾ inch. There was no cost to the Applicants for this upgrade. The flooring chosen by the Applicants was similar to or exactly as on the sample (Exhibit 6). The flooring in the home was "vastly different" to the sample which Quinn had shown to them and promised them. Small conceded under cross-examination that the following clause appears in the agreement at paragraph "u" on page 5 of Schedule "X" to the agreement.

- (u) The Purchaser specifically acknowledges that in the manufacture of finishing items, colour variances sometimes occur. The Purchaser hereby shall accept any such colour variation resulting from the manufacturing process without any

right of abatement of purchase price and in full satisfaction of the vendor's obligation herein.

Small also conceded that the flooring complaint was not mentioned in the pre-delivery inspection report.

Nelson Lopes

Lopes testified that he was the site supervisor for the Builder. He stated that the oak wood flooring would have been delivered to the home in strips bundled together. Only pre-finished wood is delivered in boxes.

The standard practice in the building industry, according to Lopes, is that knots in wood are not filled with putty or epoxy but are filled with a collection of sawdust obtained from sanding the wood which is then mixed with an adhesive. He went on to observe that the colour of the knot holes is beige in appearance and the photographs of the knots appear to have been taken close up and such photographs do not represent what is observed under normal circumstances.

Bruce Stephens

Stevens testified that he has been a Field Claims Representative with Tarion for some twelve years during which time he has done about 100 conciliations inspections per year.

He confirmed having authored the decision letter and noted and confirmed his observations/comments when he inspected the three issues in dispute in this matter.

He conceded that in relation to the handrail at a point where there is a joiner of two pieces of the maple wood handrail there is "some undulation" and this can be felt by hand although there is a smooth transition between the two pieces of wood. It is not seen or visible under "normal viewing". When the two pieces of maple wood were joined they were sanded so as to smooth the joint which is accepted standard practice in the industry. The sanding resulted in a slight undulation. There is however, according to Stephens, no defect in work or material. He stated that there will always be minor variances in a handrail which are not visible to the naked eye, as in this instance, but only on close scrutiny.

Stephens raised the possibility of the staircase railing having been removed at some time in the past. The Applicants responded to this statement during Stephens' testimony, that they had indeed had the railing removed and reinstalled in July 2002 after taking possession of the home.

Insofar as the hardwood floor is concerned Stephens reiterated what he stated in his inspection reports and in the decision letter.

In cross-examination he was shown the photograph of the home's dining room floor (Exhibit 3, tab 17 photograph "Y") and stated that he was not able to discern any visible

knots in the floor. He stated further that there are invariably different shade variations within oak.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal.

1. The Applicants and the Builder entered into a written Agreement of Purchase and Sale, a copy of which is contained in Exhibit 3, tab 1. The transaction closed on May 30, 2002 and a pre-delivery inspection of the home was conducted on May 29, 2002.
2. Incorporated in the agreement were certain schedules including Schedule "X".
3. Pursuant to the execution of the agreement the Applicants selected $\frac{3}{4}$ inch by $3\frac{1}{4}$ inches oak strip hardwood natural with clear natural and glossy finish to be installed by the Builder in the home. This hardwood flooring was an upgrade for which the Applicants were not required to pay extra.
4. The aforesaid hardwood flooring was to be installed in the home's living room, dining room as well as certain other rooms and areas of the home.
5. The Applicants selected natural soft maple wood to be used in the construction and installation of the home's staircase including the staircase railings. The staircase and railings were to be finished with a gloss.
6. The oak strip hardwood floors as referred to in paragraphs 3, and 4 above were duly installed in the home by the Builder as was the staircase and its railings as referred to in paragraph 5 above.
7. In July 2002, after the Applicants obtained occupation and possession of the home on May 30, 2002, the Applicants caused the home's staircase railing to be removed and thereafter to be reinstalled.
8. In the vicinity of the joiner of two pieces of maple wood that formed the home's staircase handrail, there is a barely visible or observable undulation.
9. One ceramic tile installed by the Builder in the Applicants' home's kitchen has a hairline crack of about 6 inches in length and which hairline crack is not visible to an observer unless seen by an observer when on his/her hands and knees.
10. The Applicants' complaints relating to the home's hardwood floors, the home's staircase railing and the cracked kitchen tile were not included by the Applicants in the pre-delivery inspection report of May 29, 2002.

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
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

Section 14 of the Act states:

- 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. 1998, c. 19, s. 185 (1); 2000, c. 26, Sched. B, s. 15 (3, 4).

Regulation 892 under the Act states:

18 (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

- (2) Subsection (1) does not apply where,
 - (a) the purchaser, having been notified, does not make a selection within thirty days after executing the purchase agreement or within such other time period as may be agreed; or
 - (b) an item selected under clause (a) is not available and the purchaser does not make a selection within seven days of receiving written notice from the vendor or within such other time period as may be agreed that the item is unavailable.
- (3) Every vendor of a new home warrants to the owner that where the purchaser fails to make a selection under clause (2) (a) or (b) that the vendor will make a selection on the purchaser's behalf that is of equal or better quality than the original selection as set out in the purchase agreement.

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

REASONS FOR DECISION

The onus of proof rests upon the Applicants.

The Tribunal has considered the three issues in this matter and its findings and conclusions are set out hereunder relative to each issue.

1. THE ISSUE OF THE CRACKED TILE IN THE KITCHEN

The Tribunal noted that this cracked tile was not reported on the pre-delivery inspection report of May 29, 2002 but was disclosed by the Applicants some months after that inspection. The reason for the delay in reporting this cracked tile can only be that either the crack was not observed upon inspection or that the damage occurred after the Applicants took possession and occupation of the home. If the damage occurred after possession and occupation the Program and the Builder are clearly not liable. On the other hand if the tile was damaged at the time of the inspection it is found to be so insignificant and minor that it could not be seen unless observed from one's hands and knees. If the crack was there at the time of possession and occupation (which the Tribunal does not find due to the Applicants' having brought no evidence to support such theory), then it was unobserved and remained unobserved due to the fact that the crack is a hairline crack and barely, if at all, observable to the naked eye.

The expectation of the Applicants was that of perfection which is not a realistic expectation, particularly when one is dealing with a standard production home. As was stated in *Breen (1999) CRAT* released on April 15, 1999

A microscopic examination is not the appropriate standard of testing. In law this type of mark could be considered "de minimus not curat lex" meaning that the law does not take notice of nor care about very small or trifling matters.

The Tribunal also notes and associates itself with what was stated in the matter of *Saporita (1999) CRAT* released on July 28, 1999, namely

Perfection and nothing less than perfection is not a reasonable expectation when dealing with what can be termed a standard home. One does not live in a perfect world and allowances must be made for minor imperfections. If imperfections exist in the Applicants' home they are, from the evidence tendered, minor in nature and do not result in aesthetically displeasing results.

The Tribunal does find that there is no proven defect in either the workmanship of the Builder or no proven defect in materials used. Additionally, there is no breach of section 13 of the Act. If there had been a defect in material or workmanship of the Builder (which has not been proven nor found by the Tribunal) the legal maxim "de minimus non curat lex" would aptly apply for the court does not take notice of small or trifling matters.

2. THE ISSUE OF THE STAIR RAILINGS

This issue relates to the undulation in the railing of the staircase at the point where two pieces of maple are joined together. This issue was not reported in the pre-delivery inspection report. Furthermore, the Applicants conceded that they had the railing removed and thereafter reinstalled after their taking possession and occupation of the home. There is no evidence before the Tribunal to show that on possession a defect was present in the staircase railing and the real possibility exists that when the railing was reinstalled by the Applicants, the undulation was then caused in the sanding of the join of the two pieces of maple wood. In such event the Program and the Builder are clearly not liable to the Applicants.

If however, the undulation complained of was caused by the Builder (which fact has not been found proven by the Tribunal) it was of such a minor nature that the legal maxim “de minimus non curat lex” applies and what is stated above under the first issue regarding perfection would likewise apply. On the Applicants’ own evidence, the undulation was so minor that it was only visible as an undulation when a straight edge ruler was placed alongside that undulation, as seen in a photograph taken by the Applicants themselves.

The Tribunal accordingly finds that there has been no violation of section 13 (1) of the Act.

3. THE ISSUE OF HARDWOOD FLOORING

The Agreement of Purchase and Sale incorporated and included a schedule marked “E”. Paragraph 1 of that schedule reads

Install ¾” x 3¼” oak strip flooring in the Living Room, Dining Room, Family Room, Library, second floor hallway, Master Bedroom, and Bedroom #2, #3, and #4.

The flooring selection sheet signed by the Applicants on March 2, 2002 states that where oak strip natural floors are to be installed they shall be of glossy clear and natural finish. The Tribunal, after considering all the evidence, finds that the contracted for flooring was installed in the home. The Tribunal also finds that the agreement does not specify the actual quality of oak to be used nor whether it is to be red or white oak. The agreement went no further, regarding the oak to be used in the home’s flooring, than what is stated above. Nothing specific was stated in the agreement beyond what is stated above. The Tribunal finds that the oak strip flooring installed in the home was in accordance with the agreement.

Unfortunately, in the absence of specifics the expectations of the Applicants differed from what they received. Nevertheless, there has clearly been no substitution within the meaning of sections 18 and 19 of Regulation 892 to the Act.

The Applicants stated in their testimony that the strip flooring exhibited various colours

or shades. There was a clear dispute on the evidence as to whether or not there were different colours or shades of oak strip flooring. The Tribunal makes no finding in this regard as there was insufficient evidence to make a definitive finding on this aspect. The Tribunal however finds in this regard that the Applicants have not discharged the onus upon them. Quite apart from what is stated above the Tribunal is cognizant of clause (u) of Schedule "X" to the agreement which states as follows:

(u) The Purchaser specifically acknowledges that in the manufacture of finishing items, colour variances sometimes occur. The Purchaser hereby shall accept any such colour variation resulting from the manufacturing process without any right of abatement of purchase price and in full satisfaction of the vendor's obligation herein.

If there were differences in shade or colour (upon which the Tribunal made no finding) the Applicants would nevertheless fail due to the existence of the above clause. Furthermore, if there were any representations made by Quinn or other employees of the Builder, such representations would not be binding upon the Builder by virtue of clause 8 to Schedule "X" which reads in part as follows:

There is no representation, warranty, collateral Agreement or condition affecting this Agreement or the property, or supported hereby, except as set forth herein writing.

No where in the Agreement is there reference to the flooring being required to be in accordance with the sample flooring shown by Quinn to the Applicants. Insofar as the knots in the oak flooring are concerned, once again there was a clear dispute between the parties as to the nature, extent and appearance of the knots. The Applicants submitted two photographs of the oak wood flooring showing knots in the wood in the library of the home. These two photographs were obviously and clearly taken up close to the strip flooring itself and give an observer of such photographs no clear idea of how the knots appeared when viewed from a standing position. Knots are commonly found in wood and appear in wood flooring. Excessive knots may found a legitimate complaint. The evidence of the program's warranty representative Stephens as supported by numerous photographs of the home's floors as disclosed in Exhibit 3, tab 17 do not show any knots in the oak flooring. While the testimony of Luney for the Applicants is at odds with the evidence of Stephens, the Tribunal finds that the Applicants have not discharged the onus upon them regarding the flooring generally.

In summary, under this issue, the Tribunal finds the Applicants have not discharged the onus that rested upon them and finds that insofar as the oak hardwood floors are concerned there has been no violation by the Builder of section 13 (1) of the Act nor has there been a substitution within the meaning of sections 18 and 19 of Regulation 892 to the Act. The hardwood flooring as installed in the home is precisely what the Agreement of Purchase and Sale called for and what was installed in the home.

DECISION:

Accordingly, based on the evidence and by virtue of section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal confirms the decision of the Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 5, 2005

FILE NAME: 2717.onhwp.a.Small

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



ACADEMY INDUSTRY OF CANADA INC.

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

TO DISALLOW A CLAIM

TRIBUNAL: G. MAURICE POWER, Vice-Chair, presiding

APPEARANCES: CHARLES SKIPPER, Counsel, on behalf of the Applicant

CAROL STREET, Counsel, appeared on behalf of the Ontario New
Home Warranty Program, now Tarion Warranty Corporation

CSABA REIDER, Agent, on behalf of 1085303 Ontario Limited,
one of the Added Parties

GARY EISEN, Agent, on behalf of 479781 Ontario Limited,
for the other Added Party

DATE OF
HEARING: April 4, 2005

Toronto

ORDER

On consent of all parties, and in accordance with Minutes of Settlement, filed:

This Tribunal orders that these proceedings are concluded, with no costs to any party.

LICENCE APPEAL TRIBUNAL

G. Maurice Power, Vice-Chair

RELEASED: April 11, 2005

Filename: 2001.nhw.Academy Industry of Canada Inc.



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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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APPEAL UNDER SECTION 7(2) OF THE *PRIVATE CAREER COLLEGES ACT*, R.S.O. 1990, CHAP. P.26 AS AMENDED,
FROM A NOTICE AND PROPOSAL OF THE
SUPERINTENDENT OF PRIVATE CAREER COLLEGES

TO SUSPEND AND TO REVOKE REGISTRATION AS A
PRIVATE CAREER COLLEGE

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: No one appeared representing the Applicant

KAREN INSELSBACHER, Counsel, representing the Superintendent
of Private Career Colleges

ORDER

WHEREAS attendances were required by the parties at the Chambers of the Licence Appeal Tribunal at 9:30 a.m. on March 29, 2006;

AND WHEREAS the matter was convened at the scheduled time with attendance by Counsel for the Superintendent of Private Career Colleges, and in the absence of a representative of the Applicant;

AND WHEREAS no one representing the Applicant appeared, despite several attempts at contact;

UPON REVIEW of the matter and the submissions:

IT IS ORDERED that the Decision of the Superintendent of Private Career Colleges set forth in the Notice dated December 14, 2005 is confirmed and the Appeal therefrom, is dismissed.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair

RELEASED: March 29, 2006

FILE NAME: 3434.pcca.QGI.dismiss

This decision will also be available on Quicklaw at a later date.



Licence Appeal Tribunal

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>>	SIMON I. DAHAN	
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>>	3013-REBBA	
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PRE-HEARING

JEROME S. NICHOLSON

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION.

TRIBUNAL: DEREK ISRAEL, Vice-Chair
DONALD BENNINGER, Member

APPEARANCES: IRVING SNITMAN, Counsel, appearing on behalf of Jerome S.
Nicholson

ROBERT MAXWELL, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: March 22, 2006

Toronto

ORDER

Following attendances on March 22, 2006 at a pre-hearing before this Tribunal of Irving Snitman, Counsel, who appeared for Jerome S. Nicholson (the "Applicant") and Robert Maxwell, Counsel, who appeared for the Registrar under the *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 May 11, 2006 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. By no later than 7 days after the date of release of this Order the Applicant's Counsel shall advise both the Registrar and the Tribunal, in writing, as to precisely what allegations in the Registrar's proposal dated December 15, 2005 the Applicant admits and what allegations are not required to be proved by the Registrar at the hearing of this matter.

3. In the event of certain allegations in the Registrar's proposal not being admitted by the Applicant, the latter's Counsel shall specify, in writing, within 7 days of the release of this Order, addressed to the Registrar's Counsel and the Tribunal, precisely what allegations are not admitted by the Applicant and the Registrar is required to prove at the hearing.
4. Both parties shall make full, complete and timely disclosure as required of Rule 6 of the Rules of Practice of this Tribunal.
5. At least 10 days prior to the hearing of this matter each party shall advise the other party the full names of all persons that they intend to call to testify at the hearing together with a brief synopsis of the persons' intended testimony.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 29, 2006

File name: 3324.rebba.Nicholson.pre.doc

This decision will also be available on Quicklaw at a later date.



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R.4

IN THE MATTER OF
SONIA SIDDIQUI AND MANJIT SINGH AND JASON ABELA

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: November 30, 2005

AND IN THE MATTER OF a requirement for a hearing respecting the said Proposal
SONIA SIDDIQUI AND MANJIT SINGH AND JASON ABELA

Applicants

- 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 February 21, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Thursday, April 27, 2006.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: March 23, 2006



PRE-HEARING

JUTHIKA KHETANI

AN 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: HARRY KOPYTO, Agent, representing the Applicant

JENNIFER FRIEDMAN, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF

PRE-HEARING: February 28, 2006

Toronto

ORDER

Following attendances on February 28, 2006 at a pre-hearing before this Tribunal of Harry Kopyto, Agent, appearing for Juthika Khetani (the "Applicant") and Jennifer Friedman, Counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicant and the Registrar.
2. Both Parties shall fully comply with the requirements of disclosure as set forth in Rule 6.3 of the Rules of Practice of the Tribunal.

3. The hearing of this appeal originally scheduled to commence on April 20 and 21, 2006 is rescheduled to commence at 9:30 a.m. on Wednesday, July 26, 2006 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 Friday, July 28, 2006 at the Tribunal's above chambers. These dates are peremptory to the Applicant.
4. The Applicant's Agent was not able to state with any degree of certainty the number of witnesses he intends to call on behalf of the Applicant at the hearing. The Registrar expects to call between four and six witnesses.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C., Vice-Chair

RELEASED: March 8, 2006

FILE NAME: 3307.rebba.Khetani.prehrg order.doc

This decision will also be available on Quicklaw at a later date.

RICHARD BRACKENBURY
AND RICHARD BRACKENBURY REAL ESTATE SERVICES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: R. PAUL BRISCO, Agent, representing the Applicants

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
HEARING: January 30, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises from a written Notice of Proposal (the "Proposal") dated June 10, 2005, issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Act"), to revoke the registrations of Richard Brackenbury ("Brackenbury") and Richard Brackenbury Real Estate Services Inc. (the "Company") as brokers under the Act. Brackenbury and the Company are collectively referred to as the "Applicants" in this decision.

THE ISSUES

The Registrar bases his Proposal to revoke the registrations of Brackenbury and the Company under section 8.(2) of the Act which reads as follows:

8. (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

The Registrar further bases his Proposal in terms of section 6.(1) (a)(b)(c) and (d) of the Act which read as follows:

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

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

At the commencement of the hearing, the Applicants handed in a document signed by Brackenbury (Exhibit 4) in which it was admitted that the following quoted allegations from the Proposal (Exhibit 3, tab 1) were admitted and the Registrar was not put to the proof thereof. The allegations admitted in Exhibit 4 above are quoted by the paragraph numbers in which such allegations appear in the Proposal under the heading "B. Particulars". When referring to the Company in the Particulars quoted hereunder, the Registrar used the abbreviation "RBR".

B. PARTICULARS

IT IS ALLEGED AS FOLLOWS:

Registration History

1. Richard was first registered as a salesperson and held the following positions in that capacity:
 - (a) Corland Realty Inc. from December 4, 1990 to December 19, 2001;
 - (b) Re/Max Landmark Realty Inc. from December 20, 1991 to December 4, 1992;
January 8, 1993 to January 8, 1997; March 4, 1997 to April 25, 1998;
 - (c) Corland Realty Inc. from April 25, 1998 to June 12, 1998;
2. Richard acted as a broker for RBR from June 17, 1998 until the present.
3. RBR is a broker under the Act for the period of June 17, 1998 to the present.

Trust Account

4. Pursuant to the obligations under the Act, RBR is obligated to maintain a statutory trust account. The account is maintained to hold deposits and funds are not to be transferred from the trust account other than in accordance with the terms of the trust agreement itself. Usually, although not necessarily, the terms of the trust are embedded in agreements of purchase and sale in which the listing broker must maintain the monies in trust until such time as the transaction closes, and then the trust funds may be released to the parties owed.
5. By the terms of the Act, a broker, such as RBR, is obligated to:
 - (a) maintain a trade record sheet that must contain certain information regarding the transaction, including the amount of the deposit received and a record of the disbursement;
 - (b) every broker shall maintain a trust account for every person from whom trust money is received and full details of all trust money received and disbursements from that amount must be kept;
 - (c) a broker must maintain an account designated as a trust account at a permissible financial institution;
 - (d) all trust monies that come into the broker's hands in trust shall at all times keep the money separate and apart in the trust fund established in (c) above, and
 - (e) all trust monies shall only be disbursed in accordance with the terms of the trust.
6. RBR was obligated to maintain its trust account in accordance with the statutory and trust obligations set out above. Richard was, given his control of RBR, the person at all material times that had control of the trust account.
7. Contrary to this trust obligations of maintaining funds in trust until such times as disbursements were possible, and in breach of is statutory obligations pursuant to the *Act*, the following withdrawals occurred from the RBR trust account by Richard in the period of December 31, 2001 to December 31, 2002:
 - August 28, 2002 – ABM Withdrawal “Western Fair Casino” – 1 withdrawal for \$300.00
 - August 29, 2002 – ABM Withdrawal “Western Fair Casino” – 1 withdrawal for \$200.00
 - August 30, 2002 – ABM Withdrawal “Western Fair Casino” – 1 withdrawal for \$100.00
 - September 3, 2002 – Point of Sale Purchase “ Great West Steak House” \$51.20
 - September 3, 2002 – Point of Sale Purchase “ Nevro Sales Ltd.” \$45.19
 - September 3, 2002 – Point of Sale Purchase “ Habitat Restore” \$17.28
 - September 6, 2002 – ABM Withdrawal for \$200.00
 - September 10, 2002 – Point of Sale Purchase “The Beer Store” \$17.95
 - September 12, 2002 – Point of Sale Purchase “The Beer Store” \$17.95
 - October 2, 2002 – ABM Withdrawal “Western Fair Casino” – 3 withdrawals totaling \$1,000.00
 - October 3, 2002 – ABM Withdrawal “Western Fair Casino” – 5 withdrawals totaling \$1,200.00
 - October 4, 2002 – ABM Withdrawal “Western Fair Casino” – 1 withdrawals totaling \$100.00
8. In accordance with the inspection powers set out in the Act, Carolyn Wade (“Ms. Wade”) an inspector pursuant to the Act, establishedd April 4, 2003 as inspection

date (the transactions enumerated in paragraph 4 were not known at the time) Wade notified Richard of the inspection. However, Richard cancelled the inspection purportedly because of an ice storm. However the books and records kept by Richard on behalf of RBR were only a short distance from Ms. Wade and Ms. Wade was willing to attend to carry out the inspection. Richard advised Ms. Wade that he was out of town and unable to return for the inspection.

9. On May 5, 2003 another inspection with Ms. Wade was scheduled. Upon her attendance, Richard was not at the address and did not respond (on that day) to Ms. Wade's phone calls regarding the inspection. Richard later returned Ms. Wade's phone calls a few days later and the inspection was once again rescheduled.
10. On or about May 21, 2003, Ms. Wade was again to have his books and records inspected. Once again, Richard was not at the registered address. Richard did respond to Ms. Wade's phone call on that date and said he was not available for the inspection and it was therefore rescheduled for May 28, 2003.
11. On or about May 28, 2003, Ms. Wade called Richard in the morning to confirm her inspection for that date given the previous cancellations. Ms. Wade was informed that Richard was not at the registered address for RBR and that his books and records had been sent to a bookkeeper and had not been returned. Ms. Wade advised Richard to advise when he received the books and records.
12. Brian Prendergast ("Mr. Prendergast") is the Manager of Inspections and Investigations and the supervisor of Ms. Wade. By letter dated August 6, 2003 to Richard, he informed Richard of the inspection process under the *Act* and that Richard has an obligation to participate in the inspection process. Mr. Prendergast gave Richard and therefore RBR the deadline of August 22, 2003 to provide the following:
 1. Photocopies of all bank statements, cancelled cheques and deposit slips for all bank accounts maintained by Richard Brackenbury Real Estate Services Inc. for the months January – June 30, 2003.
 2. A copy of RBR's real estate trust account reconciliation for the months ending January – June 30, 2003, including a list of all pending real estate transactions, which balance to the reconciled trust balances.
 3. Included in the reconciliation will be a photocopy of each real estate transaction for which RBR and Richard were holding a trust deposit, during the above-mentioned period.
 4. A copy of RBR's real estate trust ledger that covers the activity of your company for the period January 2003 – June 30, 2003.
13. Notwithstanding the inspection requests by Ms. Wade and then the written request by Mr. Prendergast, on August 22, 2003, no information was received by the Registrar's Office at RECO from Richard or anybody else on behalf of RBR.
14. On or about December 10, 2003, the Registrar appointed pursuant to the *Real Estate and Business Brokers Act*, Allan Johnston, had a telephone conversation with Richard. Again, as had been done in the past and was required to by the *Act*, Richard agreed to make his books and records available for inspection.
15. As a result of the conversation between the Registrar and Richard, Ms. Wade followed up yet again to arrange an inspection. This time the inspection was to take place on January 19, 2004 at 9:30 a.m.

16. Prior to the inspection on January 19, 2004, Ms. Wade received a voicemail from Richard stating that there had been a fatality in "the plane crash in Lake Erie" and he therefore must reschedule the inspection.
17. On May 19, 2004, the Registrar sent a letter to Richard indicating that he must attend at the Real Estate Council of Ontario on either May 31 or June 7, 2004 for an inspection. As a result, the Registrar requested that Richard and RBR bring the following documentation:
 1. Photocopies of all bank statements, cancelled cheques and deposit slips for all bank accounts maintained by Richard Brackenbury Real Estate Servies Inc. for the months January 2003 to April 2004.
 2. Real Estate trust account reconciliation for the months ending January 2003 to April 2004, including a list of all pending real estate transactions, which balance to the reconciled trust balances.
 3. Included in the reconciliation will be a photocopy of each real estate transactions for which RBR was holding a trust deposit, during the above-mentioned period.
 4. Real Estate trust ledger that covers the activity of RBR for the period January 2003 – April 2004
18. On or about June 8, 2004, Richard did attend at the offices of the Real Estate Council of Ontario. At that time he met with Assistant Registrar, Brian Schlotzhauer ("Mr. Schlotzhauer") and inspector Jennifer Katsoulis ("Ms. Katsoulis"). While Ms. Katsoulis did obtain a number of books and records from Richard, the documents did not conform nor meet the requirements of the letter sent on May 19, 2004 from the Registrar to Richard. Ms. Katsoulis requested the missing documentation to be received by no later than June 16, 2004.
19. Notwithstanding the numerous deadlines that had been set out for complying with the inspection requests authorized by the statute, Richard and RBR once again failed to meet the requirements set out by Ms. Katsoulis on June 8, 2004. Specifically, on June 16, 2004 Richard and RBR had a deadline (again) for supplying specific documentation to Ms. Katsoulis. On that date Richard left a message indicating that there had been some confusion in locating the books and records, but his issue had been resolved and the documents would be delivered soon.
20. As of June 25, 2005, Ms. Katsoulis had not received the additional books and records. As a result, and pursuant to the *Act*, Ms. Katsoulis swore an affidavit outlining the failure to provide the books and records for the purposes of a Director's order appointing an investigator pursuant to the *Act*.
21. On or about July 16, 2004, a Director's investigation Order was signed, appointing Jo Ann Swain ("Ms. Swain") as an investigator pursuant to the *Act*.
24. In summary, Richard and RBR consistently avoided inspections from Ms. Wade, Ms. Katsoulis, and the Registrar and ignored requests for documentation, notwithstanding the inspection requirements of the *Act*. Pursuant to section 12 of the *Act*, the Registrar, or a person appointed by the Registrar, is permitted to inspect to ensure that the provisions of the *Act* and the regulations relating to registration and the maintenance of trust accounts and the regulation of trades are being complied with. The Registrar states

that Richard and RBR consistently stifled the reasonable requests for inspections and follow up.

In admitting the allegation in paragraph 7 above, the Applicants stated that while admitting the allegations in that paragraph, they did so “with an explanation and without personal intent”.

The further allegations in the Proposal being paragraphs 22, 23, 25, 26 and 27 as quoted hereunder were denied by the Applicants:

22. Of the documents received as a result of the inspections and of the investigation, it was revealed that RBR and Richard had unlawfully, and without colour of right, withdrawn various trust amounts as enumerated in paragraph 7 above. The withdrawals as noted above were all made at variance to the trust obligations owed in equity and the statutory trust obligations pursuant to the *Act*.
23. Further, on or about May 10, 2004, Ken Little (“Mr. Little”) wrote to the Real Estate Council of Ontario regarding trust funds deposited with RBR relating to a property known as 1401 Muskoka Road, Highway 69. Notwithstanding that Mr. Little had requested from Richard the \$10,000.00 owing as commission to Mr. Little’s firm as a cooperating broker on the transaction and that Richard had promised on several occasions to supply the funds, Mr. Little was not paid the amount owing. Of the documentation supplied to Ms. Katshoulis on June 8, 2004, the documentation did not include the Real Estate Trust Ledger (required to be kept by RBR pursuant to the *Act*). The Real Estate Trust Ledger indicates that the funds were transferred electronically by Richard and RBR real estate in breach of their trust obligations.
27. Accordingly, the Registrar has reasonable grounds to believe based on the past conduct of Richard and RBR that they will not carry on business in accordance with law and with integrity and honesty. Further, having regard to the financial position of both Richard and RBR, they cannot reasonably be expected to be financially responsible in the conduct of business.

THE EVIDENCE

The evidence introduced by the Registrar consisted of the testimony of Jennifer Josephine Katsoulis and Brian Schlotzhauer. The testimony introduced by the Applicants consisted of that of Brackenbury and Richard Paul Brisco. Certain documents were admitted to evidence and are recorded under exhibits 1 through 5 in this decision.

THE TESTIMONY OF JENNIFER JOSEPHINE KATSOULIS

Katsoulis testified that she is employed by the Real Estate Council of Ontario (“RECO”) as an inspector and has held that position since 1998. Her duties with RECO encompass inspecting registrants’ books and records so as to ensure compliance by such registrants with the *Act*. She was designated by the Registrar to inspect the Applicants’ records to ensure compliance with the requirements of the *Act*.

Katsoulis reviewed a letter dated August 6, 2003 addressed to Brackenbury by Brian Prendergast, RECO’s manager of Inspections and Investigations, prior to Katsoulis conducting inspections (Exhibit 3, tab 6). This letter recorded the four confirmed and

then cancelled inspection appointments by Brackenbury with another RECO inspector and what Prendergast referred to as the "totally unacceptable" conduct of Brackenbury in his failure to show up for appointments and pointing out to him the authority of the Registrar under section 12 of the Act to conduct inspections. It was further pointed out to Brackenbury that section 13 of the Act entitled the Registrar to free access to all books, documents and records relevant to the inspection and to the removal, if necessary, of any such books, documents and records. Prendergast then proceeded in the letter to stipulate precisely what documents were required for inspection and gave Brackenbury until August 22, 2003 to furnish the requested information and documentation.

Katsoulis went on to testify that Brackenbury failed to furnish the information requested by Prendergast nor did he comply with a further letter addressed to him by Prendergast on August 22, 2003. As well, Brackenbury continued to fail to attend prearranged meetings and to comply with the requests of RECO for the supply of information.

On May 19, 2004, the Registrar, Allan Johnston, authored a letter to Brackenbury reiterating displeasure occasioned by the ongoing failure of Brackenbury to co-operate with RECO (Exhibit 3, tab 7). Johnston set an appointment for Brackenbury to attend at RECO's offices for May 31, 2004 or June 7, 2004. On June 8, 2004, Brackenbury did attend at the offices of RECO where he met with Katsoulis and Brian Schlotzhauer, the Assistant Registrar. Certain documents were supplied by Brackenbury at that meeting but such documents as were supplied did not accord with the requirements set out in the Registrar's letter of May 19, 2004. At the meeting, Katsoulis looked through the documents handed in at that meeting by Brackenbury. She noted that there appeared to be sufficient documentation to begin an inspection. However, many relevant documents were not supplied by Brackenbury and it was agreed between Brackenbury and Schlotzhauer that the outstanding relevant documents required by RECO would be delivered to RECO by no later than June 16, 2004.

The meeting of June 8, 2004, was followed up on the same date by a letter that was faxed to Brackenbury (Exhibit 3, Tab 9). This letter detailed the documents necessary in order to conduct a complete inspection. These outstanding documents had been discussed with Brackenbury at the meeting and the outstanding documents included bank statements relating to the Company's trust account as well as its commission trust account and its general operating account. The three bank account statements that had been obtained were incomplete relative to the periods covered by the intended inspection and complete bank statements were considered essential to show the flow of monies through those accounts. Files relative to nine itemized completed deals were also requested of Brackenbury.

The above information and documentation was requested by no later than June 16, 2004 and was not furnished by that date by Brackenbury. Katsoulis went on to state that not only was the letter of June 8, 2004, not complied with by Brackenbury within the time limit stipulated but has, even at this stage, not been complied with and the information is still outstanding.

Katsoulis continued her testimony and stated that upon examination of the incomplete documents that RECO did obtain at the June 8, 2004 meeting serious concerns arose when such documents were examined. More particularly, funds had been withdrawn by

Brackenbury through an automatic bank machine (ABM) from the designated trust account of the Company. These withdrawals, numbering in all some twelve withdrawals, were during the period August 28, 2002 to October 4, 2002 (Exhibit 3, tab 8). The total withdrawn was \$2,900.00 through ABM's operated at "Western Fair Casino". In addition, other withdrawals were made on ABM's from the Company's designated trust account during the above mentioned period for purchases at retail stores and "The Beer Store".

In addition to the ABM withdrawals, Katsoulis noted that on inspection of the incomplete banking account records left by Brackenbury on June 8, 2004, there were withdrawals and transfers from and to the trust account, commission trust account and general operating account that could not be determined and that deposit books for the commission trust account and trust account lacked details in that trade numbers and/or addresses of transactions were not referenced. Furthermore, trade record sheets were incomplete and real estate transactions with missing Agreements of Purchase and Sale while the only documentation supplied by Brackenbury to Reco relative to the general account was a one page bank statement for the period March 31, 2004 to April 30, 2004, as well as three paid cheques.

THE TESTIMONY OF BRIAN SCHLOTZHAUER

Schlotzhauer testified that he is the Assistant Registrar under the Act and his duties include managing the registration process and monitoring compliance by Registrants under the Act. He stated that RECO is empowered to administer the Act which is consumer protection legislation. RECO is also empowered to ensure compliance with the provisions of the Act.

Schlotzhauer went on to state that attempts by inspector Carolyn Wade to inspect the records of the Company were not successful and that despite the legislation entitling the Registrar to inspect the records of the Company, this was not possible due to the non cooperation of Brackenbury. This became a concern to Schlotzhauer as he had found, as a general rule, that Registrants cooperate with the Registrar. This was not the case with the Applicants hence RECO's letter of May 19, 2004. Schlotzhauer emphasized that it was not at all usual for the Registrar to himself become involved in an investigation as was the case in this matter due to the Applicants' non cooperation in the investigation.

Besides the incomplete documentation provided by Brackenbury at the meeting of June 8, 2004, the latter had provided no further materials requested of him. The process of inspection commenced in 2002 and with the considerable period of time that continued to pass, the concerns of RECO increased. Even at the present time there are no complete records available from which the Registrar can determine the position of the Company. The concern over the withdrawals from the trust account by Brackenbury through the ABM's at a Casino and at retail stores increased the Registrar's unease. This was a clear breach of trust by Brackenbury and at the June 8, 2004 meeting, the latter offered no reason or explanation for the breach of trust.

Schlotzhauer completed his testimony by stating that there was ample justification for the Registrar's Proposal based upon the allegations made in the Proposal. The failure to cooperate with the Registrar over a lengthy period of time was a failure to comply

with the Act and showed a lack of honesty and integrity. He concluded that to this date, Brackenbury has failed to comply with the directions and requests of the Registrar to furnish information to which the Registrar is entitled and which the Applicants are obliged to furnish. The records requested by the Registrar, and never supplied, indicated a "red light" to the Registrar hence the Proposal.

THE TESTIMONY OF RICHARD BRACKENBURY

Brackenbury commenced his testimony by stating that the various withdrawals on the Company's trust account through ABM machines were due to an error of the Bank with which he had his personal banking accounts and with which the Company had its various banking accounts including the Company's designated trust account. In support of his contention that the error lay with the bank, he handed in a letter from the Bank of Nova Scotia, Dorchester, Ontario dated January 19, 2006, reading as follows:

To Whom It May Concern:

Re: Richard Brackenbury and Richard Brackenbury Real Estate Services Inc.
Account # [account number deleted] General Trust Account

Re: Trust Account Activity August 2002 through November 2002

Mr. Brackenbury has been a valued client of Scotiabank for several years and has five accounts linked on his debit card, three, Real Estate and two personal. The chequing and savings accounts are his personal accounts linked to "other". The links to the "other accounts" are not permissible through his savings and chequing accounts. Mr. Brackenbury had lost his debit card in early August 2002.

In acquiring a replacement debit card the "other accounts" were linked as savings and chequing accounts in error. The error was detected and amended in November 2002. Mr. Brackenbury does not have access to the "other" accounts for withdrawals from other institution ATMs or Point of Sale Purchases.

I trust this will provide an explanation to the concerns with respect to the access of the Trust Accounts. (Exhibit 5)

Brackenbury stated that he lost his debit card in August 2002 and consequently obtained a replacement card from his Bank. It was this replacement debit card that was erroneously linked by his Bank to the Company's trust account. It should not have been so linked and should have only been linked to his personal accounts. When he discovered that withdrawals for personal purchases made by him had in fact been debited to the Company's trust account, he caused the bank to correct their error in November 2002.

Brackenbury referred to the Company's trust account bank statements for the period August 30, 2002 to September 30, 2002 and September 30, 2002 to October 31, 2002 (Exhibit 3, tab 8). He stated that the various debits/withdrawals by way of withdrawals through ABM machines at the "Western Fair Casino" were due to the Bank's error when linking the Company's trust account of the debit card. The point of sale purchases made by him from various retail stores and paid for by way of his debit card should also not have been debited to the Company's trust account but should have been debited to his personal accounts. The fact that all these transactions were erroneously debited by

the Bank was not his fault. When he discovered the Bank's error, he advised the Bank which then corrected the erroneous linkage of the debit card withdrawals to the Company's trust account.

He went on to state that during the period January 2002 through to September 2004, his life was stressful. His stepfather's death occurred in 2003. In that same year, he was involved in a dispute with a partner, in a real estate venture, which was resolved in September 2003. Additionally, his father-in-law was suffering from alzheimer's disease during that time period and he separated from his wife at or about that time when his three children began living with him. Furthermore, his seventeen year old son became ill but his condition stabilized with diet, exercise and medication. In 2002/2003, he was in a relationship with a female companion that turned "tumultuous" and during the termination of that affair, his female companion deliberately "disassembled" his books and "destroyed" records. Up to that stage, she has been assisting in "doing" the books of the Company.

Brackenbury went on to state that he gambled so as to "relieve stress" and in December 2002, he "withdrew" from the Casino. He has no judgements or writs against him and has not "taken any monies from the Company's trust account."

Under cross-examination, he stated that:

- he was not keeping good records relating to the Company.
- he took out, through the ABM machine situated at the Casino, \$2,650.00 from the Company's trust account and restored the amount of \$2,600.00.
- the Company's trust account "was not precise" insofar as entries were concerned
- Prendergast told him after the June 16, 2004 deadline that passed, "not to send anything further" to RECO and that it was "too late now – I am ordering an audit", and that is the reason he has not sent any further information and documents to RECO as requested at the June 8, 2004 meeting and confirmed in RECO's letter of the same date.
- he has not reconciled the Company's trust account since 2002, a period of some four years.
- compliance with the Act is of importance and that his intent was "to get around to my obligations under the Act."
- he did not recall having informed anyone at RECO that he had in fact taken monies from the Company's trust account.
- insofar as Prendergast's letter to him of August 6, 2003, he did not respond to RECO's requirement as contained in that letter.
- in the year that followed after Prendergast's letter of August 6, 2003, he failed to attend to the requirements of RECO as contained in the aforesaid letter.

- he has at no time informed anyone at RECO what his female companion had done regarding the Company's books and records and that he has taken no steps to replace the Company's records that were destroyed due to his companion's actions.

THE TESTIMONY OF RICHARD PAUL BRISCO

Brisco stated in his testimony that he has been a registered Broker under the Act since about 1970 and has had experience in managing a real estate firm with a large number of persons employed therein. At present, he does consulting work for various parties relative to leases of real estate properties.

Brisco stated further that he has known Brackenbury since 1991 and had in fact "trained" the latter who is, in his opinion, an energetic person. He has found Brackenbury to be honest, trustworthy and with integrity, although he is "sloppy" at times.

THE LAW

The Real Estate and Business Brokers Act states as follows:

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

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

8. (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

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.

13. (1) Upon an inspection under section 11 or 12, the person inspecting,

(a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

(b) may, upon giving a receipt therefor, remove any material referred to in clause (a) that relates to the purpose of the inspection for the purpose of making a copy thereof, provided that such copying is carried out with reasonable dispatch and the material in question is promptly thereafter returned to the person being inspected,

and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

FACTS FOUND PROVEN

The following are the facts the Tribunal has found as proven.

1. All the allegations made in the Registrar's Notice of Proposal to Revoke under the heading "*B. Particulars*" in paragraphs one through six thereof as well as paragraphs eight through twenty one and paragraph twenty four thereof.
2. At no time did Brackenbury inform RECO nor any of its employees that his female companion had destroyed or interfered with the Company's books and/or records.
3. The Company's trust account has, since 2002 and to this date, for an approximative period of four years, not been balanced or reconciled.
4. When Brackenbury ascertained that the Company's trust account has had various funds removed by him through his operations at ABM machines during the period August 2002 through 2002, he failed to advise RECO of what had taken place.

DECISION AND ORDER

The issue for decision is whether the past conduct of the Applicants affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty. Furthermore, having regard to the financial position of the Applicants, they cannot reasonably be expected to be financially responsible in the conduct of business.

In the matter of *Brenner* [1983] O.J. No 1017 Southey 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.

In the later matter of *Shine Car Sales* heard in the Divisional Court on February 11, 2003 Lane J. held as follows:

In our view, the test in the Divisional Court case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and salesmen)* [1983] O.J. No. 1017, 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 test as set out in par. 12 of *Brenner* is 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 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 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.

Regard being had to what is stated above and having analyzed the evidence adduced at the hearing, the Tribunal's decision and its reason for the decision follow.

The legislation that pertains to this matter is consumer protection legislation whose very purpose is to safeguard the general public in and about their dealings with real estate brokers and salespersons. In order to enable the Registrar to effectively carry out his duties of protecting and safeguarding the public, he is authorized, entitled and empowered, under the provisions of the Act, to free access to the books and records of the Applicants so as to ensure compliance with the Act.

The Tribunal finds the conduct of Brackenbury in this matter to be one of obstruction and refusal to cooperate with the Registrar in his legitimate quest to ascertain that there has been and is compliance with the Act. Brackenbury, based upon his own admissions, failed to keep five scheduled and agreed upon inspection dates during April and May 2003 as well as January 2004. No reasonable explanations were given by Brackenbury for his failure to attend on those occasions. Prendergast's exasperation at the conduct of Brackenbury was palpable in his letter to the latter dated August 22, 2003. Brackenbury ignored Prendergast's letter of August 22, 2003 and blithely continued to avoid the Registrar's legitimate request to obtain inspection of relevant records and documents. Again, after agreeing to a meeting to be held on January 19, 2004, Brackenbury failed to meet with the Registrar's officials. Finally, on May 19, 2004, the Registrar demanded a meeting and the provision of records; this after the Registrar had shown admirable restraint in the light of the complete disregard to the Registrar's prior

repeated requests. When Brackenbury eventually attended at the offices of RECO on June 8, 2004, he still failed to produce the necessary records and documents for examination so as to alleviate the justified anxiety of the Registrar. The Registrar's Katsoulis who attended the June 8, 2004 meeting, took care, after the meeting, to record in a letter to Brackenbury precisely what documents and records remained outstanding for inspection purposes and gave the latter until June 16, 2004, to furnish such outstanding documents and records. Not only was this letter ignored by Brackenbury, but to the present date, no records or documents as requested by the Registrar have been furnished by Brackenbury.

The repeated and ongoing conduct of Brackenbury is one of irresponsibility and indicates the Applicants to be simply ungovernable. The Registrar is no nearer to obtaining information from the Applicants than he was in April/May 2003. All this is due to the Applicants' conduct of total non cooperation by Brackenbury, the controlling mind of the Company.

The Tribunal finds that the use of trust funds by Brackenbury in order to fund his personal purchases and his gambling experiences, although technically a breach of trust, was occasioned by the error in linkage of his debit card to the Company's trust account. While this occurred due to the error of the Applicants' bank, such error was not discovered by the Applicants for some three months. This delay in observing the error is indicative of the total non attention by Brackenbury to the financial affairs of the Company and basic bookkeeping controls including the reconciliation of the trust account on a monthly basis. While the incomplete financial records of the Company's trust account records do reflect the fact that Brackenbury was regularly gambling at a Casino where various cash withdrawals were made by him, the fact that Brackenbury was gambling is not in and of itself a fact that can be considered to be a violation of the Act and Regulations. However, it does indicate that Brackenbury's attention, by the observation of the frequency of his cash withdrawals for gambling purposes, was more focused on gambling than on compliance with the Act and regulations.

Brackenbury's reasons for his non cooperation, offered during his testimony, are rejected by the Tribunal as unjustifiable reasons for his conduct of non compliance. He placed the duties and obligations as imposed by the Act so far down on his priorities as to be tantamount to thumbing his nose at the Registrar. To this date, there is no picture, let alone a clear picture, of the financial position of the Company. The Registrar's repeated requests to Brackenbury remain unfulfilled by Brackenbury and the requisite documents and information have not been furnished by him.

It is of importance to note that under cross-examination, Brackenbury admitted that the Company "was not keeping good records" and that "the Company's trust account was not precise". Furthermore, it is noted that Brackenbury admitted under cross-examination that since 2002 the Company's trust account had not been reconciled. All these admissions reflect financial irresponsibility in the conduct of the Applicants' business. This conduct relates to the past conduct of Brackenbury in his personal capacity and in his capacity as sole officer and director of the Company. Not only is the aforesaid conduct "past conduct" but is the conduct that prevails at the present time. Based on this past conduct and the present ongoing course of conduct by the Applicants, the Tribunal is of the opinion that the future conduct of the Applicants will be reflective of their past and present conduct and as such, the Registrar is entitled in the

course of his duties and obligations in terms of the Act, to revoke the registrations of both Applicants. The fact that the Applicants have done nothing to replace the books and records of the Company allegedly destroyed by Brackenbury's female companion, indicates the abrogation of responsibility on the part of Brackenbury to comply with the provisions of the Act and its regulations in the maintenance of proper trust accounts and other records of the company.

The Tribunal has had the benefit of being the trier of fact in this matter and its opinion and decision is based upon a full and comprehensive hearing. The Tribunal finds no fault in the Registrar's Proposal and the relief sought in that Proposal.

ORDER

Accordingly, the Tribunal pursuant to the authority vested in it by section 9(4) of the *Real Estate and Business Brokers Act* directs the Registrar to carry out his Proposal dated June 10, 2005 to revoke the registrations as Brokers under that Act of Richard Brackenbury and Richard Brackenbury Real Estate Services Inc.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: March 7, 2006

File name: 3027.rebba.brackenbury.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.

This decision will also be available on Quicklaw at a later date.

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
JEROME S. NICHOLSON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: December 15, 2005

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

JEROME S. NICHOLSON

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on May 8, 2006;

AND 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, May 11, 2006;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: February 28, 2006



PRE-HEARING

SIMON I. DAHAN

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REINSTATEMENT OF REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SIMON I. DAHAN, representing himself

JENNIFER FRIEDMAN, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF

PRE-HEARING: February 21, 2006

Toronto

ORDER

Following attendances on February 21, 2006 at a pre-hearing before this Tribunal of Simon I Dahan, appearing on his own behalf (the "Applicant") and Jennifer Friedman, Counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on Monday the 27th day of March 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on Tuesday the 28th day of March 2006 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. Both parties shall fully comply with the requirements of disclosure as set forth in Rule 6.3 of the Rules of Practice of the Tribunal.

3. The Applicant informed the Tribunal at the prehearing that the allegations contained in the Registrar's Proposal dated November 30, 2005 as contained in the undermentioned paragraphs are admitted and do not require formal proof by the Registrar at the hearing of this matter;
 - (i) paragraph 5
 - (ii) paragraph 8
 - (iii) paragraph 9
 - (iv) paragraph 10
 - (v) paragraph 11
 - (vi) paragraph 14
 - (vii) paragraph 16
4. The Applicant was not able to state with any degree of certainty the witnesses he intends to testify on his behalf at the hearing.
5. The Registrar's Counsel advised the Tribunal that the following persons will be called by the Registrar to testify on the Registrar's behalf;
 - (i) Brian Prendergast, RECO's Manager of Inspections and Registrations
 - (ii) Ms. Benkovic (Katsoulis), Inspector
 - (iii) David Andrew, Inspector
 - (iv) Brian Schlotzhauer, Assistant Registrar
 - (v) possibly Sid Shiff, bankruptcy trustee
 - (vi) possibly Stephen Altbaum, chartered accountant

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 24, 2006

File name: 3293.rebba.Dahan.pre

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PAUL LONERGAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: CHRISTOPHER JAMES SPARLING, counsel, representing Paul
Lonerган

MARY FLYNN-GUGLIETTI, counsel, representing Paul Lonerган

TIM SNELL, counsel, representing the Registrar under the *Real
Estate and Business Brokers Act*

DATE OF
HEARING:

February 27, 2006

Toronto

ORDER

On February 27, 2006, following submissions by counsel for the Applicant and counsel for the Registrar, it was agreed that the hearing in the above-noted matter should be adjourned.

Upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties*. The hearing will re-commence before the Licence Appeal Tribunal at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30

a.m., on Wednesday, May 24, 2006 and to continue, if necessary, on May 25 and May 31, 2006, and June 1, 2006.

LICENCE APPEAL TRIBUNAL

Laurie Sanford
Vice-Chair

Released: February 27, 2006

File name: 3069.rebba.Lonergan.Prehrq.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.

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



3013-REBBA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, R.S.O.
1990, CHAPTER R.4 AS AMENDED

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, Presiding

APPEARANCES: LORNE LEVINE, Counsel, appearing on behalf of the Applicant

ROBERT MAXWELL, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act*

DATE OF
HEARING: January 9, 2006

Toronto

REASONS FOR RULING REGISTRAR'S MOTION TO DISMISS THE APPEAL

BACKGROUND:

This motion was brought by the Registrar at the onset of the hearing of this matter to dismiss the appeal on the basis that it is frivolous and vexatious and an abuse of process. The factual underpinning of the Registrar's motion is not seriously in dispute between the parties. It is as follows:

The Applicant was registered as a real estate agent on January 6, 1998. On June 18, 2004 the Registrar issued a Notice of Proposal to Revoke the registration of the Applicant alleging involvement in three transactions whereby the sale price of properties was inflated on Agreements of Purchase and Sale to secure higher mortgage financing for the purchaser. Not disclosed to the mortgagees was the fact that the vendor would make a substantial payment to the purchaser on closing to make the actual sale price reflect the true market value of the property. The mortgage companies were kept in the dark about the kick-back scheme and thus tricked into advancing greater financing than the true value of the property would support. The Applicant appealed the Notice of Proposal to this Tribunal and the matter was set down for a hearing. After an initial adjournment the hearing date was set for February 8 and 9, 2005.

On January 26, 2005 the Applicant withdrew her appeal to this Tribunal and the Registrar served a Final Notice under the *Real Estate and Business Brokers Act* revoking the Applicant's registration as a real estate salesperson on February 1, 2005.

On March 30, 2005, approximately eight weeks after the Final Notice, the Applicant applied to the Registrar for reinstatement of her registration as a salesperson and amended that application to apply as a broker on April 3rd. Before this Tribunal the Applicant has taken the position that she no longer seeks registration as a broker as she has been released from a franchise agreement that required her to hold a broker's registration.

The Registrar's evidence before the Tribunal on this motion consisted of the Affidavit of Brian Schlotzhauer sworn the 16th day of September, 2005. The Applicant tendered her own affidavit sworn on October 24, 2005 in response to an order of this Tribunal dated October 11, 2005 that states in part:

The Applicant shall no later than 20 days of date of this Order, serve upon the Registrar a responding affidavit to the affidavit dated September 16, 2005 of Brian Schlotzhauer more fully referred to at tab "B" of the Registrar's Motion Record. The aforementioned responding affidavit of the Applicant shall set forth, in detail, any and all material changes in the Applicant's situation or circumstances, as well as any fact or facts, upon which she will rely at the hearing as more fully referred to in paragraph 9 of Brian Schlotzhauer's affidavit.

Thus, as a result of the October 11, 2005 order, the Applicant's affidavit is to represent the whole of the Applicant's case with respect to s. 10 of the *Real Estate and Business Brokers Act*.

Mr. Schlotzhauer's affidavit sets out the factual underpinning as set out above. The Applicant's affidavit raises the following points.

1. There has never been a hearing on the merits with respect to the allegations in the earlier Notice of Proposal;
2. The Applicant was suffering from a medical disorder that was psychological in nature that made her particularly susceptible to being misled by the other agent in the wrongful scheme such that he convinced her it was, in fact, legal; and,
3. The Applicant now understands her medical difficulties and is taking steps to deal with them by closely following the advice of her doctors.

As evidence of her medical problem, the Applicant attached two reports from her treating doctors as exhibits to her affidavit, one from Dr. Joseph Wong, a family physician and the second from Dr. Gordon Baker, a psychiatrist.

ISSUES:

At issue in this motion is the statutory scheme for the revocation of registration, the appeal process to this Tribunal and under what circumstances a registrant, having exhausted remedies under the statute, can apply for reinstatement.

ANALYSIS:

The statutory scheme for revocation of registration and appeal set out in the *Real Estate and Business Brokers Act* is found in sections 6 through 9. By virtue of section 6 an applicant is entitled to registration or renewal:

...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;

The Registrar's right to refuse registration is found at s. 8. To put it simply, the Registrar may refuse to register or to renew a registration if, *inter alia*, the conditions set out in s. 6 are found to be present. S. 9 sets out the procedure that the Registrar must follow when a revocation or refusal to register is proposed. Chief among these is the right of a registrant to appeal to this Tribunal for a hearing on the merits of the Registrar's proposal. Of particular note is s. 9 (3), the procedure in the event an applicant or registrant does not require a hearing. The subsection states:

Powers of Registrar where no hearing

- (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).

S. 9 (3) is applicable to our facts with respect to the Registrar's proposal dated June 18, 2004. On January 26, 2005 the Applicant reversed her previous desire for a hearing and advised the Tribunal and the Registrar that she no longer required a hearing. Having waived a hearing on the merits, under what circumstances, if any, should the Tribunal permit the Applicant to re-open the issues raised in the earlier proposal?

It is of paramount importance that proceedings before courts and tribunals have a mechanism to bring finality to the process. In the *Real Estate and Business Brokers Act* finality is brought to the process when the applicant's or registrant's rights are exhausted under s. 9.

In the statutory scheme it is immaterial whether that finality arises out of the withdrawal of the appeal or out of a final order of this Tribunal. In rare cases, where the evidence discloses that an applicant is incapable of making an informed decision, it may be appropriate to reconsider the earlier process. Does the Applicant fall into that category? Put another way, has the Applicant satisfied the Tribunal that on January 26, 2005 she was incapable of making an informed decision? A review of her evidence in that regard is appropriate.

Exhibit "B" to the Applicant's affidavit is a letter from her psychiatrist, Dr. Gordon A. Baker, to Dr. Alvin Boxer, dated November 13, 2000. Dr. Baker diagnosed: *"Panic attacks, with anxiety and phobia formation. Depressive mood disorder, (unipolar mood depression), co existing with the panic disorder."* Dr. Baker prescribed Paxil and goes on to state that the Applicant's symptoms are diminishing and to refer her back to Dr. Boxer, her family physician as of November 13, 2000, for ongoing treatment. It appears that she did not see Dr. Baker again until September 2005. Accordingly Dr. Baker can tell us nothing of the Applicant's mental condition in January, 2005.

It appears that the Applicant must have had more than one family physician since she also produced a letter dated October 11, 2005 from Dr. Joseph Y. K. Wong, a family physician, which states that the Applicant had been under Dr. Wong's care since 1994. It appears that Dr. Wong did not refer the Applicant to Dr. Baker. Dr. Boxer did. Dr. Wong notes that the Applicant had mild symptoms of anxiety and depression in 2000 which became a lot worse in 2002 and 2003. According to Dr. Wong she has been improving gradually since 2003 and as of October 11, 2005 *"has been getting remarkably better this year, especially re: her ability to relate to reality and her relationship with people and her husband... My professional opinion is that <Applicant's name> is now in remission..."* Nothing in Dr. Wong's report suggests that the Applicant was unable to make informed decisions in January of 2005.

There is no evidence before this Tribunal to support a conclusion that the Applicant was incapable of making an informed decision on January 26, 2005. The Applicant's appeal rights having been exhausted, there is no basis upon which this Tribunal can re-open the proceeding arising out of the Registrar's proposal dated June 18, 2004. Any other determination would simply make a mockery of the statutory provisions and time limits. The Notice of Proposal dated June 18, 2004 and the resulting revocation of the Applicant's registration dated February 1, 2005 on the grounds set out in the proposal are now part of the Applicant's permanent record and may not be re-litigated before this Tribunal as part of the current appeal.

Notwithstanding that the Applicant may not re-litigate the allegations in the June 18, 2004 Notice of Proposal, the matter does not end there. By virtue of s. 10 of the statute:

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

Thus it is open to the Applicant to demonstrate that the provisions of s. 10 apply to her. What is perhaps of more importance to this consideration is whether the Applicant's appeal rights can be disposed of in the context of this motion or whether the statute guarantees her the right to a full hearing on the issue of whether there is new or other evidence or a clear material change in circumstances. It is the position of Counsel for the Registrar that this motion satisfies the statutory requirement for a hearing. When viewed together with the October 11, 2005 order of this Tribunal requiring the Applicant to make full disclosure of any fact or facts upon which she intends to rely to establish the application of s. 10, this submission has much substance.

The Registrar relies on s. 8 of the *Licence Appeal Tribunal Act, 1999*, S. O. 1990 Chapter 12 Schedule G. which states:

Frivolous or vexatious application

8. If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances.

The impact of s. 8 of the *Licence Appeal Tribunal Act, 1999* is to answer in the affirmative the question concerning the disposition of an application by way of motion. The Tribunal may dispose of an application by way of motion where it is satisfied that such the application is frivolous and vexatious.

To succeed on this motion the Registrar must satisfy the persuasive onus of establishing that the Applicant's appeal is frivolous and vexatious with respect to the test set out in s. 10 of the *Real Estate and Business Brokers Act*. The combined effect of the wording of s. 10 and the October 11, 2005 order of this Tribunal puts an evidentiary onus on the Applicant to demonstrate, at least on a *prima facie* basis, that there is, in fact, new or other evidence or that it is clear that material circumstances have changed.

In the 1997 case of *Potocnik v. Thunder Bay (City)* 29 C.H.R.R. D/512 an Ontario Board of Inquiry had to consider whether a complaint was "trivial, frivolous, vexatious or made in bad faith." under s. 41 (4) of the *Human Rights Code* with respect to considering an award of costs. On the facts, after 25 days of hearing evidence and three days of motions the Board found it unnecessary to ask the City of Thunder Bay to present its case in defence of the allegations against it. The Board of Inquiry considered the words "trivial" and "frivolous" in the following terms:

I also favour using the ordinary meaning of the words "trivial," "**frivolous**" and "**vexatious**," rather than the more esoteric **definitions** contained in *Black's Law Dictionary*. Thus, for the complaint to be trivial or frivolous, the issues must be unimportant, petty, silly, or insignificant enough to be a waste of the tribunal's time. In addition, a complaint completely without factual or legal basis might be considered trivial or frivolous. A vexatious complaint is one that aims to harass, annoy or drain the resources of the person complained against.

The meaning of frivolous and vexatious relating to the unlikelihood of success was considered by Dambrot J. in *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997) 37 O.R. (3d) 70, 17 C.P.C. (4th) 78 (Ont. Gen. Div.). The definition is set out at paragraph 18 of the decision as follows:

These words are often used compendiously, without any individual **definition**, and pleadings are said to be **frivolous** and **vexatious** for fact specific reasons, without any delineation of a test. A frivolous action has been defined, however, to be one which, on its face, is so unreal that no reasonable or sensible person could bring it. A frivolous and vexatious pleading has been defined as one which is “hopeless factually”, and which it is “plain and obvious...cannot succeed.” (Zurich Investments Ltd. v. Excelsior Life Insurance Co. (1988), 28 C.P.C. (2d) 264 (Alta. C.A.).

In light of this definition it is necessary to examine the evidence put forward by the Applicant in support of her position that she has new or other evidence or it is clear that material circumstances have changed. It is worthy of note that nowhere in her affidavit does the Applicant attempt to set out grounds why evidence that she now tenders was not available to her in January 2005 when she made her decision to withdraw her appeal to this Tribunal.

The Applicant’s affidavit is replete with her beliefs concerning her medical condition. It refers to the report from Dr. Baker dated in the year 2000. It also attempts to elevate the involvement of Dr. Baker well beyond the truth. Dr. Baker’s report states that he stopped seeing the Applicant in 2000 and referred the matter back to Dr. Boxer. The Applicant deposes that she has been “seeing a psychiatrist since October 2000” implying that she has been continuously under Dr. Baker’s care, which fact is patently untrue. There is also the report of Dr. Wong relating to events that occurred between 2000 and 2005. It has already been stated above that neither of these opinions states categorically or even by necessary implication that the Applicant was incapable of making informed decisions, either in 2003 when the events giving rise to the June 18, 2004 proposal arose or in January 2005 when she withdrew her application. With respect to those parts of the report of Dr. Wong that relate to the Applicant’s condition in 2003 through January 2005, there is no explanation why this evidence could not have been brought forward in time for the hearing in February 2005. Accordingly, there is a complete dearth of “new or other evidence” and it is clear that the Applicant’s appeal in relation to “new or other evidence” is “hopeless factually” and it is “plain and obvious” that it cannot succeed. What then of a “material change in circumstances?”

In considering changed circumstances, the first issue is to consider the timing. It appears from the Applicant’s affidavit that her position is that she is now a better person than she was in 2003 as a result of understanding her illness and taking her medication. It is the position of the Registrar that the appropriate time for the consideration of such evidence is between February 1, 2005 and March 30, 2005, that is the date the Proposal was implemented and the date of the new application. In keeping with the policy of the legislation to bring finality to a Registrar’s decision to deny an applicant or registrant, it follows that any circumstances that may have been advanced in mitigation in the original application to this Tribunal cannot now form the basis for an appeal.

In looking for clear evidence of a material change in circumstances under s. 10, the starting point must be the date the previous proposal became final, that is, February 1, 2005. It does not follow that the end point for such an analysis must be the date of application. It would be open to the Tribunal hearing the appeal to hear evidence of changed circumstances right up to the hearing date, especially where the evidence relates to a process of recovery.

By way of example, where the changed circumstances relate to controlling substance abuse, it would be open to an applicant to put forward evidence that there has been no further abuse up to the hearing, a length of time that may be significantly longer than the date of the application for reinstatement.

Having stated that the Tribunal will consider evidence of changed circumstances up to the hearing date, there remains one procedural point arising in this matter. Appended to the Applicant's factum was a report from Dr. Baker dated December 27, 2005. This report was not entered in evidence on the motion in any of the normally acceptable ways, either as an exhibit to a supplementary affidavit of the Applicant or as an exhibit to an affidavit by Dr. Baker himself. Notwithstanding the Tribunal's grave doubts about whether the report is properly before it, its contents will be taken into consideration at the Applicant's request and in the lack of serious objection by Counsel for the Registrar. The Applicant sets out what she believes to be the changed circumstances at paragraph 14 of her affidavit in the following words:

I believe that there has been a material change in my circumstances because I now understand my medical difficulties and I am taking steps to deal with them by closely following the advice of my doctors.

Her doctors appear to differ, not only with her but with each other. In his opinion dated October 11, 2005, after reviewing the Applicant's improvement demonstrated over 10 visits in 2005, Dr. Wong concludes that she is in remission. At the same time Dr. Baker advises that the Applicant visited him on September 22, 2005 with a recurrence of her anxiety symptoms. He advises that she is, as of the date of the letter, undergoing a course of treatment involving the use of Paxil and attendance at his office every week or second week. Of particular note is the comment at page 2 of the December 27 letter:

In summary, while she suffers a bout of this mood depression, one could not expect her to be at her best, or to be using her best judgment.

The medical evidence proffered by the Applicant, notwithstanding its internal contradiction, falls far short of establishing that "it is clear that there has been a material change of circumstances". Indeed, it was the Applicant's position that the reason she got into trouble in 2003 in the first place was because she was unable to exercise good judgment because of her medical disorder. Nothing has changed.

Absent the December 27, 2005 letter of Dr. Baker, would the Tribunal's opinion have been different?

The onus on the Applicant was to establish at least a *prima facie* case that it is clear that there has been a material change in circumstances. At best, the October 11, 2005 letter from Dr. Wong states his belief that the Applicant is in remission and currently understands the nature of her illness and the necessary treatment. It states nothing about the likelihood of a recurrence of the symptoms and conditions which, according to the Applicant, led to her being easily led into wrongful behaviour by an unscrupulous fellow agent.

In fact, it was the Applicant's position that her ability to make informed decisions was still significantly impaired in late January 2005 such that the Tribunal should allow her to re-open her earlier appeal and set aside her decision to withdraw. The marked improvement in her condition in 2005 reported by Dr. Wong has not withstood the test of time to determine if it is permanent or simply an interstitial between bouts of depression. Remission is not a cure. The Applicant has failed to establish on a *prima facie* basis that it is clear there has been a material change in circumstances.

DECISION:

In light of all the evidence, the Tribunal concludes that this is an appropriate case for the application of s. 8 of the *Licence Appeal Tribunal Act, 1999*. The Tribunal finds that the Applicant's appeal is hopeless factually, it is plain and obvious that it cannot succeed and that it is frivolous and vexatious. Accordingly, pursuant to the provisions of s. 8 of the Act, the Tribunal refuses to grant the Applicant a hearing, dismisses the Applicant's appeal and directs the Registrar to refuse to register the Applicant in accordance with the Notice of Proposal dated April 14, 2005.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: February 17, 2006

FILE NAME: 3013.rebba.ruling.doc

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

This decision will also be available on Quicklaw at a later date. The Applicant's name does not appear in the decision nor does the name of any witnesses (unless they took part in the hearing in a professional capacity or as a regulator).

Licence
Appeal
Tribunal

Tribunal
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RAHAMAN SUBADAR

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: DEREK ISRAEL, Vice-Chair

APPEARANCES: RAHAMAN SUBADAR, Applicant

TIM SNELL, Counsel, representing the Registrar under the *Real
Estate and Business Brokers Act*

DATES OF
HEARING: February 6, 7 and 13, 2006

Toronto

ORDER

WHEREAS the Applicant's Counsel's Legal Assistant, Samdai Soohoo, informed the Tribunal by telephone at approximately 9:00 a.m. on February 13, 2006 that Mr. Welman, the Applicant's Counsel had left a voice mail message for her to the effect that his father had passed away and consequently he was not able to attend at the Tribunal on February 13, 2006, to which date this matter had been adjourned;

AND WHEREAS the Applicant and the Registrar's Counsel were present at the commencement of the hearing on February 13, 2006 and consented to the adjournment of this hearing to 9:30 a.m. on Tuesday, May 16, 2006 and 9:30 a.m. on Wednesday May 17, 2006 and to a further adjournment thereafter to 9:30 a.m. on Monday May 29, 2006 and 9:30 a.m. on Tuesday May 30, 2006 all such adjournments to the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

NOW THEREFORE, this Tribunal Orders this matter be adjourned to:

9:30 a.m. on Tuesday, May 16, 2006, and

9:30 a.m. on Wednesday May 17, 2006

and thereafter to

9:30 a.m. on Monday May 29, 2006, and

9:30 a.m. on Tuesday May 30, 2006

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: February 13, 2006

File name: 3139.rebba.Subadar.order.doc

This decision will also be available on Quicklaw at a later date.



PRE-HEARING

SEPIDEH MOAZZANI

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO RENEW REGISTRATION.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SYMON ZUCKER, counsel, representing Sepideh Moazzani

ROBERT A. MAXWELL, counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: January 16, 2006

Toronto

ORDER

Following attendances on January 16, 2006 at a pre-hearing before this Tribunal of Symon Zucker, counsel, appearing on behalf of Sepideh Moazzani (the "Applicant") and Robert A. Maxwell, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on March 14, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on March 15 and 16, 2006, at the Tribunal's above Chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no resolution of any of the issues in this matter.
3. The Tribunal noted that counsel for the Applicant had been furnished, by way of a letter dated December 7, 2005, with "particulars of the complaint against" the Applicant as more fully are referred to in that letter.

4. The Tribunal also noted that this letter was received by the Applicant's counsel and that the latter contended in his letter to the Registrar that he considered the particulars furnished "have not complied with either the letter or the spirit of the Order" made by the Tribunal pursuant to the November 17, 2005, pre-hearing Order of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: January 19, 2006

File name: 3110.rebba.moazzani.pre-hrg.doc

The decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MICHAEL DESMOND BISTANY AND MICHAEL D. BISTANY REALTY LTD.

MOTION TO CONSIDER A STAY OF AN ORDER OF THE
LICENCE APPEAL TRIBUNAL

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: CLAUDIO MARTINI, Counsel, for the Applicants

ROBERT MAXWELL, Counsel for the Registrar, *Real Estate and
Business Brokers Act*

DATE OF
MOTION: November 28, 2005

Toronto

REASONS FOR RULING

BACKGROUND:

The Applicants were registrants under the *Real Estate and Business Brokers Act* R.S.O. 1990 c R4 as amended ("the Act"). By Notice of Proposal dated July 8, 2004 the Registrar under the Act acting under the aegis of the Real Estate Council of Ontario (RECO) sought to have the registration of Michael Bistany as a broker revoked and to refuse the registration as broker of Michael D. Bistany Realty Ltd. The Registrar's Proposal was appealed to the Tribunal and heard March 29 and 30, 2005. The Tribunal issued an Order May 17, 2005 which directed the Registrar to carry out his decision contained in the July 8, 2004 Notice of Proposal. By operation of section 9 of the Act the Tribunal's Order takes effect upon issuance, thereby, as at May 17 disentitling the Applicants from legally operating as real estate brokers in Ontario. The Tribunal's Decision was appealed to the Divisional Court by Notice of Appeal dated June 15, 2005 pursuant to a right granted under section 11 of the *Licence Appeal Tribunal Act*, 1999 S.O. c. 123, schedule G. The present Motion to have the Tribunal's Order stayed until disposition of the matter by the Divisional Court was brought by way of Notice dated October 3, 2005. The authority for the Tribunal to grant a stay upon the launching of an appeal is found in the section 9 (9) of "the Act".

THE LAW:

Section 11 of *The Licence Appeal Tribunal Act, 1999* states:

A party to a proceeding before the Tribunal relating to a matter under any of the following Acts may appeal from its decision or order to the Divisional Court in accordance with the rules of court.

...

Real Estate and Business Brokers Act

The *Real Estate and Business Brokers Act* states;

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

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

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.

Section 25(1) of the *Statutory Powers Procedure Act* reads as follows:

25. (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

- (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
- (b) the tribunal or the court or other appellate body orders otherwise.

The Supreme Court of Canada in the case of *RJR MacDonald v Canada (A-G)* (1991) 82 D.L.R. (4th) 385 adopted as guidance to lower courts when considering applications for stay the three stage test set out in *Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers Local 832* (1987) D.L.R. (4th) 321. The test can be summarized as follows:

1. A preliminary assessment must be made of the merits of the case to ensure that there is a serious matter to be tried.

2. It must be determined whether the Applicant would suffer irreparable harm if the application were refused.
3. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

MOTION RECORD:

The record included the motion upon which the Order for Stay is sought expressing in the grounds the fact that an appeal to the Divisional Court had been sought and appending supporting affidavit material to the effect that Mr. Bistany should be allowed to carry on his profession pending final disposition of the Tribunal's decision. In particular was the affidavit of Frank Dattillo a broker registered under the Act and a majority shareholder and officer and director of Dattillo Realty Inc which stated the willingness of the Affiant to allow the Applicant to conduct business within his company and that the Affiant would supervise any such business conducted by the Applicant.

The grounds upon which the Registrar sought revocation and refusal of the Applicants' registrations that were before the Tribunal at the hearing March 29, 2005 were set out in the Notice of Proposal. They were that, in accordance with Section 6 of the Act, the Applicants could not reasonably be expected to be financially responsible in the conduct of their business and that the past conduct of the Applicants afforded reasonable grounds for the Registrar's belief that such business would not be carried on in accordance with law and with honesty and integrity. The Tribunal's decision was included in the motion record.

The Tribunal's decision and affidavit material indicate that Michael D. Bistany Realty (MDB Realty) with Michael Bistany as sole proprietor and principal broker was incorporated and registered under the Act in early 1983. Mr. Bistany has been a registered broker since 1982 and his latest renewal was in December 2004. Michael D. Bistany Realty Ltd. ceased operation in December 2004 and closed its trust accounts per instructions of the Real Estate Council of Ontario. No untoward instances showed up on the registrations.

However, in 1996, the decision indicates that Mr. Bistany entered into a business venture with seven others that failed and subsequently closed in 2000. The partners, other than Bistany, declared bankruptcy and departed the scene. Mr. Bistany decided to assume the liabilities of the others. To do so required incurring costs that could not be carried on his real estate earnings alone. The result was increasing debt and unsatisfied judgments. As a result the regulator imposed terms and conditions upon the Applicant's registration. These included information regarding the satisfaction of outstanding judgments and using his best efforts to discharge them. As well, an investigation into the financial dealings of the MDB Realty revealed mishandling of trust monies contrary to the Act, which resulted in a charge of breach of trust under section 20(1) of the Act and a Provincial Court conviction March 4, 2005. This conviction was appealed and that appeal was sought to form the basis of an adjournment of the March 29 hearing before

the Tribunal, from which the present appeal to the Divisional Court is sought. That Motion for adjournment was denied on the grounds that matters on appeal before the Tribunal are parallel to but not related to matters before the courts.

On November 16, 2004 the Applicant filed an assignment in bankruptcy. A Supplementary Notice of Proposal dated February 5, 2005 stated that the Applicant had debts of 1.5 million. Affidavit material filed by the Applicant indicates that prior to bankruptcy the Applicant had debts in excess of 2.5 million, of which 1.9 million had been repaid. The Summary Administration statement of the Trustee indicates \$625,170.00 owing. The repayment of this amount, it is stated, could not be negotiated with creditors, one of whom garnisheed the Applicant's income forcing the declaration of bankruptcy.

The Applicant was discharged from bankruptcy August 17, 2005.

GROUND OF APPEAL:

The Applicant's Notice of Appeal to the Divisional Court, as is the wont of appellate counsel, includes a great number of grounds, some perfunctory and some substantive. This latter category included the assertion that the Tribunal erred in law in not granting an adjournment of its hearing of the March 29, 2005 appeal from the Registrar's Proposal when the fact of an appeal from a Provincial Court conviction under the Act was raised. Here the Applicant claims that the Tribunal erred in law by allowing, at least in part, use of the conviction as part of the basis of its decision prior to the conviction's final disposition on appeal. The Applicant further claims that the Tribunal used the fact of the Applicant's failure to repay his creditors as proof of a breach of the terms and conditions of his registration when those terms referred to "best efforts" to attempt to repay. Included under this head was the assertion that the Tribunal, given the broad discretion granted to it under the Act, did not adequately consider the Applicant's actual and attempted repayment efforts before deciding to use the ultimate sanction of revocation. There is no evidence that he wilfully took a position that he would not honour his obligations. The facts are more consistent with an inability to do so. The Applicant's overarching grounds are that there is inadequate evidence to de facto permanently separate the Applicant from his livelihood, as that would be the practical effect of allowing his deregistration pending appeal. There was also reference in the Notice of Appeal to the fact that the Tribunal's decision refers to the Applicant's registration as a salesperson not as a broker, as stated in the Proposal.

DECISION:

As the moving party it is incumbent upon the Applicant to satisfy the Tribunal that the tests described in *RJR MacDonald* have been met in the instant case. The first stage of the test is to establish that there is a serious matter to be tried and a review of how this requirement came to be useful.

RJR MacDonald was heard en banc and, as stated, established criteria upon which disposition of interlocutory relief as here sought should be decided.

The case involved a challenge to the constitutional validity of the 1985 *Tobacco Products Control Act*. Although successful at first instance the Applicants were overturned on appeal. Leave to appeal to the Supreme Court of Canada was granted. Regulations were passed under the Act requiring larger and more prominent health warnings on packages containing tobacco products. The applicants sought leave to have the compliance with the regulations stayed until final disposition of the matter on further appeal.

Sopinka and Cory JJ canvassed the authorities beginning with *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1987) 38 D.L.R. (4th) 321. That case established a three-stage test in order to establish the sufficiency of grounds upon which interlocutory relief such as a stay could be granted:

First a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The Court then discussed the history of the hurdle involved in the first stage. There were two tests precedent, one involving the necessity of the party seeking relief to establish a "strong prima facie case"; the other required only that the applicant establish that "the claim is not frivolous or vexatious, in other words there is a serious question to be tried". The latter appeared to the Court to be the more propitious.

With this in mind the Court stated that there are no specific requirements to be met to satisfy the "serious question" test and that the threshold is a low one. The sense of this lies in the undesirability of hearers of motions moiling around in decided matters of fact based upon observed viva voce testimony to which he or she was not privy. It is only necessary at the motion stage to make a preliminary assessment of the merits. The Court did state that in cases where leave to appeal has been sought and granted it is assumed that some degree of assessment has been made as to the merits although even in such cases such assessment would not be conclusive on the issue of "seriousness". Here the appeal lies under section 11 of the *Licence Appeal Tribunal Act, 1999*.

The Court refined the issue of the extent of required review of the merits at the motion stage in cases where a determination by the motions judge would as a practical matter be finally determinative. For example where the relief sought on final disposition at appeal would be rendered moot by either the incurring of expenses not recoverable even if successful or the inability to regain one's professional standing (right to make a living) due to the time lapse between first instance and appeal. The Tribunal takes from the Court on this point that appeal rights that are granted either statutorily or by leave

can not be effectively reduced to a right without a remedy without there being a denial of justice.

In the *RJR MacDonald* case the Applicants stated as part of their grounds for the granting of a stay that there was a serious constitutional issue to be decided, that the Applicants would suffer inordinate and unrecoverable labelling expenses and therefore the balance of convenience taking into account the public interest (public health) favoured maintaining the status quo.

The determination of the second test is, in most cases a simple question of fact, usually stemming from unrecoverable expense or loss of income.

The question posed by the third stage of the argument for a stay is succinctly stated in *Metropolitan Stores*:

A determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The balance to be drawn is between the harm to the public interest and that to the Applicant.

In the present case the Applicant asserts that if he is denied the ability to earn real estate commissions for the approximately two years before hearing and opinion on appeal, any success on that appeal would be largely meaningless. If successful he would have regained the right to make a living in his chosen field with there being precious little ability to do so remaining. As long as the public interest is adequately protected, in this case by a system of monitoring Mr. Bistany's dealings, Counsel argued that the court's direction in *RJR MacDonald* favoured the granting of the stay. That being the case it is incumbent upon the Tribunal to review the merits at least summarily.

The grounds stated above, including that the Tribunal erred in forming its decision, even in part, on the basis of a first instance conviction and refusing an adjournment until its final disposition and that there was a misinterpretation of the terms and conditions of the Applicant's registration may be thin reeds upon which to rest an appeal but given the low threshold laid down in *RJR MacDonald* the Tribunal has difficulty denying that they are at least arguable points.

The Registrar's argument is that the public interest, as expressed through the governing legislation, must be protected and it is most appropriately done by removing the Applicant from the real estate marketplace. The principal purpose of the Act is to ensure that this marketplace is conducted by those who are deserving of registration under the Act, which for the grounds stated and based upon the Tribunal's decision the Applicant is not; not even for the time required to dispose of the appeal to the Divisional Court.

It is the position of the Registrar that by granting a stay and allowing the Applicant to remain a registrant would, on the basis of the findings of the Tribunal, be contrary to the public interest. Counsel continued that the argument that any such fear is assuaged by

the monitoring of the Applicant by another broker, namely Mr. Dattillo, does not hold. The monitoring of the Applicant in the field would be nigh impossible and the real concern of the regulator, the handling of deposit money, would not be addressed.

Counsel for the Registrar raised in support the case of *Thakur*, a Tribunal decision issued July 26, 2005. In *Thakur* the Applicant refused to answer questions directed to him and ultimately advised his counsel to withdraw his appeal. The Tribunal decided on the basis of the evidence on the record that the Registrar could proceed with his Proposal. The Applicant appealed the Tribunal's decision saying that the withdrawal of the Appeal was a mistake and he motioned the Tribunal for a stay. The Tribunal hearing the motion stated that the evidence from the Registrar was clear regarding the Applicant's fraudulent behaviour. Over and above that there was no explanatory evidence to the contrary and a denial of a full hearing due to the Applicant's withdrawal from the proceedings. The Tribunal felt in the circumstances the Applicant's argument evinced essentially a position that fell within the Court's meaning of frivolous and vexatious; meeting not even the threshold set out in *RJR MacDonald*. Here, however, the Applicant fully participated and offered a defence to the case for the Registrar.

Nevertheless Counsel points to *Thakur* as having relevance in situations like the present where, as he proffered, there was "overwhelming" evidence of wrongdoing on the part of an Applicant. The position put forth by Counsel for the Applicant in response is that while there may well be findings based on seemingly substantial evidence, where conclusions based upon that evidence are under appeal it is incumbent upon the Tribunal at the motion stage to grant a stay as long as the "low threshold" test described above is met. Here he claims the Tribunal erred in drawing conclusions, at least in part, based upon evidence of a conviction that was under appeal. As well, he pointed to conclusions based upon breaches of the terms and conditions which had been imposed upon the Applicant namely that the Applicant had not in fact repaid amounts owing when the actual term was to use his "best efforts" to repay.

Finally, Counsel argued that the Applicant's recent behaviour should be looked at and in line with the precautions to be in place over the Applicant's dealings he should not be placed in the position of being, in effect, foreclosed from his profession while his right to do so is still to be finally determined.

Having considered the arguments the Tribunal finds that the tests laid down favour the granting of a stay but only in circumstances where the public interest is adequately protected. The affidavit of Mr. Dattillo allows the Tribunal to make that allowance.

ORDER:

The Tribunal orders that a stay of the Tribunal's decision to direct the Registrar to revoke the registration of Michael D. Bistany as a broker under the Act be granted until disposition of the appeal of that decision to the Divisional Court. The Tribunal's decision

to allow the Registrar to refuse the renewal of the registration of Michael D. Bistany Realty Ltd. stands.

During the duration of the stay the Applicant, Michael D. Bistany will be allowed to continue as a registrant under the Act on the following terms:

- His registration is limited to conducting business at Dattillo Realty Inc and under the supervision of Mr. Dattillo
- He is to have no dealings with trust accounts
- All contracts entered into with clients will be reviewed by Mr. Dattillo

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: January 12, 2006

File: 2504.rebba.Bistany.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 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.

The decision will also be available on Quicklaw at a later date.



PRE-HEARING

RAHIM KHAN

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SUVENDU GOSWAMI, counsel, representing Rahim Khan

ROBERT A. MAXWELL, counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: December 9, 2005 Toronto

ORDER

Following attendances on December 9, 2005 at a pre-hearing before this Tribunal of Suvendu Goswami, counsel, appearing on behalf of Rahim Khan (the "Applicant") and Robert A. Maxwell, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on the 16th day of February, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on the 17th day of February, 2006, at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no resolution of any of the issues in this matter and no agreement on any agreed facts.
3. The Applicant's counsel requested the following documentation be provided by the Registrar so as to enable the Applicant to adequately prepare for the hearing. The counsel for the Registrar undertook to endeavor to obtain such

documentation and, if successful, to provide same to the Applicant's counsel as soon as possible.

- (a) the Trade Record Sheet relative to 34 Cora Crescent that may be in the possession of Century 21 (Leading Edge).
 - (b) the computer printout of entries made by Century 21 (Leading Edge) and Home Life-Champions Realty Inc. relative to the sale transaction of 34 Cora Crescent.
 - (c) exhibit # 4 more fully referred to in paragraph #10, tab 32 of the Registrar's Book of Documents filed already with and served upon the Tribunal and the Applicant's counsel, respectively.
 - (d) a copy of Mr. Dave Tredrea's notes of the latter's interview with Broker Paul Baron which is more fully referred to at tab 45, under the heading "anticipated evidence" in the Registrar's Book of Documents referred to in paragraph (c) above.
4. The parties recorded that as present advised, the following persons are likely to testify at the hearing:
- for the Applicant; Mr. Malcolm Corkur and the Applicant.
 - for the Registrar; the Deputy Registrar as well as Evanthia Karavas, Mr. Higgins, Mr. Phung, Ms. McDaniels and Mr. Baron.
5. The parties are to fully and in a timely matter comply with the disclosure requirements as set forth in rule 9 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: December 12, 2005

File name: 3111.rebba.khan.pre-hrg.doc

This decision will also be available on Quicklaw at a later date.



MARIA CASALE

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 REFOKE REGISTRATION

TRIBUNAL: WILLIAM MCINTOSH, VICE CHAIR

APPEARANCES: VICTOR FREIDIN Q.C., Counsel, representing the Applicant

ROBERT MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATES OF
HEARING: August 8, 10, 12, 29, 30 and 31, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal brought pursuant to Section 9 of the *Real Estate and Business Brokers Act* R.S.O. 1990 C R 4 ("the Act"). The Applicant appeals the decision of the Registrar under the Act contained in an amended Notice of Proposal dated April 12, 2005 to revoke her registration as a salesperson. A Notice of Appeal was filed in response within the prescribed time.

ISSUES

It was the position of the Registrar that the evidence gathered during the investigation by the Real Estate Council of Ontario (RECO) into the matter is more than sufficient to warrant the revocation of the Applicant's registration under the Act. Specifically, appropriating transaction deposit monies impressed with both a legal and statutory trust to her own account. The Applicant did not take essential issue with the facts surrounding three of the transactions that came under scrutiny by the regulator and which formed the basis of the issuance of the Notice. These admitted facts and those put to proof provide sufficient grounds for the Registrar to take the administrative action of registration revocation allowed him under the Act.

The Applicant took the position that while there were breaches of both the Act and the imposed terms and conditions of the Registrar there was an explanation of duress sufficient to allow for a lesser penalty than outright loss of registration. Specifically, in order to make good on funds that were lost during an earlier transaction through her negligence the Applicant borrowed funds from usurers. In order to satisfy the demands of the usurers who were threatening her family she misappropriated deposit monies from clients.

Counsel further stated that the Tribunal should look at the most recent behaviour of the Applicant as the more appropriate guide as to whether the Registrar's Notice evinces reasonable grounds upon which to deny the Applicant her livelihood. Her recent behaviour and the fact that restitution was made to those affected should weigh heavily in her favour.

EVIDENCE

The Applicant's history of registration was entered into evidence as part of the particulars in the Notice of Proposal.

The Applicant' registration history:

The Applicant renewed her registration as a salesperson under the Act by an application July 11, 1983

The Applicant became registered as an associate broker of Belstar Realty March 30, 1984

The Applicant's registration was voluntarily terminated January 22, 1988.

The Applicant was registered as a broker, primary shareholder and officer and director (principal broker) of CMF Realty Ltd. Effective January 25, 1988.

The Applicant's registration as principal broker at CMF was terminated July 17, 1988

The Applicant was not registered under the Act from July 1988 to August 4, 1999

The Applicant's registration was re instated as a salesperson subject to terms and conditions August 4, 1999 at Re Max West Realty Inc..

The Applicant was terminated from Re Max West effective February 8, 2002

The Applicant was registered as a salesperson at Re Max 2000 Inc. by way of employee transfer/termination.

The Applicant was terminated from Re Max 2000 effective August 8, 2002.

The Applicant was discharged from bankruptcy May 2, 2002

The Applicant's registration was re instated September 20, 2002 as a salesperson with National/Regal Group Real Estate Inc.

The Applicant was registered as a salesperson to Royal Le Page Real Estate Professions July 25, 2003.

The case for the Regulator was outlined by Mr. Schlotzhauer, Assistant Registrar. He testified as to the role of the regulator through RECO. The legislature has decided that real estate transactions in Ontario require regulatory oversight to ensure both protection of individual consumers and a fair and open marketplace. Accordingly each of the approximately 42,000 persons who have chosen to participate in the sale of real property in the province must become registrants under the Act. The entitlement of registration is made subject to disciplinary actions allowed by the Registrar. Among these is revocation of registration, which as a practical matter prevents the registrant from making a living in the real estate industry. He explained the process of investigation and interviews with registrants which precede administrative action. In the present case the Applicant became the focus of the Registrar's attention through complaints and he commenced to investigate her dealings and record with RECO. As part of this investigative process, the Applicant was brought in for interviews.

Mr Scholtzhauer described the difficulties encountered by the Applicant while principal broker at CMF Realty in 1988. The company went bankrupt and the Applicant appears to have been out on the business for some 10 years. Upon re entry her registration became subject to Terms and Conditions, one of which was that she would not act as a broker for some period of years. The Regulator it was stated takes seriously the duties of a broker in the scheme of real estate transactions. It is the broker who is the overseer of deposit monies "in trust". It was the discovery of the Applicant's financial dealings that were the primary concern of the Registrar, particularly deposits not directed to the broker of record in transactions but essentially to her own account through a company controlled by her mother. As well he was concerned that in his opinion the Applicant was less than forthcoming with facts surrounding her registration which to the Registrar was a breach of the Terms and Conditions.

Francis Maika a registration Officer at RECO was called to expand upon the actual dealings at the regulatory level. She explained the respective roles of salesperson and broker in the real estate industry. A broker can own their own business, a salesperson can not. Brokers require qualifications over and above those imposed upon salespersons. Brokers are required to maintain trust accounts for inter alia client's deposit monies. Salespersons are not subject to these requirements and by extension must be attached to a broker in order to conduct business. The Applicant in the mid 1980's was an associate broker at Belstar (above); her registration as a broker ended in 1999 due to her personal bankruptcy. She continued as a registered salesperson subject to terms and conditions.

Terms and conditions follow the salesperson to whom they are attached upon any transfer of employment to another broker. The new broker must consent to the terms and condition as a condition precedent to acceptance of the salesperson as an employee. Terms and conditions are agreed to and constitute a binding agreement between the registrant and the regulator. On February 12, 2002 RECO received a Notice of Transfer indicating the Applicant's change from Re Max West to Re Max 2000. The "voluntariness" of the Terms remained a matter of some conjecture but in any event they were signed and they obligated the Applicant, among other things, to inform the Registrar of any complaints or charges against her immediately. They also restricted the Applicant in terms of ownership or control in any real estate enterprise. In essence the Applicant agreed to act as a salesperson only.

On January 29, 2002 solicitors representing Ms. Enza La Marca wrote a letter of complaint to RECO with regard to a real estate venture in which the Applicant acted as agent. The version of events set out were to the effect that the Applicant had in late August 2001 accepted deposit monies in the amount of \$22,500.00 to the order of the builder Greenfriar to be placed against the purchase of a property that was already under a conditional purchase by another party. Ms. La Marca was to be informed when and if the conditional purchase in fact concluded; the scheduled closing date was October 15. The following November 16, the Applicant informed Ms. La Marca that the deal with the original party in fact closed and that her deposit would be returned. The deposit did not appear and further pursuit by solicitors for Ms. La Marca received the attention of Mr. Maida the principle of Greenfriar. Several demands followed resulting in the return of the deposit on January 2, 2002. There was apparently an attempt to deliver the funds the week preceding which did not succeed.

The complaint was followed by an investigation into the affairs of the Applicant including a bankruptcy and Sheriffs search. By letter of March 7, 2002 Ms. Maika Of RECO informed the Applicant of the complaint and asked her for a response. The Applicant replied by letter of April 4 stating that Ms. La Marca's deposit cheque was applied to the wrong property through error by Greenfriar and that when the error was found a new draft was drawn in the complainant's favour. A meeting was requested by RECO and the Applicant attended on April 26. In attendance were Ms. Maika and Mr. Scholtzhauer. The difficulties of the various transactions were discussed and the Applicant asked for explanations. Included was the story repeated in testimony of the original transaction which resulted in her having to find money in a hurry to cover deposit monies which she believed she owed and how she came to run afoul of her obligations under the Act and under the Terms and Conditions attached to her registration. Attempts to discuss details off the record during the meeting were denied. Testimony with regard to the Applicant's financial position was objected to on the basis that no particulars were stated even though it is a grounds of the Notice. On this framework the case for and against the Applicant proceeded.

There were a number of witnesses who testified on behalf of the Applicant:

Marco Alverga aged 56 years testified that he has known the Applicant for 25 years. He worked with her while she was at Belstar Realty in the mid 1980's. He stated he had many business dealings with her and trusts her to the point where he still does business with her. He would hire her today despite the fact of the charges that were laid against her. He acknowledged that the activities outlined in the Notice represent wrong behaviour on behalf of people in the industry.

Maria De Filice hired the Applicant as a salesperson in 2002 while knowing of the fraud charges against her. She was told by the Applicant about her "street" money problem. She stated that she would hire her again and that while in association with her there were no client complaints. She did not consider the Applicant a business risk. On cross examination she appeared not to have specific knowledge of the amounts involved in the charges against the Applicant and went on to say that if the offences were serious and if committed in her business the salesperson would be fired. However she repeated that there were never any complaints about the Applicant while in her employ and she would hire her again. Ms. De Felice had impressive credentials within the industry having served on various committees on the Toronto and National Real Estate Boards.

Witness A testified on behalf of the Applicant from the perspective of a person who has known her for 4 years as friend and client. She was aware of the criminal charges but did not have first hand knowledge of them. Despite the revelations of the Applicant's conduct she remains a trusted friend.

Witness B, an employee of the Dufferin Peel School Board testified on the Applicant's behalf as a client and a friend. She was very satisfied with the services rendered by the Applicant when her property was sold. She was aware of the fraud charges but not of the specifics, namely misappropriating trust funds. On cross-examination she stated that she would not list a property with a person who had taken client's money.

Witness C testified that the Applicant has been a friend for some 4 years and was a former client. She was told of the criminal charges but stated that from her knowledge of the Applicant there had to be extraordinary circumstances for her to become so involved with criminals. The Applicant told her of threats to her son being the reason for her defalcations, however the witness had no personal knowledge of any threats. On cross examination she stated that she was never told of the figure of \$100,000.00 being involved in the charges.

Witness D, Professional Manager and Associate Broker at Royal Le Page testified from the perspective of an employer. There were some 68 sales agents at his offices during the time of the Applicant's employment in 2003. He was not aware of the specific criminal charges laid against the Applicant however he was aware that she had issues with the law. The Applicant was hired on the basis that she was a good producer. She in fact was in the 6 to 10 percentile in the GTA in sales he stated. Prior to her employment at Royal Le Page Witness D stated that the Applicant did not hide the fact of her problems and that he checked with the Tribunal with regard to outstanding hearings.

He further stated that when a salesperson is under the eye of the regulator there can be a process of monitoring the sales of that individual as a precaution. He admitted that this process could only be done in the office. Having two persons in the field where transactions take place would be impractical.

On cross examination he testified that he did know the amounts underlying the fraud charges. But he insisted that to his mind she would not constitute a risk, despite the fact that not dealing honestly with deposit monies is extremely serious.

The competing versions of the facts stated in the particulars in the Notice were put forth in evidence as they related to the transactions under scrutiny.

GIARDINA-PAPA

This transaction involved a property in Vaughn identified as 4030 highway 27. Mr. Giardina-Papa controlled a company, 537196 Ontario Inc., and on December 6, 2001 through his company put in an offer on the subject property using the Applicant as salesperson. The offer was accepted by the Vendor, Adele Tepperman, on December 7. A \$100,000.00 deposit was required and accordingly a cheque in that amount was made out to the Applicant's employer at the time Re Max West. It was the obligation of the Applicant under the Act to place the deposit monies in the trust account of the broker Re Max West a procedure well known to her. Instead she managed to negotiate the cheque on behalf of a numbered company 1333250 Ontario Ltd. controlled by her mother.

The following May, Giardina-Papa asked for the return of the deposit monies as the transaction had not become binding and he wanted out. The deal became null and void and despite promises from the Applicant that the monies would be returned they were not. It was at this point that Giardina-Papa inquired after his money and discovered the defalcation of the Applicant. Upon checking with the manager of Re Max West, Mr. Joe Castaldi it was discovered that the APS had never been processed through the office nor had the deposit cheque been deposited in the trust account. Mr. Castaldi testified that on the following May 27 he informed RECO of his encounter with Mr. Giardina-Papa. By this date the Applicant had changed employment to Re Max 2000. A further search of the Re Max records uncovered an APS between the vendor Adele Tepperman and the company owned by the Applicant's mother 1333250 bearing a certification of completion date of May 9, 2001. The deposit amount on this APS was \$50,000.00. This cheque drawn on the Banca Commerciale Italiana was indeed deposited in the trust account of Re Max West and when the transaction failed a cheque was issued by Re Max with 1333250 on behalf of 1333250 May 16, 2001. The Applicant insisted that this was a transaction separate from and unrelated to the Giardina-Papa deal.

The memo on the cheque produced into evidence read 4030 Highway #7. The \$100,000.00 certified cheque handed to the Applicant by Giardina-Papa for his company's offer to Tepperman was in fact not cashed but negotiated through a numbered company.

Mr. Castaldi insisted that he never gave permission to the Applicant to retain deposit cheques or to circumvent the normal transactional protocols, a fact not disputed by the Applicant.

GLADWIN SINGH

The property involved in this complaint is located at 1 McGarry Court Richmond Hill. The APS was produced shows Garden Homes as the vendor and bears a date of 25 April 2002. As well a cheque drawn by Mr. Singh as purchaser in the amount of \$25,000.00 payable to 1333250 Ontario, the corporation controlled by the Applicant's mother was identified as the deposit on the property. There is no issue before the Tribunal that the Applicant breached her trust to her client and the terms and condition of her registration as a salesperson by having the deposit dealt with in this manner instead of directing payment to the broker. The builder of the home shortly thereafter called Mr. Singh informing him that the deposit had not been received. Mr. Singh met with the vendor's representative and a few days later received a call informing him that the deposit monies were in hand. The Applicant stated that this was the sole instance of acceptance of deposits directly in reference to this particular subdivision.

ALBERT SALVATORE

This transaction involved a property located at 4726 Kirby Road Vaughan and was the subject of an APS dated July 12, 2000. Mr. Salvatore as purchaser had retained the services of the Applicant as his agent. She was also a friend of his. He stated that he gave a cheque in the amount of \$25,000.00 to the Applicant on the basis that the Applicant through 1333250 Ontario would be a 50% owner. The Applicant admitted in testimony that she had lied to Mr. Salvatore and that the deposit monies were misdirected. That is, they were not placed into the trust account of the Applicant's employer at the time Re Max West the broker of record. In the event the deal never came to fruition and the \$25,000.00 was not returned. Mr. Salvatore did seek recovery but upon hearing the story put forth by the Applicant he stated that he would not seek out criminal redress today. She could not repay at the time as she said she was still in arrears to the loan sharks. Mr. Salvatore appeared quite sanguine about the money after the Applicant's explanation and did not express particular anger at the Applicant and remains a friend. Restitution was made by the Applicant in 2004 after the crown had become involved and charges laid.

LA MARCA

This complaint previously referred to related to a property known as Lot 235 148 Monterey Drive, Woodbridge. Ms. La Marca testified that she was interested in a house and was informed by the Applicant that the property in question was only conditionally sold and that there was a chance of purchasing it if the deal fell through. The Applicant told her to put in a conditional offer with a deposit of \$22,500.00 and that if the sale did not come to fruition between the original parties, the deposit would be refunded. The deposit cheque was made out to Greenfriar Land Corporation and was deposited in its account September 4,

2001. The cheque was produced. By letter dated December 27, 2001 Greenfriar returns Ms. La Marca's deposit. The letter and enclosed cheque was received by her solicitors on January 2, 2002. Counsel for the Applicant argued that taken as a whole there was nothing particularly unusual about the transaction.

COLBORNE ESTATES-LOMBARDI

Lot 191 Plan 65M3305, 55 Silveroaks was a property for sale from the builder Colborne Estates (successor to Greenfriar) through Re Max West the Applicant's employer at the time. It was the contention of the Registrar that the Applicant took a deposit from the purchasers Mr. Lombardi and Ms. Korbis. The deposit cheque however was not made out to the builder and deposited in trust to the Broker Re Max as required but to the company controlled by the Applicant's mother 133250 Ontario. It was further contended that an additional \$15,000.00 for extras was paid in cash to the Applicant and diverted to her own use. Mr. Lombardi testified that the Applicant was the agent as she was a friend of the family. Subsequently by letter dated March 18, 2002 from vendor's solicitors Mr. Lombardi was informed that no deposit monies had been received and that a vendor's lien was attaching to the property in the name of Greenfriar authorized by the principle, Anthony Maida. Solicitors for Mr. Lombardi and Ms. Korbis wrote to the vendor's representatives demanding removal of the lien as an unjustified encumbrance upon the property. They went on to say that the vendor prepared the statement of adjustments which took into account the deposit. The testimony of Mr. Lombardi was to the effect that indeed the deal closed without problems and only six months later was there a claim that the deposit monies were not accounted for. Further Lombardi and Korbis were informed that through the good offices of the Applicant's litigation counsel Mr. Freidin the Applicant would make them whole. An action was commenced by Colborne Estates against the Applicant and Re Max West and 1333250 Ontario demanding the payment of \$40,000.00 representing the \$25,000.00 Lombardi-Korbis deposit and the \$15,000.00 in extras. The claim sounded in breach of trust and negligence. It was the defence of the Applicant that Mr. Maida (Greenfriar) was quite aware that deposit monies were paid to her company in cash and not to the Broker. She stated that this arrangement was established in order to give cash directly to Mr. Maida which she stated she did. She asserted that when Mr. Maida received payments from her he assured her that he was accepting the money on behalf of the vendor company. In the event the action was settled between the parties for the payment of \$5,000.00 without admission of liability.

SULYMAN

Mr. Sulyman testified as to the events leading up to his relationship with the Applicant. He was the purchaser of a house located at 176 Monterey Road, Vaughn also a Colborne (Greenfriar) property. A dispute arose between the Applicant and Colborne as to whether an amount was owing for extras ordered on the property. Ms. Sharon Weldon who worked in the legal department of Greenfriar (Georgian) Homes was called to testify with regard to both the Sulyman and Lombardi matters. She stated that she was familiar with the Silveroaks and the Monterey properties. She stated that in the course of the Georgian

Groups dealings if there had been a problem with payments outstanding the deals would not have closed. She testified that Anthony Maida had never complained to her about the transactions. He would always ensure funds were in hand either for deposits or upgrades before he signed the agreements. On cross examination she stated that she did not remember the actual specifics of the transactions in question but maintained that deals did not close without funds in hand. Mr. Sulyman stated that at closing there was a demand for payment for extras and that in response he instructed his solicitor to contact the Applicant. Apparently the solicitor was assuaged and the deal closed. Subsequently Mr. Sulyman's "extras" became part of the damages claimed in the Colborne action against Re Max and the Applicant. As stated above that action was settled.

CRIMINAL CHARGES

As a result of the investigations into the dealings of the Applicant the officer in charge arrested the Applicant on fraud charges on August 8, 2002.

At the appearance of the Applicant to answer the charges against her, Mr. Tait, the crown stated (certified transcript) to the court the following in explanation of the disposition:

Yes your honour this was a substantial fraud and there is no doubt police had reasonable grounds to lay the charge. Mr. Stortini (Applicant's counsel) and I have met and spoke a couple of times in the pre trial stage and it has been very thoroughly pre tried. In effect he disclosed the full extent of his defence to me and the defence of duress would apply. She was employed as a real estate agent and that is how the funds were allegedly absconded. Mr. Stortini, on behalf of his client, has made full restitution in this matter and in my view, having considered all of the evidence, and the officer in charge concurs with this view, he is here today as well, there may no longer be reasonable prospect of conviction and accordingly I feel I am duty bound to withdraw the information against Ms. Casale.

On the basis and for the reasons stated the charges were noted as withdrawn.

THE RATIONALE

Maria Casale testified as to the charges and their background. She was a discharged bankrupt as at May 2, 1992 .

The genesis of her difficulties as related by her stemmed from a real estate transaction that went wrong while she was involved with CMF Realty Ltd. Effective January 25, 1988 the Applicant became registered as broker, primary shareholder and director (principle broker) of CMF. She remained such until July 17, 1988 at which time her registration was terminated. The deal that developed into her difficulties began according to her when two properties came up for sale in 1997 on Teston Road, Vaughn. Each was offered through a separate APS and each APS indicated that a deposit of \$100,000.00 had been made. No deposit had actually been received at the time of signing of the agreements. The purchaser was Casbar Development who, prior to the purchase had an understanding with Fieldgate Developments that the land would be picked up by Fieldgate after the sale

including both the purchase price and the deposits. The principal of Fieldgate was one Mr. Kohn who was also a shareholder of CMF Realty. The Applicant stated that she had faith in Mr. Kohn that the deal would go through and that the deposit monies would be at hand. There was no forfeiture clause.

In the event the transaction did not close and the vendors took the position that they were entitled to the agreed upon deposit amounts. The Applicant stated that she knew that by not having the deposit monies in hand at closing she was in breach of her professional duties and would be answerable to RECO. To avoid this eventuality the Applicant sought out the \$200,000.00 to honour the deposit undertaking. Through a friend she was told of a source for this amount and she accepted. She stated that she did not realize the loan was subject to a \$10,000.00 per month interest charge which could not be missed without serious consequences. Those consequences, she continued, constituted threats to her family. When her own savings were exhausted she became unable to come up with the monthly payments and embarked upon the described course of dishonesty which resulted in her troubles with the regulator and her appearance before this Tribunal. She laid out in some detail the facts surrounding her relationship with the loan sharks. They threatened her son by phone and knocks on the door if payments were late. They also threatened her family with violence should she reveal their identity or the fact that she was having dealings with them. They insisted by her account that payments be made by way of leaving paper bags of money on Tim Horton's countertops. Her account of events was put forth as a counter or at least an explanation of trust account of her dishonest behaviour. Applicant's counsel argued that the explanation of this overarching rationale should counter any inference of her actions forming an objective basis for future misconduct. There is not the usual venality which underlies dishonest behaviour he insisted. The Tribunal took the rationale offered as suggesting the case of the excusable improper conduct engaged in for a higher purpose. Jean Valjean and the Bishop's candlesticks as it were.

Counsel for the Registrar cross examined the Applicant on all aspects of the proffered rationale. He attempted to place in doubt the veracity of the rationale by putting before the Tribunal evidence those factors a reasonable person would have weighed between the risk of not ensuring the return of the deposits and the risk involved in going to loan sharks in order to extricate herself from her described bind. On the issue of comparative risk counsel questioned her as to immediate threats and the potential for career consequences. The testimony revealed that there were no threats that could be established from the vendors for the deposit's return neither was there a forfeiture clause in the APS, although the document was not produced. She did not take the position that she was under no obligation to return the deposit. Instead out of a fear of repercussions from RECO she opted to go to the "street" for funds. As well she could not remember going to her errors and omissions insurers for a ruling. Counsel submitted that the Applicant's story doesn't hold up to scrutiny on this calculus of risk and reward. Applicant's counsel countered that given the circumstances evidentiary insistence on underlying rational conduct is not appropriate.

As well counsel probed the veracity of whether there was in fact a deal with loan sharks or not. When the Applicant refused to name the friend who put her in contact with the alleged "street" money counsel claimed that an adverse interest should be drawn in the absence of a contempt ruling. The refusal to answer out of fear has to be established by, at the very least collateral evidence of actual details of payment amounts and method. The officer in charge was not called and could have been, there were no records of bank withdrawals representing payment amounts that she testified were made first from her own resources which were available and no cell phone records of contacts with the malefactors were produced. Next he inquired after the actual mechanics of repayment and the Applicant stood by her account of leaving bags of money at Tim Hortons restaurants for pick up by her tormentors. The Applicant also testified that she did not inquire as to interest rates demanded even though she knew it was not going to approximate going rates.

Lou Di Lorenzo a police officer of 28 years was called to testify as to his meetings and conversations with the Applicant. He knew the Applicant's daughter and first met the Applicant while she was at CMF. He was approached both as a police officer and as a friend for advice as to what to do about the trouble she was in with the loan sharks. The witness told her that there was not much he could do about the situation without the Applicant revealing the names of the malefactors. Once persons were named he would also have been under an obligation to follow up with a formal criminal inquiry. He did state that an undercover taping of repayment could have been arranged without revelation of the name of the Applicant's erstwhile friend who arranged the "loan". As explained to him the Applicant's problem was that she owed "street" money and was having difficulty repaying. She said that her son was being threatened and she could not risk revealing her problem to the police. Officer Di Lorenzo testified that he has had experience with loan sharking and explained the typical situation in which people find themselves. Essentially collection of accounts is factored out to "biker" gangs or other such miscreants who for a designated percentage of the loan's amount begin the process of enforced repayment. Their collection techniques needless to say do not fall within the bounds of the legislation dealing with debt recovery. Intimidation is the normal course and revelation of the identity of the collectors or the "friend" is dealt with severely.

He stated that the method of payment described by the Applicant, namely leaving bags of cash at Tim Hortons' counters was unusual. Usually the person being threatened, for obvious reasons, wants to ensure proper delivery and accounting of the amounts being handed over. As well bags of money are not usually left unattended.

On this evidence the Tribunal was asked by counsel for the Registrar to conclude that the evidence is clearly consistent with the Registrar having a reasonable basis for his administrative decision. Counsel for the Applicant argued that the evidence did not reach the standard required for the sanction sought.

THE LAW

Section 6 of the *Real Estate Brokers and Business Brokers Act* states:

- 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 can not be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords a reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.
- 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 a an applicant or where the registrant is in breach of a term or condition of the registration.

APPLICATION OF LAW TO FACT

The intent of the legislature in enacting the legislation governing this appeal is clear. In order to maintain the public's confidence in the real property marketplace the bona fides behind real estate transactions must be assured. The Real Estate and Business Brokers Act is the legislative vehicle established to maintain that assurance. To that end all persons granted the entitlement under the Act to trade in real estate within the province are also made subject to the proscriptions of the Act. The administration of the Act is placed under a Registrar appointed by the Lieutenant Governor in Council. Within the scope of the Registrar's mandate is the authority to refuse to grant and to revoke the existing licences of persons registered under the Act. The grounds upon which he may do so and the notification procedures to those affected are set forth in the legislation.

Also in line with other legislation and established law the Act also provides for a hearing before this Tribunal at the instance of the person affected prior to further administrative action by the regulator. Clearly the Tribunal has an oversight function to safeguard against administrative action being taken improperly or with caprice regarding a person's right to make a living. It is the balance between this entitlement to make a living within the business of real estate trading and the public interest in a properly functioning real estate marketplace that has to be struck. The legislation it must be emphasized has the primary function of consumer protection.

The evidence from the documents and direct testimony essentially responds to and expands upon the admitted facts. There can be no doubt that the Applicant on several occasions breached not only the provisions of the legislation under which she was registered to do business but also of the terms and conditions specifically attached to her individual registration. There is considerable evidence supporting the position of the Registrar that save extenuating circumstances he would not only be justified in instituting

the revocation process but would fall short of his primary duty to protect the public interest if he did not.

In the present case the Applicant seeks to have the balance tipped in her favour on the basis of her record in the industry, the fact of restitution having been made to those affected by her misdeeds and the fact that her admitted wrongdoings were beyond her control, namely threats to her family. Her case is essentially that she should not be sanctioned to the full extent of license revocation for opting to put the protection of her family before her professional obligations. For the Tribunal to rule in the Applicant's favour would of course depend primarily upon the credence to be attached to the exculpatory explanation put forth. Absent a sufficiently credible explanation the Tribunal could not grant the relief sought. As explained the Applicant stated that in order to make good monies that went missing on a real estate transaction through her neglect she accepted "street" money from usurers colloquially referred to as loan sharks. To maintain her payments on the street money she appropriated deposit monies from clients to her own use. Threats to her family from the loan sharks with regard to timely repayment she maintained forced her to commit the betrayals of trust.

For the Applicant's defence of extenuating circumstance, in this case duress to succeed, two elements must be established. First and most obvious the basis for the duress be convincingly set forth; secondly that even if a case for duress is made out the primary function of the legislation, protection of the public, is maintained.

Counsel for the Registrar argued that an adverse inference be drawn against the Applicant on the basis that her explanation was lacking a credible evidentiary foundation. First she would not disclose while under oath the identity of the person who was her conduit to the "street" money thus denying the Respondent his rights of cross examination. Secondly there was no collateral explanation from the police officer in charge of the investigation into her activities which was readily available. Thirdly there was no evidence save her own viva voce which set out the details of the transaction which she stated was the origin of her professed difficulties. Finally the Respondent asserted that the details of the dealings with the loan sharks was not only obtuse to the point of rendering cross examination impossible but incredulous on its face.

Counsel for the Applicant argued that a refusal to answer is not sufficient grounds for the Tribunal to draw an inference adverse to the position of his client in the face of an explanation for the refusal. Such a position, it appears to the Tribunal, merely begs the question of the explanation's sufficiency. A refusal to answer under oath is in essence a denial of that oath. A witness swears to tell the whole truth; the rationale being of course twofold, that the trier of fact in order to conduct a fair and open hearing must have all available evidence before it and that full rights of cross examination be available to parties in opposition. If a matter, as in this case, is to be decided upon the preponderance of the evidence a party who removes from the scales, without convincing explanation, relevant and available portions of the evidence to be weighed a presumption that such non disclosed evidence would inure against that party is basic evidentiary logic. As well there

is the question of the importance of the refusal as it affects the totality of the matter. Here the refusal is not on some subsidiary point but goes to the centre of the relief sought. The Registrar does not accept the argument that the defalcations were “not for her own benefit” as alleged. They were as admitted, originally used to satisfy a presumed obligation in order to avoid scrutiny by the regulator.

The Tribunal remains unsatisfied as to the explanation behind the duress defence. The Tribunal was not afforded as fulsome an explanation as was within the Applicant's competence to present even under the strictures of her “duress”. Even if the Tribunal took at face the refusal out of fear she expressed at revealing the name of her friend who put her in touch with the “street” people involved, thereby denying the Respondent cross examination rights she offered no compelling explanation that the threats were real. The Tribunal was did not hear from the police officer involved in her criminal charges. The Tribunal was asked to draw an inference that the charges were not proceeded with on the grounds that her explanation of threats from loan sharks had been convincing to the court to that end.

Counsel did stress that the Applicant's conduct viewed under the circumstances through which it arose should not be taken as evidence of potential future behaviour. It is true that the authorities point to the rather obvious conclusion that the probability of any registrant engaging in future conduct deleterious to the intent of the Act should be determined on the evidence of “past conduct” stated in section 6(1)(b), as what other objective criteria come to mind. Here he argued, the reason for the behaviour stems from a dire need and is in no way related to a pattern of conduct relevant to defalcations that would take place consistent with a motive of self enrichment. The Tribunal should therefore temper any finding that the appropriations of the deposits were primarily “for her own benefit”, that is getting the loan sharks to stop threatening her family, with the surrounding circumstances.

Along this line of reasoning counsel for the Applicant asked the Tribunal to take into account the fact that the Registrar could have been more sympathetic to the exigent circumstances of his client's case. Draconian administrative decisions should not be taken without such further review. Here the Applicant was not allowed to go off the record during her meeting with the regulator as the Tribunal understood the record to presumably explain the exigent circumstances. On the other hand the Tribunal understands the Registrar's position with regard to off the record discussions. His administrative ruminations must above all be transparent to both the industry participants and the public.

Applicant's counsel argued that the requisite standard of proof for the type of administrative decision by the Registrar in this case has not been met. He referred the Tribunal to *Coates and Registrar of Motor Vehicles and Salesmen* 65 O.R. (2d) 526 for guidance. In that case the Commercial Registration Appeals Tribunal (CRAT) had ordered the Registrar under the Motor Vehicle Dealers Act to carry out its decision to revoke the licenses of both the corporate dealerships and individual registrants under the Act. On appeal the Divisional Court per Reid J held that while a company, having in this case 60 employees, may be convicted of a criminal offence there can not be an inference drawn

that individual officers may be assumed concomitantly guilty on a balance of probabilities. There has to be “clear and convincing” evidence against individuals in cases where administrative decisions impinge upon the right of that individual to make a living. His Lordship continued on page 535 that this reasoning stems from the assumption in law that: “While the grant or refusal of a licence may be regulated as a matter of privilege, rather than as a right, the revocation of an existing licence has always been regarded as an interference with a right not a privilege”. A right implies a remedy and a remedy implies legal process and legal process necessitates standards of proof.

In *Coates* the court overruled decision of CRAT primarily on the basis that the Tribunal failed to apply the proper standard of “clear and convincing proof based upon cogent evidence” implicating the individual registrant in the misdeeds of the corporate registrant even though there was evidence of that individual's control over the affairs of the corporation. The Tribunal could not merely presume the guilt of the individual registrant. The court held that there was no reverse onus on the individual registrant upon which the Registrar or the Tribunal could rely under the *Motor Vehicle Dealers Act* and by extension no presumption of guilt. The Tribunal chose not to hear direct evidence going to the registrant's knowledge of the corporation's misdeeds and instead assumed individual guilt based upon an incorrect inference stemming from the liability of the corporation.

The “clear and convincing” aspect of the evidentiary requirement comes from *In re Bernstein and College of Physicians and Surgeons of Ontario* (1997) 15 O.R. (2d) 447; a matter on appeal from a finding of misconduct by the college against the applicant. O'Leary J stated:

The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

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 or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

His Lordship decided that the consequences of a physician of good reputation being sentenced to “professional death” required stronger evidence than provided at his hearing. He continued with a quote from Chief Justice Dickson in *R v Oakes* (1986) 26 D.L.R. (4th) 200 at p 26:

Within the broad category of the civil standard, there exist different degrees of probability depending upon the nature of the case: see *Sopinka and Lederman, the Law of Evidence in Civil Cases* (Toronto, 1974), at p. 385. As Lord Denning explained in *Baterv Bater*, [1950] 2 All E.R. at p. 459 (C.A.):

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends upon the subject matter. A civil court, when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does adopt so high a degree as a criminal court even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

Here the subject matter and the occasion to use his Lordship's words, is the Applicant's loss of the right to trade in real estate as a livelihood through revocation of her registration. The law describes this as the interference with a property right, not merely the withdrawal of a privilege thereby requiring a standard of proof of a "clear and convincing" nature. There is an admission as to three of the defalcations before the Tribunal. The nature of the offence and the degree of proof required to establish its commission would appear to be satisfied by the submitted case law. The cases by inference and the statute by its intent, require the Tribunal not only to consider the consequences of the revocation of the Applicant's registration but the parallel consequences to the public interest of her continuation in the industry under regulation.

This continuation in the industry was the subject of alternative submissions of the Applicant, namely the potential for harm to the public if the Applicant is allowed to remain a registrant under the Act. He pointed to the time elapsed from the charges, some three years, albeit restitution was in 2004, and to the Applicant's stature and reputation within the industry as put forth by a number of witnesses. The emphasis should be on potential future conduct and any decision to that end should be based upon a qualitative assessment of the registrant's past conduct. On these points counsel referred the Tribunal to *Registrar of Real Estate and Business Brokers (REBBA) v. Vogelsberg* [1994] O.J. No. 226 and *REBBA v. Faccenda* [1994] O.J. No. 954. In *Vogelsberg* the court in referring the matter back to the Tribunal stated that there was a failure at first instance to establish both of the prerequisites necessary to allow for the administration action of revocation, namely that there was a contravention of the governing legislation and that such contravention forms a reasonable basis for the conclusion that the registrant will not carry on future business with honesty and integrity. In *Faccenda*, again the court remitted and instructed the Tribunal to consider all of the available evidence of conduct and to both stipulate in what respect it found fault with the conclusions under appeal and to properly set out the test that it was applying. Here as set out in *Vogelsberg* the breach of trust is the offence whether or not injurious consequences flow. Such an offence is surely of the quality contemplated by the legislation to be taken into account by the regulator in balancing the registrant's livelihood and the public interest. It bespeaks the very essence of legislation designed to ensure an honest marketplace. Counsel's point that there was restitution can not erase the fact of the defalcations or the regulator's use of them in forming his reasons for the proposed revocation. It can certainly be argued that qualitative assessment can also go to surrounding circumstances and the Tribunal indeed should in its review of the Registrar's decision ensure that such was done. Here the Applicant sat down with the regulator and was given the opportunity to offer explanations. As well she is entitled to a de novo review of her case at the Tribunal and through able counsel she received the same. That review did not reveal shortcomings at the regulatory level that skewed the balance sought to be struck between public protection and a registrant's livelihood.

Other authorities were referenced on the points in issue for which the Tribunal is grateful however they for the most part furrowed the same ground.

The Tribunal views the following options as within its mandate on consideration of its authority under the Act and the evidence presented: an outright revocation of the Applicant's registration, allowing the Applicant to retain her registration subject to restrictive terms and conditions or a suspension of her registration for a fixed period. The first would disentitle her to operate in the real estate industry and force her to seek re-entry through a renewed application which if refused would restart the appeal process; the second has sense only if the Registrar would have the authority to render the registration void upon his call as to whether or not there had been a breach of terms. This second option has been rendered largely ineffective by recent court decisions which have found that such rulings by the Tribunal have amounted to a granting of authority to the Registrar not contemplated by the statute and any such determinations by the Registrar necessitating the full range of appeal being open to the Applicant (*Pietro Amerato and Motor Vehicle Dealers Act July 22, 2005, Court of Appeal for Ontario* per Gillese J.A.). The third option of a suspension for a set time is open to the complaint that Tribunal rulings should not be punitive in nature and should instead be directed toward the public interest.

The evidence led on behalf of the Applicant was enough to convince the Tribunal that she is not a chronic defalcator and therefore unworthy of ever holding a registration. However the Registrar has a point that there was insufficient evidence that she had reformed her ways despite the favourable testimony of restitution sufficient to ensure public protection. Therefore a period of time apart from the industry during which the Applicant can reassure the industry and the regulator that she is once again suitable to hold a registration is in the Tribunal's opinion the most appropriate.

ORDER:

The Tribunal therefore orders that the Registrar refrain from carrying out the Proposal and instead orders that the Applicant's registration under the Act as a Salesperson be suspended for one calendar year commencing from the date of issuance of this decision; all terms and conditions attached to the registration to remain upon reinstatement.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: December 8, 2005

File: 2752.rebba.Casale.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.

This decision will also be available on Quicklaw at a later date.



PRE - HEARING

SEPIDEH MOAZZANI

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 TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SYMON ZUCKER, counsel, representing Sepideh Moazzani

GEORGE P. DRAMETU, counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF

PRE- HEARING: November 14, 2005

Toronto

ORDER

Following attendances on November 14, 2005 at a pre-hearing before this Tribunal of Symon Zucker, counsel, appearing on behalf of Sepideh Moazzani (the "Applicant") and George P. Drametu, counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order;

1. The Parties to the hearing shall be the Applicant and the Registrar.
2. The hearing scheduled to commence at 9:30 a.m. on Monday, Tuesday and Wednesday, the 16th, 17th and 18th days of January 2006, to consider the Notice of Proposal to Refuse to Renew the Applicant's Registration shall be adjourned and shall not take place on those dates.
3. This pre-hearing is hereby adjourned to Monday, January 16, 2006 to commence at 9:30 a.m. on that day at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor,

Toronto and at the conclusion of that pre-hearing, new hearing dates shall be set for the hearing of the Registrar's Notice of Proposal.

4. By no later than December 7, 2005, the Registrar's counsel shall deliver to the Applicant's counsel a full and concise list of each and every allegation upon which the Registrar intends to rely at the hearing. The intent of this paragraph is to ensure that the Applicant's counsel shall know and understand the full reasons for the Registrar's refusal to renew the Applicant's registration.
5. By no later than December 21, 2005, the Applicant's counsel shall deliver to the Registrar's counsel, in response to the list referred to in paragraph 4 above, in which response the Applicant's counsel shall concisely state what allegations are agreed to by the Applicant and will not require to be proven at the hearing.
6. The Applicant's counsel in responding to the Registrar's counsel's list of allegations, shall, if any allegation or allegations are not agreed to and will be in dispute at the hearing, state the Applicant's position as to why the allegation or allegations are disputed. The intent of this paragraph is to ensure the Registrar's counsel shall know and understand the full reasons for the Applicant's appeal.
7. A copy of the list of allegations more fully referred to in paragraph 4 above as well as the responses referred to in paragraph 5 above shall be delivered to the Tribunal at the time of their delivery to the party entitled to delivery.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: November 17, 2005

File name: 3110.Sepideh.Prehrd.doc

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Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CHAN GURPRASAD

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: WILLIAM McINTOSH, VICE CHAIR

APPEARANCES: CHAN GURPRASAD, Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
HEARING: October 17, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal comes before the Tribunal pursuant to section 9(2) of the *Real Estate and Business Brokers Act* R.S.O. 1990, Chapter R.4 as amended ("the Act"). The Registrar appointed under section 2 of the Act issued a Notice of Proposal to Refuse the Applicant's registration under the Act. That Notice pursuant to section 9(1) of the Act and dated July 7, 2004 was sent to the Applicant.

ISSUES:

The Registrar took the position that his refusal to grant the Applicant's registration under section 8 of the Act was justified as the Applicant manifestly fell within the proscriptions against registrations outlined in section 6 of the Act. The public interest, being the paramount concern in matters of registration, would be put in jeopardy should the Applicant be allowed to engage in the sale of real estate in this province as the evidence of past conduct is sufficient to show that he could not reasonably be expected to carry on business with honesty and integrity as required by the Act.

There was a pre-hearing held on October 15, 2004. The Applicant could not attend as he was incarcerated. A hearing on November 10, 2004 was then set and adjourned to December 3, 2004. Counsel appeared on the set date and the matter was set over to April 18, 2005. On that date the Applicant was again unable to attend due to incarceration. The matter was put over to a date beyond the Applicant's anticipated release date being sometime in September. The date was fixed by agreement for October 17, 2005.

At the hearing a letter from the Applicant's previous counsel was entered indicating that there had been no instructions and that the Applicant would be appearing on his own behalf, which he did. The position of the Applicant was that he had paid his debt and he should be allowed to carry on business as a Real Estate Salesperson.

EVIDENCE:

Counsel for the Registrar in order to establish the position that the Registrar had formed a reasonable belief that the Applicant would not carry on business with honesty and integrity and in accordance with law called Maria Paolercio. Ms. Paolercio is employed as a registration officer at the Real Estate Council of Ontario (RECO) and in that capacity reviews applications for registrations. Given her seniority she reviews the more complex applications and after that review goes over the results with the Registrar. In the case of the Applicant a history of criminal convictions and prison sentences led her to the conclusion that his registration under the Act might not be in the public interest.

It was explained to the Tribunal that the Registrar's office, given the very large number of registrants in the province (some 42,000), tracks sources of information including newspaper accounts and direct advise from the public to ensure the accuracy and honesty of the application process. The Applicant's name first appeared on this radar when press reports implicating him in an immigrant smuggling ring were received. The reports indicated that he had been convicted and sentenced in the U.S. and that he had a 1999 Canadian conviction for assault with a weapon. A review of his record indicated that there had been a failure to disclose these facts on a previous application. The Registrar called the Applicant in for a meeting to explain. Subsequent to the meeting it was determined that as at December 27, 2001, the Applicant was able to maintain his registration on Terms and Conditions, one of which was to disclose to the Registrar the outcome of court proceedings along with transcripts. On March 10, 2003, the Registrar wrote to the Applicant demanding an answer. On April 10, the Registrar received a letter from the Applicant's counsel disclosing the fact that the Applicant had been convicted on November 29, 2002, of one count of conspiracy to violate U.S. immigration laws and sentenced to three years and forfeiture of \$160,000.00.

The Applicant submitted an application for registration, which was received by RECO on September 30, 2003. Question 7 on the application form reads:

"Are there currently any charges pending, or have you been found guilty, pleaded guilty to or been convicted of an offense under any law?"

In response the Applicant gave a written account to the effect that he had pleaded guilty to the charge of conspiracy to break U.S. immigration laws and that he had been sentenced to three years. He further wrote that he had served six months and that he was at the time on parole.

Ms. Paolercio by letter of November 6 informed the Applicant that he was already on terms and conditions from a previous registration of December 27, 2001, which inter alia obliged him to submit a copy of the trial proceedings, the judge's reasons and parole conditions related to the offence. Once received these were to be considered along with his previous assault convictions and a determination made as to his suitability for registration. The obligation in the terms and conditions was not forthcoming for a period in excess of one year. Finally in response to a warning letter of March 10, 2003, a letter dated April 10, 2003, stating that the Applicant had been convicted of the immigration offence. The trial proceedings were not included. On March 30, 2003, RECO received a Notice of Employee Change indicating that Homelife Miracle Realty had terminated the Applicant's employment. On May 29, 2003, RECO sent to the Applicant a Notice of Expiry of Registration under the Act.

The response to the demand from RECO for the court record arising from the September 30 application was received on December 5, 2003. That record as reported during the sentencing quotes Allen J. as stating:

"Well these are, as everyone acknowledges, serious crimes. The people who suffer the most are the legitimate immigrants and refugees whose lives are complicated and made much more difficult by this kind of behavior. The fraudulent use of refugee claims lends credence to the right wing elements in society that claim that all refugee claimants are phonies and it adds enormously to the expense for the public purse of screening people and trying to ensure that this sort of thing happens as little as possible.

Mr. Gurprasad is particularly reprehensible having been caught doing this and sentenced to a period of incarceration and simply goes on to elevate himself. This is purely mercenary and an obviously very lucrative undertaking. There is absolutely no excuse for it. It is motivated by greed and an indifference to the rule of law and nothing else."

In line with the joint submission he was sentenced to three years. The details behind the sentencing recommendation revealed a prior record in the U.S. for the similar activity. The Applicant was a truck driver engaged in alien smuggling and after a term of incarceration and a prohibition from entering the U.S. ever again he worked his way further up the ladder of the smuggling ring in Canada. There was as well reference to his prior record of assault with a weapon.

Particularly relevant to these proceedings there were reports that his registration was used as a cover for these activities with no real estate business being transacted during the time period in question.

Even with this array of blemishes on his record the Registrar was willing to meet with the Applicant to review his application. That meeting took place on January 20, 2004. The

Deputy Registrar Mr. Schlotzhauer went over the Applicant's record with him including the fact that he hadn't really been active in the real estate business, the Applicant's health and the seriousness of the offences. After this review the Applicant was informed of RECO's decision to refuse his application for registration and that his recourse was now to the Tribunal.

The Deputy Registrar Mr. Schlotzhauer was called to explain the decision of RECO and to explain the circumstances in light of his responsibilities under the Act. In this case the Applicant's criminal record more or less spoke for itself in terms of the preconditions of an applicant for registration being honest and law abiding. The fact that there were no complaints from the public was, in his opinion, answered by the fact that there was little or no real estate business being conducted out of his office. Non-disclosures on an application are taken seriously. The application form is the first point of contact between a potential registrant and the regulator and false or misleading information submitted legitimately leads the Registrar to draw a negative inference about an applicant's suitability for registration. In this as in other cases there is a presumption that missing or incorrect information is put into applications for the purpose of misleading the regulator.

The cross-examination of Mr. Schlotzhauer by the Applicant although unclear appeared to be to the effect that given the large number of registrants and the limited resources available to screen applicants it was just his bad luck to be caught by a diligent evaluator. Through this analysis he seemed to be asking the Tribunal to conclude that as there had to be other inappropriate registrants out there it was somehow unfair for him to be singled out for sanction.

THE LAW

Sections 6, 7 and 8 of the *Real Estate Brokers and Business Brokers Act* states:

6. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations. R.S.O. 1990, c. R.4, s. 6 (1).

7. (1) A corporation having share capital shall not be registered as a broker,
- (a) unless the persons holding shares carrying at least 51 per cent of the voting rights attached to all shares of the corporation for the time being outstanding are registered brokers, but this clause does not apply to a corporation that is a trust corporation registered under the *Loan and Trust Corporations Act*;
 - (b) if any broker holding voting shares of the corporation acts as broker in respect of any other business registered as a broker or holds voting shares in any other corporation registered as a broker, but this clause does not apply to the holding of voting shares of a corporation that is a trust corporation registered under the *Loan and Trust Corporations Act* where the shares held do not give the holder a substantial interest; or
 - (c) if a salesperson holds shares of the corporation carrying more than 10 per cent of the voting rights attached to all shares of the corporation for the time being outstanding. R.S.O. 1990, c. R.4, s. 7 (1).
8. (1) Subject to section 9, the Registrar may refuse to register an applicant here in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7. R.S.O. 1990, c. R.4, s. 8 (1).
- (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. R.S.O.1990, c. R.4, s. 8 (2).

APPLICATION OF LAW TO FACT:

The Tribunal was here faced with an appeal in which the conduct of the Applicant clearly gave the Registrar reason grounds to conclude that he was unworthy of registration and that his application should be refused. The evidence was presented in an orderly unembellished manner leaving no doubt as to the appropriateness of the sanction sought by the Registrar. The Tribunal can find nothing in the evidence that would lead it to a different or less onerous result.

ORDER:

The Tribunal therefore directs that the Registrar carry out the terms of the Notice of Proposal dated July 7, 2004.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: November 29, 2005

File: 2505.rebba.gurprasad.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.

This decision will also be available on Quicklaw at a later date.



PRE-HEARING

RAHAMAN SUBADAR

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: ALLEN P. WELMAN, counsel, representing Rahaman Subadar

TIM SNELL, counsel, representing the Registrar under the *Real
Estate and Business Brokers Act*

DATE OF

PRE-HEARING: November 10, 2005

Toronto

ORDER

Following attendances on November 10, 2005 at a pre-hearing at the Tribunal's Chambers, Allen P. Welman, counsel, appearing on behalf of Rahaman Subadar (the "Applicant") and Tim Snell, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on February 6, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on February 7, 2006 and February 13, 2006 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no resolution of any issues in this matter.
3. The hearing scheduled to take place at the Tribunal's Chambers on January 6, 2006 and to continue on January 12, 2006 and January 13, 2006, if necessary, is hereby adjourned until February 6, 2006 at the Tribunal's Chambers as set forth

in the preamble to this Order and to continue, if necessary, on February 7, 2006 and February 13, 2006 at the Tribunal's aforesaid chambers.

4. By December 16, 2005 the Registrar's counsel shall furnish to the Applicant's counsel full and completed disclosure of each and every document upon which the Registrar intends to rely at the hearing of this matter.
5. By January 15, 2006 the Applicant's counsel, or in the absence of counsel, the Applicant, shall furnish to the Registrar's counsel full and completed disclosure of each and every document upon which the Applicant intends to rely at the hearing of this matter.
6. Counsel for the Registrar estimates that the Registrar shall call to testify at the hearing 5 persons requiring 2 days. By January 15, 2006, counsel for the Applicant, or in the absence of counsel, the Applicant, shall advise the Tribunal and counsel for the Registrar of the number of witnesses he intends to call and the estimated time to put in the Applicant's case.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: November 10, 2005

File name: 3139.rebba.subadar.Prehrd.doc

This decision, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website www.lat.gov.on.ca in two weeks time. The decision will also be available on Quick law at a later date.



PRE-HEARING

LARRY BURNETT

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: STUART R. MacKAY, counsel, representing Larry Burnett

GEORGE P. DRAMETU, counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: October 31, 2005 *by teleconference*

ORDER

Following attendances on October 31, 2005 at a pre-hearing by teleconference before this Tribunal of Stuart R. MacKay, counsel, appearing on behalf of Larry Burnett (the "Applicant") and George P. Drametu, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on March 22, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on March 23, 2006 and March 24, 2006 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no resolution of any issues in this matter.
3. The hearing scheduled to take place at the Tribunal's Chambers on November 29 and 30, 2005 and to continue on December 6, 2005 is hereby adjourned until March 22, 2006 at the Tribunal's Chambers as set forth in the preamble to this

Order and to continue, if necessary on March 23 and 24, 2006 at the Tribunal's aforesaid chambers.

4. Within 14 days of the date of this prehearing the Registrar's counsel shall furnish to the Applicant's counsel full and precise written details of each and every allegation upon which the Registrar intends to rely at the hearing of this matter, the intent being that the Applicant's counsel shall be furnished sufficient information so as to enable the Applicant to know what allegations are being preferred against him.
5. Within 14 days of the date upon which the aforesaid details are furnished to the Applicant's counsel, the latter shall be entitled to make written request to the Registrar's counsel for such reasonable further and better particulars to the allegations upon which the Registrar intends to rely and such reasonable further and better particulars shall be furnished within 14 days of receipt of the written request for such particulars.
6. The Applicant shall fully and in a timely manner comply with the disclosure requirements as are more fully set forth in Rule 6 of the Rules of Practice of this Tribunal.
7. The respective Counsel for the parties estimate that the Registrar and the Applicant shall each call to testify at the hearing between 7 and 8 persons.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: November 4, 2005

File name: 3090.rebba.burnett.Prehrd.doc



2504-REBBA-ADJ-Adjournment

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

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 REVOKE AND TO REFUSE TO RENEW REGISTRATIONS
- Proposal dated: July 8, 2004

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

MICHAEL DESMOND BISTANY and MICHAEL D. BISTANY REALTY LTD.

Applicants

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

AND WHEREAS, the Tribunal appointed a time and place for a hearing of a motion in the above matter on November 2, 2005;

AND TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 12:30 p.m. on Monday, November 28, 2005;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: November 1, 2005

FILENAME: 2504.rebba.Bistany.adj.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario, 1990 Chapter R.4 and Regulations

RAHIM KHAN O/A
CENTURY 21 LEADING EDGE REALTY INC. – ADJ - Adjournment

IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: July 27, 2005

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

RAHIM KHAN O/A
CENTURY 21 LEADING EDGE REALTY INC.

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 November 14, 2005;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on January 3 and 4, 2006;

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 before the Licence Appeal Tribunal at 9:30 a.m. on Friday, the 9th day of December, 2005.

2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Licence Appeal Tribunal at 9:30 a.m. on Thursday and Friday, the 16th and the 17th days of February, 2006.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: October 25, 2005

FILE NAME: 3111.REBBA.Khan.adj.doc

PRE-HEARING

PAUL LONERGAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: CHRISTOPHER JAMES SPARLING, counsel, representing Paul
Lonergan

TIM SNELL, counsel, representing the Registrar under the *Real
Estate and Business Brokers Act*

DATE OF
PRE-HEARING: October 11, 2005 Toronto

ORDER

Following attendances on October 11, 2005 at a pre-hearing before this Tribunal of Christopher James Sparling, counsel, on behalf of Paul Lonergan (the "Applicant") and Tim Snell, counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on November 21, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on November 22, 2005 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. Save for what is stated in this Order, there were no facts or evidence agreed upon by the Parties nor was there settlement of any of the issues.

3. The Applicant's counsel advised the Tribunal that at this stage of the proceedings, the Applicant intended to have about 9 persons testify on his behalf at the hearing.
4. The Registrar's counsel advised the Tribunal that at this stage of the proceedings, the Registrar intended to have about 8 persons testify on his behalf at the hearing.
5. Within 7 days of the date of this pre-hearing, both parties shall disclose in writing to the other's counsel the full names and telephone numbers of all persons who, at this stage, it is intended will testify at the hearing.
6. The counsel for the Applicant advised the Tribunal that his client admitted the convictions more fully referred to in paragraphs 4 and 5 of the Registrar's Notice of Proposal to Revoke Registration, dated July 4, 2005.
7. The counsel for the Registrar shall, within 7 days, of this pre-hearing provide to the Applicant's counsel a copy of the Registrar's Brief of Documents in the matter of the Proposal brought before this Tribunal against Brian Francis Haywood by the Registrar.
8. The Registrar shall, within 7 days of the pre-hearing, furnish the Applicant's counsel with the notes made by Jennifer Katsoulis, pursuant to her inspection of Islington Kingsway Realty on January 5 and January 12, 2001.
9. Full disclosure shall be made to both Parties' counsel in terms of Rule 6.3 of the Rules of Practice of the Tribunal, at least 14 days prior to November 21, 2005

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 12, 2005

File name: 3069.rebba.Lonergan.Prehrd.doc

PRE-HEARING

ANTHONY T. FERNANDES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE REGISTRATION

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

APPEARANCES: ANTHONY T. FERNANDES, Applicant

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: October 6, 2005

Toronto

ORDER

Following attendances on October 6, 2005 at a pre-hearing before this Tribunal of Anthony T. Fernandes (the "Applicant"), George P. Drametu, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on November 25, 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 advised the Tribunal at the pre-hearing that, at this stage, he intends to call two witnesses to testify at the hearing, and the Registrar's Counsel advised that the Registrar, at this stage, intends to call four witnesses to testify at the hearing.

3. The Parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of this Tribunal.
4. The Applicant has been made aware of his right to counsel
5. It is expected that the hearing shall take one day.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.
Vice-Chair

Released: October 12, 2005

File name: 3062.rebba.Fernandes.Prehrq.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

RICHARD BRACKENBURY
AND RICHARD BRACKENBURY REAL ESTATE SERVICES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATIONS

TRIBUNAL: DIAMOND M. ANDREW, Presiding Member

APPEARANCES: RICHARD BRACKENBURY, Applicant

PAUL BRISCO, Agent for the Applicant

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: October 11, 2005

Toronto

ORDER

Following attendances on October 11, 2005, at a pre-hearing before this Tribunal of Richard Brackenbury (the "Applicant") with his agent Paul Brisco, 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 January 30, 2006 and continue if necessary on January 31, 2006, 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 advised the Tribunal at the pre-hearing that, at this stage, he wishes to use affidavit of evidence as his witnesses are in London, Ontario. The Parties have agreed to the following Protocol:
 - (a) The Applicant shall deliver all affidavits he wishes to rely on to Counsel for the Registrar no later than 4.00 p.m. on December 22, 2005.
 - (b) The Counsel for the Registrar shall advise the Applicant no later than January 15, 2006 as to which of the affidavits the Registrar will allow to be tendered without cross-examination; which of the affidavits the Registrar wishes to cross-examine on in London, Ontario prior to the hearing; and which of the Affidavits the Registrar will object to thereby giving the Applicant the opportunity to call those witnesses to testify at the hearing.
3. The Registrar's Counsel advised that the Registrar, at this stage, intends to call 5 witnesses to testify at the hearing.
4. The Parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of this Tribunal.
5. The Parties have agreed to meet privately on or about January 20, 2006, to discuss possible settlement.
6. It is expected that the hearing shall take two days.

LICENCE APPEAL TRIBUNAL

Andrew M. Diamond
Presiding Member

Released: October 13, 2005

File name: 3027.rebba.brackenbury.Prehr.doc

Licence
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Tribunal

Tribunal
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matière de permis



PRE-HEARING

KATHLEEN TRAN

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

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding

APPEARANCES: LORNE LEVINE, Counsel, appearing on behalf of Kathleen Tran

ROBERT MAXWELL, counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: October 6, 2005

Toronto

ORDER

WHEREAS the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar") issued a Proposal dated April 14, 2005 to refuse reinstatement of registration of Kathleen Tran (the "Applicant") under the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant has delivered to the Registrar a notice in writing appealing the Proposal and requiring a hearing;

AND WHEREAS the Tribunal appointed October 6, 2005 as the date for the hearing of the Applicant's appeal;

AND WHEREAS at the outset of the hearing of the appeal on October 6, 2005, the Registrar moved that the Applicant's appeal be dismissed as it is frivolous, vexatious and amounts to an abuse of process.

NOW THEREFORE ON READING the documents filed and hearing submissions of both parties counsel, this Tribunal makes the following ORDER:

1. The hearing of the Applicant's appeal is adjourned on a peremptory basis against the Applicant until 9:30 a.m. on January 9, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto and to continue, if necessary, on January 10, 2006 at the Tribunal's above chambers;
2. The Applicant shall pay to the Registrar costs in the sum of \$800.00 within 20 days of the date of release of this Order and which costs relate to the aborted hearing of October 6, 2005.
3. The Applicant shall no later than 20 days of date of this Order, serve upon the Registrar a responding affidavit to the affidavit dated September 16, 2005 of Brian Schlotzhauer more fully referred to at tab "B" of the Registrar's Motion Record. The aforementioned responding affidavit of the Applicant shall set forth, in detail, any and all material changes in the Applicant's situation or circumstances, as well as any fact or facts, upon which she will rely at the hearing as more fully referred to in paragraph 9 of Brian Schlotzhauer's affidavit.
4. The Applicant's counsel having advised the Tribunal at the hearing of these motions, that the Applicant intends to call to testify on behalf of the Applicant at the hearing of this matter Dr. Gordon Baker, psychiatrist, Dr. Joseph Wong, family practitioner and Dr. Chessex of Toronto Western Hospital, hereby further ORDERS that the Applicant shall comply with Rule 6.4(1) and (2) of the Tribunal's Rules of Practice.
5. Notwithstanding what is stated in the preceding paragraph 4 hereof, both parties shall comply in a timely manner with all pertinent disclosure requirements in terms of the Tribunal's aforementioned Rules of Practice.
6. The Registrar's motion may be brought before the Tribunal for consideration when the hearing of this matter proceeds on January 9, 2006.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 11, 2005

File name: 3013.rebba.Tran.Prehr.doc



PRE-HEARING

PAUL JAIGO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
DAVID FLUDE, Vice-Chair
LAURIE SANFORD, Vice-Chair

APPEARANCES: PAUL JAIGO, appearing on his own behalf

GEORGE DRAMETU, counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: September 26, 2005

Toronto

ORDER

Following attendances on September 26, 2005 at a pre-hearing before this Tribunal of Paul Jaigo, appearing on his own behalf (the "Applicant"), and George Drametu, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on December 15, 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. At the prehearing held under Rule 9 of the Rules of this Tribunal an overall resolution of the Registrar's Notice of Proposal to refuse to grant the Applicant's registration was not attained and it was agreed by the Parties that the hearing of the Registrar's proposal would proceed to hearing on December 15, 2005.
3. Notwithstanding that an overall resolution was not attained, the Parties agreed upon the undermentioned facts with a view to simplification of the issues and reducing the scope of the hearing.
 - (a) The Applicant conceded and admitted the correctness and the accurateness of all the facts in the November 16, 2004 CPIC Search Report regarding the Applicant and more fully referred to in paragraph #35 of the Registrar's Notice of Proposal.
 - (b) The Applicant conceded that in the course of the hearing the Registrar will not be required to prove the facts asserted to in the CPIC report above.
 - (c) The Applicant conceded and admitted that on or about July 18, 2005 he plead guilty to and was found guilty of the offence more fully identified and referred to in the tab 22 of the Registrar's Book of Documents a copy of which Book of documents the Applicant acknowledged was served upon him at the pre hearing held in this matter. The Applicant further conceded and admitted that pursuant to the aforementioned guilty plea, and the finding of the court, he was fined the sum of \$3, 500.00 and was given 6 months within which to pay such fine.
 - (d) The Applicant conceded that in the course of the hearing the Registrar will not be required to prove any of the issues or allegations referred to in subparagraph (c) above.
 - (e) The Applicant admitted and conceded that in all his applications for registration/reinstatement as a salesperson under the Act, as more fully referred to in the Registrar's Notice of Proposal, he did not disclose in such applications that he had been convicted of or found guilty of an offence under any law.
4. Should the Registrar intend at the hearing of this matter to rely upon any consumer complaint or allegation or upon the specific consumer complaint or allegation mentioned in paragraph #41 of the Registrar's Notice of Proposal, then and in such event the Tribunal hereby orders and directs that not less than 45 days prior to the hearing the Registrar shall provide to the Applicant full and further particulars such that there shall be a full and satisfactory disclosure of such complaint/allegation.

5. The Applicant was provided by the Tribunal at the prehearing with a full explanation of the disclosure requirements as set forth in Rule 6.1, 6.3 and 6.7. The Applicant was cautioned as to the necessity of complying in a timely fashion with the aforementioned subsections to Rule 6 and of the possible consequences of failure to comply.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: September 30, 2005

File name: 3060.rebba.jaigo.Prehrq.doc



3060-REBBA-ADJ-Adjournment

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
PAUL JAIGO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE TO GRANT REGISTRATION
- Proposal dated: June 23, 2005

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

PAUL JAIGO

Applicant

-and-

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on November 7, 2005;

AND TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chamber, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Thursday, December 15, 2005;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 22, 2005

FILENAME: 3060.rebba.Paul Jaigo



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario, 1990 Chapter R.4 and Regulations

ANTHONY T. FERNANDES – ADJ - Adjournment

IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: June 16, 2005

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

ANTHONY T. FERNANDES

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on September 27, 2005;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on November 8, 2005;

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 before the Licence Appeal Tribunal at 9:30 a.m. on Friday, the 7th day of October, 2005.

2. that the hearing in this matter is adjourned, *peremptory against all parties*, to commence at the Licence Appeal Tribunal at 9:30 a.m. on Friday, the 25th day of November, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: September 6, 2005

FILE NAME: 3062.REBBA.Fernandes.adj.doc



PRE-HEARING

KATHLEEN TRAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE REGISTRATION

TRIBUNAL: ANDREW DIAMOND, Member

APPEARANCES: KATHLEEN TRAN, Applicant

ROBERT A. MAXWELL and JENNIFER FRIEDMAN, Counsel,
representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: September 9, 2005 Toronto

ORDER

Following attendances on September 9, 2005 at a pre-hearing before this Tribunal of Kathleen Tran (the "Applicant"), Robert A. Maxwell and Jennifer Friedman, Counsel, appearing on behalf of the Registrar under the *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 October 6, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on October 7, 2005 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. Counsel for the Registrar advised the Tribunal at the pre-hearing that it is the Registrar's intention to bring a motion at the commencement of the hearing on October 6, 2005 to dismiss the appeal based on res judicata and issue estoppel.

3. The Applicant advised the Tribunal at the pre-hearing that at this stage she intends to call 4 witnesses to testify at the hearing and the Registrar's Counsel advised that the Registrar at this stage intends to call up to 5 witnesses to testify at the hearing.
4. The Parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

Andrew Diamond, Member

Released: September 14, 2005

File name: 3013.rebba.Tran.Prehrd.doc



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
RICHARD J. BRACKENBURY AND
RICHARD BRACKENBURY REAL ESTATE SERVICES INC.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: June 10th, 2005

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

RICHARD J. BRACKENBURY AND
RICHARD BRACKENBURY REAL ESTATE SERVICES INC. Applicants
- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on September 6, 2005;

AND 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 1:30 p.m. on Tuesday, October 11, 2005;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 29, 2005



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 REFUSE REGISTRATION
- Proposal dated: April 14, 2005

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 pre-hearing in the above matter on September 6, 2005;

AND 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 Friday, September 9, 2005;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: August 17, 2005

FILE NAME: 3013.rebba.Tran.adj.pre.doc



PRE-HEARING

JOSEPH D. SINGH

IN THE MATTER OF the *REAL ESTATE AND BUSINESS BROKERS ACT*, Revised Statutes of Ontario, 1990, Chapter R.4, as amended and Regulations;

AND IN THE MATTER OF the Proposal by the Registrar of *Real Estate and Business Brokers Act* dated April 28, 2005, to revoke the registration of Joseph D. Singh as a salesperson.

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

APPEARANCES: JERALD W. MacKENZIE, Counsel, on behalf of Joseph D. Singh,

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: August 5, 2005

Toronto

REASONS FOR DECISION AND ORDER

This Pre-hearing Conference arises from a Notice of Proposal dated the 28th day of April, 2005, issued by the Registrar of *Real Estate and Business Brokers Act* (the "Registrar"), which said Notice contains a proposal (the "Proposal") to revoke the registration of Joseph D. Singh, (the "Applicant"), as a salesperson pursuant to Section 9(1) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R.4 (the "Act").

The Applicant, by a notice in writing dated May 12, 2005 (the "Appeal") to the Registrar and to the Licence Appeal Tribunal (the "Tribunal"), appealed the Proposal and requested a hearing by the Tribunal pursuant to Section 9(2) of the Act.

ISSUES:

The Registrar bases the Proposal upon Section 8(1) of the Act whereby the Registrar may revoke the registration of the Applicant as a salesperson in the circumstances, which would disentitle the Applicant to such registration if the Applicant was an applicant for such registration pursuant to Section 6(1) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty as required by Section 6(1)(b) of the Act.

The Applicant, in the Appeal, appeals the resulting decision emanating from this opinion of the Registrar based on an incomplete understanding by the Registrar of the particular circumstances of the various facts relied upon by the Registrar in the Proposal, which gave rise to such opinion and decision.

At the request of the Registrar and with the consent of the Applicant, the Registrar of the Tribunal issued a Notice of a Pre-hearing Conference dated June 23, 2005, to be held at the Tribunal's Chambers on Friday, August 5, 2005, at 9:30 a.m. (the "Pre-hearing Conference").

Also, on June 23, 2005, the Registrar of the Tribunal issued a Notice of Hearing (the "Hearing Notice") setting the place, time and dates of the hearing of the Appeal to the Proposal at the Tribunal's Chambers at 9:30 a.m. on Thursday September 8, 2005, and Friday, September 9, 2005, (the "Hearing").

Pursuant to the Rules of Practice of the Tribunal, no testimony of witnesses was heard by the Tribunal at this Pre-hearing 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 counsel appearing at this Conference as noted above, the Applicant, Joseph D. Singh, was also present. At this Pre-hearing 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.

It became apparent at the Conference that the main issue to be dealt with respecting the registration of the Applicant was the particular circumstances of the various facts relied upon by the Registrar in the Proposal which gave rise to the Registrar's opinion and decision. The evidence and credibility of witnesses would most certainly be the determining factor in reviewing such opinion and decision. This Tribunal is content with the discovery process, which took place at the Pre-hearing Conference and counsel had a full, open discussion of the issue contained in the Proposal and the Appeal.

As it was not possible for either Counsel to be available on the dates set in the Hearing Notice, and both Counsel were uncertain as to whether or not the said hearing could be completed within the two days allotted, it was agreed that the Hearing should take place during the third week of November, 2005.

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 understood and agreed upon by both Counsels.

Order:

The Tribunal therefore makes the following Order respecting the Hearing:

The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, November 14, 2005, commencing at 9:30 A.M., and shall be continued, if necessary, on Wednesday, Thursday and Friday, November 16, 17 and 18, 2005.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C., Vice Chair

Released: August 11, 2005

File name: 2971.rebba.singh.prehrg



SORAYA SHEILA EMAMI o/a SHEILA EMAMI

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: JOHN LEGGE, Counsel, representing the Applicant

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
HEARING: May 16, 2005

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant was initially registered as a salesperson under the *Real Estate and Business Brokers Act* (the Act) on January 15, 2001 with Century 21 Leading Edge Realty Inc. Her registration with that broker terminated on July 24, 2002 and was transferred on September 5, 2002 to Century 21 Harvest Realty Ltd. (Harvest Realty)

The Applicant's registration expired on January 15, 2003 because she had not completed three of the mandated articling courses in real estate that are required of all registrants within two years following their initial registration.

The Applicant subsequently successfully completed the three mandated real estate courses. On October 3, 2003 she applied to have her registration reinstated under the Act.

As a result of a consumer complaint he received in June 2003, the Director issued a Director's Investigation Order under which investigators employed by the Real Estate Council of Ontario (RECO) were employed to investigate this complaint. A RECO investigator and inspector attended upon the Harvest Realty office on October 14, 2003 at

which time it was allegedly disclosed that the Applicant was trading in real estate without registration with respect to three transactions.

On October 23, 2003 the Applicant gave a statement to the RECO investigators. A week later she was charged with four counts under the Act. RECO subsequently withdrew one of these counts. On June 16, 2004 the Applicant was found guilty by Justice of the Peace L. Tivey of the Ontario Court of Justice of unlawfully trading in real estate with respect to two of these counts. These offences arise by operation of subsection 3 (b) and paragraph 50 (1) (c) of the Act. The Justice of the Peace dismissed the third count citing reasonable doubt. The Applicant was fined the sum of \$800 and was given three months to pay. Her appeal from these convictions was dismissed by the Honourable Justice John Ritchie of the Ontario Court of Justice on March 29, 2005.

On October 25, 2004 the Registrar proposed to refuse to grant the Applicant registration under the Act because her past conduct afforded reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty.

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. It is part of his duties as Assistant Registrar to review applications for registration so as to assure that the applicants comply with the provisions of the Act, which is consumer protection legislation. All applicants must be financially responsible in the conduct of their business and, having regard to their past conduct, must be able to carry on business with honesty, integrity and within the law. In this case, Mr. Schlotzhauer was concerned with the fact that the Applicant had been charged with and convicted of the offence of unlawfully trading in real estate while being unregistered.

Mr. Schlotzhauer and an official from his office met with the Applicant at the RECO office in Toronto on November 27, 2003. Minutes of that meeting were recorded by Ms. Yvonne Nandalall. These minutes form part of the Respondent's Book of Documents, which were filed as an exhibit at the hearing. This meeting took place after charges had been laid against the Applicant and after the Applicant had given a statement to the RECO investigator concerning these charges. Ms Nandalall recorded that "He [Brian Schlotzhauer] talked about the recent Investigations which proved that Sheila [the Applicant] was trading without the Benefit of Registration which was a very serious offence under the Act."

The Applicant was asked at the meeting to explain her involvement with the three real estate transactions that gave rise to the charges being laid against her. Mr. Schlotzhauer

stated that the Applicant denied trading in real estate while unregistered and that she did not receive any commission income from the sale of the aforementioned real estate transactions. She never asked to be paid by her broker nor did she receive any money from the broker. She stated that she acted as a driver for a friend who was a salesperson. She denied using her broker's office while she was unregistered and at the same time she continued to pay the broker \$975 per month in fees. She stated that she was in dire financial circumstances and that it did not make financial sense to pay these monies to the broker.

Mr. Schlotzhauer stated that registering the Applicant subject to terms and conditions was not an option open to the Registrar. His meeting with the Applicant was part of the normal office practice employed by the Registrar in reviewing applications for registration. It was his view that the Applicant, who knew that she was not registered, continued to work as a salesperson. She attempted to cover up her activities in her meetings with the investigator and with the Registrar's office. She tried to blame her predicament on others. She was not forthcoming in her dealings with the Registrar.

Mr. Schlotzhauer acknowledged that the Applicant has completed the educational requirements incumbent upon new registrants, that no one was hurt as a result of her conduct and there has been no public complaint about the Applicant. These positive factors did not diminish the Registrar's concerns about the Applicant. He stated that one must look at the entire picture and determine if the Applicant has been honest and forthcoming in her dealings with the Registrar. There was an element of risk present in this case, which compromised the Registrar's duty to protect the consumer in the public interest. The Registrar stood by his proposal denying the Applicant registration under the Act.

During cross-examination Mr. Schlotzhauer admitted that the only notes of his meeting with the Applicant on November 27, 2003 are those as above referred to. There are no notes of any subsequent meetings. There have been no subsequent investigations into the Applicant's conduct. Mr. Schlotzhauer did not review the trial proceedings; nor did he review the reasons for decision. (The reasons for decision form part of the Respondent's Book of Documents). He received the notes made of the investigator's interview with the Applicant at the time of the investigation. The investigator told Mr. Schlotzhauer that complaints had been made against Ahmed Akefi who was the person the Applicant drove to real estate appointments while she was not registered.

Mr. John Legge, counsel for the Applicant, referred to the Applicant's involvement with three real estate transactions as referred to in the Respondent's Book of Documents. These transactions relate to those properties hereinafter designated as Property One, Property Two and Property Three.

The Toronto Real Estate Board listing for Property One shows that Florence Yue is the contact person for Harvest Realty. The sign installation request form dated February 21, 2003 discloses that Sheila Emami is the name of the agent for this property. This form was

signed on behalf of Harvest Realty by "Rita" who was a secretary at Harvest Realty. Mr. Schlotzhauer stated that he was aware of the court decision but that he was not personally aware if the Applicant dealt with the public with respect to this property or if she held herself out as agent. He did not witness this documentation.

Mr. Schlotzhauer stated that he reviewed the documentation relating to Property Two.

In the agreement of purchase and sale for this property, Florence Yue's signature is affixed in that section of the document relating to Co-operating Broker. Mr. Schlotzhauer assumed that the Applicant witnessed the buyers' signature to this agreement. The Applicant also witnessed the buyers' signature in the waiver document associated with this property. In the Harvest Realty Sold Report Sheet, the Applicant's name is scratched out as selling agent and is replaced by that of Florence Yue. In the Harvest Realty Trade Sheet no. 8571 Sheila Emami is listed as the agent and her signature is affixed to that document. The commission payable to Harvest Realty with respect to this property was \$8487.78. In the cheque notation form, the name "Sheila Emami" appears under the heading "Your rep." Harvest Realty sent a fax to Re/Max Executive Realty on January 28, 2003. The fax was sent by Florence Yue (c/o Sheila Emami). Mr. Schlotzhauer stated that he did know who prepared these documents. He did not see any cheque payable to the Applicant. There is no allegation that the Applicant was paid any commission in cash or in kind.

The Justice of the Peace found that there was insufficient evidence to convict the Applicant on one charge of trading in real estate while unregistered. This charge relates to Property Three. Mr. Schlotzhauer admitted that the trading documents do not show the Applicant as being either agent or broker. There is no receipt, cheque or voucher indicating that the Applicant received any payment relating to this property. The Applicant's name appears as the recipient of two faxes sent to her with respect to this property. The Applicant also prepared a Toronto Real Estate Board listing form for this property. The Applicant was not asked to bring any documentation with her to her meeting with Mr. Schlotzhauer. She was only called upon to explain her conduct.

As part of their investigation into the Applicant's activities in October 2003 the Harvest Realty Annual General Expense Sheet was produced and given to the investigators. This document disclosed that the Applicant incurred expenses from the period January 2002 until September 2002. The Applicant's business expenses for that period were summarized and form part of paragraph 26 of the Notice of Proposal. The Proposal states that: "During this time, the Applicant's registration effectively expired." Mr. Schlotzhauer stated that the Expense Sheet is a broker's document. The salesperson receives a copy of this document.

Simon Chang and Florence Yue are the brokers associated with Harvest Realty. They gave the RECO investigator statements pertaining to their business relationship with the Applicant. They were charged under the Act and pleaded guilty. They gave evidence against the Applicant at her Provincial Offences Trial. Mr. Schlotzhauer stated that he knew of their being convicted under the Act but was not aware that they gave evidence against the Applicant. He acknowledged that there were no other civil, criminal or

bankruptcy matters involving the Applicant who has not been subject to any further complaints. It was the Applicant's conduct that was important to the Registrar who regulates individuals not brokerages. The commission monies due the Applicant was offset by Harvest Realty in order to cover the monies due them for the period the Applicant was unregistered and occupying space at that brokerage. The Applicant's conviction under the Act was important. The fact that she was acquitted on one charge was, by itself, not persuasive. The fact that the Justice of the Peace found the brokers were "the main contributors to the offence" was also not persuasive.

Mr. Schlotzhauer stated that although the Applicant did not hide any of her activities, she was not truthful at her interview. He stated that the Applicant kept lying after she was caught, notwithstanding her acquittal on one charge.

Soraya Sheila Emami

The Applicant came to Canada in 1988 as a refugee. She is the mother of 3 adult children and a 9-year-old child. At the time of the expiration of her registration in January 2003 she had some properties for sale that were listed through Harvest Realty.

The Applicant stated that following the expiration of her registration she did not receive any commission statements from Harvest Realty nor did that firm pay her any commission cheques or payments. She denied paying Harvest Realty any fees. She admitted that Harvest Realty charged her for certain things such as rent.

With respect to Property One the Applicant stated that she was contacted by the vendor who she referred to Florence Yue because her registration had lapsed. She did not show this house nor did she prepare the agreement of purchase and sale.

The Applicant stated that she did not show Property Two after her registration lapsed. She admitted to witnessing the signature of the purchasers to the agreement of purchase and sale. She knew the purchasers and witnessed their signature at the request of Florence Yue. The Applicant gave conflicting evidence as to where she witnessed the purchasers' signatures. Initially, she stated she witnessed the signatures at the office of Harvest Realty. She subsequently remembered that she witnessed the signatures at the purchasers' residence. Florence Yue prepared and presented the offer.

The Applicant admitted to witnessing the waiver document at the request of Ms. Yue. The Sold Report Sheet was prepared by Ms. Yue. The accounting department prepared Trade Record Sheet Number 8571, which the Applicant signed on May 6, 2003. The Applicant stated that she had nothing to do with the preparation of the commission statement, cheque notation, cheque, the faxes sent to her and the Toronto Real Estate Board Status Report for Property Two.

The Applicant stated that she did not prepare any of the documentation related to Property Three.

The Applicant admitted signing the Sales Representative Agreement with Harvest Realty which agreement detailed the terms of her professional relationship with that firm and outlined the manner in which her commissions would be paid. She stated that she did not speak to her broker with respect to the expiration of her registration. Harvest Realty sent the Toronto Real Estate Board a Notice of Termination with respect to the Applicant's membership in that Board on July 2, 2003. The Applicant admitted receiving commission statements and cheques from her broker but denied receiving similar documentation for 2003. The Applicant was upset at the fact that she was charged fees for using the Harvest Realty office after her registration expired. She denied showing any properties following the expiration of her registration. She stated that she did not understand the meaning of the word "solicit". She has never been subject to any other charges or offences. She never attempted to evade her obligations as a salesperson. She acknowledged that she made a mistake, which led to her being convicted under the Act.

During cross-examination, the Applicant admitted that she knew that her registration expired on January 15, 2003. She had left some items at the Harvest Realty office and went to that office with Ahmed Akefi who was a salesperson with that office. She stated that she went to the office when Ms Yue requested her to do so and that she had no access to any office computer system.

The Applicant stated that she prepared a Toronto Real Estate Board listing sheet on April 26, 2003 with respect to Property Three at the request of Mr. Akefi, which event occurred while she was still a member of that Board. She admitted sending that Board a cheque for her membership with the Board on February 27, 2003, which cheque replaced an earlier cheque she had drawn on December 28, 2002 and which did not clear. These two cheques are found in the Respondent's Book of Documents. The Applicant had access to the Toronto Real Estate Board computer system when the February cheque cleared the bank.

The Applicant admitted to sending a fax for Mr. Akefi with respect to Property Three. She did not know why her name appeared on a fax sent by Florence Yue (c/o Sheila Emami) with respect to Property Two. She could not explain why her name appeared on a cheque notation form under the heading "Your Rep." as sent by a broker from its commission trust account to Harvest Realty with respect to the commission due Harvest Realty for Property Two. Although her name appeared as agent on the sign requisition form issued for Property One, the Applicant stated that her name did not appear on the sign. It is customary for an agent's name to appear on a sign. The sign requisition form was prepared by the office secretary. She stated that she was neither the listing nor selling agent with respect to this property.

SUBMISSIONS

At the conclusion of the hearing the Tribunal heard the closing submissions made by counsel for the Applicant and the Registrar. The Tribunal then invited counsel to make further submissions on the issue of fairness having regard to the fact that the Registrar, through his investigator, laid charges under the Act against the Applicant while at the same time the Registrar was processing and ultimately denied the Applicant registration.

Applicant's Submissions

The Applicant, through her counsel, John Legge, submitted that the Applicant derived no benefit from her misconduct. Any commissions she may have made while unregistered were offset by her obligations to her broker. Mr. Legge acknowledged that the Applicant erred and that she made stupid mistakes. If she were an employee "there would have been no problem." Trading is defined broadly under the Act and the Applicant got caught under that broad definition.

The Registrar would not concede that the broker has concurrent responsibility in this case. Indeed, a greater responsibility lies with the broker. This would be a sound finding in policy and in law. The Registrar ought to have considered the legal doctrine of *respondeat superior* in an effort to absolve the Applicant of some responsibility.

The Applicant neither listed nor showed any property for sale. Her brokers were charged and convicted under the Act. They received a fine that was less than the commissions they received with respect to the Applicant's listings. Their broker's licence was not suspended. An examination of the broker's accounting records, as appearing in the Registrar's disclosure documentation, reveals that the broker did not take the commission into income. The broker is precluded from employing or engaging an unregistered person from trading in real estate under paragraph 29 (1) (b) of the Act. The broker could not therefore charge the Applicant rent as per her former agreement with her broker. The Applicant has paid a steep price for her transgressions. She has gone without income for over two years and has incurred substantial legal and other costs.

The Registrar failed to give due weight to the fact that the Applicant was acquitted on the charge of unlawfully trading with respect to Property Three. The Applicant is a dedicated, competent and educated mother of four children. She has paid her fine and acknowledged her mistakes. She now knows the importance of strictly complying with the provisions of the Act. It would not be contrary to the public interest were the Applicant lawfully permitted to sell real estate.

With respect to the fairness issue, the Applicant submitted that the minutes of the Applicant's meeting with Mr. Schlotzhauer that was held on November 27, 2003 disclosed that the Applicant was told that "... the decision was out of your (sic) hands now " by which time the Registrar had refused registration and given instructions for a prosecution to take place. The Assistant Registrar was not then prepared to concede that the Applicant's acquittal with regard to Property Three was a factor in the Applicant's favour when considering her application for reinstatement. The Applicant was never cross-examined on her evidence "about never having received money from the impugned transactions directly or indirectly nor having in fact paid the Century 21 brokers Chang and Yue."

Mr. Schlotzhauer's refusal to reconsider the initial refusal in light of the acquittal amount to a refusal on the part of the decision maker to take into account a fact and argument that a fair minded official would need to be informed in order to reach a rational result.

The Applicant, while admitting that principles of fairness and natural justice are flexible and are not lightly interfered with by courts and administrative tribunals, submitted that Mr. Schlotzhauer's refusal to consider the acquittal and the Applicant's evidence amounted to a denial of natural justice because:

- The Applicant provided cogent, credible and uncontroverted evidence that in fact she had not been paid by the broker, but that the broker simply kept the entire commission and apportioned it after the fact in a such a manner as to keep the funds from the properties in issue;
- Mr. Schlotzhauer stated that the investigation into the Applicant's conduct proved that the Applicant was trading without the benefit of registration with respect to the three properties;
- RECO acts as both investigator and prosecutor with respect to the charges laid against the Applicant, and as judge as to inquiry and adjudication as to licensing. Where a statute provides that these hybrid functions be conducted by a single administrator and decision maker, then the decision maker must fairly consider partial acquittals and explanatory circumstances and the evidence. The Applicant relied on the decision of the Ontario Court of Appeal in the case of *Latimer v. Bray* (1974), 6 O.R. (2d) 129 in support this submission;
- Where the decision maker has, before a court hearing publicly expressed a view that the offences have been proven by the investigation, then the expression of such a view reasonably gives rise to a finding of bias. *Old St. Boniface Residence Assn. Inc. v Winnipeg (City)* [1990] 3S.C.R.1170. In the circumstances of this case the Registrar has demonstrated a closed mind when he refused to be persuaded by the partial acquittal and the explanatory evidence given by the Applicant;
- The Applicant did not have the benefit of the investigation reports that were made available to Mr. Schlotzhauer prior to the November 27, 2003 meeting with the Applicant which reports led him to talk about "the recent investigation which proved that Sheila was trading without the benefit of registration...". The Applicant was not given the opportunity to know the case she had to meet or to reasonably answer the allegations against her in the licensing context. The first opportunity that the Applicant had to give evidence as to her background, character and integrity was at the Tribunal hearing. The Tribunal has heard this matter at first instance because of the Registrar's failure to comply with the requirements of natural justice.

The Applicant concluded her written submissions by stating that the Registrar's decision was unreasonable because of the Registrar's failure and refusal to reasonably consider

the Applicant's application after her partial acquittal and given of explanatory and further evidence as to fitness.

The failure of the Registrar to segregate "prosecuting from licensing" in the circumstances of this case is of particular import because the prosecutor in the Provincial Offences Court acted as counsel in the licensing appeal. Counsel retained by the Registrar had no specific role under the Act. They are not independent of the Registrar in the way crown attorneys are independent of the police or "other officers of the State." The discretion given a crown attorney to withdraw or settle a proceeding cannot be exercised by the Registrar's counsel who must obtain instructions from the Registrar because the Registrar has been given a statutory duty to regulate prosecutions and licensing.

Registrar's Submissions

The Registrar submitted that there was sufficient evidence to support his reasonable belief that the Applicant's past conduct was indicative of the fact that she will not carry on business in accordance with law and with integrity and honesty. The Applicant was convicted in the Provincial Offences Court of trading in real estate while not being registered. Her appeal from this conviction was upheld on appeal.

The Applicant was not forthcoming at her interview. She did not accept responsibility for her conduct. She blamed her brokers for her misconduct. She used her brokers to help her. The Applicant was also not credible. She did not know why she was being charged monthly expenses payable by a Century 21 agent. The evidence shows that the Applicant received a commission while being unregistered. She claimed that she was not in the office yet she signed documentation at the office relating to sales of real estate. One conviction under the Act may provide a sufficient basis in law for the Registrar to deny registration. A person trading in real estate while unregistered creates a risk to the consumer.

It was submitted that the Applicant did not give evidence at her hearing in the Provincial Offences Court. The Tribunal does not give any weight to this submission because there is no legal obligation on a person charged with an offence to give evidence at her trial. The Applicant is protected against self-incrimination under subsection 11(3) of the *Canadian Charter of Rights and Freedoms*. (the Charter).

With respect to the fairness issue, the Registrar submitted that the standard of proof in the Provincial Court is beyond a reasonable doubt, whereas in a proceeding before the Tribunal the standard of proof is less stringent. There was evidence before the Tribunal for it to conclude that the Applicant received a commission while being unregistered with reference to Property Two. The Registrar did not therefore demonstrate a closed mind. He only expressed his lawful concerns about the propriety of the Applicant's registration. The Registrar, in the lawful exercise of his duty to consider the propriety of the Applicant's application for reinstatement, was entitled to consider the fact that the Applicant was

convicted in the Provincial Offences Court of violating the Act. To argue that the Registrar should have waited for a decision on the prosecution before issuing a proposal would amount to a fettering of the Registrar's discretion. The Applicant is entitled to know the reasons for denying her reinstatement, and if she so desires, to challenge the Registrar's decision before an impartial arbiter. The laying of charges and the fact that an Applicant was convicted of violating the Act do not automatically lead to a proposal denying registration. The Registrar does not need a conviction to refuse registration. The conviction amounts to evidence of past conduct. Similarly, an acquittal on a criminal or quasi-criminal charge does not preclude the Registrar from issuing a proposal. If an applicant has been convicted of an offence the Tribunal cannot go behind the conviction and re-hear the matter.

The Registrar is given quasi-criminal and regulatory powers under the Act. The exercise of one of these powers does not preclude the Registrar from exercising the other power. These powers may be exercised separately or concurrently at the Registrar's sole discretion, having regard to the public interest. If the Legislature intended to restrict the concurrent use of the powers given the Registrar under the Act, it would have done so expressly. The quasi-criminal powers act as (a) a general and specific deterrent so that the offending conduct is not repeated by the offender or others and (b) as a denunciation of specific conduct. The regulatory powers are used for consumer protection so as to assure that those who are fit and proper are registered under the Act.

Where charges are laid under the Act, the investigation made with respect to these charges must be conducted in accordance with acceptable legal standards including respect for the Applicant's rights under the *Charter*. There are no *Charter* rights involved in the exercise of the Registrar's regulatory powers. The exercise of the regulatory power is checked by the applicants being given a right to a hearing before the Tribunal.

The results of the quasi-criminal investigation can be and are consistently used for regulatory purposes. Once an inspection tends to show that an offence has been committed, the inspection ceases and an investigation begins in a manner consistent with constitutional safeguards. The results of the investigation are relevant and bear directly on the propriety of an applicant to be registered.

THE LAW

Those sections of the Act relevant to this appeal are stated as follows:

2. "salesperson" means a person employed, appointed or authorized by a broker to trade in real estate;
 "trade" includes a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance

of any disposition, acquisition, transaction, offer or attempt, and the verb “trade” has a corresponding meaning;

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;

3. (1) No person shall,
 - (a) trade in real estate as a broker unless the person is registered as a broker;
 - (b) trade in real estate as a salesperson unless he or she is registered as a salesperson of a registered broker;
 - (c) act on behalf of a corporation or partnership in connection with a trade in real estate unless the person and the corporation or partnership are registered as brokers.

50. (1) Every person who, knowingly,
 - (a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
 - (b) fails to comply with any order, direction or other requirement made under this Act; or
 - (c) contravenes any provision of this Act or the regulations,
 and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both.

ANALYSIS

In its consideration of this matter the Tribunal follows the guidance offered by the Divisional Court in the following cases. In *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.R. No. 1017, the Court stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will 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 *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales* 40 M.V.R. (4th) 86 the Divisional Court added that:

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 inappropriately. The Tribunal approaches the matter uninhibited in any way by the Registrar’s view.

The Tribunal may look at all of the circumstances surrounding the conviction registered against the applicant under the Act for the purpose of mitigation and not re-litigation. *Ontario (Registrar of Motor Vehicles) v. Jacobs* 2004 O.J. No. 189 (Quicklaw)

In June 2003, acting on a consumer complaint that RECO had received, the Director of the *Real Estate and Business Brokers Act* (the Director), acting under section 15 of the Act issued a Directors Investigation Order under which RECO investigators were appointed under the Act to investigate the complaint which related to the Applicant's conduct. The statutory basis for the issuance of such order is found in subsections 15 (1) and (2) of the Act, which provides as follows:

Investigation by Director

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.

Powers of investigator

(2) For purposes relevant to the subject-matter of an investigation under this section, the person appointed to make the investigation may inquire into and examine the affairs of the person in respect of whom the investigation is being made and may,

- (a) upon production of his or her appointment, enter at any reasonable time the business premises of such person and examine books, papers, documents and things relevant to the subject-matter of the investigation; and
- (b) inquire into negotiations, transactions, loans, borrowings made by or on behalf of or in relation to such person and into property, assets or things owned, acquired or alienated in whole or in part by the person or any person acting on the person's behalf that are relevant to the subject-matter of the investigation,

and for the purposes of the inquiry, the person making the investigation has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such inquiry as if it were an inquiry under that Act.

The Applicant sought reinstatement by application dated October 3, 2003 and received by RECO on October 7, 2003. A Director's Investigation Order had been issued a day earlier. When the application for reinstatement was received, the Director already had reasonable and probable cause to believe that the Applicant contravened some of the provisions of the Act. Within three weeks of her application, a RECO inspector and investigator attended at the office of Harvest Realty and spoke to the owners of that real estate office and reviewed the documentation relating to the three properties. Shortly thereafter, the Applicant was charged in the Ontario Court of Justice with four offences under the Act. RECO inspector

Dave Tredrea, who is also a Provincial Offences Officer, was the informant. There is no evidence before the Tribunal indicating when these charges were laid. The Applicant gave a statement to the investigator on October 23, 2003 at which time the Applicant learned that she was going to be charged with three counts of trading in real estate while not being registered under the Act. At the time he laid these charges, Mr. Tredrea had reasonable and probable grounds to believe that the Applicant committed these offences, otherwise the charges would not have been received by the Justice of the Peace under subsection 23(1) of the *Provincial Offences Act* R.S.O. 1990 c.P.33. The Registrar's Book of Disclosure includes (a) the statement made by the Applicant (b) a statement of anticipated evidence made by Inspector Tredrea (c) a copy of hand written case notes relating to the conduct of Ahmad Akefi and the Applicant and (d) a statement of anticipated evidence made by RECO Inspector Maureen McDaniels and written case notes relating to the several properties involving Akefi and the Applicant.

The Applicant was interviewed by Mr. Schlotzhauer on November 27, 2003. Registration Officer Yvonne Nandalall took notes of the meeting, which lasted about 35 minutes. There is no evidence to show that these minutes did not accurately recite what transpired at the meeting. The minutes of this meeting include the following sentences

- (a) " He [Brian Schlotzhauer] talked about the recent Investigations which proved that Sheila was trading without the Benefit of Registration which was a very serious offence under the Act"
- (b) and (b) Brian then advise (sic) Ms. Emami that the Registrar will be issuing a proposal to Refuse her Reinstatement appl. under the Act. He went out to explain the various steps with regards to the proposal."

The next day, Ms. Nandalall wrote the Applicant that the Director had directed the preparation of a Proposal to refuse her registration as a salesperson under the Act and that it might take several months to prepare the Notice of Proposal outlining the Registrar's reasons for refusing reinstatement. The Applicant was convicted of two charges of trading was being unregistered on June 16, 2004. She was fined the sum of \$800. The Notice of Proposal was signed by the Registrar on October 25, 2004, which was almost eleven months after the Applicant was advised that her application for reinstatement would be refused and almost four months after her being convicted in the Provincial Offences Court. An appeal from the conviction was dismissed by Justice John Ritchie of the Ontario Court of Justice on March 29, 2005. No reason has been given for the delay in the sending of the Notice of Proposal.

It would appear that Mr. Schlotzhauer had already made up his mind that the Applicant had unlawfully been trading in real estate when he interviewed the Applicant. He read the investigation reports relating to the Applicant's trading activities. He appeared to know what action the Registrar would take with respect to the application for reinstatement.

The Tribunal notes that the RECO Investigator Tredrea and Inspector McDaniels took a statement from the Applicant prior to her being charged under the Act. They gave her the usual warning regarding self-incrimination at that time as if she had been charged.

Nonetheless the Applicant gave her statement.

Assuming that the Registrar read the investigation reports into the Applicant's trading activity before signifying his intention to deny registration on November 28, 2003, then it would appear that the Registrar relied, in part, on information given to RECO by third parties (Samuel Chang and Florence Yue) in proposing to deny the application for reinstatement. The Applicant did not have the opportunity of seeing this information and commenting upon it before the decision was made denying her reinstatement.

In considering the legal efficacy of the Registrar's decision-making process, it is important to note that since the case of *Martineau v. Matsqui Institution Disciplinary Board* [1992] 1 S.C.R. 623 the duty of fairness applies to all administrative bodies. The nature and extent of such duty will depend upon the nature and function of the particular tribunal. Generally speaking, the Act involves registration of salespersons and brokers and the regulation of trading in real estate. The Registrar is given exclusive jurisdiction over registration matters. It is his proposal that counts and he made the proposal. His proposal to deny reinstatement was signified months before the Applicant was convicted in the Provincial Offences Court.

In this case it was another senior official, the Director, who issued the Director's Investigation Order that led to an inspection and investigation of the Harvest Realty office and the laying of charges against the Applicant and her brokers. The powers to register and investigate are two separate powers involving different considerations and consequences. These powers are necessary to insure integrity in the real estate industry and are designed to protect the public. Where charges have been laid under the Act and in conformity with the safeguards found in the *Provincial Offences Act*, it is a neutral decision-maker who determines the guilt or innocence of the person accused of violating the Act. This situation may be contrasted with that found in the case of *Latimer v. Bray*, supra, under which the Ontario Securities Commission was lawfully permitted under its enabling legislation to investigate, prosecute and judge.

A proposal made by the Registrar under the Act suggests a course of action that the Registrar will take with respect to an application. It does not have immediate effect. Under subsection 9(2) of the Act, an applicant has fifteen days to appeal to the Tribunal. If the applicant does not appeal, then the proposal ceases to be inchoate and the Registrar may then carry out his proposal. If an appeal is commenced, then the Tribunal, following a hearing, may, while acting under subsections 9(4) and (5) of the Act direct the Registrar to carry out or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take under the Act and the regulations. 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.

In this case, the decision on the application for reinstatement is made at the time the Tribunal makes its order. The Applicant has had a full hearing before a neutral arbiter. She had the assistance of counsel who was afforded the right to cross-examine witnesses. She

has had disclosure of the documentary evidence upon which the Registrar relied as well as the opportunity of submitting such evidence as she deems appropriate in the furtherance of her appeal. The Applicant has not been denied fairness.

The Applicant is concerned that the proposal is flawed in law by reason of bias because Mr. Schlotzhauer prejudged the Applicant's case. The charges laid against the Applicant and their ultimate disposition are not matters relating to registration or reinstatement, which is the area in which Mr. Schlotzhauer is involved. He was involved in the decision-making process leading to the Registrar's proposal. His opinion may be a factor influencing the ultimate decision. He did not make the decision denying reinstatement. Having regard to the manner in which registrations are dealt with under the Act, the Tribunal finds that the Registrar exhibited no bias in the making of his proposal.

The evidence before the Tribunal clearly indicates that the Applicant traded in real estate while unregistered. Her conduct clearly fell within the definition of "trade" as found in section 2 of the Act. The Applicant was convicted in the Provincial Offences Court of unlawfully trading in real estate in respect of two properties. Her appeal from her conviction was dismissed. She requested that signs be erected with respect to the sale of one property. The Appointment Information for New Listing form indicated that an interested party was to page Sheila. She witnessed documentation with respect to the proposed sale of a property. The Applicant signed the Sale of Competitors Listing document on May 6, 2003 as agent. She was known to Re/Max Executive Realty as the sales representative of Harvest Realty. Her name appears on faxes received with respect to the disposition of real estate. She accessed the Toronto Real Estate Board computer while unregistered. She maintained her membership in that organization while unregistered. Her association with Harvest Realty did not formally end until July 2003, which was about 6 months after her registration lapsed. Her status as agent is apparent from reviewing the accounting documentation prepared by Harvest Realty. The Applicant paid the Century 21 desk fee and user fee for 6 months after she ceased to be registered. Mr. Chang and Ms Yue told the investigator and inspector that they tried to accommodate the Applicant who continued as their agent while unregistered because they believed that the Applicant would finish her mandatory real estate courses within, what they believed would be a relatively short period of time. The Applicant has acknowledged her error. It is highly implausible that an impecunious mother of four would continue to make payments to her broker (in the manner of an agent) in the amount of \$925 per month for several months in order for her to have a place to study.

The Tribunal does not accept the Applicant's submission that as a matter of sound policy and law the greater responsibility lies with the broker and that the Registrar ought to have considered the legal doctrine of *respondeat superior*. Under this doctrine liability attributes to the employer because the employer is the employee's superior and thus is in charge or command of the employee. (*London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299)

The evidence before the Tribunal clearly indicates that the Applicant was not an employee of Harvest Realty. The Applicant entered into a Sales Representative Agreement with Harvest Realty on August 31, 2002 under which she agreed that she would remain a self-employed contractor and that she would not represent herself to be a partner or employee of Harvest Realty or to be related to Harvest Realty other than a self-employed independent contractor. She was permitted to conduct her business activities in such manner as she considered appropriate. She further agreed to abide by the laws of the Province of Ontario relating to a real estate agent.

Salespersons and brokers must, independently of each other, abide by the terms of the Act and regulations. Their duties and responsibilities are defined separately under the Act. There can only be one degree of acceptable conduct, which must be exhibited by both salespersons and brokers. Each group is responsible for complying with the law and to the same extent and that is total compliance with the law. To hold otherwise would compromise the public interest and would denigrate from the statutory requirement that salespersons and brokers must comply with the law and conduct their affairs honestly and with integrity,

The fact that the Applicant was acquitted on one of the charges laid against her is a factor in her favour. It does not change the fact that she was convicted on the two remaining counts. These convictions, along with the other evidence adduced at the hearing, relate to the ability of the Applicant to lawfully carry on business in the manner proscribed in paragraph 6(1) (b) of the Act, which is the area of concern relevant to both the Registrar and the Tribunal.

The relationship between crown attorneys and the police in Ontario is rooted in history and involves considerations not relevant to this case. Mr. Drametu is counsel to the Real Estate Council of Ontario. There is nothing improper in his prosecuting the case for the Registrar and acting for the Registrar in defence of his proposal at the hearing.

The Tribunal finds that the Applicant traded in real estate while being unregistered with respect to Properties One and Two. This conduct compromises the public interest. There is not enough evidence to show on the balance of probabilities that she engaged in trading with respect to Property Three.

The Tribunal finds that the Applicant, with some degree of reticence, has acknowledged her wrongdoing. She could have been more forthcoming in her relationship with RECO officials with respect to her application for reinstatement. She tried to slough off her responsibilities upon her brokers.

For the past two and one-half years the Applicant has manifested a continuing intention to be reinstated as a salesperson. She successfully completed her continuing education courses in real estate. She has acknowledged her error. She now knows that she must conduct her affairs in accordance with law. One of the two transactions in which she was involved while being unregistered did not close. She did not enjoy, or even see the fruit of

her misconduct. Any monies she improperly received were kept by her broker in purported satisfaction of her liabilities to the broker. The Applicant acted as a registered salesperson for two years without incident or complaint. She has no other disciplinary history. She has never gone bankrupt. The Applicant has paid a steep price for her conduct. Hopefully, she has learned a lesson and will live up to her responsibilities as a salesperson in the future.

ORDER

The Tribunal, acting under subsection 9(4) of the Act, directs the Registrar to reinstate the Applicant's registration as a salesperson.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C., Vice-Chair

Released: July 21, 2005

File: 2680.rebba.Emami

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



JAYANT THAKUR

MOTION TO CONSIDER A STAY OF AN ORDER OF THE LICENCE APPEAL TRIBUNAL

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES: JAYANT THAKUR, representing himself

TIM SNELL, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act*

DATE OF
MOTION: July 15, 2005

Toronto

REASONS FOR RULING

BACKGROUND:

The Applicant, Jayant Thakur, brings this motion in which he seeks an order granting the stay of the Tribunal's decision dated March 31, 2005, to revoke the Applicant's registration under the *Real Estate and Business Brokers Act*.

THE FACTS:

A. Grounds Of Appeal

The Applicant has filed a Notice of Appeal with the Superior Court of Justice, Divisional Court. The grounds of appeal read as follows:

1. The Appeal Tribunal erred in judgment because the decision made is leaning more in favor of the Counsel, representing the Registrar, Real Estate and Business Brokers Act and not giving the Registrant a fair and equal opportunity to looking into the facts of the case and judging based on facts and not assumptions.
2. The issue was "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?"

3. The Counsel representing the Registrar failed to submit any concrete evidence that would prove the contents of the issue in question.
4. The Counsel for the Registrar cited three transactions alleging that they were fraudulent or attempted fraud and provided a very weak argument for the following reasons.
 - a) All the transactions cited were under Power of Sale by the Banks, therefore, regardless of what the market values are, the banks are professionals and sold these properties at the price which they felt were a fair price otherwise they failed in their obligation to protect the interest of the mortgagee. The fact of the matter is that these properties were purchased at very close to listing price and were bought by the purchaser in the open free market place. The mortgagee has the right to sue the banks and recover the difference between the price at which they sold and the price at which these properties were eventually sold and the same banks approved higher mortgages. Rather than filing complaint for their misjudging the market they should protect the interest of their clients and that is the consumer.
 - b) The Counsel for the Registrar failed to cite which provision of Real Estate and Business Brokers Act states that before a property is resold it must be deeded and registered before it can be sold. In fact the Council did not cite any law that would require a purchaser to register the property before it can be sold or that Real Estate Broker is responsible for what the Purchaser does after the sale is concluded.
 - c) The Registrant did not arrange for mortgages on these properties. They were granted by the Bank based on their criteria. The bank does its own property appraisal before Mortgage is accepted. If CMHC is involved an appraisal is required. The banks must have done due diligence before accepting Mortgage otherwise they would not have accepted the applicant. In these transactions the Registrant did not do appraisal for the banks nor claimed any finders fee.
 - d) "The Council 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."

The Council for the Registrar is completely off track here. The price of homes is set in the market place when there is "a willing buyer and a willing seller." This charge is baseless because the appraised value sets the price, as far as the banks are concerned, and not the Registrant, Purchaser, or Seller. If the value is not right, the Banks would not advance funds regardless of if the Purchaser qualifies or not. Perhaps one has to visit the new builders construction sites one would learn how fast the prices are increased (inflated) in short period of time. That happens because of market forces of buyers and nothing to do with the construction cost of the home plus fair margin of profit. The fact of the matter is that the bank did do its homework and appraised the right value otherwise they would not advance funds.

5. Testimony of Chris Georgious.

Ms Georgious, though has lot of experience in Banking industry but, seems to lack the fundamentals of real estate transactions and over reacted in getting RECO involved. MLS documents are forms and until it is listed on the MLS system, there is no MLS number given to it, therefore, the bank should understand this basic information. These forms are available by walking into any real estate office. MLS has a listing agreement and a Data form. Both must be filed with the board to make it valid MLS Listing. It is then the MLS number is allocated when the Board has received these. Any MLS Data Form without MLS number is just a Data Form and nothing else. Showing of the Real Estate Brokers name does not make it a valid MLS listing.

6. Testimony of Maureen McDaniels:

The testimony of Maureen McDaniels confirmed the fact that Trade Record Sheets were up-to-date and the Registrant was in compliance with the Real Estate and Business Brokers Act. MLS systems is not controlled by the Real Estate Business Brokers Act. There is no breach of having Jaysons Real Estate Ltd in the box. If there is any issue on this, it would be that of the Toronto Real Estate Board and not RECO.

7. Testimony of Jo Ann Swain.

This whole search was for transaction registered by the eventual purchaser and nothing to do with the initial transaction in which the Registrant was involved with an investor. This whole exercise was looking for evidence to tie the Registrant to the transaction to which he was not a party.

8. Testimony of Yvonne Nandalall:

There are thousands of transactions carried out in the market place including Real Estate where the identify of the investor is not disclosed. This is confidential information and should not be a matter for RECO. How can a person that deals with complex cases did not take notes

B. Grounds for Stay of Proceedings

- a) Applicant Jayant Thakur filed an Appeal on October 18, 2004 with the Licensing Appeal Tribunal against the proposal of the Registrar Dated October 1, 2004 to revoke the License of the Applicant under the Real Estate & Business Brokers Act.

Reasons given by the Registrar REBBA was:

"Past Conduct of the Registrant affords reasonable grounds for the belief that Jayant Thakur would not carry on business in accordance with the Law and with integrity & honesty."

The Registrar failed to substantiate which part of the Real Estate & Business Brokers Act was breached by the Applicant to justify the revocation of the License to the extent of denying him the opportunity to earn his livelihood in the profession he has practiced for over 20 years without any complaint filed against him.

- b) The fact of the matter is that the decision was made by the Tribunal (will be shown later hereunder) and the Real Estate Council of Ontario so hastily that they used the wrong term of reference when notifying the Applicant of the "Notice of Proposal to Revoke Registration." The Notice reads; **"Now therefore, take notice that pursuant to section 9 (4) of the Act, the Registrar is carrying out the proposal to revoke the registration of the Registrant as a "Salesperson" under the Act and the Registration is hereby revoked."**

Under the Real Estate & Business Brokers Act Sec 1 "Definitions". "Salesperson means a person employed, appointed or authorized by a broker to trade in real estate; (agent immobilier)." **The notice given to the Applicant was that of being a "Salesperson" whereas the Applicant is not a "Salesperson" but a "Broker"** defined under the Act as " Broker means a person who, for another or others, for compensation, gain or reward or hope or promise therefore, either alone or through one or more officials or salespersons, trades in real estate, or a person who holds himself, herself or itself out as such; ("courtier").

- c) Tribunal Hearing was based on Assumptions presented by RECO and not any facts or points of law.
- d) The transactions cited by RECO, no one suffered any injuries and RECO failed to produce any evidence on any injuries suffered, all the mortgages in question were renewed by the lending institutions.
- e) Applicant Jayant Thakur wants to represent himself as counsel services are too expensive, since Applicant Jayant Thakur has no means of income until his license is re-instated.
- f) Under the Rules of Civil procedures R. 1.05 it is directed to courts **"When making an order under these rules the court may impose such terms and give such direction as are just."**

The Applicant expected a "just" ruling from the Tribunal, on behalf of the Registrar of the Real Estate & Business Brokers Act, but that did not happen because the Tribunal completely ignored the provisions of the Real Estate & Business Brokers Act, The Canadian Real Estate Association's code of Ethics " Standards of Business Practices for Realtors in Canada and Toronto Real Estate Boards " MLS Rules and Regulations.". The Tribunal gave more weight to falsely laid charges by Chris Georgiou, Manager, Credit Risk Management of CIBC Mortgages Inc to RECO identifying some Real Estate transactions as "Suspicious Real Estate transactions that had been presented to the CIBC in support of application for mortgage financing." The Applicants company Jaysons was identified as the Real Estate Broker involved.

- g) The Tribunal was presented with reports on various investigations and they were unable to identify a single Clause of Real Estate & Business Brokers Act or The code of Ethics of the Canadian Real Estate Association was breached, therefore, under what provision did the Registrar of Real Estate Business Act come to the conclusion that **"Past Conduct of the Registrant affords reasonable grounds for the belief that Jayant Thakur would not carry on business in accordance with the Law and with integrity & honesty."** This reference is to Sect 6.1 (b) of the Act. Under the Real Estate & Business Brokers Act Sec 8.2 makes reference to **"... or where the registrant is in breach of a term or condition of the registration"** **There is no such breach.**

The Applicant fully co-operated and complied with all investigations, which falls under the Act including Sect 11.1, 11.3, 12.1, 13.1, 19 & 20. The fact of the matter is the

Trade Record Sheets, Trust Ledger and Trust accounts were reviewed by the investigators but no breach was found. There was no sale recorded on the re-sale of the properties in question because the Applicant was not involved.

Section 9 of Real Estate and Business Brokers Act states:

" Even if a registrant appeals an order of the Tribunal under section 11 of the Licence Appeal Tribunal Act, the order takes effect immediately but the Tribunal may grant a stay until the disposition of the appeal."

- h) The whole case argument of CIBC was based on MLS Data Sheet which is a property data sheet and at no time it was presented as an MLS listing. The Tribunal was told that there was no MLS number, therefore, without this number it cannot be used as MLS Listing. The Toronto Real Estate Boards MLS Listing Agreement Rules states;

Section 1.02 - Requirements for a new MLS Listing states;

"In all cases a new MLS Listing requires the following

A completed MLS Listing Agreement (Form 012,302,303 or 304); and A completed MLS Data Information Sheet (Form 07A, 07C or 318)."

It further states in Section 4.01;

"To offer real estate for sale, lease or sub-lease on the MLS System, the Listing Broker shall obtain a complete and effective MLS Listing Agreement, which includes the MLS Data information Sheet, conforming with MLS Rules and Regulations and MLS Policies."

When Listing Agreement & Data sheet is files with the Toronto Real Estate Board, and approved for data completion, an MLS Number is given. These rules are in public domain and the Banks cannot treat an MLS Data Sheet without an MLS Number as MLS Listing. The fact of the matter is any MLS Data sheet without MLS Listing Number should not and cannot be treated as MLS listing, no matter who prepares it. It is regretful that all the experts who did investigation and the Tribunal who passed the judgment did not challenge this but were in a hurry to come to conclusion. In other words they could only see what they wanted to see or give meaning to a document which was far fetched.

- i) The moving party has launched an appeal to the Divisional Court of the Superior Court of Justice Court File No. DC-05-004240-00 within the time frame as contemplated under the applicable legislation and the Rules of Civil Procedure and to order the requisite transcripts from the Licence Appeal Tribunal in connection with the same;
- j) On the balance of convenience it would be just to grant the Order, pending appeal.
- k) The granting of the Order requested will result in no harm or prejudice to the Registrar, Real Estate and Business Brokers Act.
- l) Such further and other grounds as Applicant may advice.

C. Affidavit Evidence

Applicant's motion for a stay is supported by an affidavit of the Applicant in which he deposes as follows:

1. I have filed an Appeal against an order issued by the Licensing Appeal Tribunal of Ontario, delivered on March 31, 2005 to revoke my Real Estate Broker Registration.
2. I am a Real Estate Agent/Broker for the past twenty-two years.
3. Selling Real Estate which I earn commissions is the only source of income I have.
4. In the past twenty-two years there were no complaints filed against me regarding Real Estate Transactions.
5. C.I.B.C. filed a complaint against me with RECO without giving any reference of any sections of the Real Estate and Business Brokers Act, which I had violated.
6. I have no Agency Relationship with C.I.B.C.
6. C.L.B.C. is not a Consumer, but a Sophisticated Business House.
7. RECO revoked my Licence to practice as a Real Estate Agent giving reasons that I failed to Co-Operate.
8. I fully Co-Operated and attended their meetings twice and responded to their correspondence in writing.
9. I filed an Appeal with the Licensing Appeal Tribunal.
10. At the time of the hearing, I requested to withdraw my Appeal; this decision of mine was a great mistake.
11. I was under tremendous pressure physically and economically.
12. On June 15, 2004 I had a triple by-pass open heart surgery, am a Diabetic which suffers from double vision.
13. Solicitor acting on my behalf was asking unrelated questions and I felt that my Legal bill will increase tremendously, which I could not afford.
14. During the hearing, the Tribunal members intervened and starting asking for appearances for my clients, which were not required nor subpoenaed. Furthermore the Tribunal member made comments about the Lawyer acting for the purchaser, "why anybody did not report him, to the Law Society"
15. During the questions asked by the Member of the Tribunal, I felt that the Member was not acting impartially, but the decision was already made beforehand.
16. I wrote a letter to the Registrar Licence Appeal Tribunal of Feb 23, 2005 of my mistake to withdraw the Appeal, and to restore the Appeal.
17. The Registrar Licence Appeal Tribunal wrote back stating to wait for the Decision of the Tribunal, then Appeal.

No further affidavits were filed by either the Applicant or the Registrar.

THE LAW:

Section 25(1) of the *Statutory Powers Procedure Act* reads as follows:

25. (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

- (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
- (b) the tribunal or the court or other appellate body orders otherwise.

The above quoted section results in an appeal from a Tribunal operating as a stay unless it is expressly provided to the contrary in the *Real Estate and Business Brokers Act*, R.S.O. 1990 Chapter R.4.

Section 9(9) of the *Real Estate and Business Brokers Act* above reads as follows:

9.(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.

In the matter of *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* (1987) 38 D.L.R. (4th) 321, the court adopted a 3-stage test for courts to apply when considering an application for a stay. This decision was followed in *RJR-Macdonald Inc. v. Canada (A-G)* (1991) 82 D.L.R. (4th) 385 at 405.

FIRST TEST

A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.

SECOND TEST

It must be determined whether the Applicant would suffer irreparable harm if the application were refused.

THIRD TEST

An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

ANALYSIS:

In terms of Section 9.(9) of the *Real Estate and Business Brokers Act*, the decision of the Tribunal dated March 31, 2005 takes immediate effect and an appeal from that decision does not operate as a stay of such decision. However, the Tribunal may grant a stay of the decision until the disposition of the appeal.

The motion now before this Tribunal is for an order staying its decision of March 31, 2005, pending disposition of the Applicant's appeal.

The Tribunal will now consider each of the tests referred to above and in so doing will apply those tests to the facts presented in this matter.

Consideration Of The First Test

The House of Lords held *American Cyanamid Co vs. Ethicon Ltd.* [1975] A.C. 396, that for an appellant to meet this first test it must satisfy the Court that there is a serious question to be tried, as opposed to a frivolous or vexatious claim. The decision in the *American Cyanamid* case has been followed on this particular point in many Canadian cases and is followed by this Tribunal in this matter.

In the matter of *RJR MacDonald Inc. vs. Canada* (A-G) 111 D.L.R. (4th) 385, heard before the Supreme Court of Canada on March 3, 1994, it was held that there are no specific requirements which must be met in order to answer the question as to what is a serious question to be tried. The threshold is a low one.

The Registrar has the burden of proving the existence of facts which afford reasonable grounds for his belief that the Applicant's registration should be revoked under section 6(1)(b) of the Act. The Registrar based his proposal on the past conduct of the Applicant giving rise to reasonable grounds for his belief that the Applicant will not carry on business in accordance with law, and with honesty and integrity.

In regard to the John Garland Boulevard property the evidence placed before the Tribunal by the Registrar and accepted by the Tribunal was that documents obtained by the Registrar from the Applicant indicated that the above property was sold to Prathiba Rath, who purchased it from the Royal Bank of Canada at the sum of \$107,000.00. The documents obtained from CIBC, which was to provide financing in regard to the transaction, reflected that the property was sold for \$139,000.00 (not for \$107,000.00) and the owner was Prathiba Rath (not the Royal Bank of Canada). Documents inspected at the Registry Office reflect the Royal Bank of Canada as transferor of the property, the purchaser as Sameer Thakur, the Applicant's son, and the purchase price as \$139,000.00 with a mortgage registered in favour of CIBC Mortgages Inc. in the amount of \$123,227.00.

Mortgage financing was granted by CIBC Mortgage Inc. based on a sale price of \$139,000.00 from Rath, who in fact never obtained legal title to the property. The mortgage financing granted by CIBC Mortgage Inc. was greater than the \$107,000.00 consideration under the purchase and sale agreement between the Royal Bank of Canada and Rath. There was no indication in the Registry Office's records that Sameer Thakur paid any consideration to Rath, nor that Rath had held title to the property or of any assignment of the agreement of purchase and sale. Additionally, on the Registry documents Rath's name is crossed out and Sameer Thakur's name written in while the

sum of \$107,000.00 had been altered to read \$139,000.00. The result was that CIBC Mortgages granted a mortgage based on a purported selling price of \$139,000.00 whereas, in fact, the property was sold at \$107,000.00.

In regard to the property at 15 Heatherside Court once again documents were obtained from CIBC by the Registrar. Among such documents was an agreement of purchase and sale indicating Sameer Kulkani as vendor and Roger Gaio as purchaser with a purchase price of 170,000.00. Further documents obtained by the Registrar from the Applicant included an agreement of sale of this property reflecting Prathiba Rath as Purchaser of the property and the Laurentian Bank of Canada as vendor with a purchase consideration of \$137,000.00. A search of the records of the Registry Office revealed the vendor of the property was the Laurentian Bank of Canada and the purchase consideration was \$137,000.00, and that Rath's name as Purchaser had been crossed out and Sameer Kulkani's name as purchaser inserted. Also registered on title was a mortgage in favour of CIBC for \$102,750.00 with the mortgagee as Kulkani. CIBC had refused to grant a higher amount of mortgage financing based on \$170,000.00. The transaction in fact closed on the sale amount of \$137,000.00 with a mortgage placed on the property at \$102,750.00 given the inconsistencies found by CIBC.

CIBC, when it observed the inconsistencies in documents provided to it by the Applicant did not grant a mortgage amount commensurate with the false documents including a falsified agreement of purchase and sale supplied by the Applicant to CIBC. If the falsified agreement that been accepted and acted upon by CIBC mortgage financing in an amount greater than the actual purchase price of the property would have been obtained.

Insofar as the property at 475 Bramalea Road is concerned documents were obtained from the Applicant showing Prathiba Rath as the purchaser of the above property and the vendor as Scotia Mortgage Corporation under a Power of Sale. The Applicant was acting for Rath as her broker. The agreement of sale obtained by the Registrar further reflected the sale price of the property as \$112,000.00. A search of the records at the Registry Office revealed that the sale price, in typewritten form, of \$118,000.00 had been crossed out and \$145,000.00 inserted as the sale price. The vendor was noted as the Montreal Trust Company of Canada and the purchaser as Mahesh Thakur. Rath's name as purchaser had been crossed out and Mahesh Thakur's name written in its place. There was no assignment or transfer from Rath to Mahesh Thakur.

The mortgagor on title was noted as Mahesh Thakur and the mortgagee as Scotia Mortgage Corporation. The amount of the mortgage was \$133,762.50, which is greater than the \$118,000.00 purchase price reflected on the agreement obtained from the Applicant.

While the threshold is a low one, and considering whether the first test has been satisfied in that there is a serious question to be tried, the Tribunal is faced with an unusual situation in this matter for the Applicant did not adduce any evidence before the Tribunal other than his own testimony in chief. It is noted that at the conclusion of the

Applicant's examination-in-chief, before allowing himself to be cross-examined and without calling any person or persons to testify in support of his position he withdrew his appeal. It would be helpful to quote from the decision of the Vice-Chair at the hearing in which she stated as follows:

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.

The evidence presented by the Registrar at the hearing was accepted by the Vice-Chair. The testimony of the Registrar's various witnesses was not disturbed by the Applicant. The evidence presented by the Registrar is convincing and credible and shows deceitful practices adopted by the Applicant. Fraudulent agreements were created at inflated prices resulting in financial institutions granting financing at amounts greater than the actual purchase prices. The fact that the Applicant, quite apart from what is stated immediately above, failed to introduce any independent evidence to support his position, failed to cooperate with the Tribunal in furnishing information of the whereabouts of Rath so as to enable the Tribunal to seek and obtain a fair and true picture of Rath's position in the various transactions, failed to allow himself to be cross-examined and coupled with the Applicant's withdrawal of his appeal leaves the Tribunal of the opinion that the Applicant's defence to the Registrar's Proposal is frivolous and vexatious and that he has not met even the low threshold required to satisfy this first test.

Consideration Of The Second Test

The Registrar has conceded that this test has been met by the Applicant.

Consideration Of The Third Test

The third test to be applied was described by Beetz J. in *Metropolitan Stores (MTS) Ltd. vs Manitoba Food & Commercial Workers, Local 832* (1987), 38 D.L.R. (4th) 321 at page 334 as:

A determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The balance of inconvenience and public interest considerations must be considered. It was held in *Ainsley Financial Corp v. Ontario Securities Commission* (1993) 106 D.L.R. (4th), 507 at page 530 that:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

The *Act* that regulates the real estate and business brokers industry is a consumer protection statute and considerations of public interest are of the utmost importance and were no doubt behind the rationale for legislating that *Act* into existence.

The Tribunal, appointed as such in terms of the *Act*, is empowered to ensure that the public interest is safeguarded. The Registrar has a duty to deal with brokers and salespersons under the *Act* whom he reasonably perceives to be acting contrary to the public interest and who may cause harm to the consumer. Considerations of public interest are without doubt of great importance having regard to the tenor of the *Act*.

The uncontroverted evidence in this matter is that the Applicant demonstrated undeniable conduct that affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. If the Applicant were to be allowed to continue in the business of a broker or salesperson pending the outcome of his appeal he may, in the light of his recent conduct, cause serious harm to the consumer and, accordingly, a stay should not be granted to the Applicant.

Accordingly, the Tribunal is not of the opinion that the third test has been met by the Applicant.

DECISION:

For all the reasons stated above, and pursuant to the authority vested in it by section 9.(9) of the Act, the Tribunal directs that the Applicant's motion for a stay of the Tribunal's decision dated March 31, 2005 until the disposition of the Applicant's appeal to the Divisional Court, be and is hereby rejected.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: July 26, 2005

File: 2653.rebba.Motion.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.



MARIA CASALE

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: CARL DOMBEK, Chair

APPEARANCES: VICTOR FREIDIN, Counsel
Representing the Applicant

ROBERT A. MAXWELL, Counsel
Representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
HEARING: July 5, 2005 Toronto

ADJOURNMENT

WHEREAS a hearing of a motion in the above matter commenced on July 5, 2005;

AND WHEREAS the Tribunal appointed July 12, 13 and 14, 2005 for an oral hearing:

TAKE NOTICE, the hearing in this matter is adjourned, *peremptory against both parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, August 8, 2005 and will recommence on Wednesday August 10, 2005 and is to continue if necessary on August 12, 2005, starting each day at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: July 6, 2005

CHIARA AFFRUNTI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO GRANT REGISTRATION

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

APPEARANCES:

NO ONE APPEARING for the Applicant, Chiara Affrunti

ROBERT MAXWELL, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING:

May 10, 2005

TORONTO

ORDER

WHEREAS, a Notice of Proposal was issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar"), dated December 15, 2004, to refuse to grant registration as a real estate salesperson to Chiara Affrunti (the "Applicant").

AND WHEREAS the Applicant appealed the Notice of Proposal to the Tribunal;

AND WHEREAS the Applicant's appeal was set down for hearing before the Tribunal on May 10, 2005 at 9:30 a.m. in Toronto;

AND WHEREAS Robert Maxwell, counsel for the Registrar, was present at the hearing on May 10, 2005;

AND WHEREAS no one appeared for the Applicant who was duly notified of the hearing date by Notice of Hearing, dated February 3, 2005;

AND WHEREAS the Applicant had communicated to the office of the Registrar, *Real Estate and Business Brokers Act* that she would not be attending the hearing of her appeal;

AND WHEREAS, Counsel for the Registrar moved for an order dismissing the Applicant's

appeal as abandoned;

NOW THEREFORE this Tribunal orders that the appeal of Chiara Affrunti be and the same is hereby dismissed as abandoned.

LICENCE APPEAL TRIBUNAL

Irvin Sherman, Vice-Chair

Released: May 12, 2005

file name: 2753.Affrunti.REBBA.order.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



MICHAEL DESMOND BISTANY &
MICHAEL D. BISTANY REALTY LTD.

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 THE REGISTRATION
OF MICHAEL D. BISTANY REALTY LTD. AND TO REFUSE TO
RENEW THE REGISTRATION OF MICHAEL D. BISTANY

TRIBUNAL: IRVIN H. SHERMAN Q.C., VICE CHAIR

APPEARANCES: KENNETH S. MARLEY, Counsel representing the Applicants

ROBERT MAXWELL, 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:

March 29 and 30, 2005

Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND

By Notice of Proposal dated July 8, 2004 the Registrar of Real Estate and Business Brokers (the Registrar), acting under subsection 8 (2) of the *Real Estate and Business Brokers Act* (the Act) proposed to refuse to renew the registration of Michael Desmond Bistany (the Applicant) and to refuse the registration of Michael D. Bistany Realty Ltd. (the Company) as brokers under the Act.

It was the Registrar's opinion that the Applicant was not entitled to registration under section 6 of the Act because (a) having regard to the Applicant's financial position, he could not reasonably be expected to be financially responsible in the conduct of his business and (b) his past conduct afforded reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty.

The Registrar further opined that the Company was not entitled to registration under section 6 of the Act because (a) having regard to the Company's financial position, it could

not reasonably be expected to be financially responsible in the conduct of its business and (b) the past conduct of its director and president (the Applicant) afforded reasonable grounds for belief that the Company's business would not be carried on in accordance with law and with integrity and with honesty.

The Applicant became a registered salesperson under the Act in December 1982. He became a broker sometime before May 1983 when the Company became registered as a broker under the Act. At all material times the Applicant has been the president and director of the Company.

The Applicant's registration, expired on December 30, 2004, was subject to the following terms and conditions imposed upon him on December 20, 2000 under which he agreed:

- (a) to voluntarily surrender his registration as a broker if in the opinion of the Registrar, he breached any of the terms and conditions he consented to or if he breached any of the terms and conditions prescribed by Regulation 986, as amended, and made under the Act.
- (b) that his registration could not be transferred without the prior authorization of the Registrar, which would not unreasonably be withheld. Should the Registrar authorize the transfer of his registration to a new broker, then this broker must acknowledge and agree in writing to abide by these terms and conditions.
- (c) to use his best efforts to ensure that all unsatisfied judgments are satisfied with proof with the next renewal application.
- (d) that if the judgments were not satisfied by the time of the next renewal application, then he would provide a sheriff's report with the subsequent application.

The Applicant also agreed that:

- (a) the Registrar may take further administrative action, including the making of a proposal to revoke registration, arising from any matters that have occurred or may occur relating to his honesty and integrity or financial position.
- (b) the terms and conditions shall remain in place until he satisfies the judgments against him; and
- (c) he has obtained or has had the opportunity of obtaining independent legal advice with respect to his consenting to the terms and conditions imposed against him.

By the end of 2000 there were four outstanding judgments levied against the Applicant in the aggregate amount of \$64,378 plus interest, prejudgment interest and costs. When the Applicant reapplied for registration in December 2002 he produced a sheriff's certificate that showed that there were still four outstanding judgments against him. This time, there

were three new judgment creditors. The aggregate amount of these judgments was \$38,935 plus costs. In August 2003 the Registrar obtained a new sheriff's certificate that disclosed that the Applicant still had four judgments against him. Two of the judgment creditors were previous creditors. These judgments amounted to \$209,666.

The Applicant met with Brian Schlotzhauer, the Assistant Registrar of the Real Estate Council of Ontario (RECO) and with Margaret Marshall, a registration officer, at the RECO office in Toronto on September 3, 2003 at which time they discussed the reasons why there were unsatisfied judgments levied against the Applicant, his efforts to repay these judgments and whether there were any documents to support the Applicant's repaying the whole or part of the judgments. The Applicant advised that he and several others were associated with a business called Windsor Auto Trend, which commenced operation in 1996. This business closed in 2000 when seven business associates declared bankruptcy. Instead of declaring bankruptcy, the Applicant decided to assume the liabilities of Windsor Auto Trend. He borrowed money to repay some of these liabilities and to finance a lawsuit in the Ontario Superior Court relating to his involvement with Windsor Auto Trend.

RECO obtained another Sheriff's certificate against the Applicant and the Company in March 2004, which revealed results similar to the 2003 certificate. By the date of the Notice of Proposal the Applicant had not provided the Registrar's office with any documentation relating to his satisfying the judgments referred to in the 2003 and the 2004 sheriff's certificates.

In December 2002 a RECO inspector attended the Company's office and inspected the Company's trust accounts and its general account. Of particular interest was a \$100,000 trust deposit received from 1185696 Ontario Ltd. (1185696) pursuant to an agreement of purchase and sale relating to a commercial property in Tecumseh, Ontario. This deposit was made on November 13, 2002. Nine days later, \$100,000 was deposited into the Company's general account. The Applicant advised the inspector that the source of these funds was his personal money. He produced a photocopy of a CIBC bank draft payable to the Company, which the Applicant claimed supported the deposit.

The inspector examined the photocopy of the bank draft and found certain information illegible, including the name of the remitter. The inspector subsequently asked the Applicant to provide one page from the on-line bank information relating to the trust account that was missing. When the Applicant provided the missing page, the inspector inquired about a trust cheque in the amount of \$100,000 that was written on November 22, 2002 (cheque no. 175). The Applicant told the inspector that this trust cheque represented the disbursement of the 1185696 deposit from the trust account to an interest bearing Guaranteed Term Investment. (GTI). The Applicant thereupon produced a letter from the National Bank of Canada in which the bank acknowledged holding a 30 day \$100,000 GTI in the Company name in trust for 1185696 and another person.

The inspector noted that vendors and purchasers would agree in writing to loan the Applicant and the Company all or part of the deposit monies relating to a proposed sale of

realty before closing and that the Applicant would be personally responsible for such funds if the sale did not close. This was contrary to the usual industry practice wherein brokers held deposit monies in trust pending the sale or termination of the agreement of purchase and sale. Upon completion of the inspection, the inspector relayed the results of the inspection to the Manager of Inspections and Investigations.

An investigator was subsequently appointed under section 15 of the Act to investigate the business dealings of the Applicant and the Company in order to ascertain whether subsection 20 (1) of the Act was contravened. Under this subsection a broker is mandated to disburse trust monies only in accordance with the terms of the trust.

The Applicant, responding to a request made to him by the inspector, faxed a copy of the agreement of purchase and sale relating to the Tecumseh commercial property, a copy of cheque no. 175 and a copy of the GTI certificate to the inspector. The inspector thereupon executed search warrants on the National Bank and on a branch of the CIBC that issued the \$100,000 bank draft.

The inspection yielded the following information:

- the Tecumseh commercial property was sold for \$3,000,000 with the deposit of \$100,000 payable to the Company in trust pending completion or other termination of the agreement of purchase and sale;
- the deposit money was placed in the Company's trust account;
- the agreement of purchase and sale was amended on November 22, 2002 so as to provide for the Company to place the \$100,000 deposit in an interest bearing instrument on or before November 29, 2002 with interest thereon accruing to the benefit of the purchaser;
- the original copy of cheque no 175 showed the same information as the cheque faxed by the Applicant to the inspector except for the fact that "white-out" was visible on the original copy of the cheque under the Reference Notation;
- the microfiche copy of the cheque obtained from the National Bank showed all the pertinent information except for the fact that the Reference Notation read "Transfer to Gen Account" rather than "Transfer to GTI Account" and "Consumer #4¹ to 185696 Ontario Inc." which appeared on both the faxed and original copies of the cheque;
- when the Applicant drew cheque no. 175 on the Company trust account on November 22, 2002, the balance of the trust account was \$2,372.94;
- on November 22, 2002 a \$100,000 deposit was made to the Company's general account and the deposit slip indicated a notation of "Transfer from Trust Acct." and the instrument supporting the deposit was the above-referred cheque.
- prior to his depositing the \$100,000, the Company general account had a balance of \$42.32

¹ Names and items of identifying information have been deleted throughout in accordance with the requirements of the *Freedom of Information and Protection of Privacy Act*.

- the Applicant used the monies to pay certain personal and business debts.
- on the day prior to the purchase of the GTI, the general account was overdrawn by \$413.72 and on the day following the purchase of the GTI, the general account had a balance of \$206.92
- there was no activity in the trust account from November 22, 2002 until November 30, 2002;
- the Company purchased the GTI on November 29, 2002 by means of a CIBC bank draft. The name of the remitter was Dr. Donald Carom.
- the Company used the funds from the CIBC bank draft remitted by Dr. Carom to purchase the GTI on November 29, 2002. The deposit money given by 1185696 was depleted by November 28, 2002. The deposit money was transferred to the general account on November 22, 2002 and then used by the Applicant to pay personal and business debts.
- the inspector met with an authorized representative of 1185696 who confirmed giving the Company the \$100,000 deposit cheque while stating that this money was to be held in trust at all times and was to be used for no other purpose.

The Registrar opined that the disbursement of the \$100,000 deposit money from the Company trust account to the general account on November 22, 2002 was contrary to the terms of the Tecumseh commercial property agreement of purchase of sale and, further, was violative of subsection 20(1) of the Act.

On March 18, 2003 the Applicant and the Company were each charged with one count of breach of trust contrary to subsection 20(1) of the Act and with one count of obstructing a person appointed to make an investigation under s 15 of the Act by altering a cheque relevant to the subject matter of the investigation in an attempt to conceal the true information on the cheque.

In March 2004, the Registrar received a complaint from Consumer #2 who was acting on behalf of his mother, Consumer #1, who was the Applicant's client. The Applicant had previously assisted Consumer #1 with the sale of two properties.

When the sale of the second property closed in May 2001, Consumer #1 was to receive the sum of \$39,000. She loaned the Applicant \$35,000. This loan was arranged prior to closing. The Applicant gave Consumer #1 a promissory note on Company stationery, which provided that the loan would be repayable by monthly interest installments of \$350. The note became due on July 1, 2002.

Consumer #1 subsequently loaned the Applicant a further \$28,000 that was secured by a promissory note written on Company stationery which provided for monthly interest payments of \$175. This note also became due on July 1, 2002.

The Applicant failed to repay the loans. The monthly interest payments were sometimes paid sporadically and sometimes were not in the required amounts. Consumer #1 repeatedly demanded payment from the Applicant without satisfaction. The Applicant

assured Consumer #1 that the payments would be forthcoming. He stated he needed the money to finance the litigation relating to the failed automobile business.

By Supplementary Notice of Proposal dated February 5, 2005 the Registrar stated that the Applicant went bankrupt in November 2004 with debts in excess of \$1.5 million dollars and with assets of \$500. The creditors included the Canada Revenue Agency, various professionals, corporations and individuals. The Applicant had borrowed money from a number of people including clients. He used his professional relationship and the reposing of trust by his clients to borrow money from the clients. He induced these clients and former clients to loan him money on the false promises regarding fictitious investment schemes.

The Company's registration terminated on November 16, 2004. The Company is no longer a registrant. On December 8, 2004 the Applicant transferred his registration to Integrity Realty Ltd.

The Registrar stated that the Applicant's bankruptcy constituted a further reason why he ought not to be registered. It was clear that the Applicant could not operate in accordance with law and with integrity and with honesty. The bankruptcy was indicative of the fact that the Applicant could not reasonably be expected to be responsible in the conduct of business.

By Further Supplementary Notice of Proposal dated March 10, 2005 the Registrar referred to the Applicant's bankruptcy and the fact that on March 4, 2005 the Applicant and the Company were each convicted in Provincial Court of breach of trust under subsection 20(1) of the Act and of obstructing an investigation under subsection 15 (3) of the Act. The Registrar again stated that the Applicant and the Company had not exhibited the requisite degree of financial responsibility to carry on as registrants under the Act. Their past conduct afforded reasonable grounds to believe that the Applicant and the Company would not carry on business in accordance with law and with integrity and with honesty.

A PRELIMINARY MATTER

It was agreed by counsel for the Registrar and the Applicant that this appeal would relate solely to the Applicant. The Company's registration has expired. The Company's appeal is therefore dismissed as abandoned.

REQUEST FOR ADJOURNMENT

At the outset of the appeal, the Applicant requested an adjournment because he has appealed the convictions registered against him in the Provincial Court on March 4, 2005 on the basis, inter alia, that the Justice of the Peace misconstrued the evidence before her. The Applicant said it was only fair to grant him the adjournment. No date has yet been set for the hearing of the appeal.

The Registrar's counsel submitted that that request for adjournment be denied. Counsel stated that the Registrar has appealed the sentences levied against the Applicant and the Company. The Applicant has not sought a stay of the Registrar's decision. The Tribunal may rely upon the convictions. It cannot go behind the convictions. It is not the function of the Tribunal to retry the Provincial Offences Court case. The issues faced by the Tribunal are separate and distinct from the issues heard in the Provincial Offences Court.

The Tribunal dismissed the request for an adjournment. The case law is replete with decisions denying a party an adjournment pending a hearing or a decision in a collateral matter. In *Basdeo v Canada (MEI)* [1984] F.C.J. NO. 506 (Quicklaw) the Federal Court of Appeal refused to grant an applicant for judicial review an adjournment in a case where the Applicant was awaiting a decision of the Supreme Court of Canada on a collateral matter. In *Toronto Community Housing Corp. v. Graves*, 2004 CanLii 47794 the Superior Court of Justice – Divisional Court upheld a decision of the Ontario Rental Housing Tribunal refusing to grant the tenant an adjournment of her appeal pending the trial of a criminal matter involving the tenant in a matter that was related to the hearing before that tribunal. Vice-Chair Derek Israel, in the recent case of *Colatosti* (LAT 2004), refused to grant the Applicant an adjournment of his appeal from a decision made by the Registrar of Real Estate Brokers pending the hearing of charges laid against the Applicant under the Provincial Offences Act. The learned Tribunal member relied on the case of *Minister of Employment and Immigration v. Lundgren* [1993] 1 F.C. 187 (T.D. where Mr. Justice Dube stated:

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.

There are no extraordinary circumstances present in this case. The Applicant's right to a full and fair hearing in the Provincial Offences Court is not at issue. The issues before this Tribunal are separate and distinct from the issues before the Provincial Offences Court. The Tribunal, in the exercise of its mandate to hold an appeal hearing in an expeditious manner and having regard to the public interest, denied the Applicant's request for an adjournment.

SCOPE OF QUESTIONING

An issue arose during the examination in chief of the Applicant as to the nature and scope of the questions that could be put to him with respect to his convictions in the Provincial Offences Court.

Kenneth S. Marley, counsel for the Applicant, submitted that the legal issues in the Court matter have long since been resolved. His conviction is under appeal. It is only fair that the Applicant be permitted to speak anew as to issues before the Court that are relevant to the issues before this Tribunal. Otherwise the Applicant would be denied due process. It is important for the Tribunal to hear all of the Applicant's evidence on these matters.

Robert Maxwell, counsel for the Registrar, submitted that the Applicant can be asked questions about matters that were not before the Provincial Offences Court such as his bankruptcy and his relationship with his creditors. He cannot re-litigate. He cannot now explain away the evidence he gave at Court. Mr. Maxwell relied on the decision of the Ontario Superior Court of Justice – Divisional Court in the case of Ontario (*Motor Vehicles Act, Registrar*) v *Jacobs* [2004] O.J. No. 189 (Quicklaw) (the *Jacobs* case) in support of his submission.

The Tribunal found Mr. Maxwell's submissions convincing and determinative of the issue. In the *Jacobs* case, Mr. Jacobs had been found guilty of fraud under the *Criminal Code* for odometer tampering. The Registrar revoked his registration. On appeal, the Tribunal held that Jacobs was responsible for the conduct of his employees and the "bad paperwork" but that his new business systems justified considering the criminal convictions in a new light. In allowing the appeal brought by the Registrar, the Divisional Court held that the Tribunal exceeded its jurisdiction by re-litigating Jacob's criminal intent and considering the criminal intent in a new light in which he was not personally blameworthy.

The Court held that the Tribunal was entitled to look at all of the circumstances that gave rise to the criminal charges for the purpose of mitigation and not for the purpose of re-litigation. In *Jacobs*, the Tribunal attempted to re-litigate the *mens rea* aspect of Mr. Jacob's defense. In the cases of *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)* [2003] 3 S.C.R. 77 and *Ontario v Ontario Public Service Employees Union (O.P.S.E.U.)* [2003] 3 S.C.R.149 the Supreme Court of Canada refused those persons who had been convicted of criminal offences to re-litigate their guilt before administrative tribunals. It can be discerned from these later two cases that administrative tribunals are also not permitted to re-litigate the *actus reus* aspect of a prior criminal conviction that may be relevant to the issues before such tribunals.

This Tribunal, guided by the principles of law enunciated in the aforementioned cases, permitted the Applicant to give oral evidence on issues relating to his Provincial Offences Court convictions for the purpose of mitigation and not re-litigation.

THE EVIDENCE

Consumer #1

Consumer #1, who now lives in senior citizen housing, retained the Applicant to assist her with the sale of two properties. These properties closed uneventfully. Consumer #1 was

satisfied with the Applicant's role as broker. She had savings of \$63,000 which she ultimately loaned to the Applicant and which have not been repaid. Consumer #1 initially loaned the Applicant the sum of \$35,000. She subsequently loaned him a further \$28,000. These loans were secured by two promissory notes and were payable interest only monthly. The first note provided for monthly interest payments of \$350 and the second note provided for monthly interest payments of \$175. Both notes were renewed. They became due and payable on July 1, 2002.

Consumer #1 stated that she has received most of the interest payments. She had to repeatedly demand payment from the Applicant who sometimes made lesser monthly payments or was late in making the payments. She stated that she loaned the Applicant the money because she trusted him. The Applicant assured Consumer #1 that he was awaiting payment of a large amount of money. In cross-examination stated that she probably knew of the Applicant's prior involvement in an unsuccessful automobile business. Consumer #1 stated that she now needs the money she loaned to the Applicant.

Consumer #2

Consumer #2 is Consumer #1's son. Consumer #2 was not initially privy to the two loans his mother made to the Applicant. He subsequently learned of these loans. He recalled his demanding payment of these loans on his mother's behalf on at least six occasions. He was always assured that the payments would be forthcoming. He knows of the Applicant's bankruptcy and of his being involved in the automobile business.

Consumer #3

Consumer #3 retained the Applicant's services to help him buy investment properties. He had no qualms about the real estate services the Applicant rendered him.

Consumer #3 stated that in November 2002 the Applicant approached him 2000 looking for money to form part of a "floating fund" that the Applicant operated for bridge financing purposes. Consumer #3 advanced the aggregate sum of \$145,000 to the Applicant in a series of transactions over the next two years. Most of these loans bore interest at the rate of 12% per annum. Some were for a one-year period, while others were for a shorter period of time.

Consumer #3 recalled the terms of each of the loans he made to the Applicant. He related the efforts he made to collect these loans and of the unfulfilled promises he received regarding repayment of the loans. The pressures associated with his unsuccessful attempts to collect the monies he loaned the Applicant affected his personal life.

Consumer #3 sued the Applicant in early 2003 and obtained a default judgment against him and the Company in the amount of \$151,136.98 plus costs. Consumer #3 subsequently obtained a garnishee order and was successful in garnisheeing monies that other brokers owed the Company. The Applicant sought, but was ultimately unable to stave

off the garnishment of the receivables through negotiations with Consumer #3 and his lawyers. Consumer #3 was able to realize over \$36,000 through his garnishment of the receivables. The Applicant went bankrupt on November 2004 owing Consumer #3 and his spouse approximately \$115,000.

Consumer #3 stated that it was in February 2004 when the Applicant told him that the loan proceeds did not form part of a million dollar pool of money used for bridge financing. The loan proceeds were used to pay the Applicant's personal, legal and business debts. Consumer #3 was upset at the fact that the Applicant did not use the loan proceeds for the purpose he indicated. Consumer #3 stated that he would not have loaned the money had he known the monies would not form part of the bridge financing pool of funds. He would not have made a personal loan to the Applicant. Consumer #3 stated that he loaned the money to the Applicant as a consequence of the trust that had built up between him and the Applicant as a result of their professional relationship and because of the reputation the Applicant's family had in their community.

During cross-examination Consumer #3 admitted that he never asked the Applicant for proof of the funds he allegedly had in the bridge financing pool. He did not know the Applicant prior to the Applicant assisting him with his real estate transactions. He viewed the Applicant's entreaties to invest funds in the bridge financing pool as a lucrative investment opportunity that involved little risk because there was allegedly one million dollars in the pool. His money would be returned to him on one month's notice. When asked if the high rate of return he expected to receive on his investment reflected a high degree of risk, Consumer #3 replied that he was deceived, that he did not have the opportunity of making an informed decision and that the Applicant lied to him for four years. Consumer #3 admitted that he came to know of the Applicant's involvement with Windsor Auto Trend. The Applicant told him and he believed that the Applicant was involved in significant litigation regarding Windsor Auto Trend. It was then he learned that the Applicant used the loan proceeds in order to stay in business.

Sandra Bistany

Sandra Bistany is the Applicant's sister-in-law who, at all relevant times, was the office administrator for the Company. It was part of her duties to prepare cheques, make deposits and to transfer funds from the trust account. The Applicant had the signing authority for the trust cheques.

Ms Bistany testified that several people who loaned the Applicant money would often come to the office and complain to her about the Applicant's default in his loan obligations. Amongst these persons were Consumer #1, Consumer #3, family members and friends. Consumer #1, Consumer #3 and others were visibly upset at the Applicant's default. Ms Bistany told these people that she would express their concerns to the Applicant who told her that he would get back to them. Sometimes the Applicant would not respond to Ms Bistany's comments.

Ms Bistany was shown a copy of cheque no. 175 and the microfilmed copy of this cheque. These cheques form part of Exhibit 5 at the hearing. This cheque, drawn on the Company's trust account, bears date November 22, 2002 and is the amount of \$100,000. It is payable to the Company. Ms. Bistany denied altering the cheque by applying "white out" to it. She did not know how the notation "Consumer #4 to 1185696 Ontario Inc." became affixed to the cheque. She stated that it was the Company's usual practice to transfer trust monies from the trust account to the general account when the deal closed and a letter arrived from the lawyer confirming the sale. The Tecumseh commercial property deal was not scheduled to close on November 22, 2002.

Ms Bistany stated that she has known the Applicant for 24 years. The Applicant and his two brothers have been in the real estate business for some time. At one time they had a busy office. The Applicant's family had a good name in the Tecumseh community. She knew that the Applicant was involved with Windsor Auto Trend and that he has to go to court over this matter. He told her that he needed money to fund his lawsuit. Ms. Bistany has not worked with the Applicant since 2003 and was not aware of the particulars of his repaying any of his debts.

Cheque no. 175 was prepared because the agreement of purchase and sale had been amended. Ms Bistany stated that she did not prepare the amending agreement and that it was not prepared when she prepared cheque no 175. It was her belief that the amending agreement was backdated and that it was prepared to cover up an improper transfer of funds from the Company's trust account to its general account

During her cross-examination Ms Bistany conceded that her relationship and her husband's relationship with the Applicant was not as strong as it once was. She and her husband have left the Applicant's office. The Company's business was faltering and the Applicant talked of going bankrupt.

The Applicant and the Company were tried in the Provincial Offences Court in Windsor on November 4 and 5, 2004. The case was reported the next day in the local newspaper. Ms Bistany read that the Applicant had apparently stated in Court that she made a false document. Ms Bistany thereupon called RECO. The court case was reopened. Ms Bistany gave evidence at the reopening of the court case in which she denied making or being party to the proffering of false documentation to RECO.

Brian Schlotzhauer

Brian Schlotzhauer is the Assistant Registrar for RECO where he manages the registration and education departments. It is part of his duties to review applications for registration and to make recommendations regarding an Applicant's suitability for registration. Mr. Schlotzhauer stated that he was familiar with the Applicant's application for re-registration. At the hearing Mr. Schlotzhauer reviewed the Applicant's registration history, the contents of the various sheriff's certificates obtained by RECO with respect to the registrations, the efforts made by the Applicant to satisfy in whole or in part the judgments levied against him

as well as the terms and conditions imposed upon the Applicant's registration. Mr. Schlotzhauer stated that the imposition of the terms and conditions gives the Registrar some level of comfort that the registrant is attempting to resolve the issues of concern. He referred to the fact that the Applicant failed to disclose some of the judgments levied against him. It is important for an Applicant to make complete disclosure which otherwise compromises the decision making process. Unsatisfied judgments and the subsequent imposition of new judgments against an Applicant relate directly to the issue of financial responsibility.

Mr. Schlotzhauer referred to the notes of the meeting he had with the Applicant on September 3, 2003, at which time he was unable to get a clear understanding of the events surrounding the issuing of cheque no 175. It was noted that the purchaser signed the amending agreement to the Tecumseh commercial property on November 22, 2002; the vendor signed the amending agreement on November 25, 2002 and the GIT was purchased on November 29, 2002. The inspection results did not match up. There was no direct purchase of the GIT from the trust account.

Mr. Schlotzhauer stated that the Applicant was advised by letter dated September 11, 2003 that the Registrar would be proposing to revoke his registration. In arriving at his decision the Registrar took into account the fact that there were outstanding judgments against the Applicant for some period of time, the amount of the judgments and the issues surrounding the trust account led the Registrar to propose revocation. The Applicant's bankruptcy as well as the convictions registered against him and the Company under ss 20(1) and ss15 (3) of the Act impacted negatively upon the Applicant's financial responsibility, his honesty and integrity and his ability to operate with the law. The trust account is established so as to assure that consumer funds are not at risk.

During cross-examination, Mr. Schlotzhauer stated that there is no statutory definition of an associate broker. The designation of an associate broker arises by administrative policy permitted by the Registrar. Associate brokers are salespersons with the educational achievement of brokers. Associate brokers work for brokers. They do not control the broker's trust account.

There are over 6000 brokers and over 35000 salespersons in Ontario, some of whom have been bankrupt. Mr. Schlotzhauer did not know what percentage of brokers or salespersons have gone bankrupt.

Mr. Schlotzhauer was unaware of any disciplinary matters being taken against the Applicant by either the Registrar or the Windsor Real Estate Board. He conceded that the Applicant responded truthfully when questioned about the judgments against him. He made no attempt to deceive the Registrar when questioned about these judgments. Mr. Schlotzhauer stated that the Registrar relied on the results of the investigation and the other information found in the Applicant's file when deciding to make the proposal. There was no need to rely on other sources of information.

Mr. Schlotzhauer stated that the investigation showed that the Applicant borrowed \$100,000 from his trust account for the period November 22, 2002 until November 29, 2002. The Applicant was not authorized under the amending agreement to appropriate trust monies for his own use for the one-week period. The Applicant borrowed money from Dr. Carom on November 29, 2002. He thereupon purchased the GIT certificate with these funds. The Applicant's client's money was at risk during this period. Neither the purchaser nor the vendor suffered financially as a result of the Applicant's conduct. When questioned if he knew that the Applicant told the vendor and purchaser that the money would be in place on November 29, 2002 on the strength of a representation made to him by Dr. Carom, Mr. Schlotzhauer responded that he did not recall speaking to Dr. Carom.

The Company is no longer registered as a broker. The Applicant is not permitted to operate a trust account. Mr. Schlotzhauer was not aware if the Applicant subsequently made any trades as a broker. He was aware that the Applicant is now working as an associate broker with Tecumseh Realty, whose principal is Robert Janisse.

The Applicant would like to sell real estate as an associate broker who does not control or possess a trust account. Mr. Schlotzhauer stated that a conditional registration on the facts of this case would be inappropriate. It would be impossible for a broker to monitor all of the Applicant's activities. It would be difficult for the Registrar to monitor the relationship between the Applicant and the broker.

Mr. Schlotzhauer stated that some undischarged bankrupts are permitted registration. He did not know how frequently brokers subject to inspections. There are currently 22 active proposals relating to 44,000 registrants.

Michael Desmond Bistany, the Applicant

The Applicant is a 43-year-old married man with three teenage children. He is the significant breadwinner for his family. Beginning in 1993 the Applicant invested heavily in certain automotive businesses in Windsor. He was corporate vice president whose duties stemmed around the financial aspects of the businesses. The Applicant commenced litigation in July 1998 against former business associates seeking over two million dollars in damages from them. His trial has been scheduled to begin in February 2006.

The Applicant stated that he has repaid several of the judgments referred to in the Notice of Proposal. He has made payments on other judgments. He admitted owing Consumer #3 and his spouse approximately \$115,000.

The Applicant confirmed his business relationship with Consumer #1 with whom he has been friendly for 6 or 7 years. He stated he paid Consumer #1 interest on her loans in the amount of 12 percent. The loans were renewed yearly. He stated he made his interest payments monthly on time with a few exceptions. He stated that all interest payments were made until October 2004. He admitted owing Consumer #1 the sum of \$63,000.

The Applicant did not know Consumer #3 or his spouse before he was their realtor. He acknowledged borrowing money from Consumer #3 and his spouse in the manner and in the terms stated by Consumer #3. He stated that Consumer #3 and his spouse made an investment with him, which yielded a return to them of 12 percent per annum. He denied telling Consumer #3 that his monies formed part of a mortgage pool of funds with a capital of one million dollars. He stated from the beginning that the money advanced to him was a loan. He told Consumer #3 of his involvement with the automobile business and the fact that he was involved in significant litigation relating to this business. He admitted that he was often in arrears of repaying the loan to Consumer #3. The Applicant denied promising to repay the loan to Consumer #3 in full by the end of 2002. He further denied Consumer #3's expectation of meeting him in his office on December 24, 2004 at which time he was to repay the loan. The Applicant stated that he went bankrupt in November 2004 after consulting his accountant and lawyer because a major portion of his income was being garnisheed and he just couldn't make any more payments.

The Applicant stated that cheque no. 175 was typed by Sandra Bistany at his direction as a consequence of the purchaser of the Tecumseh commercial property desiring to have his deposit money place in an interest-bearing instrument.

The Applicant stated that he withdrew as a corporate broker and entered into a business relationship with Robert Janisse (Tecumseh Realty Ltd.) who he has known for many years. He now carries on business from Janisse's house while retaining a small office at his former corporate office. He has no signing authority on any trust account. He is in the processing of closing his corporate accounts. The Applicant expressed his willingness not to operate any trust account and to be employed by and supervised by Mr. Janisse. The Applicant meets with Mr. Janisse three or four times a week and speaks to him daily by telephone. Mr. Janisse is aware of the Provincial Offences Court matter.

The Applicant is concerned that the loss of his license to sell real estate will adversely affect his ability to support his family. Real estate has been his major source of livelihood since he was 18 years of age. The Applicant had no prior involvement with the automobile business until he invested in it. He was not involved in the automobile business on a day-to-day basis. The Applicant related that his Provincial Offences Court case was publicized in the local media, which has hampered his ability to earn an income. He has two sales awaiting closing and four listings. The Applicant has no other employment. He lives with his family in a rented home. The Applicant previously owned this home, which is now owned by one of his former creditors. The Applicant stated that he would be willing to abide by any terms and conditions that may be imposed by the Tribunal on his registration. He has in the past complied to the best of his ability with similar restrictions placed on his registration. He has not been subject to any prior complaints, proceedings or disciplinary matters. No complaints have ever been lodged against him with the Windsor Essex Real Estate Board. The Applicant is a member of the St Vincent de Paul Society and is involved with Easter Seals through the Canadian Legion.

The Applicant stated that after Terry Raffi, the principal behind 1185696, requested that the \$100,000 deposit money be placed in an interest bearing instrument, he drafted an amending agreed that was typed by Sandra Bistany. He denied backdating the agreement. The Applicant stated that he witnessed Mr. Raffi sign the amending agreement on November 22, 2002 and Consumer #4 (the vendor) signed this document three days later. He stated that he did not purchase the GTI with a cheque from his trust account because he needed a paper trail to evidence the purchase of the GTI. Cheque no. 175 was prepared before he learned that the monies he intended to borrow as a third and fourth mortgage on his home with the assistance of David Booth would not be forthcoming on November 22, 2002.

The Applicant, through his counsel, admitted that he could have directly purchased the GTI from his trust account and before the signatures were affixed to the amending agreement. The amending agreement was silent as to the use of the deposit monies for the one-week period commencing on November 22, 2002.

The Applicant stated that he advised Mr. Raffi that the mortgage monies on his home did not come through as planned. The Applicant went to a family friend, Dr. Donald Carom, who stated that he would help the Applicant obtain \$150,000 by November 29, 2002. This occurred after the Applicant learned that the mortgage money would not be obtained on November 22, 2002 but before he spoke to Mr. Raffi. The Applicant told Consumer #4 when the later signed the amending agreement that the mortgage monies he expected to receive had not been advanced and that he was using the deposit money for one week. The Applicant stated that he had promised to pay several people by November 22, 2002 and if he did not it would reflect upon his honesty. He was also in arrears of municipal realty taxes for two years.

Dr. Carom gave \$150,000 to the Applicant in the late afternoon on November 29, 2002. The Applicant immediately deposited that money in his general account and purchased the \$100,000 GTI. He hand delivered a copy of the GTI to Mr. Raffi. He did not verify if the Carom money in fact went into the general account.

When RECO inspector Carolyn Wade visited his office on December 4, 2002, the Applicant was not in receipt of his November bank statements, which he received a few days later. When he received these records he noticed that the sum of \$100,000 was not deposited to his general account. He complied with RECO's request to furnish them with certain November banking records and the sales records relating to the agreement of purchase and sale. When GTI expired after 30 days, the Applicant went to his bank and, at the insistence of his bank manager, a bank draft was prepared payable to Consumer #4 and 1185696. Consumer #4 signed the bank draft and the Applicant then delivered it to Raffi. The Applicant stated that he has repaid the monies loaned to him by Dr. Carom.

Under cross-examination the Applicant admitted that by November 21, 2002 he did not know who was to advance him mortgage monies. He had verbal and written assurances that the mortgage monies would be available. He spent the trust money to repay personal

and business debts. He received Dr. Carom's money on November 29, 2002. He relied on Dr. Carom's oral assurances that money would be forthcoming on November 29, 2002. He acknowledged that his client's money was at risk until he replenished the \$100,000. He repaid the sum of \$75,000 to Dr. Carom in either January or February 2003.

On November 16, 2004 the Applicant filed an assignment in bankruptcy in which he stated that he owed his creditors over \$1,500,000. He had nominal assets of \$500. Amongst the creditors were his mother, brother and sister in law, Consumer #1, Consumer #3 and Dr. Carom. The Applicant acknowledged owing unknown amounts of money to the Canada Revenue Agency. He acknowledged that Consumer #1, and Consumer #3 and his spouse imposed trust in him and that he had a fiduciary obligation to repay them.

The trustee in bankruptcy has taken over the Applicant's Superior Court litigation in which he claims two million dollars from the defendants.

The Applicant acknowledges that he should have assured that the \$100,000 was deposited to his general account on November 29, 2002. He said that it looked like the \$100,000 was missing and that this was not his intent. He did not know that he could have purchased the GTI with a cheque drawn on his trust account. The Applicant was shown two cheques drawn by a realtor in which he personally was the payee. He stated that the cheques represented the payment of a referral fee and a debt. He did not know why these cheques were not made payable to the Company.

The Applicant stated that he now works as an associate broker. He usually works from premises adjacent to his old office. He conceded that the Company sign is still in place. He stated that he did not remove this sign because he was waiting for the weather to change and for the results of this appeal. He denied that he was holding out i.e. still trading under his corporate name.

The Applicant stated that he does not meet with Mr. Janisse on every presentation. He speaks to Mr. Janisse daily. They each have separate offices. His old office is not yet registered as a branch office. He hands over trust cheques to Mr. Janisse. He stated that although he may have the opportunity to borrow money from clients in the future, he would not do so. He acknowledged that some of the amounts owing his creditors as shown on the bankruptcy documentation are not correct and that he disclosed these errors to the trustee in bankruptcy. In response to a question put to him by the Tribunal, he admitted that he sued a former automobile business associate and recovered judgment against this associate for \$114,452.25 who has since gone bankrupt. This money is shown on his bankruptcy statement as being a debt. There has been no meeting of creditors.

He stated he gave Consumer #3 a post-dated cheque, which bounced, in anticipation of receiving a cheque for commission on a real estate transaction that ultimately did not close.

Consumer #4

Consumer #4 was the vendor of the Tecumseh commercial property that was referred in the amending agreement. Consumer #4 acknowledged signing the amending agreement on November 25, 2002. He was unable to do so earlier because he was out of town. The Applicant had spoken to him by telephone on November 22, 2002. Consumer #4 did not recall all of the circumstances surrounding his signing the amending agreement. He did not object to the purchaser seeking to place the deposit money with the Applicant in an interest-bearing instrument.

Robert Janisse

Robert Janisse is the principal behind Tecumseh Realty Ltd., formerly known as Integrity Realty. He has been a broker since 1984. The Applicant now works with Tecumseh Realty Ltd. as an associate broker who has no access to the firm's trust accounts. Mr. Janisse and the Applicant have entered into an agreement under which the Applicant will work under Mr. Janisse's supervision.

Mr. Janisse has no other employees. His prime source of income comes from working as an appraiser and mortgage broker. He has known the Applicant for about 25 years. It was Mr. Janisse's view that the Applicant had a good reputation in the community. He is aware of the trust violation and the Provincial Offences Court convictions. He stated that the Applicant is adept in his profession and appears to be quite busy having regard to the number of telephone calls the Applicant receives and the number of agreements of purchase and sale he has written. Mr. Janisse stated that he is willing to supervise the Applicant's work as an associate broker. He expects the Applicant to carry on business in accordance with law. He would not shirk in his duty to report wrongdoing.

Mr. Janisse does not accompany the Applicant on his calls. He knows that the Applicant sometimes visits the building where his former broker's office was located.

Mario Valente

Mario Valente is a homebuilder and land developer who has known the Applicant for several years on a business basis. He has met with the Applicant socially on occasion. He has also employed the Applicant as an agent. It was Mr. Valente's view that the Applicant appeared to be knowledgeable and a good sales person. He called the Applicant a likeable individual. Mr. Valente stated that he was aware of the trust violation and the fact that the Applicant has gone bankrupt. He conceded that he once loaned the Applicant money and had to sue in order to recover his money.

David Booth

David Booth is licenced under the insurance act. He has connections with mortgage brokers. He described his attempts to introduce the Applicant to persons who could loan money to the Applicant in November 2002. He was not involved with this matter after

November 20, 2002. He knew that the Applicant was able to get the loan but stated that he did not know how the loan proceeds were disbursed.

THE LAW

The sections of the Act relevant to this matter are stated as follows.

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business,
- or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

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.

9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

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

...

(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

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.

...

(3) No person shall obstruct a person appointed to make an investigation under this section or withhold from him or her or conceal or destroy any books, papers, documents or things relevant to the subject-matter of the investigation.

20. (1) Every broker shall maintain an account designated as a trust account in a bank listed in Schedule I or II to the *Bank Act* (Canada), loan or trust corporation, credit union, as defined in the *Credit Unions and Caisses Populaires Act*, or Province of Ontario Savings Office in which shall be deposited all money that come into the broker's hands in trust for other persons in connection with the broker's business, and shall at all times keep the money separate and apart from money belonging to the broker or to the partnership, in the case of a partnership, and shall disburse the money only in accordance with the terms of the trust.

...

50. (1) Every person who, knowingly,

- (a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
- (b) fails to comply with any order, direction or other requirement made under this Act;

or

- (c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$100,000 and not as provided therein.

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 registration 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 Applicant has been in the real estate business for all of his working life. Until the events that gave rise to the Notice of Proposal, as further amended, the Applicant had an unblemished record in the real estate industry.

His financial problems stemmed from his investing in automotive businesses. He did not work directly in these businesses. His work efforts centered on the financial aspects of these businesses. The businesses failed. Seven business associates went bankrupt. He commenced court proceedings against certain people with whom he was involved as a consequence of his investing in these businesses. The Applicant tried to persevere. His perseverance has led to his financial downfall. He began borrowing money from many people including family, friends and clients. He did not have the income to support his debt and to fund the pending litigation he commenced in the Ontario Superior Court.

The Applicant has been unable to pay his creditors since 1998 when the first judgment was registered against him. Over the next six years he accumulated more debt. When a judgment was repaid or partially repaid, other judgments would be registered against him. By the spring of 2004 his income was greatly reduced when his commission income was garnisheed. With significant debt and little income the Applicant went bankrupt in November 2004 owing his creditors approximately \$1.5 million dollars. The Tribunal finds that this debt was incurred for what appears to be legitimate personal, professional and business expenses. The Applicant sold his home in order to repay creditors. Amongst his creditors were his clients Consumer #1, and Consumer #3 and his spouse who imposed trust in the Applicant and relied on his representations as to the repayment of the monies they loaned him.

The Applicant sought the assistance of David Booth and others to obtain mortgage funds by November 22, 2002. The funds were to be used to place a third and fourth mortgage on the Applicant's matrimonial home so as to secure loans made to him by two family members and also to pay some bills. When the mortgage funds were not forthcoming, The Applicant arranged a loan with Dr. Carom who was able to advance funds on November 29, 2002.

The Applicant, having committed himself to the payment of certain debts on November 22, 2002 drew cheques on his general account that day in order to pay these debts.

Mr. Raffi, through his numbered Company, decided that it would be advisable if his \$100,000 deposit money was placed in an interest bearing GTI on November 29, 2002. The Applicant caused an amending agreement to be prepared. He witnessed Raffi sign the amending agreement on November 22, 2002. Consumer #4 was able to sign this agreement three days later. There is no oral or written evidence to show that Messrs. Raffi and Consumer #4 authorized the Applicant to use the deposit money for a one-week period. Nonetheless, the Applicant took the \$100,000 from his trust account and made an unauthorized deposit into his general account. He drew on these funds to pay his creditors.

The Applicant received the Carom loan proceeds on November 29, 2002 and purchased the GTI that date. He had the unauthorized use of trust monies for one week. It is fortunate that no person lost money as a result of the Applicant's conduct. A similar situation arose in the case of *Ontario (Registrar of Real Estate and Business Brokers) v. Vogelsberg* [1994] O.J. No. 226 (Quicklaw) (Ontario Divisional Court) where Mr. Justice Saunders stated,

Interfering with a trust account is a wrongful act and the fact that no one was hurt makes no difference.

Real estate brokers are mandated to establish trust accounts so as to segregate clients' money from their own money. Trust monies are to be disbursed in accordance with the terms of trust. (Ss 20(1) Act) The evidence before the Tribunal clearly indicates that the Applicant disbursed trust funds for his own use thereby placing his client's fund at risk. He put his needs ahead of his client's expectations. The Applicant has been convicted in the Provincial Offences Court of breach of trust as referred to ss 20(1) of the Act.

Sandra Bistany denied falsifying cheque no 175. At the hearing the Applicant did not offer any evidence as to how this cheque was altered. The documentary evidence indicates that cheque no. 175 was altered at or about the time that the Applicant sent a copy of that cheque to RECO. The Applicant has been found guilty of obstructing an investigator under ss15 (3) of the Act.

The Applicant has surrendered the Company's registration. He no longer operates as a broker. Instead he became an associate broker with Tecumseh Realty Ltd. whose principal is Robert Janisse. The Applicant has no access to the trust account. His conduct would be supervised by Mr. Janisse. He submits that because of his hereunto unblemished career in real estate spanning a quarter century, he should be permitted to be registered subject to terms and conditions. The loss of registration would prove to be a hardship for him and his family for whom he is the principal breadwinner.

The Tribunal, mindful of the Applicant's plight, states that it would be inappropriate at this time to impose terms and conditions upon the Applicant's registration. The Applicant's registration has been subject to terms and conditions since December 2000. He was to use his best efforts to discharge the judgments levied against him. He failed to do so. As a

consequence of Consumer #3 and his spouse holding a judgment against him, a significant portion of his commission income was garnisheed. Having lost this income, the Applicant was forced into bankruptcy owing his creditors over a million dollars. During this time he was also convicted of two charges under the Act. The Act is an instrument of public policy designed to regulate the conduct of salespersons and brokers so as to afford the public a certain degree of comfort and protection. The Applicant willfully did not live up to the standard of conduct expected of registrants.

The Tribunal, upon careful consideration of the evidence, concurs with the Registrar that the Applicant is not entitled to registration under section 6 of the Act because (a) having regard to his financial position, the Applicant could not reasonably be expected to be financially responsible in the conduct of business and (b) his past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

DECISION

The Tribunal, acting under the authority vested in it under ss 9(4) of the Act, directs the Registrar to carry out his proposal to refuse to renew the registration of Michael Desmond Bistany.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Q.C.,
Vice Chair

RELEASED: May 17, 2005

File name: 2504.rebba.Bistany.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



JAMES ROGER KENNY

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 A REINSTATEMENT OF
A REGISTRATION

TRIBUNAL: DOUGLAS R.WALLACE, Vice-Chair

APPEARANCES: KEVIN PALFRAMAN, Counsel, representing James Roger Kenny

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATES OF
HEARING:

April 7 and 8, 2005

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals the Registrar's Proposal dated June 18, 2004 refusing to reinstate his previous registration as a salesperson under the *Real Estate and Business Brokers Act*, R.S.O.1990, Chapter 4 as amended (the Act).

The Registrar based his decision on a finding that the past conduct of the Applicant provided reasonable grounds for him to believe that the Applicant, if licenced, would not carry on business in accordance with law and with integrity and honesty. That part of the Applicant's past conduct which caused him particular concern was the conduct which lead to his convictions in 2002 on 7 charges relating to drug trafficking, money laundering, income tax evasion and attempted obstruction of justice. The Applicant by his Notice of Appeal dated June 30, 2004 disputed the allegation that he would not carry on business in accordance with law and with integrity and honesty. He provided considerable evidence of the high regard in which he was, and still is, held in the real estate community and the belief of many in his sincere desire and ability to conduct himself in accordance with the law in the future.

The hearing took place over two days in Ottawa.

EVIDENCE:

The Registrar's Book of Disclosure was filed on consent as Exhibit 3 in these proceedings. The facts set out in the Registrar's Notice of Proposal found at tab 1 of Exhibit 3 and the Transcript of Court proceedings found at Tab 11 were not disputed in any way and are accepted in their entirety by the Tribunal. The most salient of these facts and the reasonable inferences from these facts indicate the following:

1. The Applicant was registered as a salesperson under the Act from January 29, 1986 to November 14, 2001.
2. Throughout all, or certainly the major part of this time he, together with one other person, was the head of an organized operation trafficking in *cannabis resin*.
3. In the course of the operation the Applicant attempted to hide the true nature of his conversations with others involved in the drug trade by speaking in code using terms common in the real estate business. He also used his place of business at least on one occasion to conceal drugs.
4. The drug operation resulted in substantial profits giving rise to charges of money laundering, possession of the proceeds of crime, income tax evasion and attempted obstruction of justice.
5. The Applicant pled guilty to a number of criminal charges on May 31, 2002 and was sentenced to imprisonment for a term of five years less a day. These charges include the following:
 - (i) Conspiracy to commit an Indictable Offence pursuant to Section 465(1)(c) of the *Criminal Code*;
 - (ii) Possession of Proceeds of Crime pursuant to Section 8(1) of the *Controlled Drugs and Substances Act*;
 - (iii) Laundering Proceeds of Crime pursuant to Section 1 of the *Controlled Drugs and Substances Act*;
 - (iv) Possession of a Scheduled Substance for the Purpose of Trafficking pursuant to Section 5(2) of the *Controlled Drugs and Substances Act*;
 - (v) Trafficking in a Schedule II Substance pursuant to Section 5(1) of the *Controlled Drugs and Substances Act*
 - (vi) Contravention of Section 239(1) (d) of the *Income Tax Act* (evasion of tax)
6. Details of these charges against the Applicant are set out in the transcript of court proceedings before Judge Hugh Fraser, which was filed at Tab 11 of Exhibit 3.

7. The Applicant was convicted on the further charge of Attempted Obstruction of Justice contrary to Section 139(2) of the *Criminal Code* on November 20, 2002. No details concerning this charge were made available to the Tribunal.
8. The transcript indicates that at the date of sentencing the Applicant “had an entry a number of years ago in the U.S. under the *Banking and Securities Act* for which he was placed on probation”. No details concerning this “entry” were provided.
9. The Applicant applied for reinstatement of his registration as a real estate salesperson within a month of being granted day parole on September 30, 2003. He was placed on full parole on March 31, 2004 and will continue on parole until November 29, 2005.

Oral Testimony

Counsel for the Registrar only called one witness, Mr. Brian Schlotzhauer, the Assistant Registrar at the Real Estate Council of Ontario. Mr. Schlotzhauer outlined his experience and the process he follows in reviewing applications for registration or reinstatement. He indicated that the primary responsibility of the Registrar under the Act is to see that the public interest is protected and noted the importance that section 6 of the Act gives to the issues of financial responsibility and the ability of the Applicant to conduct his business in accordance with the law and with honesty and integrity. He stressed the element of trust that must exist between the consumer and the real estate salesperson. Although any history of complaints is looked at, the Registrar recognizes that the absence of complaints is not a certain sign that business is being conducted properly as the consumer is often unaware of problems that may exist. He indicated that an examination of the manner in which a salesperson conducted himself in the past includes an examination of conduct unrelated to business as “we want a complete picture”. In the case of Mr. Kenny’s application he noted the existence of prior convictions. He concluded, primarily from a review of the court transcript that the conduct which resulted in these convictions constituted grounds for believing that the Applicant would not conduct his business in accordance with the law and with honesty and integrity and that the application should consequently be refused under the authority of paragraph (1) (b) of section 6 and subsection 8 (1) of the Act. In coming to this conclusion he paid particular attention to the number of convictions, the length of time over which the conduct took place, the scale of the operation, the connection he saw between the offences and the business of a real estate salesperson, and the elements of greed and fraud indicated by the nature of the offences. He indicated that he did not consider that the Applicant had “paid his debt to society” and that the time between his release from prison and his application was not long enough to indicate a reliable change in his conduct. He made no enquiry concerning other conduct of the Applicant during the period over which the offences took place nor to the Applicant’s conduct since being released on day parole. He did not believe that any terms and conditions attached to a registration would be effective given the independent nature of a salesperson’s work or would be appropriate given the seriousness of the Applicant’s offences.

The Tribunal heard evidence from a total of ten witnesses called on behalf of the Applicant.

Seven of these witnesses gave evidence that they had known the Applicant for a number of years in his professional capacity as a real estate salesperson. Their evidence, which was not contradicted in any way, was unanimously to the effect that the Applicant had during the entire period they had known him exhibited nothing but honesty and integrity. To a person they believed that the Applicant was remorseful, had seen the error of his way, and was anxious to turn over a new leaf. They had not seen signs of the Applicant's illegal activities over the period they had known him and were shocked to learn of his convictions after the fact. Although they admitted the obvious, that the Applicant's conduct during that time was illegal, they would have no problem trusting him or working with him in the future.

The Tribunal has no hesitancy in finding that the evidence of these witnesses was given in complete honesty and good faith. The effect of the testimony is, however, considerably weakened by the fact that they failed to detect any signs of dishonesty in the Applicant's conduct during the time that he was committing the crimes for which he was subsequently convicted and their failure to give any examples of conduct showing his present honesty and integrity.

One of the seven witnesses, Mr. Al Shepherd, also gave evidence that he worked as head of a team of four real estate salespeople under a broker. The team has daily sales meetings and, as head of the team, he has a very good knowledge of the day-to-day activities of each member of the team. He would be prepared not only to recommend the Applicant to his broker, Jacques Bedard, but to monitor his activities and provide periodic reports to the Registrar. The Assistant Registrar, at the Tribunal's invitation, indicated that he would consider the imposition of a condition requiring a salesperson to work only as part of a sales team problematic at best as such teams are not recognized by the governing legislation. Although unnecessary to decide the point in this case, this Tribunal is not convinced that a carefully crafted condition to this effect would not be enforceable or appropriate in the proper circumstances.

Two witnesses, Dr. Justin Ciale, and Mr. Gaston Nicholas, from the Canadian Office of Human Rights, gave very convincing evidence on behalf of the Applicant. Both are well qualified in their field and have extensive experience in helping parolees reintegrate into society. Both gave evidence that they are satisfied that the Applicant is truly remorseful and sincere in his desire to "put his life back together". They are convinced that the Applicant has the support necessary to turn his life around and that there is a very good prospect that he will not re-offend. The Office has had an impressive record of success in the reintegration of ex convicts and the Tribunal is satisfied that it would not support the Applicant in this case if it felt that there was any substantial risk of his re-offending.

The only evidence as to the Applicant's activities subsequent to his release on day parole on September 30, 2003 was given by Mr. Paul Stickley, the President of Craftsman

Furniture Co. Mr. Stickley gave evidence that the Applicant is currently assisting him in his business as a “marketing and sales guy”. He has known the Applicant for almost two years now and knows of his criminal conviction but trusts him and would continue to employ him. He finds that the Applicant is a caring person and does not think that he will go back to his previous illegal activities.

A letter from the Applicant to the Real Estate Council of Ontario dated November 20, 2003 was filed as part of Exhibit 3 on consent of all Parties. In it, the Applicant addressed his past convictions as follows:

I would also like to take this opportunity to say a word or two about myself. In November 2001, I made a serious mistake and was subsequently charged with marijuana offences. Under a plea arrangement, I pleaded guilty. This is now part of my past and I am moving forward and hope to continue in my career in the real estate field.

And later:

I thank you for considering my Application for Reinstatement. I sincerely hope that my past foolishness has not jeopardized my real estate career.

The Applicant, although present throughout the Hearing, did not give testimony under oath.

THE ISSUE:

The only issue in this proceeding is whether the past conduct of the Applicant affords reasonable grounds to believe that the Applicant will not carry on business in accordance with law and with integrity.

THE LAW

Section 6 of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chap.R.4 provides as follows:

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

(a)....

(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....

In cases such as this involving prior convictions it is clear that the Tribunal must base its decision on an analysis of the Applicant’s past conduct rather than on any view it might have as to the likelihood of reformation. Thus in *Brenner v. Ontario (Registrar of Motor*

Vehicle Dealers and Salesmen) [1983] O.J. 1017 Southey, J., speaking for the Divisional Court, says in overturning the Tribunal's decision at ¶9

"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 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.

To similar effect is the decision of the Ontario Commercial Registration Appeal Tribunal in *Montgomery v. Registrar of Real Estate and Business Brokers*, (1988) 17 C.R.A.T. 257 and the decision of the Ontario Divisional Court in *Registrar v. Griese* (1993) 25 C.R.A.T. 765.

Further, when the past conduct involves criminal convictions, the Tribunal will generally not consider registration until the sentence, including parole or probation has been fully served and sufficient time has elapsed to show a change in the pattern of behaviour. (See, for example, *Rubin (c.o.b. as Affordable Auto Sales)* [2000] O.L.A.T.D. No.377; *Alman* O.L.A.T. October 29, 2004; and *Colafranceschi* O.L.A.T. December 29, 2004). In the Tribunal's view this is not due to any desire to see that the Applicant fully pays his debt to society. This is more properly the role of the Criminal Courts. Rather, it is partly a reflection of the fact that the longer the period of "good behaviour" the more reasonable it is to assume that this conduct will continue in the future and partly a question of the need to preserve the public confidence in registered salespersons under the Act.

The need to maintain public confidence in those registered under the Act was judged of paramount importance in by the Tribunal in *Giovanni Gianini v Registrar of Real Estate and Business Brokers* 1985 Vpl.14 C.R.A.T. vol.179 where it is stated that "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." To similar effect are the decisions in *Grunberg v. the Registrar of Real Estate and Business Brokers* 1990 Vol. 20 C.R.A.T. 466 and *Ronald W. Northover* (91984) 13 CRAT 292

ANALYSIS

The Tribunal has carefully considered the nature of the crimes for which the Applicant was convicted, the period of time over which the offences took place, the time which has elapsed since the Applicant's release from jail and the character evidence lead by the Applicant.

With regard to the nature of the crimes the Tribunal notes the following:

1. The offences were serious enough in their entirety to be prosecuted by indictment and to attract a five year sentence upon conviction.
2. None of the offences, collectively, or even individually, can be considered to have taken place on the spur of the moment. On the contrary they all required a considerable amount of planning and preparation. This is particularly true of the charges of conspiracy, money laundering and income tax evasion.
3. The offences took place over a lengthy period of time, possibly covering the entire time the Applicant was licenced as a salesperson. Rather than indicating a sudden lapse of judgment or a foolish mistake they indicate, in the Tribunal's opinion a pattern and determined way of life.
4. The Applicant was head, or one of the leaders of a relatively large-scale organization with activities in a number of provinces and outside Canada.
5. The offences involved dishonesty, moral turpitude and monetary greed completely incompatible with the responsibilities of a salesperson registered under the Act.

The Applicant did not give evidence as to when the illegal conduct of which he was convicted began, how extensive it was, what motivated it, whether those motivators still exist in his life, the extent, if any, of his present involvement with those who participated with him in the criminal activity, or the extent that his illegal activity involved clients he met through his real estate work. Nor did he indicate anything about his plans for the future.

The Tribunal carefully considered the very positive character evidence called on his behalf. These witnesses testified that the Applicant expressed sincere remorse for his past behaviour and stated their belief in his present honesty and integrity. They did not purport however to be able to give evidence as to how the Applicant's life now differs from the life he had been living while he committed the offences for which he was subsequently convicted. This is perhaps understandable in light of the fact that they had not detected his illegal activities while he was committing them and the short period of time which has elapsed since his release from jail. It also indicates, however, in the Tribunal's opinion the need for more time to elapse for the Applicant to establish a record of honesty and integrity to overcome the record of his past conduct.

In the absence of convincing evidence as to how the Applicant has changed his life since his conviction the Tribunal finds that his past conduct affords reasonable grounds to believe that he will not carry on business in accordance with law and with honesty and integrity as required by the Act.

DECISION

For the reasons stated, 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 carry out the Proposal to refuse to register James Roger Kenny as a real estate salesperson.

LICENCE APPEAL TRIBUNAL

Douglas R. Wallace,
Vice-Chair

Released: May 9, 2005

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
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PARAM SAINI

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,

MOTION TO CONSIDER AN APPLICATION FOR EXTENTION OF
TIME

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES: HOWARD BUCKMAN, Agent, appeared for Param Saini

ROBERT A. MAXWELL, Counsel, appeared for the Registrar, *Real
Estate and Business Brokers Act*

DATES OF
HEARING: April 6, 2005 Toronto

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal to extend the time for Param Saini (the "Applicant") to file an appeal to the Notice of Proposal (the "Proposal") dated October 15, 2004 of the Registrar under the *Real Estate and Business Brokers Act* (the "Act"). The Proposal is to refuse to reinstate the Applicant's registration as a salesperson under the Act. (Exhibit 1)

The hearing of the motion proceeded as an electronic hearing. The Applicant filed a Notice of Motion with the Tribunal dated February 16, 2005 (Exhibit 3) together with an affidavit of the Applicant in support of the motion and giving reasons for the motion. (Exhibit 3 (a))

The Applicant in his affidavit in support of his motion acknowledges having received the Proposal on October 15, 2004. The Applicant also stated in that affidavit that:

- (a) he was hospitalized from October 2, 2004 to October 6, 2004

- (b) he contacted one Fran Maika ("Maika") at the Real Estate Council of Ontario ("RECO") in early November 2004 requesting a meeting with the "Assistant Registrar", one Prendergast.
- (c) at the end of November 2004, Prendergast informed him that he was not handling the Applicant's file and would direct the Applicant's enquiry to the Assistant Registrar.
- (d) on December 7, 2004 the Applicant was advised that the Assistant Registrar would not meet with him.
- (e) on December 8, 2004 he received a message from Maika "directing me to submit my statement of defence" which message he only received on December 13, 2004.
- (f) he spoke with Maika on December 13, 2004 informing her of his "health condition" and that he would attempt to submit his defence "very shortly".
- (g) on December 16, 2004 he received the Registrar's final notice.
- (h) on December 17, 2004 he had "completed" his defence.
- (i) on January 12, 2005 he "forwarded his defence to the Registrar".
- (j) on January 15, 2005 he filed his Notice of Appeal with the Tribunal when he was advised it was "late".
- (k) the medical condition according to his medical advisors letter of February 12, 2005 in support of the Applicant's Motion indicates his medical history is very complex and significant for diabetes, strokes, renal failure and ischemia, heart disease and visual disturbances.
- (l) he believes the allegations in the Proposal against him are "flawed" and that if not for his medical condition as well as his expectation of having a meeting with a representative of RECO he would not have delayed in filing his appeal.

The Registrar has filed materials opposing the Applicant's Motion. Included in the materials is an affidavit of Brian Schlotzhauer, RECO's Assistant Registrar and Fran Maika. Also included in the materials was a "final notice" dated December 16, 2004 which was personally served upon the Applicant on December 16, 2004 advising the Applicant that as he did not exercise his right to a hearing the Proposal had become final and the Respondent's Proposal to Refuse to Reinstate the registration of the Applicant was refused. (Exhibit 4).

No oral testimony was adduced by the Parties at the hearing and they relied upon the various documents in the Motion record as filed by them.

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.”

The *Real Estate and Business Brokers Act* states as:

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;

9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

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

(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

APPLICATION OF LAW TO FACTS:

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 above tests were adopted in the matter of *Bilodeau* (1994), 26 CRAT 930.

In the matter of *Frey v. MacDonald* (1989) O.J. No. 236 heard before the Ontario Court of Appeal, Blair J. A. stated:

Usually, time for an appeal or taking any steps within an appeal is not extended unless the appellant has maintained a firm intention from the beginning to appeal and the failure to observe the time limits is reasonably explained. This however, is subject to a broader rule that extensions should be granted if the "justice of the case" requires.

It was stated in *Miller Manufacturing and Development Company v. Robert J. Alden* (1979), 13 C.P.C. 63 (Ont. C.A.) 65 that each case depends on its circumstances and discretion is to be exercised so as to do what justice requires in each particular case and what considerations are viewed as important including the existence of a bonafide intention to appeal, the length of the delay, prejudice to the other party, and the merits of the appeal.

Having regard to what is contained in the Applicant's affidavit in support of the Motion and applying the tests in the *Bilodeau* case, the Tribunal finds the following:

1. The facts in the Applicant's affidavit do not show an intention to appeal within the time limit. The Proposal was clear and detailed. It stated that the Applicant had the right to a hearing by the Tribunal in respect of the Proposal and that he had 15 days after receipt of the Proposal to deliver, in writing, his appeal. The Applicant admits to having received the Proposal on October 15, 2004 and having filed his Notice of Appeal on January 15, 2005, well beyond the 15 days within which to appeal.

During the intervening period the Applicant made no attempt to file an appeal. All he did was seek a meeting to discuss the Proposal with Mr. Schlotzhauer. Even when the meeting was refused by Schlotzhauer, he did not file an appeal. His actions are not supportive of an intention to appeal within the time limit and accordingly the first requirement has not been met by the Applicant.

2. The Applicant does not state in his affidavit that he did not understand or appreciate that he was to appeal within 15 days of the Proposal being served. There is no doubt in the Tribunal's mind, and the Tribunal so finds, that even when he knew or should have known of the requirements to appeal he did nothing regarding the appeal and merely continued to seek a meeting. The Motion was not made in a timely fashion and the circumstances surrounding

the delay have not been adequately explained. Accordingly this requirement has not been met.

3. There is no prejudice to the Registrar as the Applicant is presently without registration.
4. The last requirement of the four tests is whether the Applicant has a reasonable chance of success. It is for the Applicant to show that he does have a reasonable chance of success and although the bar is not set high in this regard it is noted that the Applicant has not dealt with all or any of the allegations made against him in the Proposal. There were six allegations made against him in the detailed Proposal of the Registrar. The only comments that the Applicant made in his affidavit regarding the Registrar's allegations are found in paragraph 14 of the Applicant's supporting affidavit in which he stated the Registrar's allegations "are flawed and are based on both a misunderstanding of and erroneous conclusion of the facts". This single statement does not explain the Applicant's position on the merits and does not outline or raise a genuine defence to the numerous serious allegations in the Proposal. On the basis that this fourth requirement has clearly not been met by the Applicant, the Tribunal is unable to conclude that the Applicant has a reasonable chance of success should the matter proceed to a hearing.

In the opinion of the Tribunal the "justice of the case" does not require that the time for an appeal should be extended.

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 to the Registrar's Notice of Proposal dated October 15, 2004 be and is hereby refused.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 12, 2005

File: 2771.rebba.Saini

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

MARIA CASALE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: VICTOR L. FREIDIN, Q.C., Counsel, representing Maria Casale

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF
PRE-HEARING: April 11, 2005

Toronto

ORDER

Following attendances on April 11, 2005 at a pre-hearing before this Tribunal of Victor L. Freidin, Counsel, appearing on behalf of Maria Casale (the "Applicant") and Robert A. Maxwell, Counsel, appearing on behalf of the Registrar under the *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 July 12, 2005 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on July 13 and July 14, 2005 at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Registrar's Counsel shall serve the Applicant's Counsel and file with the Tribunal a written notice amending the Registrar's Notice of Proposal dated the 13th day of December 2004. The notice shall be served and filed by April 18, 2005.

3. The Applicant's Counsel shall serve the Registrar's Counsel by no later than May 6, 2005 and file with the Tribunal a statement of defence to the Registrar's Notice of Proposal.
4. The Parties shall serve upon the other and file with the Tribunal a list of the full names and addresses with the telephone numbers of each and every witness who they intend to call to testify at the hearing and the date for compliance with this requirement shall be by no later than 30 days prior to July 12, 2005.
5. Counsel for the Applicant advised the Tribunal at the pre-hearing that at this stage the Applicant intends to call 14 witnesses to testify at the hearing and the Registrar's Counsel advised that the Registrar at this stage intends to call up to 8 witnesses to testify at the hearing.
6. The Parties shall fully comply with the disclosure requirements set forth in Rule 6 of the Rules of Practice of this Tribunal save and except that the time for compliance under Rule 6.1(1) and Rule 6.3 of the aforesaid Rules shall be extended to 30 days.
7. The Parties shall no later than 30 days before the hearing sign and execute a statement of facts agreed upon relative to the Registrar's Notice of Proposal of December 13, 2004 or any amendment thereto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: April 12, 2005

File name: 2752.rebba.casale.prehrg



REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

2505-REBBA-ADJ-Adjournment

IN THE MATTER OF
CHAN GURPRASAD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 7th, 2004

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

CHAN GURPRASAD

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 April 18, 2005;

AND TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chamber, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, October 17, 2005;

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

RELEASED: April 15, 2005

FILE NAME: 2505.rebba.Gurprasad.adj.doc



Licence Appeal Tribunal

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>>	SANDRA LUBBELINKHOF o/a S.H. BINGO PALS	
>>	CHRISTINA LORRAINE BROUGH o/a WORLDCLASS TRAVEL SERVICES	
>>	ITALIAN TRAVEL COMPANY INC.	
>>	1380140 ONTARIO INC. o/a JANETRAVEL and CRUISE	
>>	KHAMLECK NGUYEN AND KINKAID TRAVEL LTD.	
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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.19 AS
AMENDED

TO REVOKE REGISTRATION

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

APPEARANCES: JEAN GILL-WYATT, Agent, appearing on behalf of 1175926 Ontario
Ltd. o/a Gill's Travel (the "Applicant")

FRANK WILLIAMS, Counsel, appearing on behalf of the Registrar,
Travel Industry Act (the "Respondent")

DATE OF
HEARING: February 6, 2006 *by teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

This is the hearing of a motion brought by Michael Pepper, Registrar, Travel Industry Council of Ontario (the "Registrar" and "TICO" respectively) for an order revoking the registration of 1175926 Ontario Ltd. o/a Gill's Travel (the "Applicant") which motion arises in those circumstances hereinafter related.

In October 2004, the Registrar issued a Proposal to Revoke the Registration of the Applicant as a travel agent for failure to submit its financial statements for the fiscal year-ended April 30, 2004 as required by Regulation 806/93 made pursuant to the *Travel Industry Act*, R.S.O. 1990, Chapter T.19. The Applicant thereupon appealed to the Licence Appeal Tribunal (the "Tribunal").

A hearing was scheduled to commence on April 21, 2005 before Tribunal Chair Carl Dombek. At the onset the Parties filed a Joint Statement of Fact and a Joint Submission, following which the Tribunal ordered that the Registrar refrain from carrying out the Proposal, provided the Applicant fulfill the conditions outlined in the Tribunal's Order.

Under the terms of this order, the Applicant was directed to file its financial statements for the year ending April 30, 2005 as prepared in the form of a review engagement report and signed by an accountant licensed under the *Public Accountancy Act* no later than July 31, 2005.

The Registrar has stated that the Applicant has failed to file the financial statements to date and is therefore in apparent breach of the Tribunal's Order.

At the motion hearing, Jean Gill-Wyatt, the principal behind the Applicant corporation acknowledged that the financial statements have not been filed to date, citing reasons of health. Ms. Gill-Wyatt was hospitalized for three weeks in July 2005 and has been taking medication since then. She has been working at the travel agency full time since August 2005. She promised that the Applicant will be submitting its financial statements but did not state when the statements would be filed.

Paragraph 8 of the Tribunal Order provides:

In the event that the Applicant fails to comply with any of the conditions in this Order, the Registrar shall make a motion to the Licence Appeal Tribunal to address his concerns, review the Order and proceed with the proposal to revoke registration. Any such motion shall be made in accordance with Rule 13.1 of the Rules of Practice for the Licence Appeal Tribunal and the Applicant shall have notice of such a motion.

Frank Williams, Counsel for the Registrar, submitted that the Applicant's registration be revoked or alternately a date be set for the hearing of the appeal without the necessity of the Registrar filing a new proposal to revoke registration. The Applicant made no submission on the remedy the Tribunal should adopt with respect to this motion.

The Tribunal in its Order retained jurisdiction to continue with the hearing of the appeal were the Applicant to allegedly breach any of the conditions found in the Order, and the Registrar has brought a motion to proceed with the Proposal to revoke the Applicant's registration. The Applicant has requested a hearing and is entitled to a hearing in accordance with the principles of fairness. In the Tribunal's view, it would be unfair to the Applicant were the Tribunal to direct the Registrar to carry out his Proposal to revoke the Applicant's registration at the motion stage.

ORDER:

Accordingly the Tribunal allows the motion brought by the Registrar for an order to set a date for the hearing of this appeal without the necessity of the Registrar filing a new proposal to revoke registration, and hereby directs the Tribunal's Registrar to set an early date for the hearing of this appeal.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman Q.C., Vice Chair

RELEASED: February 16, 2006

FILE NAME: 2683.tia.1175926 Ontario Ltd. o/a Gill's Travel.ruling.doc

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

This decision will also be available on Quicklaw at a later date.

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PRE-HEARING

WAYNE'S WORLD TRAVEL INC.
o/a CRUISE SELLOFFS, FLIGHT SELLOFFS, VACATION SELLOFFS

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, Presiding Member

APPEARANCES: ELIZABETH CORMIER, Counsel, representing Wayne's
World Travel Inc., o/a Cruise Sell Offs, Flight Sell Offs,
Vacation Sell Offs

MARY-ANN HARRISON, Agent, representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: October 4, 2005 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on October 4, 2005 at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Elizabeth Cormier, Counsel, on behalf of Wayne's World Travel Inc., o/a Cruise Sell Offs, Flight Sell Offs, Vacation Sell Offs. (the "Applicant" / "Wayne's World Travel") and Mary-Ann Harrison, Agent, representing 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, November 10, 2005, at the Tribunal's Chambers, 1 St. Clair Ave., West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.

2. The Respondent confirmed the financial statements had not been received and the Applicant's Counsel confirmed the information submitted through the Applicant's Affidavit of July 15, 2005.
3. The Applicant's Counsel and the Agent for the Registrar advised on their mutual interest in resolving the matter and therefore agreed as follows:
 - a) that the Applicant will provide a letter from his new auditor, to the Registrar's attention, which will be the auditor's confirmation that they (1) have been engaged to complete the financial statements for Wayne's World Travel and (2) confirm that if they receive the working materials by a date to be specified, they will be able to provide the Applicant with completed financial statements by a date to also be specified;
 - b) the Applicant will present this letter, from his auditor, to the Registrar, by or before 5:00 p.m., Monday, October 17, 2005;
 - c) the Respondent will review this letter and will reply to the Applicant as to its acceptability by or before 5:00 p.m., October 21, 2005;
 - d) in the event the timing is found reasonable, considering they have been due since March 31, 2005, and therefore acceptable to the Registrar, an adjournment may be required to allow sufficient time for the financial statements to be completed and then reviewed by the Registrar;
 - i. In the event the Parties are able to arrive at a settlement of the issue prior to the hearing, the Parties' Counsel and Agent will each advise the Tribunal in writing, at the earliest possible date, prior to the hearing, that the matter has been resolved and a hearing will not be required.
4. In the event a settlement is not arrived at by or before October 27, 2005 or 14 days prior to the scheduled hearing date of November 10, 2005, the matter will proceed to the hearing and all Parties shall fully and in a timely fashion comply with the disclosure requirements as set out in Rule 6 of the Rules of Practice of the Tribunal.
 - a) The Applicant and the Registrar shall, not less than 14 days before the hearing, provide each other with the names of all witnesses they intend to call to testify on their behalf at the hearing.
 - b) Both the Applicant and the Registrar shall not, less than 10 days before the hearing, serve on the other and file with the Tribunal a Book of Documents upon which each intends to refer to or rely upon at the hearing.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: October 6, 2005.

File: 3071.tia. Wayne's World.prehrg.doc

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PRE-HEARING

SANDRA LUBBELINKHOF o/a S.H. BINGO PALS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
DAVID FLUDE, Vice-Chair
LAURIE SANFORD, Vice-Chair

APPEARANCES: SANDRA LUBBELINKHOF, represented herself

MARY ANN HARRISON, Agent, represented the Registrar under
the *Travel Industry Act*

DATE OF
PRE-HEARING: September 26, 2005

Toronto

ORDER

Following attendances on September 26, 2005 at a pre-hearing before this Tribunal of Sandra Lubbelinkhof, appearing on her own behalf (the "Applicant") and Mary Ann Harrison, Agent, appearing 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 October 27, 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 undertook that within seven days of the date of this pre-hearing she will provide the Registrar with an acceptable and duly signed financial statement for the year ended December 31, 2004 relative to the travel agency operating as S. H. Bingo Pals in Oshawa.
3. The Applicant advised the Tribunal at the pre-hearing that she agreed and in no manner disputed all the allegations made by the Registrar in his Notice of Proposal dated June 7, 2005 set forth under paragraph "D. Particulars" subparagraphs one through 7.
4. Subject to full and timely compliance by the Applicant of the requirements of paragraph two above, the Registrar will advise the Tribunal in writing that he withdraws his Notice of Proposal against the Applicant dated June 7, 2005 and the matter will not proceed to a hearing on October 27, 2005.
5. Should the Applicant fail to comply with the requirements of paragraph two above, the hearing set for October 27 will be held on that date.
6. In the event of this matter proceeding to a hearing the Parties shall fully and in a timely manner comply with Rule 6 of the Rules of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: September 30, 2005

File name: 3031.tia.Bingo Pals.prehrg.doc

Licence
Appeal
Tribunal

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PRE-HEARING

CHRISTINA LORRAINE BROUGH o/a WORLDCLASS TRAVEL SERVICES

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, Presiding Member

APPEARANCES: CHRISTINA BROUGH, representing Worldclass Travel
Services

MARY-ANN HARRISON, Agent, representing the Registrar,
Travel Industry Act and Michael Pepper, Registrar

DATE OF
PRE-HEARING: September 15, 2005 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on September 15, 2005 at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Christina Brough, on her own behalf as Christina Lorraine Brough o/a Worldclass Travel Services (the "Applicant") and Mary-Ann Harrison, Counsel, representing the Registrar, *Travel Industry Act* (the "Registrar");

The Applicant did not dispute the facts contained in the Notice of Proposal and the Parties advised the Tribunal they had arrived at a resolution to the matter. Therefore the Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, October 21, 2005, at the Licence Appeal Tribunal:

1. The Registrar shall refrain from carrying out the Proposal to Revoke

Registration dated June 14, 2005 as the Parties confirmed the the Applicant has filed financial statements and submitted information regarding its working capital position to the satisfaction of the Registrar;

2. The Registrar noted the Applicant was registered as a travel agent on July 2, 2003. The Registrar also expressed concern the Applicant had not met the time requirements in filing its annual financial statements and therefore the Registrar requested that timely filing be made a condition of the Order;
3. The Applicant confirmed she would in the future meet the filing requirements as stated in the Act;
4. Therefore, the Applicant 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, 2005 no later than March 31, 2006;
5. In the event the Applicant fails to comply with the condition for timely filing in this Order, the Registrar shall make a motion to the Licence Appeal Tribunal to address his concerns, review the Order and proceed with the proposal to revoke registration. Any such motion shall be made in accordance with the Rules of Practice for the Licence Appeal Tribunal and the Applicant shall have notice of such a motion.
6. Therefore, and upon receipt by the Tribunal, by or before September 30, 2005, of the Applicant's written notice of withdrawal of their Appeal, the Tribunal will consider the matter concluded and disposed of without a hearing.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: September 26, 2005

File: 3020.tia.WorldclassTravel.prehrg.doc



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

IN THE MATTER of the REGISTRATION of
ITALIAN TRAVEL COMPANY INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 20, 2005

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

ITALIAN TRAVEL COMPANY INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on October 7, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday October 11, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: September 1, 2005

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1380140 ONTARIO INC. o/a JANETRAVEL and CRUISE

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: SIMON DANN, Presiding Member

APPEARANCES: JANET ROACH, Applicant, appeared for 1380140 Ontario
Ltd. o/a JaneTravel and Cruise

MARIA L. ABATE, Counsel, appeared for the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: July 25, 2005

Toronto

ORDER

WHEREAS the parties agreed upon the facts, and the issues to be resolved, the parties agreed to file a Joint Statement of Fact and a Joint Submission.

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";

AND upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of on the basis of the terms set out in Schedule "A".

AND WHEREAS, the Applicant has received independent legal advice (Schedule "A" Page 3), the Licence Appeal Tribunal orders that:

1. The Registrar shall refrain from carrying out the Proposal to Revoke Registration dated April 13, 2005 provided that the Registrant fulfills the conditions outlined in this Order. The hearing at the Licence Appeal Tribunal on Tuesday, October 25, 2005 at 9:30 a.m. will no longer proceed provided that all parties agree to the Consent Order and the Licence Appeal Tribunal accepts it.
2. The Registrant shall correct the working capital deficiency of \$5,318 reflected in its financial statements for the fiscal year-ending October 31, 2004 on or before September 16, 2005 and the Registrant shall provide evidence of the working capital correction to the Registrar no later than 5:00 PM on September 16, 2005.
3. The Registrant shall not, at any time, remove the working capital correction made pursuant to condition 2 of this Order. An Inspector designated by the Registrar may, at any reasonable time, conduct a random financial inspection to determine whether the working capital has been maintained.
4. The financial statements for the year-ended October 31, 2005 shall be submitted by the registrant to the Registrar as required by Section 24 of the Regulation or any such subsequent provision as may be in force at the time, no later than January 31, 2006.
5. In the event that the financial statements for the year-ended October 31, 2005 reveal a working capital deficiency, the registrant shall have thirty (30) calendar days from the date of the Notice of Deficiency to correct the shortfall in working capital and provide evidence of its correction to the Registrar. The Registrar shall send the Notice of Deficiency to the registrant via registered mail.
6. The financial statements for the year-ending October 31, 2006 shall be submitted by the registrant to the Registrar as required by Section 24 of the Regulation or any such subsequent provision as may be in force at that time, no later than January 31, 2007.
7. In the event that the financial statements for the year-ending October 31, 2006 reveal a working capital deficiency, the registrant shall have thirty (30) calendar days from the date of the Notice of Deficiency to correct the shortfall in working capital and provide evidence of its correction to the Registrar. The Registrar shall send the Notice of Deficiency to the registrant via registered mail.
8. This agreement shall override any previous agreements or arrangements made between the Applicant and the Registrar.

9. In the event that the Applicant fails to comply with any of the conditions in this Order, the Registrar shall make a motion to the Licence Appeal Tribunal to address his concerns, review the Order and proceed with the proposal to revoke registration. Any such motion shall be made in accordance with Rule 13.1 of the Rules of Practice for the Licence Appeal Tribunal and the Applicant shall have notice of such a motion.
10. 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.
11. Provided that each of the conditions of this Order is completed in its entirety, this Order shall expire at 5:00 PM on March 31, 2007.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: September 2, 2005

File name: 2942-TIA-Janet travel and cruise



PRE-HEARING

KHAMLECK NGUYEN AND KINKAID TRAVEL LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MICHAEL W. OSTROFF, Agent, representing Khamleck Nguyen and
Kinkaid Travel Ltd.

MICHAEL PEPPER, Agent, representing the Registrar, *Travel
Industry Act*

DATE OF
PRE-HEARING: August 23, 2005

Toronto

ORDER

Following attendances on August 23, 2005 at a pre-hearing before this Tribunal of Michael W. Ostroff, Agent, appearing on behalf of Khamleck Nguyen and Kinkaid Travel Ltd. (the "Applicant") and Michael Pepper, agent, appearing 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 November 2, 2005 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 record that there was no resolution of any of the issues in this matter.

3. Without in any way derogating from what is stated in paragraph 2 above, the Applicant conceded the following in regard to the Registrar's proposal dated June 28, 2005;

Re paragraph 7 of the proposal

The allegations are correct and need not be proven by the Registrar should this matter proceed to hearing.

Re paragraph 8 of the proposal

The Applicant conceded that he has in the past occupied the two premises listed in this paragraph and the Registrar need not prove such allegations should this matter proceed to hearing.

Re paragraph 10 of the proposal

The Applicant conceded that he submitted and proposed to the Registrar that Ms. Lan Az Hang be the prospective Manager of the proposed travel agency.

4. Save and except for the above facts that are conceded by the Applicant the latter has no knowledge of the other allegations made in the proposal and puts the Registrar to the proof thereof should this matter proceed to hearing.
5. Notwithstanding what is stated above the Applicant's agent has undertaken to submit to the Registrar, by no later than September 30, 2005 a detailed written proposal as to what criteria the Applicant is prepared to accept and abide by to satisfy the Registrar in relation to the Applicant's possible registration as a travel agent. The Registrar upon the timely receipt of the Applicant's aforementioned proposal shall advise the Applicant whether he will be prepared to enter into an acceptable arrangement with the Applicant so as to permit the Applicant's registration and if so the terms and conditions of such arrangement.
6. Should there be no settlement arrived at between the parties they shall fully and in a timely manner comply with Rule 6 of the Rules of the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: August 25, 2005



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

IN THE MATTER of the REGISTRATION of
1543371 ONTARIO LIMITED O/A PAYLESS TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 20, 2005

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

1543371 ONTARIO LIMITED O/A PAYLESS TRAVEL

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 October 7, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against both Parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Tuesday October 11, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: August 29, 2005

file name: 3036.tia.payless.adj

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

IN THE MATTER of the REGISTRATION of
WATAN TRAVELS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 12, 2005

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

WATAN TRAVELS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

Terence Wardrop
Vice-Chair

Released: August 11, 2005

LICENCE APPEAL TRIBUNAL

BETWEEN:

1075361 ONTARIO LTD. O/A SOLAREX 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

BACKGROUND

1. 1075361 Ontario Ltd. o/a Solarex Travel (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 4398129/R) since October 10, 1995. The Registrant's fiscal year end is July 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a 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 annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated July 12, 2001, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending July 31, 2001 by October 31, 2001.
4. On November 6, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by November 30, 2001.
5. By letter dated December 3, 2001, the Registrar, *Travel Industry Act* issued a final due date of December 11, 2001 for the Registrant's July 31, 2001 financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.

6. On December 14, 2001, TICO received a telephone call from the Registrant advising that everything was with the Accountant and estimating that the financial statements would be submitted by mid January 2002.
7. On February 4, 2002, TICO telephoned the Registrant to advise that financial statements had not been received and was advised that the company had not been getting its mail. TICO advised the Registrant of the December 14, 2001 conversation. The Registrant indicated that it would contact its accountant to see when financial statements would be ready for submission.
8. On February 5, 2002, the Registrant indicated that it did not have the funding to pay the accountant.
9. By February 11, 2002, the Registrant failed to file its financial statements. On that date, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's registration.
10. To date, the Registrant has not filed its financial statements for its fiscal year ended July 31, 2001 in accordance with subsection 24(2) of the Regulation.

EVENTS SINCE THE ISSUANCE OF THE PROPOSAL - LATE FORM 1 FILING

11. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by TICO indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
12. To date, the Registrant has not filed its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended January 31, 2002, which was due by March 15, 2002.
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 subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 11, 2002;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ended January 31, 2002, which was due by March 15, 2002, by June 15, 2002;

- (b) the Registrant shall file complete financial statements as required by section 24 of the Regulation, for its fiscal year ended July 31, 2001, no later than June 15, 2002;
 - (c) If the above-noted financial statements as submitted reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Thereafter, the Registrant shall maintain the minimum working capital in accordance with section 25 of the Regulation or such subsequent provision as may be in force from time to time. Notice of the deficiency, if any, shall be sent by facsimile, registered mail, or courier to the Registrant;
 - (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending July 31, 2002, no later than October 31, 2002;
 - (e) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending July 31, 2003, no later than October 31, 2003;
 - (f) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending July 31, 2002 by September 15, 2002 ;
 - (g) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal half-year ending January 31, 2003 by March 15, 2003; and
 - (h) the Registrant shall file its Form 1 with the corresponding payment to TICO, for its fiscal year ending July 31, 2003 by September 15, 2003.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (h) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via facsimile transmission, courier or registered mail.
 - 4. The Registrar shall provide the Registrant with written reminder that its filings identified in paragraphs (2) (d) to (h) inclusive are due at least 30 days in advance of their respective due dates. Such reminder shall be sent via facsimile transmission, courier or registered mail.
 - 5. 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 this ____ day of May, 2002

Ms Nadia Palos
1075361 Ontario Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



VIKAS SHARMA

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: VIKAS SHARMA, Applicant, representing himself

MARIA ABATE, Counsel, representing the Travel
Industry Council of Ontario

DATE OF
HEARING: August 9, 2005

Toronto

ORDER

WHEREAS this is an appeal by Vikas Sharma, (the "Applicant"), to the Licence Appeal Tribunal (the "Tribunal") from a decision dated April 13, 2005 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 April 25, 2005, received by the Tribunal on April 29, 2005, requesting a hearing;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on August 9, 2005 at the Tribunal;

AND WHEREAS there was agreement between the Parties that the Applicant filed his claim 16 months 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: August 10, 2005

FILE NAME: 2946.tia.sharma.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.



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

IN THE MATTER of the REGISTRATION of
JUBBA WORLD TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 21, 2005

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

JUBBA WORLD TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 3, 2005;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *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 Friday October 28, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek,
Chair

Released: July 29, 2005

file name:2891.tia.Jubba World Travel.adj



1583721 ONTARIO CORP. o/a UNITRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*
TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: WASSIM BAWAB, Agent representing the Applicant

MARIA ABATE, Counsel representing the Registrar
under the *Travel Industry Act*

DATES OF HEARING: June 20, 2005

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 March 2, 2005, proposed to revoke the registration of 1583721 Ontario Corp. o/a Unitravel ("Unitravel") under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Unitravel on the grounds that the Registrant is not entitled to registration under Section 4 of the Act as it is in contravention of the Act and Regulation.

In the Notice of Proposal, the Registrar set out the particulars as follows:

1. The registrant was registered as a travel agent on December 10, 2003.
2. By letter dated August 23, 2004, the Registrant was requested to file its financial statements for the year ended September 30, 2004 no later than December 30, 2004.

3. By letter dated January 6, 2005 the Registrant was reminded to file its financial statements for the year ended September 30, 2004.
4. By letter dated January 24, 2005, the Registrar requested that the Registrant file its financial statements for the year ended September 30, 2004. The Registrant was given a final due date of January 31, 2005.
5. Between November 24, 2004 and February 9, 2005, an inspector visited the Registrant 6 times to determine if the manager of record was on the premises as a complaint had been received that the manager was never in the office. The inspector concluded that the Registrant appears to operate without a manager approved by the Registrar.
6. On February 17, 2005, a call to the Registrant found no answer and that the voicemail box was full.
7. To date there has been no further response from the Registrant and the Registrant has failed to submit appropriate financial statements for the year ended September 30, 2004 and the Registrant appears to be operating without a manager. It is therefore the opinion of the Registrar that the Registrant's registration should be revoked.

ISSUE:

The issue in this case is whether the Registrant's failure to comply with the requirements of the Act and the regulations to file financial statements in a timely manner, disentitles the Registrant to registration.

FACTS:Preliminary Matters

Wassim Bawab ("Wassim") requested a 30-day adjournment in order to have an opportunity to familiarize himself with the file. Wassim added there had been an illness in the family and he needed 30 days.

The Registrar's counsel, Ms. Abate, objected to the request saying that the Notice of Proposal ("NOP") had been issued March 2nd, the prehearing originally scheduled for April 5th took place on May 12th and the prehearing Order was released on May 17, 2005.

It was Ms. Abate's view that there had been adequate time for the Applicant's agent to familiarize himself with the file as full disclosure had been provided and there were not a substantial amount of documents to examine.

Ms. Abate also submitted that the Applicant confirmed at the prehearing that he understood the issue in this case.

After considering the submissions of the parties, the Tribunal agreed that there had been an adequate interval from the issue of the NOP and the date of the prehearing. A review of the disclosure documents confirmed that there was a limited number to review and the request for an adjournment was denied.

Opening Statements

Ms. Abate summarized the grounds upon which the Notice of Proposal to revoke the Applicant's registration being (1) failure to submit financial statements as required by the Act; (2) the absence of the statements leave the Registrar unable to determine whether the Applicant has sufficient working capital; (3) the hours of operation of the business and that it is improperly supervised.

On behalf of the Applicant, Wassim stated the business opened two years ago and has gone through renovation and building upgrades. He added that the business has always had ample cash flow and was operated professionally at all times.

Witnesses For The Registrar

Evidence was called by the Registrar, and testimony was given by Wendy Wu and Fred Angus.

Ms. Wu is a certified general accountant ("CGA") and holds the position of financial inspection coordinator with the Travel Industry Council of Ontario ("TICO"). She has been with TICO for approximately one year and her duties include making sure that registrants meet their financial requirements.

Ms. Wu said the purpose of the financial statements is to enable an evaluation of the registrant's financial position, as there is no other way to make a financial assessment and ensure there is no risk to the public.

Ms. Wu confirmed the documents found in Exhibit 3, Tabs 2 and 3 regarding the member profile information and the first reminder, dated August 23, 2004, of the due date for the financial statements. This was followed by additional reminder letters dated January 6, 2005 and January 24, 2005 (Exhibit 3, Tabs 4 and 5).

The member profile, dated December 11, 2003, listed the office contact as being Mr. Kandarp Patel, Manager. The business contact was listed as Mr. Wissam Bawab, President.

Ms. Wu identified the TICO activity record (Exhibit 3, Tab 7) and confirmed that the Registrant sent a corporate tax return copy, which was not an acceptable alternate.

She also said that as of today's date, TICO had still not received the required financial statements.

In cross-examination, Wassim asked how phone records (Exhibit 3, Tab 7) are created. Ms. Wu explained that TICO has a policy to note contact exchanges for the file record and the notes were made at the time of the contact.

Mr. Angus is also a CGA with 34 years experience and is currently an inspector with TICO on a contract basis.

Mr. Angus confirmed that he wrote the February 9, 2005 report (Exhibit 3, Tab 6) describing his findings on each of the six visits he made to the Unitravel office between November 24, 2004 and February 9, 2005.

Mr. Angus confirmed meeting another occupant, named Abraham, on his visits and that on one occasion Abraham "stated that he had no business card, and he insisted that he was not a travel agent and had no connection with Unitravel" (Exhibit 3, Tab 6).

The conclusion Mr. Angus arrived at was that "the Registrant appears to operate without an active manager".

In cross-examination, Mr. Angus described how he identifies himself to registrants at the time of an inspection visit. He acknowledged that when he visited the Unitravel office and found it locked he only stayed for about a minute but returned on another day. The second time this happened, he returned 4 hours later. He confirmed there was no 'Closed' sign in sight.

Witness For The Applicant

The Applicant's witness was Wissam Bawab.

Mr. Bawab testified that when he applied for registration he provided \$11,000 in guaranteed investment certificates ("GICs") and an additional \$5,000 in a trust account.

He added that in the first year he sold 20 to 30 tickets. He said the manager, Mr. Patel left for India and he "had to provide additional personal resources to keep the company afloat".

He said he did not think that 20-30 ticket sales required more than a corporate tax record and, while the agency management had some flaws, it was growing.

In cross-examination, Mr. Bawab confirmed (1) he had received an information package when he registered, (2) that he had not provided financial statements, and that at times there had been no manager on site. He also agreed that he was proposing to have Abraham manage the agency now.

Mr. Bawab confirmed he had received all the letters regarding the statements and that it was his responsibility to supply them.

When asked if he had any evidence to show an accountant had been retained to complete the financial statements, Mr. Bawab said he only had the accountant's business card.

Closing Statements

Ms. Abate submitted that the testimony has shown there were problems with the business. She stated that consumers need to be served by knowledgeable people and a "phantom operation" cannot do this. In addition, no statements had ever been supplied.

Ms. Abate cited *Susan Taylor o/a Word of Mouth Enterprises, LAT, November 10, 2004*, in submitting that the test to consider is whether the Tribunal will come to the same conclusion as the Registrar and agree that there is ample evidence to confirm the revocation of the Registrant's registration.

In his closing, Wassim submitted that there have been no customer complaints, there is no issue of fraud and that the Registrant should have a 30 day period in which to adhere to all the requirements.

THE LAW:

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 his, 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

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 ordered 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.

Regulation 806/93 under the Act provides in part:

- 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*.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that

1. The Registrant has failed to file copies of its annual financial statements by the date prescribed by the Regulation.
2. The Registrant was not operating with an active manager of record.

APPLICATION OF LAW TO FACTS:

The legal issue in this case is principally whether the Applicant will carry on business with integrity, honesty, in accordance with the law.

In essence, the Tribunal finds the failure to provide financial statements, despite repeated reminders, and that the business was operating without a manager approved by the Registrar, to be relevant past conduct regarding the issue of integrity.

The Registrant's failure to provide the financial statements, specifically in the post-prehearing period, when the Registrant must have realized the importance of submitting them to ensure he retained his registration, raise questions about the financial viability of the business.

Mr. Bawab's testimony that he had to provide "additional personal resources to keep the company afloat" make clear that the company did not have the resources to support its sales.

However, while that would have been acceptable as it is not uncommon for business owners to provide operating capital as an investment in their business, the Registrant presented no material evidence to support such action on his part.

In the absence of any confirmation of the financial capability of the business, the Tribunal returns to the question of why the financial statements have not been submitted. They are a fundamental element of good business management.

As presented in Ms. Wu's testimony, the financial statements are the only means by which the Registrar can assess a registrant's financial position and ensure there is no risk to the public.

The other issue in this case is that there is no evidence to show that there have been any complaints or any indications of fraud in the Registrant's dealings with his customers. This speaks to the heart of the issue of honesty and is seen to be in the Registrant's favour.

The Tribunal noted that while the Registrant was understandably reluctant in giving testimony through cross-examination, he did not deny but rather acknowledged the facts as testified to by Mr. Angus and Ms. Wu.

This is also seen to be in the Registrant's favour.

While the Tribunal has concerns regarding Mr. Bawab's failure to submit his financial statements, and ensuring the business has a manager in accordance with the requirements of the Act, the Tribunal weighs that against the absence of evidence to show the Registrant will not carry on business with honesty. Therefore the Tribunal is prepared to consider conditions for the Registrant's continued registration, rather than confirm the drastic remedy of revocation of the registration.

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 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, 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 Registrant is to submit the past due financial statements within 21 days of the release date of this Decision. In the event the statements are not received by the Registrar or the financial position of the company fails to meet the requirements of the Act, as required by the Regulation, the Registrar is to immediately revoke the registration of the Registrant. As the Registrant has had his appeal heard by the Tribunal any revocation does not require a further Proposal or right of appeal to this Tribunal.
2. The Registrant is at all times to file all financial statements as required by the Regulation or the Registrar in a timely manner, and is to maintain the necessary working capital as required by the Regulation. The Registrar may require the Applicant to provide proof of such funds. Failure to do so will enable the Registrar to consider issuing a new proposal to revoke registration.
3. The Registrant is to submit the necessary information required to complete a revised and current member profile, and state how and by whom, the agency will be managed and supervised so as to be in accordance with the requirements of the Act. This is to also be submitted within 21 days of

the release of this Decision. In the event the Registrant fails to meet the requirements of the Act, the Registrar is to immediately revoke the registration of the Registrant, without any further Proposal or right of appeal to this Tribunal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: July 21, 2005

file name: 2836.tia.Uniitravel.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.



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

IN THE MATTER of the REGISTRATION of
WATAN TRAVELS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 12, 2005

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

WATAN TRAVELS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on July 7, 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, August 4, 2005.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek
Chair

Released: June 17, 2005



PREHEARING

1380140 ONTARIO INC. o/a JANETRAVEL AND CRUISE-ADJ-Adjournment;

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, Presiding member

APPEARANCES: no one appeared for the Applicant, 1380140 Ontario Inc. o/a
Janetravel and Cruise

MARIA L. ABATE, Counsel, representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: June 14, 2005 Toronto

ADJOURNMENT ORDER

Following attendance by Maria Abate, Counsel, representing the Registrar, *Travel Industry Act* (the "Registrar") and no one on behalf of 1380140 Ontario Inc. o/a Janetravel and Cruise on June 14, 2005 at a pre-hearing scheduled to begin at 1:30 p.m., before the Licence Appeal Tribunal (the "Tribunal");

And after delaying for one hour in expectation of the attendance of the Applicant or their representative, the Tribunal Orders that the Pre-Hearing be adjourned until Monday, 9:30 a.m., July 25, 2005.

On the basis of the decision to adjourn, Counsel for the Registrar made a request for costs in the amount of \$100.00 in accordance with Rule 14 of the Tribunal's Rules of Practice:

14.2 The Tribunal in determining whether a party has acted in bad faith, in an unreasonable, frivolous or vexatious manner, 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;

14.3 Where the Tribunal finds that a party has acted in bad faith, in an unreasonable, frivolous or vexatious manner, 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.

And as the Applicant failed to attend or provide notice, the Tribunal awards the above stated cost and Orders it be paid to the Registrar, *Travel Industry Act* by or before June 30, 2005.

Failure to pay the cost by the said date will result in the dismissal of the Appeal.

A review of the Tribunal's records showed the Applicant had received prior notice for the prehearing date as follows:

- May 12, 2005 - fax received from Applicant consenting to the prehearing;
- May 13, 2005 - fax sent to both Parties regarding the Notice of Prehearing and Notice of Hearing; copies of the Tribunal's Rules of Practice were mailed to the Applicant;
- June 14, 2005 - voice mail message left on Applicant's telephone number;
- June 15, 2005 - Tribunal's voice mail message system had two messages left by Applicant after-hours on June 14th claiming she was unaware of prehearing but noted the July 25th hearing date.

A new hearing date will be set at the prehearing scheduled to reconvene on July 25, 2005, at 9:30 a.m. at the Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

PRE-HEARING

1294322 ONTARIO LTD. o/a SUNBREEZE TRAVEL & TOURS

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: FRANK SUNGA, representing the Applicant, 1294322 Ontario Ltd.
o/a Sunbreeze Travel & Tours

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel
Industry Act* (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: June 14, 2005

Toronto

ORDER

Following attendances in person on June 14, 2005, at a pre-hearing before the Tribunal of Frank Sunga who appeared as representative for 1294322 Ontario Ltd. o/a Sunbreeze Travel & Tours (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, July 28, 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 has filed the required financial statements with the Registrar. As the statements reflect a working capital deficiency;

- a. the Applicant agreed and undertook to file with the Registrar by or before June 30, 2005, copies of banking documents to show there was a deposit of funds into the company's working capital account to remedy that deficiency;
 - b. the deposit document copies may be either from the time of the company's real estate refinancing to show funds were added to the working capital account at that time or a copy of the company's current bank statement to show the current working capital account meets the requirement at this time.
3. Subject to the Applicant complying fully and in a timely fashion with what is stated in paragraphs 2.a and 2.b above, the Registrar will consent to the withdrawal of the proposal dated March 24, 2005 and the matter will then not proceed to the hearing on July 28, 2005.
4. Should the Applicant fail to fully and in a timely manner comply with the requirements of paragraphs 2.a and 2.b above, the hearing will proceed on July 28, 2005 and the Parties shall fully comply with the applicable requirements of Disclosure as set out in Rule 6 of the Tribunal's Rules of Practice, a copy of which the Applicant's representative confirmed having received from the Tribunal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Member

Released: June 15, 2005

Filename: 2883.tia.Sunbreeze.pre.doc

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

1583721 ONTARIO CORP. O/A UNITRAVEL

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: WISSAM BAWAB, Agent for 1583721 Ontario Inc., operating as
Unitravel, Registrant,

MARIA L. ABATE, Counsel for Registrar, *Travel Industry Act*,
Respondent.

DATE OF
PRE-HEARING: May 12, 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 March 2nd, 2005, (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of **1583721 Ontario Inc., operating as Unitravel**, (the "Registrant") as a travel agent (Registration Number 50012144R).

The Registrant, by a Notice of Appeal dated March 3, 2005 (the "Appeal"), and filed at the offices of the Licence Appeal Tribunal (the "Tribunal") on March 11, 2005, requires a hearing by the Tribunal in respect of the Proposal.

In response to the Appeal, the Respondent requested a pre-hearing conference in order that settlement discussions could be held and an **Appointment For and Notice of Pre-hearing** dated April 5th, 2005, was sent by the Registrar of the Tribunal to both parties by way of facsimile. Participation in the Pre-hearing Conference was set down for a conference on May 12th, 2005, in accordance with the Rules of Practice of the Tribunal.

At the Pre-hearing Conference, the Registrant was represented by Wissam Bawab, an officer of the Registrant, and was accepted by this Tribunal as agent for the Registrant. All present were very helpful in providing what appeared to be useful information respecting the current circumstances of the Registrant.

It became apparent to this Tribunal that more time was necessary to reach a satisfactory resolution to the very simple and straight forward issues raised in the Proposal. There was ample time to conclude such a resolution prior to the hearing scheduled to be held on Monday, June 20, 2005, in accordance with the Appointment for and Notice of Hearing dated April 5, 2005, (the "Hearing Notice").

This Tribunal, therefore, issued an oral decision which was explained to those present at the conference, and acknowledged to be understood, which this Tribunal undertook to confirm in writing by way of a formal Order.

ORDER:

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

1. The Hearing shall take place in accordance with the Hearing Notice.
2. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Vice-Chair

Released: May 17, 2005

File No.: 2836.tia.Unitravel.pre

**Licence
Appeal
Tribunal**

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



PRE-HEARING

556032 ONTARIO LTD. o/a TRAVELSOURCE NETWORK

IN THE MATTER OF THE TRAVEL INDUSTRY ACT Revised Statutes of
Ontario, 1990, Chapter T.19

Notice of Proposal issued by the Registrar under the *Travel Industry Act* to
revoke the registration of 556032 Ontario Ltd., carrying on business under
the firm name and style as "Travelsource Network", as a travel retailer.
The Registrar, *Travel Industry Act*, Respondent

TRIBUNAL: TERENCE A. WARDROP, Q.C., VICE CHAIR

APPEARANCES: CAROLYN KING, Agent, appearing on behalf of 556032 Ontario Ltd.
o/a Travelsource Network Inc. (the "Applicant")

MARIA L. ABATE, Counsel, appearing on behalf of the Registrar,
Travel Industry Act (the "Respondent" or the "Registrar")

Date of Adjourned
Pre-hearing

Conference: April 13, 2005

Toronto

REASONS FOR ORDER

Background:

Pursuant to Sections 6 of the *Travel Industry Act*, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a *Notice of Proposal* dated February 7, 2005 (the "Proposal") was issued by the Registrar appointed under Section 2 of the Act (the "Registrar") to revoke the registration of 556032 Ontario Ltd., carrying on business under the firm name and style as "Travelsource Network", (the "Registrant") as a travel retailer (Registrations Number 2122091).

The Registrant, by a Notice of Appeal dated February 17, 2005 (the "Appeal"), filed on February 21, 2005 at the offices of the Licence Appeal Tribunal (the "Tribunal") requires a hearing by the Tribunal in respect of the Proposal.

On April 8, 2005, the Registrar filed an Order of Temporary Suspension and Notice of Further & Other Particulars dated April 5, 2005, (the "Temporary Suspension Order") at the offices of the Tribunal, immediately preceding participation in a pre-hearing conference which was set down for a hearing on April 8, 2005 (the "Pre-hearing Conference"), in accordance with the Rules of Practice of the Tribunal.

At the conclusion of the Pre-hearing Conference, the Tribunal ordered an adjournment of the Pre-hearing Conference and lifted the Temporary Suspension Order pending the adjourned Pre-hearing Conference upon the terms of an oral Order of the Tribunal dated April 8, 2005, and confirmed by a written Order of the Tribunal issued on April 12, 2005 (the "Interim Order").

At the adjourned Pre-hearing Conference, the Registrant was again represented by Caroline King pursuant to a power of attorney document and without counsel, but accepted by this Tribunal as agent and spokesperson for the incarcerated principal officer of the Registrant. In addition, Larry Finn, a representative of a prospective purchaser of the Registrant and his counsel, Jonathan E. Fleisher, were present. as was Steve Sanlor, a former employee and Officer of the Registrant. Participating with Counsel for the Registrar was M. Harrison representing the Travel Industry Council of Ontario. All present were very helpful in providing what appeared to be useful information respecting the current circumstances of the Registrant.

It became once again apparent to this Tribunal that more time was necessary to reach a satisfactory resolution to the vulnerability of the business undertaking of the Registrant and safeguard the public and creditors. A complex yet timely scheme was proposed which was acceptable to the Registrar and would involve the approval of the Courts. Accordingly, it was expedient to grant another adjournment of the Pre-hearing Conference and afford this Tribunal the opportunity to remain seized of the matter and its orderly and timely procedure towards a hearing.

Moreover, in order for the Appeal to be heard by the Tribunal and fully understood, the continued lifting of the Temporary Suspension Order should be extended during the period of time pending the conclusion of the Pre-hearing Conference and certainly during the period of adjournment of this conference.

This Tribunal, therefore, issued an oral decision which was explained to all those present at the conference, and acknowledged to be understood, which this Tribunal undertook to confirm in writing by way of a formal Order.

Order:

The Tribunal therefore makes the following Order pursuant to Section 9.3 of the Rules of practice of the Tribunal respecting the continuation of this Pre-hearing Conference and the hearing to be heard before the Tribunal:

1. This Pre-hearing Conference is adjourned to 10:30 a.m. on Wednesday, May 4, 2005;
2. The lifting of the Temporary Suspension Order shall be extended effective April 13, 2005 at 10:00 A.M., for a temporary period of time and shall be addressed at the adjourned pre-hearing conference;
3. Proper representation at the adjourned pre-hearing conference on behalf of the Registrant by Counsel duly retained and authorized is mandatory, subject only to the ruling of this Tribunal at that time;
4. Any undertaking by Larry Finn as to the continuation of the registration of the Registrant pending the formal hearing of the Appeal, including the Temporary Suspension Order, shall be in writing, as in the case of any other prospective successor respecting the future control of the Registrant; and
5. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on a date to be fixed by this Tribunal at the adjourned pre-hearing conference on Wednesday, May 4, 2005.

LICENCE APPEAL TRIBUNAL

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

Released: April 29, 2005

FILENAME: 2826.tia.Travelsource Network.pre.2

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: CARL DOMBEK, Chair

APPEARANCES: ALLAN THOMAS STRADER, Counsel, appearing on behalf of
1175926 Ontario Ltd. o/a Gill's Travel

JEAN GILL-WYATT, Agent, appearing on behalf of 1175926 Ontario
Ltd. o/a Gill's Travel

MARIA L. ABATE, Counsel, appearing on behalf of the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: April 21, 2005

Toronto

ORDER

WHEREAS, the parties have filed a Joint Statement of Fact and a Joint Submission
(Schedule "A").

AND WHEREAS, the Applicant has received independent legal advice (Schedule "A"
Page 3).

The Licence Appeal Tribunal orders that:

1. The Registrar shall refrain from carrying out the Proposal to Revoke Registration dated October 21, 2004 should the Registrant fulfill the conditions outlined in this Order.
2. The Registrant shall correct the working capital deficiencies reflected in its financial statements for the fiscal year-ending April 30, 2004. The working capital deficiency of \$8,985.00 shall be corrected on or before May 2, 2005 and the Registrant shall provide evidence of the working capital correction to the Registrar no later than 5:00 PM on May 2, 2005.

3. The Registrant shall not, at any time, remove the working capital correction made pursuant to condition 2 of this Order. An Inspector designated by the Registrar may, at any reasonable time, conduct a random financial inspection to determine whether the working capital has been maintained.
4. The financial statements for the fiscal year-ending April 30, 2005 shall be submitted to the Registrar on or before July 31, 2005.
5. The financial statements shall be prepared in the form of a review engagement report by an accountant licensed under the *Public Accountancy Act*. The financial statements for the fiscal year-ending April 30, 2005 shall not be submitted in draft form and will not be acceptable in such form.
6. In the event that the financial statements for the fiscal year-ended April 30, 2005 reveal a working capital deficiency, the Registrant shall have thirty (30) days to correct the said deficiency and provide evidence of its correction to the Registrar. The thirty (30) day period will begin on August 1, 2005 and expire at 5:00 PM on August 31, 2005.
7. This agreement shall override any previous agreements or arrangements made between the Applicant and the Registrar.
8. In the event that the Applicant fails to comply with any of the conditions in this Order, the Registrar shall make a motion to the Licence Appeal Tribunal to address his concerns, review the Order and proceed with the proposal to revoke registration. Any such motion shall be made in accordance with Rule 13.1 of the Rules of Practice for the Licence Appeal Tribunal and the Applicant shall have notice of such a motion.
9. 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.
10. Provided that each of the conditions of this Order is completed in its entirety, this Order shall expire at 5:00 PM on August 31, 2005.

LICENCE APPEAL TRIBUNAL

Carl Dombek, Chair

RELEASED: April 21, 2005

FILE NAME: 2683.tia.gill's travel.order.doc

SCHEDULE "A"

LICENCE APPEAL TRIBUNAL

BETWEEN:

1175926 ONTARIO LTD. O/A
GILL'S TRAVEL, REGISTRATION No. 4445383

Applicant

-and-

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

JOINT STATEMENT OF FACT

1. The Registrant was registered as a travel agent (Registration No 4445383/R) on July 10, 1996.
2. On October 21, 2004, a Proposal to Revoke Registration was issued against the Registrant for failing to submit its financial statements for the fiscal year-ended April 30, 2004.
3. On February 16, 2005, a pre-hearing conference was held and an Order issued. Paragraph 2 of the Order indicates that the Registrant (Applicant) acknowledged and agreed to each allegation outlined in the Proposal to Revoke Registration.
4. Paragraph 3 of the pre-hearing Order required that the Registrant file its annual financial statements for the year-ended April 30, 2004 together with a review engagement report by a public accountant licensed under the *Public Accountancy Act* no later than the close of business on March 15, 2005. In the event that this condition was not fulfilled, paragraph 4 of the pre-hearing Order required that the parties attend before a hearing of the Licence Appeal Tribunal at 9:30 AM on April 21, 2005.
5. On March 14, 2005, the Registrar received draft financial statements for the Registrant's year-ended April 30, 2004. Accompanying the financial statements was a letter from the Registrant's accountants indicating that the final financial statements and a review report would follow in approximately twelve days.
6. On March 20, 2005, the Registrar informed the Registrant that the draft financial statements were not complete and not in the form stipulated in condition 3 of the pre-hearing Order. The Registrar advised the Registrant that it would begin

preparation to attend a hearing before the Licence Appeal Tribunal as required by condition 4 of the pre-hearing Order.

7. On April 15, 2005, the Registrar received the review engagement report and financial statements for the fiscal year-ended April 30, 2004. The financial statements were provided by Counsel for the Registrant.
8. On April 18, 2005, the financial statements were reviewed by the Chief Financial Officer for the Travel Industry Council of Ontario. The review indicated that the Registrant had a working capital deficiency of \$8,985.00.
9. On April 19, 2005, Counsel for the Registrar, advised Counsel for the Registrant of the working capital deficiency.
10. On April 20, 2005, Counsel for each party entered settlement discussions and agreed that Counsel for the Registrar would prepare a joint submission for presentation to the Licence Appeal Tribunal on April 21, 2005.

JOINT SUBMISSION

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:

11. the Registrar shall refrain from carrying out the Proposal to Revoke Registration dated October 21, 2004 should the Registrant fulfill the conditions outlined in this Order.
12. the Registrant shall correct the working capital deficiencies reflected in its financial statements for the fiscal year-ending April 30, 2004. The working capital deficiency of \$8,985.00 shall be corrected on or before May 2, 2005 and the Registrant shall provide evidence of the working capital correction to the Registrar no later than 5:00 PM on May 2, 2005.
13. the Registrant shall not, at any time, remove the working capital correction made pursuant to condition 2 of this Order. An Inspector designated by the Registrar may, at any reasonable time, conduct a random financial inspection to determine whether the working capital has been maintained.
14. the financial statements for the fiscal year-ending April 30, 2005 shall be submitted to the Registrar on or before July 31, 2005.
15. the financial statements shall be prepared in the form of a review engagement report by an accountant licensed under the *Public Accountancy Act*. The financial statements for the fiscal year-ending April 30, 2005 shall not be submitted in draft form and will not be acceptable in such form.

16. in the event that the financial statements for the fiscal year-ended April 30, 2005 reveal a working capital deficiency, the Registrant shall have thirty (30) days to correct the said deficiency and provide evidence of its correction to the Registrar. The thirty (30) day period will begin on August 1, 2005 and expire at 5:00 PM on August 31, 2005.
17. this agreement shall override any previous agreements or arrangements made between the Applicant and the Registrar.
18. in the event that the Applicant fails to comply with any of the conditions in this Order, the Registrar shall make a motion to the Licence Appeal Tribunal to address his concerns, review the Order and proceed with the proposal to revoke registration. Any such motion shall be made in accordance with Rule 13.1 of the Rules of Practice for the Licence Appeal Tribunal and the Applicant shall have notice of such a motion.
19. 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.
20. provided that each of the conditions of this Order is completed in its entirety, this Order shall expire at 5:00 PM on August 31, 2005.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to retain independent legal advice with respect 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.

Authorized Signing Officer
Jean Elizabeth Wyatt, President
1175926 Ontario Ltd. o/a
Gill's Travel

Witness

Michael Pepper, *Registrar*
Travel Industry Act

Witness

DATED THIS ____ DAY OF APRIL, 2005 AT TORONTO, ONTARIO

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

556032 ONTARIO LTD. o/a TRAVELSOURCE NETWORK

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: CAROLYN KING, Agent, appearing on behalf of 556032 Ontario Ltd.
o/a Travelsource Network Inc. (the "Applicant")

LARRY FINN, Representative of a prospective purchaser of the
Applicant

STEVE SANLOR, Former employee and Officer of the Applicant

MARIA L. ABATE, Counsel, appearing on behalf of the Registrar,
Travel Industry Act (the "Respondent" or the "Registrar")

DATE OF
PRE-HEARING: April 8, 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 (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of **556032 Ontario Ltd., carrying on business under the firm name and style as "Travelsource Network"**, (the "Applicant") as a travel retailer (Registration Number 2122091).

The Applicant, by a Notice of Appeal (the "Appeal"), filed at the offices of the Licence Appeal Tribunal (the "Tribunal") requires a hearing by the Tribunal in respect of the Proposal.

Participation in the Pre-hearing Conference was set down for a conference in accordance with the Rules of Practice of the Tribunal. At the Pre-hearing Conference the Applicant was represented by Carolyn King pursuant to a power of attorney document which this Tribunal found to be inadequate for the purpose. In addition, Larry Finn, a representative of a prospective purchaser of the Applicant, and Steve Sanlor, a former employee and Officer of the Applicant, were also present, participated and were very helpful in providing what appeared to be useful information respecting the current circumstances of the Applicant.

It became apparent to this Tribunal that more time and information was necessary to reach any kind of understanding concerning the Applicant's prospects for carrying on its business undertaking and sustaining any value in its goodwill and registration under the Act. At the same time, it was necessary to appreciate the duty of the Registrar to protect the public and the risks of a business failure which would result whether or not the Proposal was implemented and which would surely follow upon acceptance of the Proposal.

Moreover, in order for the Appeal to be heard by the Tribunal and fully understood, a Suspension Order issued by the registrar and dated April 5, 2005, should be lifted for a temporary period of time, and certainly during any short period of adjournment of this conference.

This Tribunal, therefore, issued an oral decision which was precisely explained to all those present at the conference, and acknowledged to be understood without qualification, which this Tribunal undertook to confirm in writing by way of a formal Order.

DECISION AND ORDER:

The Tribunal therefore makes the following Order pursuant to Section 9.3 of the Rules of Practice of the Tribunal respecting the continuation of this Pre-hearing Conference and the hearing to be heard before the Tribunal:

1. This Pre-hearing Conference is adjourned to 9:30 a.m. on Wednesday, April 13, 2005;
2. The Suspension Order dated April 5, 2005 shall be lifted effective April 8, 2005 at 3:00 p.m., for a temporary period of time and shall be addressed at the adjourned pre-hearing conference;

3. Proper representation at the adjourned pre-hearing conference on behalf of the Applicant by Counsel duly retained and authorized is mandatory, subject only to the ruling of this Tribunal at that time;
4. Any undertaking by Larry Finn as to the continuation of the registration of the Applicant pending the formal hearing of the Appeal, including the Suspension Order, shall be in writing, as in the case of any other prospective successor respecting the future control of the Applicant; and
5. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on a date to be fixed by this Tribunal at the adjourned pre-hearing conference on Wednesday, April 13, 2005.

LICENCE APPEAL TRIBUNAL

Terrence Wardrop, Q.C.,
Vice Chair

RELEASED: April 12, 2005

Filename: 2816.tia.Travelsource Network.pre



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PRE-HEARING

AERO CANADIAN TOUR & TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice Chair
DONALD BENNINGER, Member

APPEARANCES: NATHAN KANAPATHIPPILLAI, Agent, appearing on behalf of Aero
Canadian Tour & Travel Inc.

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: March 24, 2006

Toronto

ORDER

Following attendances on March 24, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Nathan Kanapathippillai, Agent, appearing on behalf of Aero Canadian Tour & Travel Inc. (the "Applicant") and Soussanna Karas, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

After hearing submissions from the Parties, the Tribunal makes the following Order:

1. It was agreed on consent that the Registrant (Applicant) will forward to the office of the Registrar by April 30, 2006 Trust Reconciliations (reconciliation of customer deposit to trust account) as required by Section 36 of Regulation 806/93 prepared by a licensed public accountant.

2. Failure to satisfy these conditions or if there is a deficiency either in the reconciliation statements or the accounts proper, this matter will proceed to hearing on the scheduled date of Friday, May 12, 2006, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair

RELEASED: March 29, 2006

FILE NAME: 3336.tia.Aero Canadian Tour & Travel Inc.prehrg order.doc

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
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matière de permis



MICHAEL KENNY-Dismissal

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, Chapter 30, Schedule D

IN THE MATTER OF a CLAIM by
MICHAEL KENNY

AND IN THE MATTER of the DECISION of the
Board of the Travel Industry Council of Ontario
made pursuant to Regulation 26/05 under the *Travel Industry Act, 2002*

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

MICHAEL KENNY

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Travel Industry Act, 2002*, S.O. 2002, Chapter 30, Schedule D (the "Act"), Michael Kenny (the "Applicant") initiated an appeal under section 71(2) of Regulation 26/05 under the *Travel Industry Act, 2002* from a Decision issued by the Board of the Travel Industry Council of Ontario (the "Board") dated December 16, 2005 in terms of which the Board denied the Applicant's claim;

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 71 of Regulation 26/05 under the *Travel Industry Act, 2002*, this Tribunal directs the Board of the Travel Industry Council of Ontario to deny the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Carl F. Dombek, Chair

RELEASED: February 27, 2006

FILE NAME: 3359.tia.Kenny.dismissal order.doc

This decision will also be available on Quicklaw at a later date.



PREHEARING

585119 ONTARIO INC. O/A SEVEN OAKS TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT, 2002*, R.S.O. 1990,
CHAPTER T.19 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: no one appeared for the Applicant, 585119 Ontario Inc. o/a
Seven Oaks Travel

MICHAEL PEPPER, Counsel, representing the Registrar,
Travel Industry Act, 2002

DATE OF
PRE-HEARING: January 10, 2006

Toronto

ORDER

On January 10, 2006, Michael Pepper, Counsel, representing the Registrar, *Travel Industry Act, 2002*, (the "Registrar") attended at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal"), scheduled to begin at 9:30 a.m. in the above-noted matter. No one appeared on behalf of 585119 Ontario Inc. o/a Seven Oaks Travel;

During a delay of half an hour in expectation of the Applicant or its representative to appear, the Tribunal telephoned Kamlesh Kalia, who filed the Notice of Appeal and received no reply. The Tribunal also telephoned Jim Plant, an accountant for 585119 Ontario Inc. o/a Seven Oaks Travel.

Mr. Plant advised the Tribunal that he had been informed by the Applicant that the Appeal was being withdrawn and that a written withdrawal would be filed with the Tribunal.

On January 17, 2006, the Tribunal received notice in writing from the Applicant that the Appeal had been withdrawn.

Accordingly, it is ordered that:

1. The Appeal in the above-noted matter is withdrawn;
2. The Hearing in this matter, scheduled to proceed on February 14, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, is cancelled.

LICENCE APPEAL TRIBUNAL

Laurie Sanford
Vice-Chair

RELEASED: January 23, 2006

File No. 3217.SevenOaksTravel.tia.doc

The decision will also be available on Quicklaw at a later date.



HIGHBOURNE ENTERPRISES INC. O/A HELEN THOMPSON TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, 2002

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BRUCE BISHINS, Agent, appeared for Highbourne Enterprises Inc.
o/a Helen Thompson Travel

TRACY MCKIENAN, counsel, appeared for the Registrar, Travel
Industry Act

DATE OF
HEARING: December 9, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises out of a Notice of Proposal (the “proposal”) dated July 29, 2005, issued by the Registrar under the *Travel Industry Act* (the “Registrar” and the “Act”, respectively) to revoke the registration of Highbourne Enterprises Inc. operating as Helen Thompson Travel (the “Applicant”) as a travel agent under the provisions of the Act.

The Registrar’s proposal is brought pursuant to section 6 of the Act as read with section 4 (1)(c) and section 5 (2) of the Act.

The Registrar bases his proposal on the following allegations as contained in his proposal:

- i. Section 44 of Ontario Regulation 806/93, as amended, (the “Regulation”) made under the Act requires every travel agent to participate in the Ontario Travel

Industry Compensation Fund (the “Fund”) and to comply with the terms of the Fund as set out in the Regulation.

- ii. Section 47. (1) of the Regulation requires a travel agent twice yearly to make payment to the Travel Industry Council (the “Council”) in an amount that is the greater of the following:
 - 1. \$25 plus the applicable taxes
 - 2. the amount of,
 - i) \$0.40 plus the applicable taxes for every \$1,000 (or part of \$1, 000) of sales made before May 1, 2000, and
 - ii) \$0.25 plus the applicable taxes for every \$1,000 (or part of \$1,000) of sales made on or after May 1, 2000.
- iii. Section 47. (3) of the Regulation requires the payments under section 41(1) above to be made within 45 days after the end of the travel agents fiscal year or fiscal half year.
- iv. Section 47. (5) of the Regulation requires that the payments above shall be accompanied by a completed Form 1 indicating the sales of the Travel Agent for the reporting period and the amount of payments owing to the Council.
- v. Section 47. (6) of the Regulation requires that the completed return, namely the Form 1, shall be certified by the Travel Agent’s authorized officer as to its accuracy.
- vi. Section 1, Part I of the Regulation defines a “registrant” to mean a person who is registered under the Act as a travel agent or a travel wholesaler.
- vii. Section 1, Part I of the Regulation defines “sales” to mean

“in relation to a registrant, the amount of payments received or to be received for all travel services,

 - (a) sold in Ontario during a reporting period by or through a registered travel agent to a customer, or
 - (b) sold in Ontario during a reporting period by a registered travel wholesaler to or through a registered travel agent or registered travel wholesaler.”

In support of his proposal, the Registrar states as follows:

1. The Registrant was registered as a travel agent on February 20, 1989. At this time, the registrant was assigned registration No. 3014193. The fiscal year-end of the registrant is November 30.
2. On March 11, 2004, the registrant submitted financial statement of the fiscal year-ended November 30, 2003. The financial statement reflected sales of \$2,061,664.00. For the purpose of Form 1 filings, the registrant declared total sales of \$1,022,959.00 and contributed \$294.11 to the Ontario Travel Industry Compensation Fund (hereinafter referred to as the "Fund"). The difference between the two figures is \$1,038,705.00. As a result of the discrepancy, the registrant's 2003 Form 1 payment is short by \$298.63.
3. On June 23, 2003 the registrant contacted the Form 1 Co-ordinator, Lori Furlan, at the Travel Industry Council of Ontario (hereinafter referred to as "TICO") to inquire about the calculation of Form 1 payments. At this time, the Registrar wrote to the registrant to clarify the calculation of Form 1 payments and directed the registrant to the appropriate provisions of the Regulation. The Registrar included the definition of the term "sales" as it occurs in the Regulation and its application with respect to the calculation of Form 1 payments.
4. The Registrar's letter further indicated that a sale as defined by the Regulation and for the purpose of a Form 1 payment, did not include consideration of whether a transaction resulted in a commission for the agent, but rather that a transaction resulting in the sale of a travel service had been facilitated by or through the agent and / or his agency.
5. The Registrar's letter also cited Section 23(1) of the Regulation, which required the same invoicing procedures to be followed regardless of the consumer's payment method and/or the earnings of the agent. He stated that Section 23(1) required agents to issue statements, invoices or receipts for all consumer payments as the use of the term "payment" was not limited to cash or cheque payments only. All consumers whose travel services are paid by credit card and which processed by or through an agency were to be issued an invoice as per the Regulation. The registrant had previously indicated to the Form 1 Co-ordinator that they were not issuing invoices for sales processed through the registrant to the airline as he derived only a service fee from this type of sale. Again, The Registrar clarified that the registrant is still required to abide by these provisions whether or not a commission or service fee is received by the agent.
6. By letter dated July 15, 2003 the registrant responded indicating that they did not agree with the interpretation of the Regulation as outlined by TICO. The registrant indicated that he had calculated his Form 1 payment excluding purchases that are made by consumers using credit cards because the credit cards are charged directly by the end suppliers of the travel services.
7. By letter dated August 29, 2003, the Registrar wrote to the registrant advising that he was required to make payments to the Fund based on sales as defined by the Regulation and that TICO was required to administer and enforce the Regulation as it is written. The letter noted that the Legislature of Ontario had opted to define sales as *"the amount of payments received or to be received for all travel services sold... by or through a registered agent"* The Registrar stated that in other sections of the Regulation, its drafters adopted the terms "funds" or "monies received" as opposed to "payments" and therefore, intentionally drafted the definition of sale to be more inclusively using the term "payments" when defining "sales" for the purpose of a Form 1 calculation.

8. The letter also stated a similar position with respect to the phrase "*received by or through*" the registrant and not simply "*received by*" the registrant. Credit card transactions are processed through registrants and therefore considered a sale to be included in the calculation of the Form 1 payment. Again, TICO acknowledged the registrant's concerns and explained that it is their duty to enforce and administer the Regulation as it is written. To date, the outstanding 2003 Form 1 shortfall of \$298.63 has yet to be forwarded to the Fund.
9. On March 15, 2005, the registrant submitted financial statements for the fiscal year-ended November 30, 2004. The financial statements reflected sales in Ontario of \$2,355,829.00. For the purpose of Form 1 filings, the registrant declared total sales of \$378,707.00 and contributed \$108.97 to the Fund. The difference between the two figures is \$1,977,122.00. As a result of the discrepancy, the registrant's 2004 Form 1 payment was short by \$568.42. To date, the outstanding 2004 Form 1 shortfall of \$568.42 has yet to be forwarded to the Fund.
10. On May 24, 2005, TICO Inspector Jack Foster attended at the registrant's premises to review their Form 1 sales reporting to the sales reported in financial statements submitted for the years 2003 and 2004. Mr. and Mrs. Perry, President and Vice-President, of the registrant corporation were present at the inspection. Also present was Mr. Bruce Bishins, Chief Executive Officer and President of CSTAR [Canadian Standard Travel Agent Registry]. During the course of the inspection Mr. Bishins raised the issue of including credit card sales in the calculation of the registrant's Form 1 payment to the Fund. All parties indicated that they felt these sales should be excluded from the calculation, since the consumer's credit card payments were deposited directly into the bank accounts of the travel suppliers, except for the commission received or service fee charged by the agent. The Inspector concluded that the registrant was not in compliance with the Form 1 requirements as outlined by the Regulation.
11. By letter dated June 2, 2005, the Registrar wrote to the registrant regarding the shortfall in payments to the Fund. The letter outlined TICO's duty to administer and enforce the Act, explained the calculation of the, Form 1 payment a further time and acknowledged that the registrant disagreed with this calculation. The letter also included an invoice for the outstanding Form 1 payments calculated using the sales figures as declared by the registrant in their financial statements. The letter requested that the registrant remit the outstanding total payment of \$867.05 no later than June 30, 2005.
12. By letter dated June 14, 2005, the registrant replied stating that they disagreed with the definition of "sales" as defined by the Regulation. In this letter, the registrant did not include the outstanding payment in the amount of \$867.05, but proposed placing the funds in escrow or in a trust account in favour of TICO.
13. By letter dated July 4, 2005, the Registrar replied to the registrant providing a second invoice for the outstanding Form 1 payments and a final deadline of July 15, 2005 for submission of the payment. The Registrar did not accept the proposal to place the outstanding funds in escrow or in a trust account and briefly outlined the appeals procedure for the Licence Appeal Tribunal as per the registrant's request.
14. By letter dated July 7, 2005, the registrant replied and requested that the Registrar issue a Notice of Proposal to Revoke Registration so that they may appeal the Proposal and settle the matter before a "competent arms-

length party".

15. The registrant has yet to submit the \$867.05 in outstanding Form 1 contributions for the 2003 and 2004 fiscal years. The registrant has failed to meet its obligations as required under the Act and Regulation and wilfully refuses to do so as outlined in their letters. It is therefore the opinion of the Registrar that the Registrant's registration should be revoked.

(Exhibit 4, tab 1)

The Applicant's Notice of Appeal states as follows:

The item(s) of the decision I/we wish to appeal is (are):

1. The Applicant appeals and claims as false the TICO Registrar's interpretation of a "sale" and the notion of "payments received or to be received", including the notion "by or through a registered travel agent" as stated in Section C.7 of the Notice of Proposal to Revoke Registration.

Reason: The Applicant does not and cannot "receive" payments which do not pass directly or indirectly to or through its bank, merchant account, credit facilities, or other financial repository.

2. The Applicant appeals and claims as false the TICO Registrar's interpretation that there is a difference in the meaning among the terms "payment", "monies", and "funds", as alleged by the Registrar in Section D.7 of the Notice of Proposal to Revoke Registration.

Reason: The Applicant feels the Registrar is overreaching his authority to make such an interpretation or to suggest that there is any evidence to support such a distinction as intended by the "drafters" of the Regulations. Furthermore, in the case of airline transactions in favour of carriers participating in the International Air Transport Association (IA TA) Billing and Settlement Plan - Canada (BSP Canada), where the consumer pays the airline via cash or cheque, any monies tendered by the travel agent on behalf of the airline are monies which are contractually the sole and exclusive property of the air carrier.

3. The Applicant appeals and claims as false the TICO Registrar's statement that "Credit card transactions are processed through Registrants" as alleged by the Registrar in Section D.8 of the Notice of Proposal to Revoke Registration.

Reason: In the case of airline transactions paid by credit card to carriers participating in the International Air Transport Association (IA TA) Billing and Settlement Plan - Canada (BSP Canada), or for transactions via an airline's web site or other e-commerce portal, travel agents neither process, nor transact credit card billings which result in any charge to consumers either directly or indirectly by the travel agent. None of these transactions result in any monies received by the travel agent from the consumer.

4. The Applicant appeals the underlying basis upon which the TWO Registrar has forced the Applicant to declare "sales" inconsistent with commercial reality, including the definition of a sale within the Regulations, and how the Registrar has interpreted when a "sale" occurs and the amount of such a sale for the purposes of determining the alleged proper calculation of "Form 1" contributions to the compensation fund as alluded to in Sections C.5, D.2, D.3, D.4, D.5, D.6, D.7, D.8, D.9, D.10, D.11, D.12, D.13, and D.15 of the Notice of Proposal to Revoke Registration..

Reason: By virtue of being forced under threat of registration revocation to complete Form 1 and produce supporting financial statements in a manner inconsistent with the Applicant's actual and true sales and by virtue of TICO's failure to reasonably address the extensive inconsistencies in defining alleged travel agency "sales " transactions, including but not limited to web bookings, hotel bookings, car rental bookings, and many other transactions where a travel agent provides payment terms data to end-suppliers, the Applicant is unable to reasonably and accurately determine which transactions should legally be included as a "sale "for the sole purpose of satisfying TICO, rightly or wrongly.

The Applicant does not deny that its Form 1 submissions and financial statements may contain errors or inconsistencies. Travel agency accounting software, including GBO (used by the Applicant and most agencies in Canada) has been developed and programmed to accommodate TICO's financial reporting requirements. However, the Applicant, for tax purposes, IA TA, or other government filings would not and does not use such accounting output in that it is totally inconsistent with generally accepted accounting principles. The Applicant cannot be expected to abide by the confusing and inconsistent sales interpretations of TICO, most all of which fail the test of commercial reality or natural justice. The Applicant does not agree with the amounts alleged by TICO to hewing.

(Exhibit 4, tab 2, page 3-4)

The Evidence

The evidence introduced by the Registrar consisted of the testimony of Lori Furlan, Jack Foster and the Registrar, Michael Pepper. The Applicant did not have any person testify on its behalf.

The testimony of Lori Furlan

Furlan testifies that she is the claims coordinator at the Travel Industry Council of Ontario ("TICO") where she has been employed for the past 13 years. Prior to working for TICO, she worked in the travel industry itself.

In her capacity as claims coordinator at TICO, she supervises the processing of claims made under the Act and regulations. She explained the requirements of all travel agents registered under the Act that they complete a Form 1 twice every year and to file this form with the Fund together with the requisite contributions due by the travel agent which contributions are utilized in funding the Fund.

Furlan testified further that contributions by travel agents to the Fund are based upon gross sales of travel services made by the such agents and that Regulation 806/93 defines "sales" in Section 1 of Part 1 of that Regulation.

Furlan went on to testify that the Applicant was registered as a travel agent under the Act on February 20, 1989, the fiscal year-end of the Applicant is November 30 and that the Applicant's financial statement for fiscal year-ended November 30, 2003, reflected gross sales of \$2,061,664.00 whilst the Form 1 completed and filed by the Applicant for the year ended November 30, 2003, reflected a sales total of \$1,022,959 and a

contribution of \$294.11 to the Fund. The difference between sales reflected in the financial statement and sales reflected in the Form 1 was \$ 1,038,705.00 and the resultant discrepancy or under-payment was \$298.63.

On March 15, 2005, the Applicant's financial statements for the fiscal year-ending November 30, 2004 were submitted to TICO and reflected gross sales of \$2,355,829.00 whilst the Form 1 filings for the year ending November 30, 2004 reflected total sales of \$378,707.00 and a contribution to the Fund of \$108.97. The discrepancy resulted in a shortfall in contribution of \$568.42.

Furlan went on to state that airlines and cruise lines are known as end suppliers of travel services. End suppliers obtain payment from the travel agent or through the travel agent. The travel agent usually obtains a completed and signed credit card slip from the customer payable to the end supplier and which credit card slip is then sent through the travel agent to the end supplier airline or cruise line. Furlan went on to state that the Fund reimburses customers of registered travel agents for eligible claims arising from the bankruptcy or insolvency of a registrant under the Act or arising from the failure of an end supplier airline or cruise line.

The Testimony of Jack Foster

Foster testified that he is an inspector employed by TICO and is a certified management accountant. He has been with TICO for the past 12 ½ years. His duties with TICO include doing financial analysis and examination of registrant's financial statements. He reviewed the Applicant's November 30, 2003 financial statement (Exhibit 4, tab 7) and observed that the notes to such statement indicate that the gross sales of the Applicant for the year ended November 30, 2003 amounted to \$2,061,664.00. He also noted that the Applicant for the fiscal period ending November 30, 2003 reported sales, according to the Applicant's Form 1 filed with TICO, of \$1,022,959.00 and that there was a shortfall of \$298.63 in the contribution paid to TICO. Foster pointed out that when he analyzed the Applicant's November 30, 2004, financial statements and the notes thereto, the gross sales for the Applicant for the fiscal year ending November 30, 2004, were \$2,355,829.00 whereas for that fiscal period, according to the Form 1 filed by the Applicant with TICO, the sales were \$378,707.00, a difference of \$1,977,122.00 with consequent shortfall in contribution paid of \$568.42.

Foster visited the Applicant on May 24, 2005 and spoke with Mr. and Ms. Parry, the owners of the Applicant, and their agent, Bruce Bishins. The Parrys and Bishins contended that consumers' credit card payments that were deposited directly into the end suppliers' bank accounts should not be considered as sales in Form 1 and they did not accept the definition of "sales" in section 1 of Regulation 806/93. They felt that the end supplier *"receiving the credit card transaction, processing through their merchant credit card processor, is receiving the traveller's payment directly and therefore not the sale of the registrant as defined by Regulation 806/93."* (Exhibit 4, Tab 15, page 3).

Foster concluded that he found the Applicant to be well financed but not in compliance with Form 1 reporting and by stating that a “credit card sale” has always been considered by TICO to be a sale in terms of Regulation 806/93.

The testimony of Michael Pepper

Pepper testified that he has been the Registrar under the Act since 1997 and is chief executive officer of TICO.

He went on to state that in June 2003, Lori Furlan spoke with him regarding her discussion with the Applicant’s Mr. Parry, when the latter person requested clarification, in writing, of the calculation of sales for the purposes of contributions to the Fund. In response to Parry’s request, Pepper stated he addressed a letter to the Applicant on June 23, 2003 (Exhibit 4, Tab 4). In that letter, Pepper set out the definition of “sales” as stated in section 1 of Regulation 806/93 and then went on to state in that letter:

This means that any sales that are processed through a registrant to a consumer are subject to form 1 contributions even if the payment goes directly to the airline. I understand from your conversation with TICO staff that your company is not providing an invoice to the consumer for sales that are made directly to the airline and that you are only charging the consumer a service fee. This is not correct as the registrant is still responsible to inform consumers about any conditions related to the purchase of the travel services whether it is in person or over the internet. Section 21, 22, and 23 of the Regulation continue to apply for any services bought through your agency whether in person, over the phone or on the internet. We have included a copy of these sections for your review.

While TICO understand that in many cases the travel agent no longer receives a commission from the airline for airline sales, these are still sales as defined by the Act. The consumer believes that they are booking through a registrant and the registrant is required to adhere to the provision of the Act and Regulation.

(Exhibit 4, Tab 4)

Pepper went on to state that in Parry’s reply to the above letter, Parry took issue with Pepper’s interpretation of the definition of sales in Regulation 806/93 stating:

Unfortunately, I cannot agree with your interpretation. In no way does it reflect the Act as I see it and it leaves many crucially important questions unanswered. Mr. Pepper, I’m sure you can see that we must get this matter resolved with the utmost urgency. The Act was written in another time and much has changed. We have zero commissions, we have Internet bookings, we have ticketing by airlines and so on.

Canadians are confronted with the very real possibility that the nation’s largest airline could fail leaving the Fund to carry a massive burden of compensation – a burden for which it was never designed and could not sustain.

Section 48 clearly holds TICO registrants liable in the event of failure of a major airline. TICO can come back to Ontario travel agents at any time to demand additional monies in the event that it does not have enough money to settle these claims.

(Exhibit 4, Tab 5)

By letter dated August 29, 2003, Pepper responded to Parry’s concerns and emphasized in his response that the use of the words “received by or through” a registered travel agent in relation to travel services, captures the situation where the

latter receives from the customer a credit card payable to the end-supplier such as an airline or cruise line. (Exhibit 4, Tab 6)

Pepper further testified that in May 2005, TICO realized that the Applicant continued to have a shortfall between gross sales reported in its financial statements and sales reported in the Applicant's Form 1 contributions. Accordingly, inspector Foster was required to conduct an inspection of the Applicant and to report as to his findings, which he did in his inspection report of May 25, 2005, (Exhibit 4, Tab 15). Pursuant to Foster's report, Pepper addressed a further letter to the Applicant essentially reiterating TICO's position and making it clear that the Fund provides reimbursement of monies paid by or through a registered travel agent for travel services not provided due to the bankruptcy or insolvency of an end supplier airline or cruise line. The Applicant was again requested to pay TICO the outstanding amount of \$867.05 respecting the shortfall in payments due to the Fund for the fiscal years November 2003 and November 2004 (Exhibit 4, Tab 16).

The amount of \$867.05 was not paid by the Applicant and remains owing to the Fund. The Applicant did, however, state in its letter to TICO, dated June 14, 2005, that it continued to challenge TICO's suggestion

that when agencies are neither the merchant nor the seller of a travel service, that passing on credit card information to the actual merchant or seller constitutes a sale by the agency

and went on to further state that

as a matter of good faith, and to prove that it is not our intention to evade payment we are prepared to place our alleged contribution of \$867.05 in an escrow/trust account in TICO's favour, pending the final outcome of this dispute.

(Exhibit 4, Tab 17)

TICO responded in its letter of July 4, 2005, to the Applicant that the latter's offer to place contributions in an escrow/trust account was not acceptable and the Registrar proceeded with his Proposal to Revoke the Applicant's registration.

At the conclusion of the Registrar's case, the Agent for the Applicant declined to have either Mr. or Mrs. Parry testify and advised that the Applicant would not have any person testify on the Applicant's behalf and accordingly closed its case.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal:

1. The Applicant is a registered travel agent under the Act and has been so registered since February 20, 1989.

2. The Applicant is required under section 44 of Ontario Regulation 806/93, as amended, under the Act, to participate in the Ontario Travel Industry Compensation Fund and to comply with the terms of the Fund.
3. The Applicant, in submitting financial statements to the Fund for the fiscal years ended November 30, 2003 and November 30, 2004 reported gross sales for such periods of \$2,061,664.00 and \$2,355,829.00 respectively.
4. The Applicant when completing, signing and filing Form 1's with the Fund for the years ending November 30, 2003 and November 30, 2004 reported gross sales for those periods respectively of \$1,022,959.00 and \$378,707.00.
5. The contributions to the Fund made by the Applicant for the years ending November 30, 2003 and November 30, 2004, were underpaid by \$298.63 and \$568.42 respectively. The total underpayment of the aforesaid amounts to \$867.05, which sum is currently due and owing to the Fund by the Applicant.

THE LAW

The Travel Industry Act, 2002, states as follows:

41. (1) The Travel Industry Compensation Fund established under the *Travel Industry Act* is continued.

(2) The Fund shall be administered and managed in accordance with the regulations.

Ontario Regulation 806/93 under the Travel Industry Act states in Part 1, Section 1:

1. In this Regulation

"sales" means, in relation to a registrant, the amount of payments received or to be received for all travel services,

- (a) sold in Ontario during a reporting period by or through a registered travel agent to a customer, or
- (b) sold in Ontario during a reporting period by a registered travel wholesaler to or through a registered travel agent or registered travel wholesaler.

43. In this Part,

"end supplier" means a person who supplies travel services but does not include a travel agent or travel wholesaler;

44. (1) Every registrant shall participate in the Compensation Fund and shall comply with the terms of the Fund set out in this Part.

47. (1) A travel agent shall, twice a year, make payments to the Council in the amount that is the greater of the following:

1. \$25 plus the applicable taxes
2. the amount of,
 - i) \$0.40 plus the applicable taxes for every \$1,000 (or part of \$1, 000) of sales made before May 1, 2000, and
 - ii) \$0.25 plus the applicable taxes for every \$1,000 (or part of \$1,000) of sales made on or after May 1, 2000.

DECISION AND REASONS

The sole issue for consideration by the Tribunal in this matter is the interpretation of the word “sales” as defined in section 1, Part 1 of Ontario Regulation 806/93.

The travel industry in Ontario is regulated by the Act and by regulations passed under the Act, including Regulation 806/93. The primary reason for the enactment of the Act was to regulate the travel industry and to safeguard consumers in their dealings with the industry more particularly Ontario travel agents who are required by the Act to be registered and to comply with the Act and its regulations. The Act was designed with the clear intention of protecting the consumer in the sale of travel services by travel agents. The definition in Regulation 806/93 of “sales” has been carefully crafted by the legislature so as to capture the nature, extent and meaning of the sale of travel services. The Applicant shall participate in the Compensation Fund established under the Regulation and shall comply with the terms of the Fund as set out in the Regulation.

In determining what “sales” mean, in relation to a travel agent, reference must be made to the definition of “sales” in Part 1, Section 1 of Regulation 806/93. The calculation of a registered travel agent’s contribution to the Fund is to be made according to the “sales” effected by that travel agent during its fiscal year. The Registrar relies upon two documents to determine “sales” effected, as defined, by the agent. These documents are the Form 1 filings of the agent and the financial year end statements required to be filed in terms of the Regulation. The financial statements as required under the Regulation gives the Registrar information to verify or otherwise, the “sales” figure reported by the agent in its Form 1 filings and for the Registrar to satisfy himself that correct contributions to the Fund have been made by the agent. Strict compliance with the definition of “sales” as contained in Part 1, section 1 of Regulation 806/93 must therefore be adhered to and enforced by the Registrar.

The definition of sales makes it clear that the consumer’s payment for travel services sold by the travel agent may be received “by or through” the agent. The definition does not infer or stipulate that the payment shall be received only by the agent. Accordingly, if the agent receives payment from the consumer and deposits such payment into the

agent's banking account it would constitute a "sale" for the agent. Equally, the payment for travel services sold by the agent, but paid or received "through" the agent, also constitutes a sale. Therefore, if a travel agent effects a sale of travel services with an end supplier of such services – such as a cruise line or an airline – and the end supplier of those travel services receives payment from the consumer by means of the consumer's credit card transmitted to the end supplier through the travel agent, such sale is nevertheless a sale effected by the travel agent and is captured by section 47. (1) of Regulation 806/93. The amount of such sales is to be included in the Applicant's "sales" to be reported in Form 1.

The Applicant has contended that only sales paid by a consumer to the travel agent and deposited by that agent to its banking account constitute a "sale" upon which a contribution to the Fund is required to be made. This is, in the Tribunal's opinion, a misinterpretation of the Regulation and has resulted in the Applicant failing to pay its lawfully due contributions to the Fund for the fiscal years ending November 2003 and November 2004.

The Tribunal is cognizant that the sole issue for decision in this matter relates to what constitute "sales", as defined, and what contributions are consequently required to be made by a registrant to the Fund. The issue has no relevance to claims made by consumers upon the Fund and what claims may or may not be eligible for consideration.

The Applicant contends that in respect of airline and cruise line sales effected through a travel agent on behalf of a consumer, the agent is only paid a minimal commission and should not be liable to contribute to the Fund on the gross sale amount paid by the consumer to the end supplier. While the Tribunal understands the Applicant's frustration at, as the Applicant contends, being financially "squeezed" in the industry, this situation is the result of evolving technology being used in the supply of travel services and the travel agent, as the so-called "middle man", being adversely financially affected. However understanding and sympathetic the Tribunal may be to the Applicant's predicament, it cannot and does not impinge on the interpretation of words or phrases in the Act as written and the regulations made under the Act.

The uncontradicted evidence of Furlan was that the Fund does compensate and will continue to compensate consumers who are found to be eligible for compensation due to the failure of a cruise line or airline due to bankruptcy, insolvency or cessation of business.

While the Tribunal, for the reasons stated in this decision, finds the Applicant to be in default of its obligations to make contributions of \$867.05 to the Fund, the Tribunal does not find that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business nor does it find that the past conduct of the Parry's as Directors and controlling minds of the Applicant affords the Registrar reasonable grounds for belief that the Applicant's business will not be carried on in accordance with law and with integrity and honesty. The Tribunal finds that the withholding by the Applicant of its lawful dues to the Fund was motivated by an honestly but erroneously

held belief that the Registrar was incorrectly interpreting the definition of “sales” under Regulation 806/93. The Tribunal notes that the Applicant has proposed to place the sum of \$867.05 in an escrow account and has thereby demonstrated its bona fides.

DECISION

Accordingly, pursuant to the authority vested in it by Section 6. (4) of the *Travel Industry Act, 2002*, the Tribunal orders the Applicant, Highbourne Enterprises Inc. o/a Helen Thompson Travel, to pay the sum of \$867.05 to the Travel Industry Compensation Fund established under the *Travel Industry Act, 2002*, by no later than 45 days after the release of this decision failing which the Registrar is directed to carry out his Proposal to Revoke the Registration of the aforementioned Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: December 22, 2005

File name: 3109.Highbourne.tia.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.

This decision will also be available on Quicklaw at a later date.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 2002 Chapter T.19

DENISE FRANZINI o/a OCEANO TOURS

IN THE MATTER of the REGISTRATION of
DENISE FRANZINI o/a OCEANO 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: August 17, 2005

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

DENISE FRANZINI o/a OCEANO TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Denise Franzini o/a Oceano 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: December 1, 2005

FILE NAME: 3154.tia.oceano.consent.doc

This decision will also be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



SKYPORT CANADA INC. o/a SKYPORT TRAVELS & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, R.S.O. 2002, CHAPTER T.19 AS
AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: LAL HANDAPANGODA, Counsel, appearing on behalf of
SKYPORT CANADA INC. o/a SKYPORT TRAVEL & TOURS

MARY-ANN HARRISON, Agent, appearing on behalf of the
Registrar, *Travel Industry Act*

DATE OF
PRE-HEARING: December 2, 2005

Toronto

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Skyport Canada Inc. o/a Skyport Travels & 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

D. Gregory Flude, Vice-Chair

RELEASED: December 6, 2005
File Name: 3149.tia.skyport.consent

This decision will also be available on Quicklaw at a later date.

SCHEDULE "A"

SKYPORT CANADA INC. o/a SKYPORT TRAVELS & TOURS

- **Applicant**

- **and –**

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

- **Respondent**

MINUTES OF SETTLEMENT

WHEREAS the Registrar, Travel Industry Act, 2002 has issued a Proposal to Revoke Registration dated August 12, 2005;

AND WHEREAS the Applicant has appealed to the Licence Appeal Tribunal by Notice of Appeal dated September 1, 2005;

AND WHEREAS the Applicant and the Registrar have agreed to settle all of the issues outstanding in the appeal on the following terms and conditions;

1. The Applicant and the Registrar consent to an order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement.
2. The Applicant admits as true all of the allegations of fact set out in paragraphs 1 to 7 of Section D PARTICULARS of the Notice of Proposal to Revoke Registration dated August 12, 2005 with the exception of those allegations relating to Nicholas Ramesh also referred to as Ram Nicholas.
3. The Registrar is satisfied that as of the date of these Minutes of Settlement Nicholas Ramesh is not an officer or director of the Applicant, does not have signing authority on any of the Registrant's bank accounts and that he is not involved in the day to day business of the Applicant. Nothing herein limits the right of the Registrar to seek to impose sanctions on the Applicant should further evidence come to light indicating that Nicholas Ramesh is or has become an officer or director of the Applicant, has signing authority on any of the Applicant's bank accounts or is involved in the day to day management of the business of the Applicant.
4. The Applicant undertakes to deliver to the Registrar by January 31, 2006 Interim Financial Statements covering the period from commencement of the Applicant's business up to and including October 31, 2005 prepared under a review engagement by a duly authorized and licensed public accountant.
5. The Applicant undertakes to deliver to the Registrar within 30 days of the end of each month, trust reconciliations for the applicable month for each trust account operated by the Applicant, commencing with respect to the reconciliation for November 2005.
6. Where the Interim Financial Statements for the period ending October 31, 2005 indicate a working capital less than the working capital requirements set out in Ontario Regulation 26/05, and more particularly Section 23 thereof, the Applicant undertakes to bring its working capital into compliance with the Regulation within 14 days of January 31, 2006.

7. The Applicant waives its right to a hearing before the Licence Appeal Tribunal currently set for January 9, 2006.

In witness whereof the Parties have executed these Minutes this 2nd day of December 2005:

LAL HANDAPANGODA
Solicitor for the Applicant

MARY-ANN HARRISON
For the Registrar



PRE-HEARING

LIFEDREAM TRAVEL & TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*, 2002

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: VIC RAMPERSAD, articling student in the employ of
Bernard B. Gasee, counsel, representing Lifedream Travel
&Tours Inc.

MARY-ANN HARRISON, agent, representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: November 28, 2005 Toronto

ORDER

FOLLOWING attendances on November 28, 2005, at a pre-hearing before this Tribunal of Vic Rampersad, an articling student with Bernard B. Gasee, counsel, appearing on behalf of Lifedream Travel &Tours Inc. (the "Applicant") and Mary-Ann Harrison, agent, appearing on behalf of the Registrar, *Travel Industry Act*, 2002 (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on Friday, January 13, 2006, at the Tribunal's Chambers, 1 St. Clair Ave., West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The hearing set down before this Tribunal to commence on January 13, 2006, shall, by the consent of the parties, be adjourned to 9:30 a.m. on March 31, 2006, at the Tribunal's Chambers as noted above.

3. The attached Agreed Statement of Facts and Joint Submission duly signed by the parties and marked Schedule "A", is hereby made an Order of this Tribunal on the consent of the Parties.
4. Should the Applicant comply with all the terms and conditions of the Joint Statement, this matter shall not proceed to a hearing on March 31, 2006, and the Registrar shall withdraw his Proposal to Revoke the Applicant's registration upon which this matter will be considered concluded and at an end.
5. Should the Applicant not comply with all the terms and conditions of the Joint Statement then and in such event the Registrar shall have the option of either proceeding with the hearing of the Proposal on March 31, 2006 or forthwith upon non-compliance of any term or condition to bring a motion, on notice to the Applicant, to this Tribunal for the granting of an Order as set forth in the Proposal to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: November 29, 2005.

File: 3168.lifedream.tia.pre-hrg.doc

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