

Decisions

Fiscal Year 2006 - 2007

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

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- Bailiffs Act
- Building Code Act
  - Section 2.17 - Designer
  - Section 2.18 - Sewage Systems
  - Section 2.19 - Registered Code Agency
- Cemeteries Act
- Child and Family Services Act
- Collection Agencies Act
- Consumer Protection Act, 2002
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There has been no decision released under this Act, yet, as there was no appeal filed with the Tribunal.

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Decisions under Cemeteries Act

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- THE ONTARIO HISTORICAL SOCIETY and THE ONTARIO GENEALOGICAL SOCIETY
- IN THE MATTER OF THE ONTARIO GENEALOGICAL SOCIETY AND THE ONTARIO HISTORICAL SOCIETY
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THE ONTARIO HISTORICAL SOCIETY and
THE ONTARIO GENEALOGICAL SOCIETY

Appeal under section 10 of the *Cemeteries Act* R.S.O. 1990, Chapter C. 4 as amended from a Notice of Proposal to Close St. Alban's Anglican Cemetery in the Village of Palgrave, pursuant to section 8 (2).

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: ROBERT LEVERTY, Agent, appearing on behalf of The Ontario Historical Society.

ROBERT CRAWFORD, Agent, appearing on behalf of The Ontario Genealogical Society.

JAMES STEBBING, Counsel, appearing on behalf of the Registrar, *Cemeteries Act.*

DATES OF HEARING: October 23, 24 and November 6 through 9, 2006 inclusive — Toronto

REASONS FOR DECISION AND ORDER

This appeal is brought by the Ontario Historical Society and the Ontario Genealogical Society (the "Applicants") from an order of the Registrar (the "Registrar") appointed under the *Cemeteries Act*, R. S. O. 1990 chapter C. 4 (the "Act") to close St. Alban's Anglican Cemetery in the village of Palgrave. Pursuant to section 8 (2) of the Act, the Registrar may close a cemetery where it is found in the public interest to do so. The Act and regulations provide for notice to be given to certain statutorily defined persons or organizations and, by virtue of section 10, permit any interested party to appeal to this Tribunal. The Applicants have exercised that right of appeal. Each of the Applicants has marshalled evidence within its particular area of expertise to build a joint submission on the public interest.

This appeal is the second time that an order of the Registrar to close St. Alban's Anglican Cemetery has come before the Tribunal. In 2003 the Tribunal heard an appeal from the Applicants from an order of the Registrar to partially close this cemetery and to

reinter any human remains in a designated area and to relocate any remaining monuments to that area. The area was then to be marked by a plaque. At that hearing, the Tribunal concluded that the notice provisions of the Act had not been fully complied with and found against the Registrar. In addition to opposing the order on the grounds of improper notice, the Applicants also took the position that the proposed partial closure was not in the public interest. At this hearing, based on new archaeological evidence that came to light very shortly before the hearing, it was the Applicants' ultimate position that a partial closure was in the public interest. The proposed partial closure is very different from that opposed by the Applicants in the earlier appeal and arises entirely out of the new evidence. The Tribunal does not consider the current position of the Applicants to be in any manner at odds with the position adopted in the earlier appeal.

This is the third appeal to this Tribunal arising out of the closure provisions in the Act. The first arose out of an application to close a family cemetery in Markham to permit development of a subdivision. The second was the earlier appeal regarding the St. Alban's cemetery. It has been recognized in those decisions that the use of the term "close" in the Act has a potential to cause confusion. Closure with regard to cemeteries, as that term is used in the Act, means the return of the cemetery land to normal, non-cemetery uses. As a corollary of that process it must, of necessity, involve the disinterment and reburial of human remains and relocation of any grave markers existing at the time of the closure order. It is in this sense that the Tribunal will use the words "close" and "closure" throughout these reasons[1].

Prior to considering the evidence, and in the interests of preventing confusion, it must be borne in mind that the Registrar made his decision to close the cemetery in the absence of a recently completed archaeological assessment. His knowledge concerning the number of potential gravesites was based on the best evidence then available, that of several genealogical researchers whose reports were in evidence and one of whom testified. It was their opinion, based on a paucity of records, that there might be as many as twelve burials with a reasonable estimate set at five. That number has now been definitively set at one by the recent archaeological survey.

STATUTORY PROVISIONS:

The Act sets out the process for closing a cemetery in the following terms:

> 8. (1) In this section and in sections 9, 10, 11, 12 and 13, a reference to a cemetery includes any part of a cemetery.
>
> (2) The Registrar may order a cemetery closed if the closing is in the public interest.
>
> (3) An order shall not be made under subsection (2) until,

[1] See s. 11 of the Act and particularly s. 11 (4)

(a) notice of the intention to make the order is given in the manner and to the persons prescribed; and

(b) interested persons are given the opportunity to make submissions to the Registrar within such time as is prescribed.

(4) Notice is not required if,

(a) the request is from the owner;
(b) no interments have been made in the cemetery to be closed; and
(c) the consent of all affected interment rights holders has been obtained.

9.(1) In an order to close a cemetery, the Registrar may,

(d) declare a cemetery or a portion thereof closed;
(e) require the owner to disinter all human remains therein and specify the manner of disinterment and the manner and place of reinterring or dealing with the remains;
(f) require the owner to remove any markers and relocate them to a specified place; and
(g) require the owner to provide or acquire equivalent interment rights for all holders of interment rights with respect to unused lots in the cemetery.

(2) In an order to close a cemetery, the Registrar may designate another person to do anything that the owner may be required to do

(3) The Registrar shall give every person who made a submission notice of the order and at the same time advise the person of the right of appeal.

(4) Subject to subsection (5), an order to close a cemetery comes into force thirty days after it is made unless there is an appeal filed before the order comes into force or the order sets out a later date.

(5) If submissions were made in respect of the order, the order comes into force thirty days after notice has been given to each person who made a submission unless there is an appeal filed before the order comes into force or the order sets out a later date.

(6) An order that is appealed comes into force upon being upheld by the Tribunal.

10. A person with an interest therein may appeal, to the Tribunal,

(a) An order to close a cemetery any time before the order comes into force; or
(b) a refusal to order a cemetery closed.

11. (1) The Registrar, upon being satisfied that the requirements in an order to close a cemetery have been complied with, shall issue a certificate, with a legal description of the land involved, that the cemetery is closed.

(2) Despite subsection (1), an applicant therefore is entitled to a certificate that a cemetery is closed if the cemetery had been closed by the Lieutenant Governor in Council but a certificate issued under subsection 59 (7) of the *Cemeteries Act*,

being chapter C.3 of the Revised Statutes of Ontario, 1990, or a predecessor of that subsection has not been registered.

(3) A certificate issued under this section may be registered in the appropriate land registry office.

(4) Upon registration of a certificate of closing, the land described therein ceases to be a cemetery.

Section 8 (3) provides that notice is to be given to "persons prescribed" in the manner prescribed and that interested parties are to be given an opportunity to make submissions. Ontario Regulation 130/92 sets out the "persons prescribed" and the manner of giving notice as follows:

49. (1) For the purposes of clause 8 (3) (a) of the Act, an owner who wishes to obtain an order closing a cemetery shall give notice, in accordance with this section, of the owner's intention to apply for the order.

(2) The notice shall be published,

(a) once in *The Ontario Gazette*; and

(b) once a week for two consecutive weeks in a newspaper with general circulation in the locality in which the cemetery is located.

(3) The notice shall be sent by registered mail to,

(a) each interment rights holder whose lot is situated in the portion of the cemetery subject to the order, mailed to the rights holder's last address known to the owner;

(b) the municipality in which the cemetery is located;

(c) the Local Architectural Conservation Advisory Committee, if any, established under the *Ontario Heritage Act* for the locality in which the cemetery is located;

(d) the Archives of Ontario, the Ontario Historical Society, the Ontario Archaeological Society and the Ontario Genealogical Society; and

(e) the Minister of Culture and Communications.

(4) The notice shall be conspicuously posted on a sign at the entrance to the cemetery before publication of the first notice under clause (2) (b) and shall remain posted until the Registrar makes, or refuses to make, the order sought by the owner.

50. For the purposes of clause 8 (3) (b) of the Act, the time within which interested persons may make submissions to the Registrar is forty-five days after the later of,

(a) the day on which the final notice under clause 49 (2) (b) is published; or

(b) five days after the day on which the final notice is mailed under subsection 49 (3).

51. (1) An owner who is ordered to disinter human remains and reinter them in another cemetery shall deliver copies of the records to the owner of the other cemetery.

The statutory provisions raise two issues. Firstly was there compliance with the notice procedure as set out in the statute and the regulations? Secondly, after a review of all of pertinent factors, is it in the public interest to close the St. Alban's Cemetery? There is no statutory definition of the term "public interest." Thus, the resolution of the second issue requires the consideration and balancing of numerous factors and decisions regarding the weight to accord each factor. Pursuant to section 8 of the Act the initial responsibility for the decision rests with the Registrar. Section 10 of the Act then places the ultimate responsibility, subject to rights of appeal, with this Tribunal. The scope of the Tribunal's powers is set out in section 82 as follows:

82. (1) If there is an appeal under this Act to the Tribunal, it shall appoint a time for and hold a hearing.

(2) After holding a hearing, the Tribunal may by order direct the Registrar to take an intended action or to refrain from taking an action or to take such action as the Tribunal considers that the Registrar ought to take and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(3) The Tribunal may attach such conditions to its order or to the licence, as it considers proper to give effect to the purposes of this Act

(4) The Registrar, the applicant or licensee who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this Act.

THE EVIDENCE:

Michael D'Mello

Michael D'Mello is the acting Registrar under the Act. After attending the University of Toronto, Mr. D'Mello joined the police force where he worked until 1987. His police experience was followed by a position with the Ministry of Consumer and Commercial Relations as an investigator where he investigated matters arising out of a number Ontario statutes including the Act. In June 2001 he was appointed as acting Registrar of Cemeteries. In his background and training he considers himself familiar with dealing with the public interest. He has knowledge and experience of dealing with the judicial process, the Criminal Code of Canada and approximately 30 other pieces of legislation. In his current position he oversees the regulation of five thousand and ninety-two known cemeteries in the Province of which approximately three thousand are active. He oversees the trust accounting requirements for the perpetual maintenance of cemeteries. He deals with municipalities with respect to abandoned cemeteries. He addresses issues arising out of the discovery, from time to time, of previously unknown

burials. He has handled approximately 90 previously unknown burials in his time as Acting Registrar. In his position he has dealings with consumers and stakeholders.

Mr. D'Mello reviewed the history of the Registrar's dealings with the St. Alban's Anglican Cemetery commencing in April 1956. In that year it appears an inspector visited the cemetery and determined that it was abandoned[2]. Some time later, in January 1965, a Supplementary Cemetery Inspection Report was completed. It noted that the last burial had taken place in 1906.[3] Further information was provided in a annual return form in July 1972, which described the cemetery as a "small inactive cemetery." Two monuments were noted. The part of the form dealing with financial disclosure was left blank.[4] An inspection in 1985 found that the cemetery was well maintained with the costs of maintenance being absorbed by church funds. There was still an active congregation in 1985. The file reveals that the Registrar appears to have been of the opinion that the cemetery was to be taken over by the municipality[5]. In accordance with the belief that the municipality had taken over the cemetery, the next statistical return, dated April 1987, was sent to the Town of Caledon, as was the 1988 Annual Return[6]. The 1988 Annual Return was forwarded to the church by the Municipality and it was completed and returned to the Registrar signed by the pastor, Rev. D. H. Kaye.

As a result of legislative changes, in 1991 every known cemetery in the Province of Ontario was issued a licence. The licence in this particular case was issued to the church board on March 4, 1991. The cemetery was noted as inactive[7]. The April 22, 1991 Annual Return was addressed to Rev. Kaye but the return was signed by H. R. Broadbent. There was a notation that there were no perpetual care funds. Mr. D'Mello explained that, commencing in 1955, cemeteries were required to collect and maintain in trust 35% of the value of a plot or $35.00 to be used for perpetual care of the cemetery. This amount was recently raised to 40% or $150.00. Since this cemetery had been inactive for a period commencing long before 1955 there were no perpetual care funds such that, pursuant to the provisions of the Act ultimate responsibility for ongoing maintenance would fall on the local municipality.

By 1996 it appears that it was no longer feasible to maintain a congregation at St. Alban's. The Anglican Diocese decided to seek closure of the cemetery and sale of the property. It entered into correspondence with the Registrar to fulfill the requirements of the Act[8]. The initial application brought forth one response from a descendant. Rita Reid, a niece of James Burns who was thought to still be buried in the cemetery, advised the Anglican Diocese that she had no objection to the closure.[9] It was also supported by a genealogical report prepared by Karla Bondy and Bonnie Glencross.

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[2] Ex 6 Tab 1
[3] Ex 6 Tab 2
[4] Ex 6 Tab 3
[5] Ex 6 Tab 4
[6] Ex 6 Tabs 5, 6 & 7
[7] Ex 6 Tab 8
[8] The facts of the earlier application are covered in detail in the Tribunal's earlier decision. The documents relating to it are found at Ex 6 Tabs 10 and following
[9] Ex 6 Tab 14

The Tribunal had no information on the qualifications of the authors but there were suggestions in the evidence that they were university students hired specifically to carry out this research. Neither their methodology nor their conclusions were questioned. The research in support of the report had examined burial registers and surrounding cemeteries. The authors had concluded that of the original thirty or so burials in the cemetery, all had been moved elsewhere with the exception of between seven and twelve burials that could not be accounted for.[10] Letters in support of the closure came from the Heritage Committee of the Town of Caledon and from the Town of Caledon directly. The letter from the Heritage Committee "reluctantly raises no objection" to disinterment despite a policy to resist cemetery closures. The lack of objection is based on the disturbed nature of the cemetery and the reburial of nearly all human remains at some time in the past.[11]

The Anglican Diocese carried out its intention to sell the church property by entering into an Agreement of Purchase and Sale[12] with the current owner. The transaction closed on December 3, 1998[13]. Thereafter the owner moved to develop the site for his home together with a home office and workshop/garage. Through a consulting firm, he negotiated a site plan agreement with the Town of Caledon[14]. It is a term of that agreement that the St. Alban's Cemetery be closed before any building take place. It was apparently a term of the sale that the Diocese take the necessary to close the cemetery notwithstanding the sale. Its intention to do so was confirmed by letter to the Registrar.[15] The sale, however, resulted in the need for the current owner to become the applicant. The change of applicant was handled as a simple revision of a process already underway. In and around this time, the Applicants' solicitor responded to the application to close by requesting, among other things, that an archaeological assessment be carried out to determine the exact number and location of any burials.[16]

As part of the earlier application, the Diocese set out a short history of the St. Alban's Anglican Cemetery. It appears that in the 1920's there was a perceived problem with local drinking water. It was felt at that time to be for the public good to close the cemetery and most of the burials were relocated to other cemeteries in the area. Records, however, were incomplete so it was not known how many grave sites were left leading to the genealogical research and ultimately the archaeological assessment. The Diocese has not changed its position that it is in the public interest to close this cemetery.[17]

Faced with the objections to closure from the Applicants, the owner of the property decided to amend the application to close by leaving a small area, approximately 5% of the whole, readily accessible from the road. The area was to be chained off and

[10] Ex 6 Tab 15
[11] Ex 6 Tab 16
[12] Ex 6 Tab 19
[13] Ex 6 Tab 20
[14] Ex 6 Tab 21
[15] Ex 6 Tab 22
[16] Ex 6 Tab 24
[17] The Diocese's letter is at Tab 26 of Ex 6. The uncertainty and reports are elsewhere in the materials.

marked by a memorial plaque.[18] All existing burials determined by an archaeological assessment were to be disinterred and re-interred in the area set aside for that purpose. Any monuments discovered in the process would also be relocated to that location. The Diocese supported the partial closure. As stated above, this proposal failed due to procedural irregularities.

In the interim, while waiting for the completion of the closure process and attendant appeal, the owner applied to have the property rezoned to "village commercial."[19] Such a designation would permit the owner to use the property as a home office and workshop in addition to his intended residential use. The proposed zoning change went to a public meeting. There was no objection from the public to the zoning change. The Town of Caledon subsequently approved the new zoning.[20] The Registrar testified that he took these documents into consideration when he made his decision.

Following the finding of this Tribunal that there were deficiencies with respect to the Notice, the owner re-applied for closure of the cemetery. He provided proof to the Registrar that he had satisfied the statutory notice provisions with respect to publication in the Ontario Gazette and a local newspaper, that he had posted a conspicuous sign on the property and that he had sent registered letters to all of the required parties in accordance with regulation 130/92.[21] With the exception of the Applicants, none of the other statutory parties objected to the closure of the cemetery. The material provided to the Registrar also included an undertaking from the Morningside Cemetery to receive any disinterred remains.

The Registrar received and considered the report of Brian Gilchrist, a genealogist of not inconsiderable reputation.[22] The report indicates that Mr. Gilchrist was of the view at that time that there are still two burials at St. Alban's with a further four that he was unsure about. What was noted by the Registrar was the fact of the reburial of James Rowley from another cemetery to St. Alban's. In the Registrar's view, this fact supported his belief that reburial was not an uncommon practice in the late nineteenth and early twentieth centuries.

In September 2006 Mr. D'Mello was contacted by the owner stating that the owner now wished to have an archaeological assessment to locate and confirm the number of burials. Mr. D'Mello advised the owner of the provisions of the Act. Subsequently, Mr. D'Mello was contacted by Dr. Ron Williamson advising him that there was to be an assessment. The assessment was carried out on the whole property on October 12, 2006, just eleven days before the commencement of this hearing. It found one grave shaft containing human remains. There were also two monuments and one monument

[18] Ex 6 Tab 27
[19] Ex 6 Tab 30
[20] Ex 6 Tab 31
[21] The Applicants have taken no issue with respect to the content of the Notice or compliance with the statutory signage and publication of notices so the Tribunal will not cover this evidence in any depth. The Applicants are of the opinion that more effort needed to be made to find descendants and cross-examined on that point as will be seen later.
[22] Ex 6 Tab 39

foundation not associated with the grave shaft. The rest of the cemetery had been "utterly disturbed" by the earlier disinterments. There was no evidence whatsoever to identify the name of the deceased. The results of the assessment were forwarded to counsel and then the Applicants.

In making his decision to order closure of the St. Alban's Cemetery, the Registrar stated that he took a broad approach to determining the public interest. He reviewed the Act to determine not only its contents but its purpose and objects. He considered the position of the municipality, neighbours, the Heritage Committee, the owner, the Anglican Diocese and the views expressed in approximately 169 submissions received by his office[23]. With respect to the submissions, he reviewed each one to determine its underlying rationale. He also considered the previous hearing into this matter and, in particular, a finding in that case that, if notice had been sufficiently given, the Tribunal would have found it in the public interest to close the cemetery. He weighed all of the factors and exercised his statutory discretion to order the closure of the cemetery and the removal and reburial at the Morningside Cemetery in Palgrave of all remains found at the site. The removal and reburial was to be conducted in a dignified and sensitive manner. He then issued his order with terms to that effect. Copies of the order were sent by mail to all persons who had made submissions and to the list of persons and organizations set out in the regulations. The Act requires copies to be set by "first-class" mail. Mr. D'Mello stated that he took this to mean ordinary letter mail, as there would not appear to be "first-class" mail.

On cross-examination Mr. D'Mello re-affirmed that he had taken into account each of the written submissions his office had received. This process included reviewing and taking into account the extensive correspondence from the descendants of John Rowley. It appears that since the early part of the last century, the Rowley family has left the Palgrave area and is mainly clustered around Lethbridge in southern Alberta, although there are elements in British Columbia and Midland, Ontario. The letters received from the family unanimously oppose the relocation of their ancestor's remains, it being stated in his will that he was to be buried in St. Alban's and a monument valued at up to $125.00 to be purchased and placed there.

The record indicates that the Applicants had continually asked for an archaeological assessment. In answers to questions regarding failure to require an assessment, the Registrar pointed out that there is no statutory requirement for an assessment as part of the process to close a cemetery. The Registrar was of the view that an assessment prior to a closure order would disturb graves, unnecessarily in the event the decision was made not to close the cemetery.

Mr. Crawford's cross-examination focused on the attempts made by the Registrar to locate descendants and the weight given to the views of descendants. The Registrar responded that the Act requires interment rights holders to be notified. As there were no interment rights granted prior to more modern times, the Anglican Church was the interment rights holder. The Act does not require descendants, *per se*, to be notified.

[23] All of the submissions received are set out in Ex 6 Tabs 47 to 214

When descendants are involved, it is the position of the Registrar to accept claims of ancestral relationship without requiring formal proof. If the landowner seeking closure wishes to dispute a claim then the owner carries the onus to do so. In such cases, the Registrar has accepted birth certificates and other records to determine a relationship. There is no one on the Registrar's staff with genealogical training to examine such claims closely. With respect to the numerous submissions from the Rowley family descendants in Alberta, Mr. D'Mello was of the view that their interest was stimulated by the Applicants and that otherwise they would have no interest. Given that there is no way in which notice would have reached them if not for the intervention of the Applicants, this view is a little harsh. What is perhaps more cogent is the Registrar's view that in all likelihood their ancestor's remains have already been moved.

When questioned on partial closure, Mr. D'Mello was of the view that it was not an option. In his view it creates a bad situation when one set of remains is left behind. Re-interment is the only way to protect the respect and dignity of these remains.

Dr. Ron Williamson

The second witness for the Registrar was Dr. Ron Williamson. Dr. Williamson was granted a doctorate in Anthropology in 1985. He is the president of Archaeological Services Inc. ("ASI") and an Adjunct Professor in Archaeology at the University of Toronto. He is also a member of the OHS and the OGS. He is a former president of the Canadian Association of Professional Heritage Consultants, an organization that aims to promote excellence and training in heritage consultation. ASI is a private corporation that carries out archaeological assessments for a number of purposes including pre-development assessments. ASI's business is split fairly evenly between public and private clients. Its public work is mainly for municipalities such as the current five year project it is conducting for the City of Toronto to define its archaeological assets. ASI currently carries out about three hundred assessments per year. Dr. Williamson is the Managing Partner and Chief Archaeologist of ASI. He is the Manager of the GTA Division and head of Special Projects. He oversees all special projects and has been involved in both pre- and post-contact burial sites, including the disinterment and re-interment of remains. He has been qualified as an expert witness before the predecessor of this Tribunal, the Commercial Registration Appeal Tribunal, and the Ontario Municipal Board. With particular emphasis on cemeteries, Dr. Williamson was involved in the identification and relocation of over six hundred burials from the Elmbank Cemetery within the boundaries of the Lester B. Pearson International Airport. This project was the largest ever undertaken in Ontario. The Tribunal accepted Dr. Williamson as qualified as an expert in archaeological assessment of cemeteries.

Dr. Williamson's firm was retained by the current landowner to conduct an assessment of the St. Alban's Anglican Cemetery and to prepare a report.[24] Permission to proceed was received on October 11, 2006 and the fieldwork was carried out on October 12, 2006. The methodology for the assessment was consistent with the methodology for both pre- and post-contact burial sites. Burial involves the mixing of both topsoil and

[24] The report was entered as Exhibit 9

subsoil. The approach is to remove the topsoil to the level of the buff subsoil and then locate areas where the soil is stained from the mixing. In this manner, where the soil in the general area is not greatly disturbed, it is very easy to identify grave shafts and, further, to determine if the shaft relates to an adult, adolescent or child. Notwithstanding that the work may involve the removal of centimetres of soil; the tool of choice is a Gradeall. The Gradeall removes the topsoil, usually about thirty to sixty centimetres in thickness until the stains in the subsoil become apparent. If no stains are apparent the topsoil is replaced and the machine moved to a new location.

St. Alban's is not a large area for the Gradeall to expose. It became apparent very early in the process that the soil had been disturbed to a great depth necessitating a very deep excavation. There had been very substantial previous disturbance relating to a 1950s excavation of a basement for a church hall. A septic bed area was excavated and no remains were found. The remaining burial area was excavated and one grave shaft was located in a less disturbed area. A casket containing human remains was discovered. There was nothing on the casket to identify the remains and nothing to suggest who the individual was. One monument remaining above ground was the Rowley monument, with a second gravestone resting against it. These monuments were not found near the grave shaft. A below-grade monument footing was also exposed by the excavation, again, not located near the grave shaft. Excavations around the monuments and footing established there was no related grave. Overall, the site had been disturbed to four or five feet.

Dr. Williamson recommended that the remains be disinterred and reburied elsewhere. Given that all of the other remains in the cemetery had been moved, Dr. Williamson would not counsel leaving a single burial. In his view it is only common sense to relocate to another cemetery.

In cross-examination Dr. Williamson identified Andrew Clish as the field archaeologist who had carried out the actual excavation. Dr. Williamson identified Mr. Clish as perhaps the most experienced field archaeologist in the Province. It is usual for Dr. Williamson to appear at hearings to present findings. He stated that the only role of the owner in the assessment was to retain ASI. The study was designed by ASI and the findings prepared by it.

Dr. Williamson was surprised by the extent of the disturbance. He would expect to see a grave-by-grave disinterment but in this case the whole site was disturbed except for a small-undisturbed area around the grave shaft. The site was disturbed to the edge of the survey area and beyond. Dr. Williamson could not say if there might be further burials beyond the current fence line but was fairly certain the fence line did not mark the original boundaries of the churchyard.

<u>Brian Gilchrist</u>

Brain Gilchrist was put forward by the Registrar as an expert in genealogy. He is a graduate in history from the University of Toronto. He has a certificate in Archival

Studies and was the Reference Archivist for the Region of Peel. Since 1974 he has taught tens of thousands of students about genealogy. He is a member of the Applicant, Ontario Genealogical Society and a charter member of the Ontario Chapter of the Association of Professional Genealogists. He was the genealogist on the Elmbank Cemetery relocation mentioned above involving over six hundred relocations. He has been accepted as an expert genealogist before the Supreme Court of Ontario and before this Tribunal's predecessor. He was accepted as an expert in genealogy by this Tribunal.

In the earlier proceedings concerning the St. Alban's Cemetery he had prepared a report commissioned by the Anglican Diocese of Toronto.[25] He had reviewed the Bondy/Glencross report but had access to documents at the Diocese that were unavailable to them. He had reviewed voluminous documents including newspaper reports and the William Perkins Bull papers.[26] Mr. Gilchrist concluded that there were an indeterminate number of burials in the cemetery. From his research he determined there were approximately 25 to 30 burials, of which he could not account for several. He felt that there may have been at least four infant burials unaccounted for. While he has no definitive evidence concerning the identity of the remains found at the site he did state that he could not locate another burial site for a farm worker named Burns who died of appendicitis in the 1900s or 1910s.

The Current Owner

The current owner of the property testified on behalf of the Registrar. He purchased the property from the Anglican Diocese of Toronto in 1998. It was a condition of the purchase that the Diocese would close the cemetery. After purchase, he initiated discussions with the Town of Caledon that led to a Site Plan Agreement. If closure is ordered he intends to build his home in such a manner that he will renovate and incorporate the existing church building into his design. In the earlier application he had put forward a design[27] that he wished to erect on the site. He stated that he now has an architect who is rethinking the design and wants to extend behind the church building backward. The design is not yet finalized. On cross-examination he admitted that it would be possible to design his home in such a manner that it allowed for a partial closure of the cemetery to leave the grave site in its current location. He is reluctant to do so and feels that the remains should be relocated to a "proper cemetery."

On cross-examination, the owner expanded on the Church's responsibility regarding the closure. He stated that approximately three weeks before he testified the Diocese had confirmed that it will honour its obligation to look after any reburial. It will attend to the

[25] Ex 6 Tab 39
[26] William Perkins Bull was a local historian who in the 1930s made a record of burials in the Caledon area. Apparently he mobilized an army of local historians to assist him in his endeavours. Perkins Bull states that in the 1930s there was only one grave left in the St. Alban's Cemetery and it was overgrown and not looked after. There is no information on the identity of the person buried.
[27] Ex 6 Tab 27

removal and reburial of any remains with due care and respect for the dignity of the deceased.

Heather Rosemary Broadbent

Heather Broadbent is a former chair of the Town of Caledon Heritage Committee and the author of the letter from the Heritage Committee. She also held the position of Heritage Resource Officer with the Town. Initially, she volunteered for a period of eleven years and then held the position in a paid capacity for twelve years. In her various capacities she was responsible to the Council for all heritage related matters. Ms Broadbent advised the Tribunal that she had been a reluctant chair of the Heritage Committee and repeatedly sought to get others elected. Her efforts did not succeed until she retired. Ms Broadbent is a past president of the Applicant, OHS, holds an archaeological survey licence and has extensive knowledge of heritage resources.

Caledon is an amalgamation of four and a half former municipalities and is now the largest rural municipality in southern Ontario. One of Ms Broadbent's roles was to check all abandoned cemeteries to ensure their inclusion in a by-law addressing their maintenance. She was aware of St. Alban's Cemetery but did not include it as an abandoned cemetery as it was being maintained at the time by the congregation.

The witness moved to the Palgrave area in 1976. Her interest in history and heritage matters led her to discover more about her new neighbourhood. She learned that the locals would meet at the garage around 10:00 a.m. most mornings. She attended these gatherings and began to collect recollections about the area. Local knowledge informed her that as a result of a cholera outbreak in 1919 when it was thought the St. Alban's Cemetery was contributing to contaminated drinking water, it was decided to disinter and rebury all of the remains to other local cemeteries. She confirmed the 1919 health scare, with its boil water orders, from other sources. She reviewed the letter she authored on behalf of the Heritage Committee and confirmed the Committee's position that the St. Alban's Cemetery was a poor candidate for preservation because of its disturbed state.

In cross-examination Ms Broadbent stated that to the best of her recollection the Rowley monument has been moved in the thirty years since she first saw it. She believes it was moved to facilitate grass cutting. When pressed about the practice of moving monuments Ms Broadbent reviewed a case where a monument marking a child's burial was found in a house in the Caledon area that had burned down. Research determined that the child was buried in Stoney Creek. The monument was reunited with the gravesite after an extensive lapse of time. She recalled another event where a path had been made of grave monuments from the Laurel Hill Cemetery. Laurel Hill permitted a re-unification of monuments and gravesites. In another case, monuments and remains were found during a widening project for Highway 50. The monuments were incorporated into a memorial on the embankment of the highway.

The Registrar closed his case following the evidence of Ms Broadbent. In opening remarks, the OHS and OGS stated that it was their intention to lead evidence that the complete closure of the cemetery was not in the public interest. Their evidence would focus on a partial closure with a reduced cemetery to preserve and protect the single burial and the two existing monuments and one footstone. They had four witnesses.

Dr. Dorothy Duncan

Dr. Dorothy Duncan produced a curriculum vitae, which outlined a lifetime of service to preservation of the historical resources of the Province of Ontario[28]. Her dedication and achievements have been recognized in a number of honours, not the least of which is an honorary Doctorate of Laws from the University of Waterloo. In 1966 she was the Curator of Black Creek Pioneer Village. She spearheaded the creation of an authentic pioneer village. In doing so she talked with "old timers," reviewed original documents such as diaries, wills, newspapers and magazines and any other sources she could find regarding the correct structure. Many buildings were moved to the site, some were there already, including a pioneer cemetery. Her next position was as Director of the Peel County Museum where at least one of her tasks was to review the Perkins Bull collection referred to above. She also catalogued documents and three-dimensional artefacts. Her time at Peel was followed by a position as Museum's Advisor for the Province. In that role, she would travel the Province responding to requests for help in the preservation of heritage resources. Often, she would be involved in dispute resolution such that she developed mediation skills to arrive at satisfactory resolutions. She is also a former director of the Ontario Historical Society and has always considered conflict resolution as an important aspect of her duties. She was accepted as an expert by both the Tribunal hearing the case of the Clendennan cemetery and the Tribunal hearing the earlier case for partial closure of the St. Alban's Cemetery. This Tribunal accepted her as an expert in heritage matters regarding cemeteries.

Dr. Duncan outlined some of the matters in which she was personally involved with respect to dealing with pioneer cemeteries. She advised on the incorporation of the cemetery at Ross Farm, a pioneer museum in Nova Scotia, into the museum. She spoke in Alabama regarding cemetery preservation and assisted in the rehabilitation of a cemetery wherein were buried many important leaders of the black community in that state. She was involved in the preservation of a cemetery in London, Ontario that was discovered after tombstones began turning up in a stream. She visited the site, walked the land, and dealt with the developer and, after an archaeological investigation by the Ministry of Culture, she was proud to attend at a rededication of the cemetery in August 2003.

Dr. Duncan reviewed the lengthy history of the OHS. It was originally established in 1888 and is a registered charity. In 1899 it gained the right to accept local historical societies as affiliated members. On affiliation, the local societies immediately gained the status non-profit corporations. It represents diverse cultures and religious affiliations. It was honoured recently as a result of its work with First Nations to be the

[28] Ex 8 Tab 1

first organization invited to attend a Long House Ceremony. Dr. Duncan cited by way of example, the case of a Latvian group in London, Ontario that sought the society's assistance in preserving their heritage and setting up a local historical society.

She testified that the two appellant societies heard about the drafting of a new *Cemeteries Act* quite by accident. At the time, the Bill was already in committee and committee time was already allocated. The societies did manage to be heard and submitted that, in the context of a rapidly changing Ontario, there was a need for the legislation to identify some organization to speak for and protect those left behind. She did not submit that the organizations should be either of the societies and was surprised that the final draft included both the OHS and OGS as parties to be notified in the event a closure was proposed.

Since the first publication of the OHS newsletter, the society has been actively involved with cemeteries as repositories of historical information and context. The current bulletin has a "Cemetery News" section. The OHS advocates a position that historic buildings and cemeteries should be maintained in their original locations. It has published the largest body of work in Canada including a book entitled Tombstone Tales. It presents awards for cemetery preservation and puts on training workshops. It encourages local organizations to mobilize local resources such as police and youth groups, like the cadet movement, to help preserve and restore cemeteries.

With respect to the first application to close St. Alban's Cemetery, Dr. Duncan stated that she had put out the word of a public meeting in Palgrave to discuss closure. The meeting was attended by a representative of the Anglican Church, members of the OHS and OGS and other interested persons. Dr. Duncan described the meeting as very challenging with the expression of differing views. At that time, the OHS asked for an archaeological assessment. She explained that it would provide concrete answers regarding the number of people interred in the cemetery.

Dr. Duncan stated that she has read all of the submission letters.[29] She is of the view that they are a powerful testament to the public interest in this matter. She states that the number of letters falls far short of the actual number of interested parties because many letters are from organizations such that the letter expresses the opinion of the membership. She found the strong wording of the letters to be convincing evidence that people realize the historical value of cemeteries. Wording like "I was appalled…" and "I was ashamed…" spoke volumes.

Dr. Duncan reviewed the Rowley will. In her experience, the will is unusual in that it specifically defines a sum of money to be used for the erection of a monument. The amount, $125.00, was a very substantial sum when it is borne in mind that a farm labourer would earn approximately $100.00 per annum. For today's point of view the Rowley monument is an extremely valuable cultural artefact. It is in excellent condition, sturdy and secure. It indicates that Mr. Rowley was an important member of the community. The local congregation first met in a Rowley family home before the church

[29] Ex 6 tabs 47-215

was constructed. His monument is deserving of preservation to respect his wish for memorialization.

In the view of Dr. Duncan, the number of burials in a specific site is irrelevant. There are many single burials and many small plots in the Province. If a single grave is unimportant, then, in Dr. Duncan's view, we do a disservice to the grave of the Unknown Soldier. What is important is that the dignity of, and respect for, the deceased prevails. There must be compelling reasons to move any burials. In her view, the current owner of the cemetery is now a licensed cemetery owner and should take on the responsibility for the upkeep of the single gravesites and the monuments. The cemetery does not constitute a danger to public health or a threat to public safety. A reduced cemetery would preserve that dignity and still leave the owner with a large lot to construct his house.

In cross-examination Dr. Duncan expanded on her view that the letter expresses the views of a much larger number of people than the number of letters themselves. She took as an example, the letter from the Lennox & Addington Historical Society[30]. She stated that this society has between three hundred and three hundred and fifty members. The letter would result from a monthly meeting of the membership and therefore is an expression of the collective view. The author of the letter needed the authority of the membership, either directly or by proper delegation, to send a letter on the society's behalf.

Diane Elizabeth Clendenan

Ms Clendenan testified concerning the genealogical value of preserving the St. Alban's Cemetery in its current location. Her educational and work experience includes a BA in Sociology from York University followed by two years at Toronto Teachers College. She has taught primary school for thirty-three years and is now retired. She has been a member of the OGS since 1977 and has been a member of several branches. She is on the Toronto Executive committee and is involved in OGS educational programmes. She is a member of the committee putting together a manual for beginners in genealogical studies. She is also the coordinator of the Cemeteries Preservation Project. This project's goal is to coordinate all OGS information between the head office and the branches to ensure that all known cemeteries are registered. She personally was involved in transcribing all of the graves at St. Michael's church and St. John's Norway. Transcribing is physically demanding work. Stones are often hard to read. Flat stones sink rapidly below grade and must be located using probes and then dug up to record their information. The markers must then be coordinated with burial records.

In addition to membership in the OGS, Ms Clendenan is also a member of the Manitoba Genealogical Society and a number of UK history societies. She has authored a number of articles for "Toronto Tree" the newsletter of the Toronto Genealogical Society, which is sent to branch members and local libraries. She has also authored a book on starting genealogical research. She started lecturing on the subject in 1993.

[30] Ex 6 Tab 150

She has visited cemeteries outside of the Toronto area and has twice visited the Mormon genealogical archive in Salt Lake City, Utah for research purposes. She was recognized as an expert in genealogy in the earlier St. Alban's matter and this Tribunal recognizes her as an expert in the use of grave markers to establish genealogy and family history.

Ms Clendenan testified that it is important to genealogical research that cemeteries be preserved. The situation and context are good sources of information. The grave marker may fill in missing information. It may set out the cause of death; it may include an infant burial; it may lead to other sources of information. Movement of markers to other locations creates a major problem for genealogists.

With respect to the St. Alban's Cemetery, Marjorie Stewart of the OGS undertook to locate the descendants, particularly of James Rowley. Descendants were found in Alberta, Ontario and British Columbia. James Rowley was born in Canada. His siblings were born in England in the 1830s. Information on the family was available at Archives Ontario, the Perkins Bull collection and Bolton Newspaper archives. The information was not difficult to find. One document discovered was the probated Rowley will. In general, wills are wonderful documents as they may identify siblings, children and specific heirlooms. With respect to the Rowley will, Ms Clendenan had never seen a will that specifically leaves money for a monument. In Ms Clendenan's view, the wishes in a will should be honoured. It can be very moving for descendants to visit the gravesite of their ancestors. When contacted, the Rowley descendants expressed surprise and shock that the wishes of their ancestor were not to be honoured. The OGS encouraged them to write to the Registrar and express their feelings.

Another person identified was James Burns. A descendant of Mr. Burns, Rita Reid, had written a letter identifying Mr. Burns as her uncle and stating that she had no objection to removal and re-interment of Mr. Burns' remains[31]. Ms Clendenan confirmed that Mr. Burns left no direct descendants and believed that Ms Reid was, in all likelihood, a niece.

On cross-examination, Ms Clendenan confirmed that Mr. Rowley had been originally buried somewhere other than St. Alban's. She also confirmed that there was no official record that he had ever been re-interred at St. Alban's. She is of the view that the monument is evidence of that re-interment. She tried to locate people who would have descendants and then eliminated families from the list as she discovered that remains had previously been moved. She did not discover any other wills.

Paul E. Johnston

Paul Johnston testified as an expert in land use planning matters. He has a Bachelor of Environmental Studies degree and he a member of the Canadian Institute of Planners. He has wide experience in planning matters, having worked with the *Planning Act* and various derivative instruments. He has testified before the Ontario Municipal Board and

[31] Ex 6 Tab 14

the Ontario Environmental Assessment Board. He has also testified before this Tribunal in the Clendennan Cemetery matter[32]. This Tribunal accepted him as an expert in land use planning.

His original assessment was done before the ASI archaeological assessment. Prior to giving his evidence, he had had the opportunity to review the archaeological assessment. In his view, the proposal to close the cemetery completely cannot be justified on planning grounds. In his view planning issues and the public interest are very closely related. He had a number of major grounds for his opinion. First, he was of the view that there is no benefit to the church from relocation. Second, the relocation runs afoul of the cultural heritage policies in the Provincial Policy Statement, Regional Official Plan and the Caledon Official Plan. Third, both the public interest in maintaining the cemetery and the owner's private development interest can be accommodated by scaling down the cemetery and preserving the remains and monuments in a separate area. Fourth, retention of the cemetery leads to retention and re-use of the church building. The Church can be used and a small cemetery can occupy the same site.

Mr. Johnston introduced into evidence the Provincial Policy Statement[33]. He stated that such policy statements derive from the provisions of the *Planning Act* and are intended to guide local planning activities. Local governments are required to adhere to policy statements. In the policy statement the Province has mandated preservation of heritage resources in general terms. The Peel Official Plan[34] recognizes the importance of protecting cultural heritage. Peel is currently under a great deal of urbanization pressure. Confronted with this pressure, the Official Plan attempts to protect heritage elements. Section 3.6 of the Peel Official Plan deals with the benefits of preservation of heritage resources in accordance with Provincial policies. This policy then filters down to the Caledon Official Plan[35]. In that plan, the Village of Palgrave is recognized as a rural settlement. The plan seeks to protect buildings and districts. All three levels of government take preservation of heritage resources seriously.

With specific regard to St. Alban's, Mr. Johnston identified it as a unique situation in planning policy. He stated that underlying good planning decisions is the concept that, where possible, land should be used effectively and efficiently to accommodate all interests. In cases where there is an all or nothing solution, this may not be possible. In the present case, it is possible to accommodate all interests. The owner can retain and enhance the church building and build on the site; the municipality can see a productive use of the property; and the heritage aspects of the site can be protected by the retention of a small and dignified cemetery enclosure.

On cross-examination Mr. Johnston stated that in rezoning of the property to village commercial, the Town of Caledon had to comply with the Peel Official Plan. He acknowledged that there was voluminous file material before the Caledon Council

[32] Mr. Johnston's resume is found at Ex 8, Tab 2
[33] Ex. 16
[34] Ex 17
[35] Ex 18

including the owner's application, results of a public meeting, the Heritage Committee's position and ultimately the decision of Council. The Council considered the proposed site plan agreement, which provided that the cemetery might get in the way. In addressing the Peel Official Plan, Mr. Johnston was of the view that there was an underlying false assumption – that movement of the grave artefacts is a precondition for the preservation of the church building. He is of the view that preservation can be accommodated without moving the cemetery. With respect to the Provincial Policy Statement, Mr. Johnston conceded that the policy permits conservation by removal and documentation of cultural artefacts. In practice, he stated that removal and documentation generally applied to much older pre- and post- contact aboriginal sites. This site, according to Mr. Johnston, consists of a built heritage resource and a cultural heritage landscape.

Mr. Johnston was asked about his understanding of the interaction between the *Planning Act* and the Act. The Provincial Policy Statement is a creature of the *Planning Act* and is binding on subordinate levels of government. He was not sure if it was binding on the Registrar under the Act. He stated that he did consider the public interest test in the Act in the context of planning and the public interest. Beyond considering the public interest he made no determination with respect to other aspects of the Act.

In summary, Mr. Johnston was of the view that the Rowley monument should be left where it is currently located, notwithstanding that it may have been moved from its original location. A reduced cemetery would not interfere with the placement of a dwelling. It could be done within setback requirements. There is no legal requirement of which he was aware to create a buffer between a cemetery and adjoining land. He is of the belief that the building, the required septic bed and reserve bed can be accommodated.

James Charles Leonard

Mr. Leonard testified as an expert in cemeteries as cultural heritage resources. He has an Honours BA in History and a Certificate in Museum Studies. He is not a member of either the OHS or the OGS. He is currently employed by the City of Brampton. Brampton Council deems preservation of cemeteries an important part of its heritage. He has worked on twenty-nine cemetery sites in Brampton and has worked diligently to attempt to accommodate competing interests. He deals with the Ontario *Heritage Act* on a daily basis together with the *Planning Act*. He has given seminars in cemetery preservation on behalf of the Ministry of Culture in Chatham and London. He has also been involved in workshops. He cited some examples of the conflict between development and conservation of cemeteries. In the case of the Hilltop Gore Cemetery of some fifty burials, an archaeological survey determined the limit of the cemetery and permitted development to continue to take into account the limits of the cemetery. The Harrison Hugle Cemetery contained one grave shaft and the remains of a woman and infant child. There were two small monuments. The site had been disturbed and fill had

been poured onto it. Mr. Leonard supervised the remediation of the site, the replanting of apple trees and restored the cemetery to its previous dignity.

In Mr. Leonard's view, the fact that there has been extensive disturbance in the past does not preclude the site from having value. Integrity of a site is only one element in determining value. Heritage sites are not static. The fact of change is part of the vibrancy of a heritage site. Cemeteries were created for utilitarian purposes. Remains were removed. Stones and fences were removed or lost. The City of Brampton has several disturbed cemeteries. In one case, markers were removed and embedded in a cairn as a way to memorialize the deceased, yet the site still retains cultural value. In a pioneer cemetery in Peterborough the grave stones were thrown in the river. Relocating the cemetery removes context and historical roots. The monuments are then put into a new context, a remedy, which in Mr. Leonard's view, should only used as a last resort.

Mr. Leonard testified that St. Alban's Church is a rare rural church. Its value as a heritage building is enhanced because the cemetery is attached. It tells the story of Palgrave. The building itself is an architectural gem. A reduced cemetery continues to tell the story of Palgrave while allowing development to take place. Relocating the cemetery is detrimental to the heritage value of the church. Mr. Leonard was of the view that it was in the public interest to retain the tombstone and single burial together with a designation of the area under the *Heritage Act.*

On cross-examination, Mr. Leonard pointed out that he is not giving his opinion evidence in any official capacity on behalf of the City of Brampton. He also reiterated that the integrity of the site is not determinative and went on to say that it is not as significant as some might think. He reiterated his view that the public interest is best served by leaving the remains *in situ*. In his view, if heritage conservation is in the public interest then conservation *in situ* is in the public interest. Respect and dignity are important and should also be considered in the public interest.

FACTS FOUND PROVEN:

The Tribunal finds the following facts to be proven:

1. The owner conspicuously posted a notice at the entrance to St. Alban's Anglican Cemetery setting out the intention to seek an order closing the cemetery and relocating any remaining burial to Morningside Cemetery in Palgrave as required by section 49 (4) of Regulation 130/92 (the "Regulation").
2. The owner gave notice of his intention to seek an order closing the cemetery to those parties set out in section 49 (3) of the Regulation by registered mail.
3. With respect to the St. Alban's Anglican Cemetery, there are no interment rights holders as that term is used in the Regulation. All residual rights to inter in the Cemetery were held by the Anglican Church who relinquished such rights when they transferred their property interest in the land to the owner.

4. The owner published notice of his intention to obtain an order closing the cemetery once in the Ontario Gazette and once a week for two consecutive weeks in a newspaper with general circulation in the locality of the St. Alban's Anglican Cemetery as required by section 49 (2) of the Regulation.
5. The Registrar complied with the provisions of section 9 (3) and 83 (1) of the Act by sending all persons who made submissions notice of his order closing the cemetery by mail to their last known address.
6. There is one remaining burial at the St. Alban's Anglican Cemetery, two monuments and one monument footing.
7. The monuments and the footing were not found in close proximity to the remaining burial and there is no evidence to suggest there is a link between the remains and the monuments.
8. The land in the St. Alban's Anglican Cemetery has been substantially disturbed over the years arising out of the removal and reburial of remains and construction of a church hall and septic bed.
9. The identity of the person whose remains are located at the St. Alban's Anglican Cemetery is unknown, and at this point in time, probably unknowable.
10. There is no convincing evidence to suggest that the remains are those of James Rowley.
11. James Rowley was not originally buried in the St. Alban's Anglican Cemetery and there is no record of his remains being moved there at any time after his burial.
12. The evidence in support of the fact that James Rowley was buried in the St. Alban's Anglican Cemetery arises out of the presence of an impressive monument as provided in his will. As stated above, that monument was not found in close proximity to the remaining burial such as to suggest any link between the two.
13. All other burials at the St. Alban's Cemetery were removed to other local area cemeteries in the 1920s.
14. There is no record of the reburial of James Burns.
15. James Burns left no direct descendant. His last remaining relative is a niece who consents to the closure of the cemetery.
16. There is no evidence that the Town of Caledon or Heritage Caledon has changed its previous support for closure of the cemetery.
17. The Registrar considered the numerous submissions received with respect the intention to close this cemetery and accorded weight based on the nature of the submission.
18. Notwithstanding the fact that the notice set a time limit for submissions, the Registrar considered submissions received by him outside the time limit right up to the time he mad his order.
19. In the Registrar's view, the public interest was served by closing the St. Alban's Anglican Cemetery because it resulted in the completion of a process started over 75 years ago; it resulted in those remains left unattended and abandoned being re-interred in a cemetery together with others from the community and restores respect and dignity to these largely forgotten remains, it would assist in the preservation of the church building; and the change in land use is more

appropriate and in accordance with the wishes of the local municipality and Heritage Committee.

20. There is no legislative act or Provincial policy, which prohibits the closure of the cemetery.

ANALYSIS:

Mr. Stebbings for the Registrar, in his written submissions, correctly sets out the issues before this Tribunal. As a preliminary step, the Tribunal must ensure that the notice provisions as set out in the Act have been followed. Once the Tribunal finds that there are no procedural irregularities with respect to notice, the next step is to determine whether the closure of the St. Alban's Anglican Cemetery is in the public interest. The first step is essentially a finding of fact and as may be seen from the facts as found by the Tribunal, the correct steps have been taken and the procedure satisfied. It was urged on the Tribunal by the OGS during opening argument that the Registrar should have made more effort to locate descendants of those believed to be buried in the cemetery and ascertain their wishes. Indeed, in her evidence, Ms Clendenan stated that it had not been difficult for her to locate the rather widely disbursed descendants of James Rowley and, with minimal effort, the Registrar could have done so. She stated that the OGS stood ready to assist if asked. The answer to this argument is found in the process set out in the Act and Regulations. There is a two-part process. Firstly, a person seeking an order to close a cemetery is required to publish the intention to do so in a manner which the Legislature has determined is likely to come to the attention of interested parties - publication in the local newspaper and Ontario Gazette and notice to certain statutorily defined persons or organizations. The list does not include descendants. It does include interment rights holders, who may or may not be descendants in that they may have acquired such rights but not yet used them. The Legislature has mandated that such notice is sufficient and, indeed, it appears to be so as it has stimulated the OGS and the OHS to bring their resources to bear on attracting widespread comment. It is not open to this Tribunal to add another category to the legislation. Accordingly, the Tribunal has no difficulty in concluding that the owner has fulfilled his statutory obligations to give notice and that no other notice was required.

The Registrar's duty with respect to notice is set out in the Act at subsection 9 (3). He is to provide every person who made a submission notice of the order to close the cemetery and advise that person of the right of appeal to this Tribunal. Notice is to be sent by "first class mail." It appears that there is no modern distinction between regular letter mail and any other means of sending a letter. Accordingly, normal postage pre-paid mail is the equivalent to "first class mail" as set out in the Act. What is important is that the Act does not require the Registrar to send his notice by registered mail. Further the Registrar is required to send notice to the last known address of the submitter. In these days of electronic communication, it is often the case that emails do not include a return mailing address. Such was the case with several submissions made to the Registrar. The Tribunal does not find the closure procedure to be invalid because, in several instances, the Registrar was unable to send a copy of his proposal by mail, as he did not have a "last known address." The Act does not mandate a requirement that

each person making a submission must receive notice of the order and appeal rights. It requires the Registrar to mail to the last known address. If no address is known, the Registrar's efforts are not nullified because such a submitter did not receive notice. The Tribunal is satisfied on the evidence that the Registrar fulfilled the requirements of the Act by sending notice of the order and the right to appeal by mail to all of those persons whose address was known.

Having determined that the statutory procedure has not been breached, the enquiry now shifts to a determination of the public interest. The structure of the Act is such that it is the Registrar who carries the statutory burden of determining the public interest. The Act provides no expansion of the term "public interest" or list of topics to be considered, nor is there a specific legal definition of "public interest." Rather, the term imports a discretion to consider and balance a wide range of factors in arriving at a conclusion whether a particular cemetery closure is in the public interest. In the current case, it was the Registrar's evidence that he had considered the history of the cemetery with particular emphasis on the fact that it was substantially closed in the 1920s. He considered the views of the Town of Caledon as expressed by the Heritage Committee and he considered each of the written submissions received. It is the position of the Applicants that he failed to give sufficient weight to the wishes of descendants; he failed to given sufficient weight to the historical and cultural value of maintaining the cemetery; and he failed to take into consideration the genealogical value of maintaining the cemetery. Finally, there is a fundamental difference between the Registrar and the Applicants on the best manner in which to deal with the remains found at St, Alban's.

What then is the standard of review on an appeal to this Tribunal? Section 82 of the Act gives the Tribunal a wide-ranging power to accept the Registrar's decision or to overturn, amend or vary it by attaching conditions or provide for licensing. In exercising those powers, does the Tribunal owe the Registrar any deference? This question has been answered in the negative in a number of cases before the Divisional Court. The first such case is the decision of Mr. Justice Southey in *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O. J. No. 1017 (Ont. Div. Ct.). That case dealt with a specific statutory test for refusal or revocation of a motor vehicle dealer's registration. Mr. Justice Southey held that the role of this Tribunal, as a statutory body, is to strictly apply the statute. In a later decision, *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O. J. No. 603, Mr. Justice Lane clarified that, in arriving at its decision, this Tribunal must independently review all of the evidence before it. The Tribunal holds a hearing and has the opportunity to see witnesses and assess credibility, a situation usually denied to Registrars levying sanctions for misdeeds or refusing registration on the basis of a past record. While the current appeal does not address misdeeds and all of the witnesses impressed the Tribunal by the sincerity of their opinions, this Tribunal has considered five days of evidence, not a luxury permitted the Registrar. Accordingly, the Tribunal is of the view that, in accordance with the principles set out in *Shine*, it does not owe the Registrar deference in arriving at its decision. At this stage in the proceeding it is for the Tribunal to come to its own decision on the public interest.

The term, “public interest” was first considered by this Tribunal in the Clendennen[36] matter. While the test is *obiter dicta,*[37] this Tribunal finds that it is a useful guide. It is set out as follows:

> From the foregoing, it is clear that the term "public interest" is not a term that has a fixed definition in law and does not have the same meaning across various statutes in which the term appears. Where "public interest" must be determined under a particular statute, the term's meaning is determined by the context, objects, and purposes of the statute in which the term is found and means the best possible accommodation of all interests contemplated by that statute, whether or not those interests are individually represented at a hearing under that statute.
>
> In determining what is in the public interest with respect to closing a cemetery, therefore, one element of the public interest is compliance with the Act, particularly, respecting disinterment and reinterments. In addition, the Act identifies a number of values, which are elements of the public interest. These values may be generally categorized under three general headings: maintenance of a cemetery, including its markers and features; safety of the public; and preservation of the dignity, quiet and good order of a cemetery.

In applying the tripartite test set out in the Clendennen decision the Tribunal concludes that it is in the public interest to close the St. Alban’s Anglican Cemetery. It is safe to say that there is currently no issue of public safety in the continued existence of the land as a cemetery. It was thought approximately seventy-five years ago that the cemetery was contributing to a local epidemic. This thought stimulated the removal of all but one of the graves buried there. A more modern scientific analysis might call that conclusion into question but, be that as it may, there was certainly no evidence of safety concerns put before the Tribunal.

When addressing the maintenance concern, the Tribunal is cognizant of the ambiguity of the term. The word “maintenance” may be used to raise concerns about grass cutting and general upkeep. Indeed a great deal of the Act and regulations addresses concerns about care and maintenance of cemeteries and the requirement to hold funds in trust for the future maintenance of cemeteries. At the time the St. Alban’s Anglican Cemetery was established, there was no such trust fund requirement so there are no funds for the future maintenance of the property. The costs of such maintenance must be borne by either the licensee or the taxpayers of the local municipality, none of whom bargained for this burden. The landowner has never applied for a cemetery licence. It was the evidence of the Registrar that the Church was licensed when licensing was first introduced. The landowner was then sent a licence simply because he was the successor in title to the Church. He has never applied for a licence and it was his evidence that his purchase of the land was to include closure of the cemetery. In this regard the Registrar appears to be applying a principle that every cemetery should have

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[36] Ontario Historical Society (Re) [1999] O. C. R. A T. D. No. 38

[37] The *ratio* in the Clendennen matter was that the notice posted in support of the closure application was defective on the basis that it was misleading. In simply stating that the cemetery was to be closed in the public notice, interested members of the public would not understand that the term “close” also involved the relocation of any remains still interred at the cemetery. That defect has been remedied in this matter by including in the notice a statement that any remains found at the St. Alban’s Cemetery will be relocated to the Morningside Cemetery in Palgrave.

a licensee whether the grant of a licence is sought or not. It is a dubious proposition that an unwilling licensee, be it the current landowner or a successor in title, will expend the requisite effort and expense to keep the cemetery in a manner that will maintain the dignity of the site. It was the landowner's evidence that during this period of uncertainty pending a resolution of this issue, he has limited his efforts with respect to the church building to sweeping. He has done no maintenance at all. He has agreed to the designation of the church building as a heritage building and intends to incorporate it into the design of his residence. Notwithstanding his future plans, he has taken no steps to maintain it. In the earlier hearing on an application to close the cemetery, that Tribunal addressed the maintenance concern. It felt that the lack of a licensee was a serious defect and would have ordered the closure of the whole cemetery had there not been a technical defect in the notice requirements. This Tribunal accepts that reasoning and extends it to include an unwilling licensee.

The second use of the word "maintenance" contemplates maintenance in a historical and cultural context. Indeed, if the Clendennen Tribunal intended to limit the meaning of the word to grass cutting and general maintenance then most of the evidence before it and before this Tribunal was irrelevant. It is clear from the scheme of the Act and the list of persons and organizations entitled to receive notice of a closure that the Legislature had in mind the impact of the closure of cemeteries on Ontario's cultural and historical heritage. In contemplating the public interest in this context, the Registrar must take into account other public statutes, namely the *Planning Act* and the *Ontario Heritage Act*. The focus of both these pieces of legislation is to place an onus for the preservation of local cultural and heritage buildings, artefacts and landscapes on the local municipality. It is conceded that Province may make policy statements that are binding on municipalities. The Tribunal has found, as a fact, that the current Provincial Policy Statement does not prohibit the closure of a cemetery and there was nothing brought to the attention of the Tribunal that limited the local municipality in its decision not to oppose the closure of the St. Alban's Anglican Cemetery.

The Registrar stated in evidence that he had given the lack of opposition by the local municipality considerable weight. The decision of the local municipality is set out in the letter of the Heritage Committee. The letter indicates that the Heritage Committee gave due consideration to the issue of the closure of this cemetery. The Committee stated its opposition to the closure of cemeteries generally and then cited reasons why this particular site fell outside that general opposition. There is nothing arbitrary in the reasoning. The decision of the Heritage Committee was then supported by Council when Council approved a zoning change and the Planning Department negotiated a draft site plan agreement that required the closure of the cemetery. Council then chose not to avail itself of the opportunity to oppose the closure before this Tribunal. Given the responsibilities put upon local municipalities by the *Planning Act* and the *Ontario Heritage Act* and the fact that these pieces of legislation represent clear statements of

public policy, the Tribunal agrees with the Registrar that the wishes of the local municipality must be given considerable weight in assessing the public interest.[38]

The Tribunal does not accept that the creation of a reduced cemetery as proposed by the Applicants would protect the "dignity, quiet and good order" of this cemetery. The cemetery would occupy space in someone's back garden. This fact raises questions about the interaction between use of the house as a residence and the garden for normal residential uses that may be inconsistent with the dignity, quiet and good order of the cemetery, and the rights of persons wishing to pay their respects to both access and a quiet contemplative atmosphere in which to visit the site. It would require further impingement on the owner's property for an access right of way. Given the conflict between competing and potentially irreconcilable land uses, the Tribunal is of the view that the dignity of the sole remaining grave is best preserved by relocating it to the Morningside Cemetery in Palgrave.

DECISION AND ORDER:

Accordingly, having given due consideration to the evidence and the views of the Applicants, the Registrar, those persons who made submissions, the municipality, the landowner and the public interest as defined by the Province in various statutes, the Tribunal finds that it is in the public interest to close the St. Alban's Anglican Cemetery and remove the sole remaining burial and the monuments to the Morningside Cemetery in Palgrave. By virtue of the provisions of the Act, the Tribunal orders the Registrar to carry out the closure of St. Alban's Cemetery in accordance with his order.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: February 27, 2007

File Name: 3267.3306.ca.ohs.ogs.

[38] In Clendennen the Tribunal reviewed the Town of Markham's policy to discourage cemetery closures. There was no offsetting rational as set out the Caledon Heritage Committee letter as to why the Clendennen Cemetery fell outside the Town's policy. On a reading of the Heritage Committee letter it is clear that the Committee would oppose a closure where the facts were similar to Clendennen and the cemetery was undisturbed.

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

CEMETERIES ACT
Revised Statutes of Ontario, 1990, Chapter C.4

IN THE MATTER OF
THE ONTARIO GENEALOGICAL SOCIETY
AND THE ONTARIO HISTORICAL SOCIETY

AND IN THE MATTER OF the Notice of Order issued by
The Registrar, *Cemeteries Act*
To Close St. Alban's Cemetery

- Order dated: November 16, 2005

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

THE ONTARIO GENEALOGICAL SOCIETY
AND THE ONTARIO HISTORICAL SOCIETY

Applicants

- and -

REGISTRAR, *CEMETERIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on July 13, 14, 15, 16, 25 and 26, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday and Tuesday, October 23 and 24, 2006 and on Monday, Wednesday, Thursday and Friday, November 6, 8, 9 and 10, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek
Chair

RELEASED: July 18, 2006

FILE NAME: 3267 and 3306.ca.onhs.ongs.motion .adj.doc

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

THE ONTARIO GENEALOGICAL SOCIETY AND
THE ONTARIO HISTORICAL SOCIETY

APPEAL FROM AN ORDER OF THE REGISTRAR OF THE *CEMETERIES ACT (REVISED)* R.S.O. 1990, CHAPTER C. 4

TO CLOSE A CEMETERY

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

APPEARANCES: JESSE KUGLER, Student-at-Law, representing the Applicants.

ROBERT CRAWFORD, Agent, representing The Ontario Genealogical Society.

ROBERT LEVERTY, Agent, representing The Ontario Historical Society.

JACOB BAKAN, Counsel, representing the Registrar, *Cemeteries Act* (*Revised*).

DATE OF HEARING: June 29, 2006 Toronto

REASONS FOR DECISION AND ORDER ON A MOTION BROUGHT BY THE REGISTRAR, *CEMETERIES ACT* (*REVISED)*

This is the hearing of a motion brought by the Registrar, *Cemeteries Act*, (*Revised*) (the "Registrar") for an order that The Ontario Genealogical Society and The Ontario Historical Society, (the "Applicants") be prohibited from re-litigating the issue whether it is in the public interest to close St. Alban's Cemetery, save and except for the issue of whether proper notice has been given to close this cemetery.

BACKGROUND

St. Alban's cemetery, an Anglican cemetery, which lies in the Village of Palgrave, Ontario

was established in1882. The last recorded burial there was in 1916. A small, but undetermined number of people are buried in this cemetery. In 1996, St. Alban's Anglican Church applied to close the cemetery and to move all remains and associated artifacts to another cemetery located within the Village of Palgrave. The cemetery was sold the following year to Gordon Barr who wishes to redevelop the cemetery lands.

Mr. Barr requested that the Registrar order a partial closing of the cemetery such that the remains of those persons interred in the closed section be re-interred in the remnant or open section of the cemetery. The Registrar ordered partial closure of the cemetery on June 8, 2001 subject to certain conditions.

The Applicants appealed the Registrar's order to the Licence Appeal Tribunal (the "Tribunal"), which directed the Registrar not to carry out the order closing part of the cemetery following a 14-day hearing. In its decision released on March 5, 2003, the Tribunal found that there had not been compliance with the notice provisions mandated under paragraph 8(3)(a) of the *Cemeteries Act (Revised)* R.S.O. 1990, Chapter C.4 (the "Act") and subsections 49(3) and (4) of Ontario Regulation 130/92 made under the Act. The notices posted with respect to the proposed partial closing failed to specify the correct time that interested persons had for making submissions on the partial closure issue. One person who made submissions was not sent notice of his statutory right to seek an appeal from the Registrar's order. The Tribunal classified this later violation as a "serious noncompliance" with the Act that was sufficient by itself to find that the Registrar's order was not correct and reasonable. The Tribunal also stated that if there had been compliance with the Act, it would have ordered the closing of the entire cemetery and the relocation of the human remains and markers to another cemetery in Palgrave.

Mr. Barr subsequently applied to the Registrar for an order closing the entire cemetery. On November 16, 2005, the Registrar ordered the closure of the entire cemetery subject to certain terms and conditions. The Applicants have appealed the Registrar's order to the Tribunal.

SUBMISSIONS:

The Registrar and the Applicants agree that the parties that were before the Tribunal at the former hearing are the same parties that will be before the Tribunal at the new hearing. The evidence to be given in the new hearing will be similar to that given at the former hearing.

The Registrar:

The Registrar submits that the doctrine of *res judicata* was developed to prevent the re-litigation of matters already determined by a court or tribunal. There are two branches to the doctrine of res judicata; namely, cause of action estoppel and issue estoppel. Action estoppel precludes the bringing of an action against another when the same cause of action has been determined in prior proceedings before a court or tribunal. Issue estoppel

precludes the re-litigation of issues previously decided by a court or tribunal and is relevant to this appeal. The Registrar submits that the Applicants be prohibited from proceeding with their appeal on the substantive issue of he closing of the entire cemetery by application of the principle of issue estoppel.

The Supreme Court of Canada has held that to successfully invoke the doctrine of issue estoppel, three pre-conditions must be met:

1. the issue must be the same as the one decided in a prior decision or be fundamental to the prior decision and not merely collateral or incidental to it;
2. the prior decision must have been final; and
3. the parties to both proceeding must be the same or their privies.

Toronto (City) v. C.U.P.E., Local 79 [2003] 3 S.C.R. 63

The Registrar submits that it has met each of the three pre-conditions. The issue of the closure of the whole cemetery has already been decided by the Tribunal, which held that it would be in the public interest to close the whole cemetery. The Tribunal's decision is final. It was not subject to any appeal. The Applicants were parties to the earlier Tribunal hearing and each Applicant shares a commonality of interest by seeking to maintain cemeteries for their historical and educational significance. There is a high degree of likeliness that the Tribunal would order the closure of the whole cemetery at the new hearing. The former Tribunal decision forms a strong precedent in favour of the closure of the whole cemetery. If the Tribunal were to order otherwise, then it would undermine its own credibility.

Alternatively, the Registrar submits that the Tribunal maintains discretion to prevent the re-litigation of the same issue by applying the doctrine of abuse of process in circumstances where the strict requirements of issue estoppel have not been met. This doctrine arises in circumstances where re-litigation of an issue would violate principles of judicial economy, consistency, finality and integrity of the administration of justice. (*Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 63) Having regard to the Tribunal's earlier findings, it would be inappropriate to re-litigate the issue of the closure of the whole cemetery. No other person has sought to appeal the Registrar's order except for the Applicants. The Registrar attributes no improper motive to the Applicant's seeking to appeal the Registrar's order. All procedural requirements relating to notice have been met. Consequently, the Tribunal should allow the motion and prohibit the re-litigation of the issue of the closure of the whole cemetery. The allowing of the motion would prevent the Tribunal from arriving at inconsistent results, uphold the integrity of the hearing process and would be an unnecessary expense for the parties. The only issue to be decided by the Tribunal at the new hearing should be the adequacy of the notice. The Tribunal has jurisdiction under subsection 82(2) of the Act to consider the issue of the closure of the entire cemetery. The Registrar also relies upon the decision of the Ontario Court of Appeal in the case of *McIntosh v. Parent* (1924), 54 O.L.R. 552 where Middleton J.A. stated at paragraph 13 of the reason for decision that:

> "Any right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties of their privies, though for a different cause of action.

The Applicants:

The Applicants submit the issue the new appeal involves a consideration of a new issue that was not before the Tribunal at the first hearing. The first hearing involved an appeal from an order made by the Registrar directing that part of the cemetery be closed. The issue of closure of the whole cemetery was not at issue nor was it directly determined by the Tribunal in the first decision. The Registrar in his order dated June 8, 2001, recited the fact that the new owner of the cemetery requested that an application be considered in respect of a partial closure of the cemetery. The Tribunal stated in its reasons for decision that the issue for it to determine is whether the partial closure of the cemetery is in the public interest.

The observation made by the Tribunal relating to the closure of the entire cemetery is not fundamental to its decision directing the Register not to carry out his order for partial closing. It is *obiter dicta* or an observation made by the Tribunal that is extraneous to the reasons for its decision. It is not binding on the parties. The Tribunal's decision was predicated upon procedure problems relating to notice. The Tribunal's observation on the closing of the entire cemetery cannot form the basis for an issue estoppel because it was not fundamental to the Tribunal's decision and was both collateral to and subordinate to the *ratio* of the decision.

The Tribunal maintains a residual discretion to prevent the abuse of process. The doctrine of abuse of process concentrates on the integrity of the adjudicative process. *Toronto (City) v. C.U.P.E., Local 79* [2003] 3 S.C.R. 63, at paragraph 51. It is designed to prevent vexatious proceedings and inconsistencies arising in the adjudicative process. It is invoked to prevent re-litigation in the interest of judicial economy and having regard to the integrity of the process, which issues do not arise in this case. A denial of the hearing of the appeal would, in the circumstances of this case, be an attack on the adjudicative process and on the proper administration of justice. The Tribunal has no grounds to invoke the doctrine of abuse of process.

LAW:

The statutory provisions relevant to this motion are stated as follows:

> **8.** (1) In this section and in sections 9, 10, 11, 12 and 13, a reference to a cemetery includes any part of a cemetery.
>
> (2) The Registrar may order a cemetery closed if the closing is in the public interest.
>
> (3) An order shall not be made under subsection (2) until,

(a) notice of the intention to make the order is given in the manner and to the persons prescribed; and

(b) interested persons are given the opportunity to make submissions to the Registrar within such time as is prescribed.

(4) Notice is not required if,

(a) the request is from the owner;

(b) no interments have been made in the cemetery to be closed; and

(c) the consent of all affected interment rights holders has been obtained. R.S.O. 1990, c. C.4, s. 8 (4).

9. (1) In an order to close a cemetery, the Registrar may,

(a) declare a cemetery or a portion thereof closed;

(b) require the owner to disinter all human remains therein and specify the manner of disinterment and the manner and place of reinterring or dealing with the remains;

(c) require the owner to remove any markers and relocate them to a specified place; and

(d) require the owner to provide or acquire equivalent interment rights for all holders of interment rights with respect to unused lots in the cemetery.

(2) In an order to close a cemetery, the Registrar may designate another person to do anything that the owner may be required to do.

(3) The Registrar shall give every person who made a submission notice of the order and at the same time advise the person of the right of appeal.

(4) Subject to subsection (5), an order to close a cemetery comes into force thirty days after it is made unless there is an appeal filed before the order comes into force or the order sets out a later date.

(5) If submissions were made in respect of the order, the order comes into force thirty days after notice has been given to each person who made a submission unless there is an appeal filed before the order comes into force or the order sets out a later date.

(6) An order that is appealed comes into force upon being upheld by the Tribunal

10. A person with an interest therein may appeal, to the Tribunal,

(a) an order to close a cemetery any time before the order comes into force; or

(b) a refusal to order a cemetery closed.

82. **(1)** If there is an appeal under this Act to the Tribunal, it shall appoint a time for and hold a hearing.

(2) After holding a hearing, the Tribunal may by order direct the Registrar to take an intended action or to refrain from taking an action or to take such action as the Tribunal considers that the Registrar ought to take and for such purposes the Tribunal may substitute its opinion for that of the Registrar

(3) The Tribunal may attach such conditions to its order or to the licence as it considers proper to give effect to the purposes of this Act

Subsections 49 of Ontario Regulation 130/92 provides as follows:

49. (1) For the purposes of clause 8 (3) (a) of the Act, an owner who wishes to obtain an order closing a cemetery shall give notice, in accordance with this section, of the owner's intention to apply for the order.

(2) The notice shall be published,

(a) once in *The Ontario Gazette*; and

(b) once a week for two consecutive weeks in a newspaper with general circulation in the locality in which the cemetery is located.

(3) The notice shall be sent by registered mail to,

(a) each interment rights holder whose lot is situated in the portion of the cemetery subject to the order, mailed to the rights holder's last address known to the owner;

(b) the municipality in which the cemetery is located;

(c) the Local Architectural Conservation Advisory Committee, if any, established under the *Ontario Heritage Act* for the locality in which the cemetery is located;

(d) the Archives of Ontario, the Ontario Historical Society, the Ontario Archaeological Society and the Ontario Genealogical Society; and

(e) the Minister of Culture and Communications.

(4) The notice shall be conspicuously posted on a sign at the entrance to the cemetery before publication of the first notice under clause (2) (b) and shall remain posted until the Registrar makes, or refuses to make, the order sought by the owner.

ANALYSIS:

It is first necessary to decide what the Tribunal actually decided in its March 2003 decision (the prior decision). As Lord Halsbury said : A case is only authority for what it actually decides." *Quinn v, Leatham* [1901] A.C. 495 (HL) The Tribunal directed the Registrar not to carry out his order directing partial closure of the St. Alban's cemetery because of the non-compliance with provisions of the Act relating to notice and because it was not in the public interest to do so.

Mr. Barr sought and the Registrar ordered partial closing of the cemetery. The Applicants, appealed the Registrar's order relating to partial closure. The Tribunal's order related to the circumstances surrounding the request for partial closure.

The provisions found in the Act and regulations relating to notice to be given of the proposed closure of all or part of cemetery and of the rights of interested parties to an appeal, are steps taken by the Legislature to assure fairness in the process leading to the closure of a cemetery. These provisions are designed to assure that persons affected by the proposed closure of the cemetery are given the right to meaningfully participate in the decision making process.

The evidence before the Tribunal at the earlier hearing indicated that it was not in the public interest to close only part of St. Alban's Cemetery. The Registrar's order was found to be incorrect and unreasonable by reason of significant flaws in the process leading to the

making of the Registrar's order.

The Tribunal found that had there been compliance with the provisions of the Act and regulations, then it would have ordered closure of the entire cemetery. This amounts to nothing more than a gratuitous statement. It is *obiter dictum* – a statement unnecessary to the decision. The Tribunal cannot fetter the discretion afforded the Tribunal in its consideration of issues in a subsequent case.

The Tribunal, after holding a hearing, is authorized under subsection 82 (2) of the Act to do one of three things. It may by order direct the Registrar (a) to take an intended action , (b) to refrain from taking an action; or (c) to take such action as the Tribunal considers that the Registrar ought to take. The Tribunal may also substitute its opinion for that of the Registrar in its consideration of which action to take. In its earlier decision, the Tribunal ordered the Registrar to refrain from taking an action – to refrain from ordering the partial closure of the cemetery. It would be absurd for the Tribunal to direct the Registrar from refraining to carry out his order because of significant errors in the decision-making process and then order a result that was not in issue.

Mr. Barr subsequently sought a Registrar's Order directing the closure of the entire cemetery, which Order was granted. An appeal from this order is now before the Tribunal. The Tribunal finds that the issue in the current appeal (whether the procedural requirements and the substantive merits of the Order directing closure of the entire cemetery have been) is not the same issue that was before the Tribunal in the prior appeal. (the partial closure issue) It is neither collateral nor incidental to the issues considered by the Tribunal in the prior appeal.

The Tribunal refuses to apply the principle of issue estoppel for two reasons. The Registrar has not met the requirements for the application of that principle. The issue before the Tribunal differs from the issue that was previously before the Tribunal. Regardless if the three pre-conditions for the application of issue estoppel have been met, the Tribunal refuses to exercise the discretion afforded in its consideration of the application of the principle of issue estoppel where the prior decision was made without regard to the statutory process and compromised fairness.

It is not appropriate for the foregoing reasons and in the circumstances of this case to invoke the doctrine of abuse of process The Applicants are asserting their statutory right to appeal the Registrar's order and to have a full hearing before an independent tribunal. It has been over three years since the parties to this appeal were before the Tribunal. Circumstances may have changed in the interim. This is the first time an appeal has been brought relating to an order directing closure of the entire cemetery. The Applicants are entitled to their hearing.

ORDER:

The Motion brought by the Registrar for an order that the Applicants be prohibited from re-litigating the issue of whether it is in the public interest to close St. Alban's Cemetery, save and except for the issue of whether proper notice has been given to close the Cemetery is dismissed.

LICENCE APPEAL TRIBUNAL

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

RELEASED: July 4, 2006

FILE NAME: 3267.3306.ca. The Ontario Genealogical Society et al.order.doc

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

CEMETERIES ACT
Revised Statutes of Ontario, 1990, Chapter C.4

IN THE MATTER OF
THE ONTARIO GENEALOGICAL SOCIETY
AND THE ONTARIO HISTORICAL SOCIETY

AND IN THE MATTER OF the Notice of Order issued by
The Registrar, *Cemeteries Act*
To Close St. Alban's Cemetery

- Order dated: November 16, 2005

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

THE ONTARIO GENEALOGICAL SOCIETY
AND THE ONTARIO HISTORICAL SOCIETY

Applicants

- and -

REGISTRAR, *CEMETERIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a motion hearing in the above matter on June 5, 2006;

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 1:30 p.m. on Thursday, June 29, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: June 2, 2006

FILE NAME: 3267 and 3306.ca.onhs.ongs.motion .adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

THE ONTARIO GENEALOGICAL SOCIETY
AND THE ONTARIO HISTORICAL SOCIETY

APPEAL FROM AN ORDER OF THE REGISTRAR OF THE *CEMETERIES ACT* R.S.O. 1990, CHAPTER C. 4

TO CLOSE A CEMETERY

TRIBUNAL: DEREK ISRAEL, Vice-Chair
DONALD BENNINGER, Member

APPEARANCES: ROBERT CRAWFORD, Agent, representing The Ontario Genealogical Society

ROBERT LEVERTY, Agent, representing The Ontario Historical Society

JACOB BAKAN, Counsel, representing the Registrar, *Cemeteries Act*

DATE OF PRE-HEARING: March 30, 2006 Toronto

ORDER

Following attendances on March 30, 2006 at a pre-hearing before this Tribunal of Robert Crawford, Agent, representing The Ontario Genealogical Society (the “OGS”) and Robert Leverty, Agent, representing The Ontario Historical Society (the "OHS”), and Jacob Bakan, Counsel, representing the Registrar, *Cemeteries Act* (the “Registrar”);

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Thursday, July 13, 2006 at the Tribunal’s Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on July 14, 17, 18 and 19, 2006, at 9:30 a.m. at the Tribunal’s above chambers:

1. The Parties to the hearing are the OGS, the OHS and the Registrar.

2. The hearing scheduled for May 11, 12, 15, 16, 25 and 26, 2006 at the Tribunal's above chambers is hereby adjourned to July 13, 14, 17, 18 and 19, 2006.

3. The Parties to the hearing shall by no later than 30 days prior to July 13, 2006 fully comply with all the disclosure requirements under Rules 6.3 and 6. 4 (the latter if applicable only) of the Tribunal's Rules of Practice, save and except the 10 day requirement under Rule 6.3 of the Rules.

4. By no later than 30 days prior to July 13, 2006 all Parties shall advise the other of the full names of the witnesses they propose to call to testify at the hearing and such advise shall also contain a brief synopsis of the proposed testimony of such witnesses.

5. Counsel for the Registrar advised the Tribunal at the pre-hearing that it is the present intention of the Registrar to bring a motion to the Tribunal and which motion will deal with the question of issue estoppel. In the event of the Registrar's deciding to bring such motion he shall serve notice of such motion on the other Parties by no later than May 15, 2006.

6. Save for the above the Parties recorded there was no resolution of any of the issues in this matter.

LICENCE APPEAL TRIBUNAL

_____

Derek Israel, Vice-Chair

RELEASED: April 5, 2006

FILE NAME: 3267.3306.ca.The Ontario Genealogical Society et al.prehrg order.doc

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

Decisions under Child And Family Services Act

Fiscal Year 2006 - 2007

LAT Decisions, Rulings and Orders

Archives

- 2001 - 2002
- 2002 - 2003
- 2003 - 2004
- 2004 - 2005
- 2005 - 2006

Decisions from the Superior Court of Justice

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

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- OMEGA HOUSE INC. OPERATING A CHILDREN'S RESIDENCE IN BELLEVILLE, ONTARIO UNDER THE NAME OF OMEGA HOUSE
- 836591 ONTARIO LTD. OPERATING AS MARY HOMES INC.
- OMEGA HOUSE INC.
- OMEGA HOUSE INC.

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

OMEGA HOUSE INC. OPERATING A CHILDREN'S RESIDENCE IN BELLEVILLE, ONTARIO UNDER THE NAME OF OMEGA HOUSE

APPEAL UNDER SECTION 197 (2) OF THE *CHILD AND FAMILY SERVICES ACT* AS AMENDED FROM A NOTICE OF INTENTION, DATED DECEMBER 29, 2005.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JOHN D. BONN, Counsel, appearing by teleconference on behalf of OMEGA HOUSE INC.

KATHERINE RENISON, Counsel, appearing on behalf of the Director for the purposes of *Child and Family Services Act*

DATE OF HEARING: May 31, 2006 *By teleconference*

DECISION AND ORDER
APPLICANT'S MOTION FOR AN ADJOURNMENT

This motion is brought by, Omega House Inc. (the "Applicant") for an adjournment of the hearing of this matter currently scheduled to commence on June 5, 2006 in Kingston, Ontario. The grounds for the motion are that the Applicant provided all of its original documentation to the Director, under the *Child and Family Services Act* (the "Director" and the "Act" respectively) in and around March 6, 2006 and has not received all of it back in a timely fashion such that it can prepare properly for the hearing.

In and around March 6, after agreement between counsel to address the confrontational dealings between the Applicant and the Director's investigator, the Applicant delivered all of its documents to Ms. Renison. It appears that in breach of s. 6 of the Act, the Applicant had refused access to the investigator. What followed delivery of the original documentation, constituting some 22 boxes in a disorganized state, was several months of extremely hard and detailed efforts by the Director's staff to review and collate documentation and prepare some 36 document binders for use in the upcoming hearing.

Commencing in early May, boxes of original documents were returned to the Applicant's counsel, Mr. Bonn. Mr. Bonn advised the Tribunal that he received a folder as late as

4:30 p.m. on May 29 and two boxes on May 30. The May 30 shipment was to constitute three boxes but it appears the shipping company took it upon itself to deliver one box to Owen Sound.

It was the position of Mr. Bonn that without all of the original documents available to him in a timely manner for review, he is not in a position to prepare his case and responding document briefs. Indeed, he stated that one relevant document was found in the folder delivered on May 29. It was the position of Ms. Renison that the Director had disclosed all relevant documents within the time set out in the Tribunal's rules and Mr. Bonn has had ample opportunity to review and discuss documentation with his client, documentation that, after all, originated with the Applicant and was not delivered to the Director until approximately 3 months after these proceedings commenced.

Having reviewed the affidavits filed and considered the submissions of counsel for the parties, this Tribunal has determined that the adjournment must be granted. Without for one minute suggesting that the Director has not fulfilled all of its disclosure obligations in the review of the original documentation and the preparation of the 36 volumes of documents, it is crucial to the adversarial process that the Applicant be given full opportunity to review all of the original documents and draw therefrom any documents it feels may help its case, independent of the Director's view of the relevance or importance of any particular document. Accordingly, the matter is adjourned to be heard at the GKA Reporting Services, 275 Ontario Street, Suite 205, Kingston, Ontario, on October 16, 2006 and to continue as necessary on each subsequent day up to and including October 26, 2006.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: June 20, 2006

File Name: 3334.CFSA.Omega House Inc.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.

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

836591 ONTARIO LTD. OPERATING AS MARY HOMES INC.

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

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

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

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

DATE OF PRE-HEARING: February 28, 2006 *By Teleconference*

ORDER

Following attendances on February 28, 2006, at a pre-hearing by teleconference before the Licence Appeal Tribunal (the "Tribunal") of Emilio S. Binavince, appearing by telephone as counsel for the Applicant and Katharine Renison, appearing in person as counsel for the Director under the *Child and Family Services Act.*

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on April 11, 2006, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, and to continue at the same location at 9:30 a.m. on April 12, 2006, if necessary.

1. The parties to the hearing are the Applicant and the Director.

2. The Director shall provide full disclosure of any and all documents it intends to rely on at the hearing of this matter by providing a copy of any and all such documents to the Applicant and the Tribunal on or before March 31, 2006.

3. The Applicant 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 31, 2006.

4. The Applicant shall provide a brief synopsis of the expected evidence of Mr. Wilson by March 31, 2006.

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.

The motion brought by the Director for an Order dismissing the appeal pursuant to Rule 2.10 of the Tribunal's Rules of Practice originally scheduled to be heard on February 28, 2006, shall be heard at the commencement of the hearing on April 11, 2006

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude
Vice-Chair

RELEASED: April 5, 2006

File: 3282.3284.3338.3375.cfsa.maryhomes.pre-hrg.doc

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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: DEREK ISRAEL, Vice-Chair

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

JOHN D. BONN, Counsel representing Omega House Inc.

DATE OF HEARING: March 30, 2006 *By Teleconference*

ORDER

Following attendance on March 30, 2006, at a hearing of a motion before this Tribunal of Katharine Renison, Counsel, appearing in person on behalf of the Director, under the *Child and Family Services Act* (the "Director") and John D. Bonn, Counsel, appearing by teleconference on behalf of Omega House Inc. (the "Applicant");

And upon hearing submissions made by the Director's Counsel and the statement made by Omega House Inc.'s Counsel that the latter has no objection to the proposed Order sought by the Director;

The Tribunal makes the following Order;

1. The Kawartha-Haliburton 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 Prince Edward 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.

3. The materials provided to the Tribunal from the records of the various Children's Aid Societies shall not form part of the public records and will be limited in their distribution to the Tribunal, the parties and expert witnesses.

4. 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.

5. At the end of the hearing of this matter or of any appeal there from, the Tribunal shall retain one copy of the records and Counsel shall shred all others in their possession.

LICENCE APPEAL TRIBUNAL

_____

Derek Israel
Vice-Chair

RELEASED: April 3, 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.

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

OMEGA HOUSE INC.

IN THE MATTER OF THE NOTICE OF INTENTION BY THE DIRECTOR, UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

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

JOHN D. BONN, Counsel, appearing on behalf of Omega House Inc.

DATE OF PRE-HEARING: March 30, 2006 *By Teleconference*

ORDER

Following attendance on March 30, 2006, at a Pre-hearing before this Tribunal of Katharine Renison, Counsel, appearing in person and there and then representing the Director, under the *Child and Family Services Act* (the "Director") and John D. Bonn, Counsel, who appeared by teleconference before this Tribunal and who there and then represented Omega House Inc. (the "Applicant");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on June 5, 2006 and to continue, if necessary, on June 6, 7, 8, 9, 12, 13, 14 and 15, 2006 at Kingston City Hall, John Counter Room, 216 Ontario Street, Kingston, Ontario, save for the hearing on June 13, 2006 on which date the hearing shall take place in the Sir John A. Macdonald room of the Kingston City Hall;

1. The Parties to the hearing are the Director and Omega House Inc.

2. The Parties record that there was no resolution of any of the issues in this matter.

3. The Parties recorded that the Director has to date made disclosure of some 5 volumes of documentation and Counsel for the director informed the Tribunal that she anticipates being in possession of further documents shortly when further disclosure will be made.

4. Both Parties shall fully and in a timely manner comply with Rules 6.3 and 6.4 of the Rules of Practice of this Tribunal and shall make disclosure no later than 15 days prior to the hearing notwithstanding that the Tribunal's Rules only require 10 days disclosure prior to the hearing.

5. Counsel for Omega House Inc. was directed and ordered by the Tribunal that within 14 days of date of this Order, he shall advise Counsel for the Director, in writing, precisely what facts and allegations contained in the Director's Notice of Intention dated December 29, 2005, are admitted and do not require to be proved at the hearing and what facts and allegations are denied and do require to be proved by the Director.

6. No later than 30 days prior to the commencement of the hearing, each party shall advise the other the full names of each and every witness they intend to call to testify on their behalf at the hearing together with a brief synopsis of their proposed testimony and their contact telephone numbers.

LICENCE APPEAL TRIBUNAL

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Derek Israel
Vice-Chair

RELEASED: April 3, 2006

File: 3334.cfsa.omega.doc

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Decisions from the Superior Court of Justice

Decisions under Collection Agencies Act

Fiscal Year 2006 - 2007

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Decisions from the Superior Court of Justice

Decisions under Consumer Protection Act, 2002

Fiscal Year 2006 - 2007

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Decisions from the Superior Court of Justice

Decisions under Consumer Reporting Act

Fiscal Year 2006 - 2007

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Decisions under Day Nurseries Act

Fiscal Year 2006 - 2007

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LAT Decisions, Rulings and Orders

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Decisions from the Superior Court of Justice

- MALVERN MONTESSORI SCHOOL INC.
- MALVERN MONTESSORI SCHOOL INC.
- MALVERN MONTESSORI SCHOOL INC.
- O/A SUNRISE CENTRAL DAYCARE

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MALVERN MONTESSORI SCHOOL INC.

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

TRIBUNAL: JANE WEARY

APPEARANCES: MYLVAGANAM INPARAJAH
Counsel, appearing on behalf of Malvern Montessori School Inc., the Applicant

DANIELLA BERTOSI
Counsel, appearing on behalf of the Director under the *Day Nurseries Act*

DATE OF HEARING: March 5, 2007 Toronto

ORDER

WHEREAS the Director under the *Day Nurseries Act* (the "Act") issued a Notice of Intention to revoke the licence of Malvern Montessori school Inc., the Applicant, under the Act;

AND WHEREAS, the Applicant appealed to the Tribunal on November 9, 2006;

AND WHEREAS, the Parties appeared before the Tribunal on March 5, 2007, and Counsel advised the Applicant is withdrawing its appeal from the Director's Notice, on consent. Counsel for the Director and Counsel for the Applicant further informed the Tribunal that the Applicant would continue to operate as a valid unlicensed day nursery until such time as a further application for licence to the Director was approved, which application was available at any time on the condition that compliance with the legislation was met by the Applicant.

NOW THEREFORE, it is Ordered that the appeal to the Director's Notice is withdrawn and this matter before the Tribunal concluded.

LICENCE APPEAL TRIBUNAL

_____

Jane Weary
Vice-Chair

Released: March 6, 2007

File name: 3383.Malvern Montessori school.dna.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

MALVERN MONTESSORI SCHOOL INC.

APPEAL FROM A NOTICE OF DIRECTION AND A NOTICE OF PROPOSAL OF THE DIRECTOR UNDER THE *DAY NURSERIES ACT,* R.S.O. 1990 C.D.2.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MYLVAGANAM INPARAJAH, Counsel appearing on behalf of Malvern Montessori School Inc., Applicant

DANIELA BERTOSSI, Counsel, appearing on behalf of the Director, *Day Nurseries Act*, Respondent

DATE OF PRE-HEARING: January 22, 2007 Toronto

ORDER

Following attendances at the Tribunal's Chambers, 12th Floor, 1 St. Clair Avenue West, Toronto, Ontario, of M. Inparajah, counsel appearing on behalf of the Applicant and Daniela Bertossi, counsel appearing on behalf of the Respondent;

The Tribunal makes the following order with respect to the hearing:

1. The Parties to the hearing are the Applicant and the Respondent.

2. The hearing shall commence at the Tribunal's Chambers, 12th Floor, 1 St. Clair Avenue West, Toronto, Ontario at 9:30 a.m., on March 5, 2007, and continue as necessary on each successive day up to and including March 9, 2007.

3. The Parties shall have until February 9, 2007, to review the draft and agree upon an Agreed Statement of Facts. Should the Parties not agree upon an Agreed Statement of Facts, then all issues raised in the Proposal and in the Notice of Appeal shall remain in issue at the hearing.

4. The Parties have until February 16, 2007, to deliver to each other and deliver to the Tribunal, copies of all documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: January 25, 2007

File Name: 3883.dna.Malvern.pre-hrg.doc

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

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

IN THE MATTER of the REGISTRATION of
MALVERN MONTESSORI SCHOOL INC.

AND IN THE MATTER of the NOTICE OF INTENTION of the
Director under the *Day Nurseries Act*
made pursuant to section 12 of the *Day Nurseries Act*
TO REVOKE REGISTRATION
- Notice dated: October 27, 2006

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

MALVERN MONTESSORI SCHOOL INC.

Applicant

-and-

DIRECTOR, *DAY NURSERIES ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on January 15, 2007;

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 Monday, January 22, 2007.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: January 12, 2007

FILE NAME: 3883.dna. Malvern Montessori.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1474434 ONTARIO INC.
O/A SUNRISE CENTRAL DAYCARE

APPEAL FROM A NOTICE OF DIRECTION AND A NOTICE OF PROPOSAL OF THE DIRECTOR UNDER THE *DAY NURSERIES ACT,* R.S.O. 1990 C.D.2.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DANIEL R. MAILER, Counsel, representing 1474434 Ontario Inc.

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

DATE OF PRE-HEARING: January 5, 2007 Toronto

ORDER

Following attendances on January 5, 2007 at a pre-hearing before this Tribunal of Daniel R. Mailer, Counsel, appearing on behalf of 1474434 Ontario Inc. (the ”Applicant”) and Katharine Renison, Counsel, appearing on behalf of the Director under the *Day Nurseries Act* (the “Director”);

The Tribunal makes the following Order:

1. The Parties to the hearing shall be the Applicant and the Director;

2. The hearing of the appeals by the Applicant to the Notice of Direction and the Proposal issued by the Director shall, on the consent of the Applicant and the Director, be combined as the Parties thereto are the same, the issues between the parties are the same, a combined hearing will save expense to the Parties and the public and combining the hearing of the appeals will prevent conflicting decisions;

3. The combined hearing shall commence at 9:30 a.m. on April 16, 2006 at London Verbatim Reporting, 495 Richmond Street, Suite 503, London, Ontario and shall continue, if necessary, on April 17, 18, 19 and 20, 2006 at the aforesaid address;

4. There was no resolution of any of the issues in this matter;

5. The Parties shall make full and timely disclosure as stipulated under Rule 6 of the Rules of Practice of the Tribunal;

6. Without derogating from the aforesaid disclosure Rule the Tribunal orders that the Parties shall, no later than 21 days prior to April 16, 2006, advise the other in writing of the full names of all witnesses that they propose to call to testify at the hearing of this matter and accompanying such written notice shall be a short synopsis of the proposed witnesses testimonies;

7. On consent of the Parties the Tribunal makes the following further Order:

    (a) requiring the London-Middlesex Children's Aid Society (the "Society") to produce records relating to the children in the care of the Society who were in the care of the Applicant;

    (b) that the materials provided to the Tribunal from the Society shall be excluded from the public record and be limited in their distribution to the Tribunal, the Parties and to expert witnesses; and

    (c) the oral hearing is not open to the public during the testimony of the employees of the society.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel, Vice-Chair

RELEASED: January 9, 2007

FILE NAME: 3887.dna. 1474434 Ontario Inc. pre hearing.doc.

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



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Decisions from the Superior Court of Justice

Decisions under Discriminatory Business Practices Act

Fiscal Year 2006 - 2007

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Decisions under the Film Classification Act, 2005

Fiscal Year 2006 - 2007

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

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Decisions under Funeral Directors And Establishments Act

Fiscal Year 2006 - 2007

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- DONALD K. SKINNER
- SUSAN JAMES
- LUCIA LAM
- SUSAN JAMES
- RICHARD J. LORENZI

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

DONALD K. SKINNER

Appeal under the *Funeral Directors and Establishments Act* R.S.O. 1990, Chapter F. 36 as amended from a Decision of the Discipline Committee of the Board of Funeral Services

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: DONALD K. SKINNER, Applicant, on his own behalf

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

DATE OF HEARING: January 24, 2007 Toronto

ORDER

This is an appeal by Donald K. Skinner from a decision of the Discipline Committee of the Board of Funeral Services. The hearing was held on September 20, 2006, in Toronto and the decision was released on November 27, 2006. The statutory scheme for regulation of the funeral industry is set out in the *Funeral Directors and Establishments Act* R. S. O. 1990 chap. F. 36 (hereinafter the "Act"). Section 11 of the Act creates a Discipline Committee and by virtue of section 16 the Discipline Committee is required to look into matters of professional misconduct and incompetence referred to it by the Board of Funeral Services, the Executive Committee or the Complaints Committee. The Discipline Committee is required to hold a hearing and to produce transcripts at the request and expense of a party to the hearing. Section 18 of the Act provides for an appeal to this Tribunal and incorporates, by reference, the provisions of section 14 dealing with the powers of the Tribunal when dealing with a proposal from the Complaints Committee established under the Act, with necessary modifications.

At the outset the question arises as to the nature of the appeal to this Tribunal. The Discipline Committee is a statutorily created quasi-judicial body that held a hearing into the allegations against the Applicant with full procedural protection and fairness, including the right to examine documents and cross-examine witnesses. It was the position of the Registrar that proceedings before this Tribunal were in the nature of an

appeal where the Applicant carries the onus of convincing the Tribunal that the Discipline Committee committed a reviewable error. In support of this position counsel submitted that the current scope of the appeal was limited to sentence only. The fact of professional misconduct was admitted and not in issue. In counsel's submission it remained for the Applicant to convince the Tribunal that the decision of the Discipline Committee was in error and this Tribunal should afford deference to the Discipline Committee's decision. Counsel did concede that if professional misconduct had not been admitted then the current appeal would proceed as a hearing de novo and the onus would rest squarely with the Registrar. The Tribunal is concerned that the same statutory provisions could give rise to two completely distinct appeal procedures depending solely on the nature of the relief sought by the Applicant. It is preferable, in the Tribunal's view, that the current proceeding be dealt with as a hearing de novo and that the Registrar carry the onus. The matter proceeded as a hearing de novo.

At the start of the hearing three exhibits were introduced.

Exhibit 1	The Order of the Discipline Committee dated November 27, 2006
Exhibit 2	Applicant's Notice of Appeal
Exhibit 3	Registrar's Book of Documents

As stated above, the facts of the professional misconduct are not in issue. The hearing before both this Tribunal and the Discipline Committee proceeded on the basis of an Agreed Statement of Facts. For the purposes of this appeal, it is sufficient to state that the Applicant admitted numerous breaches of the Act arising out of one incident wherein he accepted $6,000.00 for prepaid funeral services from an elderly couple. The Act requires the Applicant to deal with prepaid funds as trust funds and to deposit them in an interest-bearing account with interest credited to the client. When funeral services are required, the fund may be used to pay the cost of the services from the principal and accrued interest. Any excess is to be returned to the client. The Applicant deposited the prepaid funds into his general business account and used them to pay his business liabilities. He failed to forward details of the interest bearing instrument to the clients in the time period provided under the Act. What he did was send a totally false statement to the clients approximately two months later informing them that their funds were being held in trust and earning interest on their behalf.[1] The wrongdoing, while extending over several months, was an isolated incident.

The Discipline Committee penalized the Applicant by suspending his licence for six months from a date to be set by the Registrar, giving an oral reprimand to be recorded on the register, a fine of $1,000.00 payable within 18 months and licence restrictions prohibiting him from supervising interns and owning or being managing director of a funeral establishment or transfer service for some time after completing his suspension. Mr. Skinner also had to take a professional development course. The only aspect of the penalty that is appealed to this Tribunal is the six-months suspension. In the Applicant's

[1] Ex 3 Tab 2 is a signed copy of the Agreed Statement of Facts.

submission it is excessive in light of suspensions levied in other discipline matters before the Committee.[2]

In her submissions, Counsel for the Registrar stated that the purpose of sentencing is to achieve both general and specific deterrence. She submitted that misappropriation of trust funds is a very serious offence and that absent a substantial suspension others in the industry would not be sufficiently deterred. She drew the Tribunal's attention to a number of cases in other professions, notably the legal profession, where misappropriation of trust funds leads, almost automatically, to disbarment. In the case of *Law Society of Upper Canada v. Dyer* [2004] L. S. D. D. No. 57, the solicitor had misappropriated $6,300.00. At paragraph 11 of the decision the Chair states:

> On the issue of the relatively small amount misappropriated in this case, we were referred to the Hearing Panel decision in the matter of Kenneth Ross Bruce dated October 20, 1997. At page 26 the following observation is made by that Panel, quote:
>
> > The temptation to use trust accounts as a form of personal petty cash is very real for lawyers with marginal practices. But this petty dabbling into trust accounts is every bit as damaging to the integrity of the profession as the misappropriation of large amounts to satisfy greed.

Mr. Dyer was disbarred. The same fate awaited Peter David Clark for misappropriation of $9,374.00.[3] In reviewing the standard in the case law arising out of discipline of funeral directors, Counsel noted that misappropriation does not tend to lead to permanent revocation of licence. In her submission, the caselaw does support a substantial suspension.

In his submissions, the Applicant restated before this Tribunal what had been accepted by the Discipline Committee. He deeply regrets the incident and is remorseful. He referred to the fact that he had cooperated fully with the investigation and that he had repaid the misappropriated funds in full from his own sources. He has filed for personal bankruptcy and is as yet undischarged. He reiterated that this event was isolated. He made no attempt to defend his actions either before the Tribunal or before the Discipline Committee. In his submission, the penalty of six months suspension is unduly harsh and fails to take into account the rehabilitation aspect of sentencing. While he is currently working as a funeral director, his employer cannot guarantee continued employment for six months if he is suspended. He is in greatly reduced circumstances and could not survive six months being unable to follow his chosen profession.

In support of his position, the Applicant produced a number of pages wherein Board of Funeral Services discipline cases were abstracted. In 1999, a funeral director who failed to invest prepaid funds was given a two-month suspension. There is nothing in the abstract of this case to suggest that the funeral director actually misappropriated the funds simply a finding that he failed to invest. The same can be said of the abstract of the case from 2000. In 2001, a funeral director failed to provide a copy of a prepaid

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[2] Ex 3 Tab 1 the penalty is set out fully at page 5 of the Committee's decision.
[3] *Law Society of Upper Canada v. Clark* [1997] L. S. D. D. No 20

funeral contract to the client. He received a $500 deposit, which he failed to deposit in trust. He used the $500 as a down payment on an insurance funded funeral contract. This case again does not deal with misappropriation for personal or business benefit. The funeral director used the funds inappropriately but they were applied to fund the funeral services. The penalty was a fine, a reprimand and a requirement to write a letter of apology. In 2002, a funeral director failed to repay excess funds. A reprimand, a fine of $3217.13 and requirement to take a professional development course were levied as penalty. The year 2003 dealt with a case that was also relied on by the Registrar. In the case of *Lymburner, Neal & MacIver*, Lymburner and Neal were the owners of the business and Mr. MacIver was the Managing Director of the Cudney Funeral Chapel. For the most part, the allegations centered around failure to pay excess funds, failure to properly invest pre-paid funds and failure to provide prepaid contracts. The activity extended over a long period of time as part of standard business practice. Lymburner and Neal were found to be the directing minds. MacIver's role appears to have been limited to advising Lymburner and Neal when more than $200.00 was owed in excess refunds. Lymburner and Neal would then only authorize repayment if funds were available. Lymburner and Neal received substantial suspensions of ten months and twelve months, respectively. MacIver received a one-month suspension. In the Applicant's submission, the nature of his offence is serious but of a different order of magnitude from the deliberate ongoing behaviour of Lymburner, Neal and MacIver. His behaviour is not more egregious than that of MacIver, who was given a month.

He also referred to a case abstract from 2005. The abstract is from a case provided by the Registrar, *Rigby*. Ms Rigby, as the Managing Director of Ralph Funeral Home, failed to remit excess funds and lied to the investigator. There were numerous incidents. She provided the investigator with copies of refund cheques, which she represented, had been sent to consumers. It appears that some, if not all, of the cheques were never sent. Her penalty was a six-month suspension. In the Applicant's submission there is no essential difference between failure to remit excess funds and misappropriation of prepaid funds, as both are, in fact, trust funds. In his submission, Ms Rigby committed two offences, misappropriation of trust funds and lying. The company subsequently went bankrupt. The Committee had the *Lymburner, Neal, MacIver* case and the *Rigby* case before it when it considered sentence.

Before proceeding to a review of the penalty, it is appropriate to consider what deference, if any, this Tribunal owes to the decision of the Discipline Committee. The standard of deference owed by this Tribunal in matters where the Registrar acts as investigator and proposes a penalty as a result of that investigation has been visited on a number of occasions by the Divisional Court. In such circumstances, the Divisional Court has held that this Tribunal owes no deference to the Registrar but must determine on its own enquiry if the Registrar has satisfied the onus of establishing that the Applicant is not a suitable candidate for licensing, or should be suspended for some period. The rational behind such cases is that the Registrar acts as investigator and does not have the benefit of hearing evidence and assessing witnesses in a full hearing. The role is analogous to that of the police in a criminal or quasi-criminal prosecution. On our facts, the Applicant has had the benefit of a full hearing and the right to make submissions before the Discipline Committee. Indeed, none of the Discipline

Committee's findings of fact is disputed. The only issue in dispute is one aspect of the penalty, the length of the suspension. In support of deference, there is the fact that the Discipline Committee is made up of funeral industry insiders who have a close familiarity with the industry. They are well placed to appreciate the impact of such behaviour as that of the Applicant on their industry, both with respect to deterrence of practitioners and with respect to the confidence of the general public. On the other hand there is the fact that there are no findings of credibility in issue. What is at issue is the application of sentencing principles to a given course of behaviour. This Tribunal is as well placed as the Discipline Committee to apply such principles. Added to that fact is the statutory scheme, which makes this appeal at trial de novo. On balance, it is the Tribunal's view that it owes no specific deference to the Discipline Committee.

There is of course a difference between deference and agreement with the penalty as levied by the Committee. Not giving the Discipline Committee deference does not mandate that this Tribunal must levy a different penalty. This Tribunal must review all of the factors before it and come to its own conclusions. This Tribunal has long held that misappropriation of trust funds is one of the most serious offences a registrant in any regulated industry can commit. In the usual case, a registrant has failed to remit retail sales tax to the Government of Ontario. By virtue of the applicable legislation, such funds are impressed with a trust. When dealing with such cases the Tribunal has imposed very dire consequences, usually the denial of registration. In the current matter, however, the Tribunal accepts the submission of the Registrar that revocation of registration is not the norm in the funeral industry for a first offence. In addition to the other aspects of sentencing, the Tribunal is of the view that one aspect to be borne in mind is consistency. Accordingly, the Tribunal will accept the industry practice in this case and not consider revocation.

As stated above, the sentencing principles advocated by the Registrar are general and specific deterrence. The Applicant adds to that the principle of rehabilitation. It was the ground of general deterrence that the Registrar advocated most strongly. In the view of Counsel it is of the utmost importance to levy a six-month suspension to deter others from contemplating misappropriation of trust funds. The Applicant submitted that such a penalty eliminates any possible rehabilitation aspect, as it will effectively drive him out of the industry. He informed the Tribunal, without leading any evidence to support the submission, that his employer has enough staff to perform those duties that do not require registration and that the Applicant will be without employment if he is suspended for such a length of time. It is the purpose of the rehabilitation dimension of sentencing that the wrongdoer re-enter society in a productive manner once the penalty has been served.

In weighing all of the various factors, the Tribunal is of the view that a six-month suspension is appropriate. By diverting these funds to his own business uses, the Applicant has undermined the public trust in the whole industry. He compounded his initial wrongdoing by sending a false trust statement. His behaviour indicates not that this act was isolated and unpremeditated but that it was a deliberate attempt over several months to hoodwink two unsuspecting clients. Such behaviour demands the highest level of specific deterrence. A six-month suspension is necessary to discourage

others from taking the same course and to reassure the general public that they can deal with funeral directors with complete confidence. Had the Applicant not shown remorse, this Tribunal would have exercised its powers to levy a longer suspension. With respect to rehabilitation, it is the Tribunal's view that the rehabilitation aspect of sentencing cannot be used to remove the sting from the penalty. A period of suspension may have the result that the Applicant becomes unemployed. This fact is an unfortunate result of the suspension but the Tribunal can find no reason why he cannot return to the industry once his registration is restored. Further, the Tribunal notes that those aspects of the penalty not appealed, namely requirements that the Applicant attend a professional development course and that he work as an employee for five years, indicate that there is a strong rehabilitative aspect to the Discipline Committee's decision. The suspension cannot be taken in isolation but must be considered as part of the whole.

DECISION

By the authority of the provisions of sections 14 and 18 of the Act, this Tribunal orders the Registrar to carry out the order of the Discipline Committee dated November 27, 2006.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: February 8, 2007

File Name: 3819.fdea.Skinner.order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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

IN THE MATTER OF
SUSAN JAMES

AND IN THE MATTER of the DECISIONS by
the Discipline Committee of the Board of Funeral Services
- Decisions dated: May 3, 2006

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

SUSAN JAMES

Applicant

-and-

DONALD HILTS AND PHILIP SEAGROVE

-and-

BOARD OF FUNERAL SERVICES

Respondents

ADJOURNMENT ORDER

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on January 23, 2007.

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Licence Appeal Tribunal, 1 St. Clair Ave. West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Wednesday, April 18, 2007.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: January 19, 2007

FILE NAME: 3601.3602.fdea.James.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

LUCIA LAM

APPEAL FROM A DECISION OF THE COMPLAINTS COMMITTEE ESTABLISHED BY THE BOARD OF FUNERAL SERVICES UNDER THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: LUCIA LAM, appeared on her own behalf

KEN ROSENBERG, Counsel, appeared on behalf of Heather Earle

JULIE MACIURA, Counsel, appeared on behalf of the Board of Funeral Services

DATE OF HEARING: October 10, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a Notice of Appeal filed with the Tribunal by Lucia Lam (the "Applicant") which notice is dated May 3, 3006. The Applicant's appeal is pursuant to a written decision dated April 10, 2006 of the Complaints Committee of the Board of Funeral Services established under section 7.(1) the *Funeral Directors and Establishements Act* (the "Act").

In its decision, the Complaints Committee set out the Applicant's allegations in her complaint against Heather Earle, the Managing Director of Highland Funeral Home Cremation and Reception Centre, Markham Chapel (the "funeral home") which allegations are as follows:

- The funeral home did not play the requested audiotaped music for the visitation period.
- The funeral home was not able to close the casket lid properly, which required that the casket be replaced. The change meant disturbing their father's body and spirit by moving his body after he had rested in peace, thereby undoing all the praying, blessing and blanketing ceremony they had conducted since the death.

- The funeral home used masking tape to tape the blessing "drape" on top of the casket and moved the casket out of the chapel while the lid was not closed properly.

- The family was told that one of the pallbearers was a very tiny short guy and sometimes his feet do not touch the ground when he carries the casket.

- The funeral home staff informed Mrs. Lam that there would be maps directing the family to the cemetery, but the maps were not distributed.

- While some family members were still arriving at the cemetery, the funeral home staff (Mr. Ma) hurriedly ordered the cemetery workers to carry out the entombment and did not allow the family an opportunity to carry out the last blessing rite and tribute to their father.

(Exhibit 1)

All the above allegations arose out of the funeral of the Applicant's father who died on November 17, 2005 and which funeral was entrusted by the Applicant to the funeral home. The Applicant and other members of the family of the deceased had decided to have a traditional Chinese Buddhist funeral to pay tribute to the 89 year old deceased, the father of the Applicant. The funeral was based on a number of traditional and religious beliefs of the family. The Applicant and the family of the deceased wished to ensure that the deceased spirit will be at peace and thus bring prosperity and good luck to generations to come. Due to the funeral home having claimed to have expertise in conducting a traditional Chinese Buddhist funeral, and based on the funeral home's promise to provide superior service through its experienced, professional and caring staff, the family hired it.

The Applicant and family of the deceased are of the opinion that the funeral home has failed to meet the family's expectations and the Applicant has accordingly sought the following from the funeral home:

- Waiver of the remaining $10,000.00 balance in respect of the funeral;

- Refund of the sum of $2,557.00 already paid to the funeral home in respect of the cost of the casket and the funeral services;

- Reimbursment of $10,000.00 donation already paid to the Tibetan Buddhist Lama for his assistance in 2005; and,

- A deposit of $20,000.00 to an escrow account to cover future cost of remediation to be performed in 2006.

During its investigation of the Applicant's complaint, the Complaints Committee spoke with the Applicant and Ms. Earle.

In its written decision, under the heading "Reasons for Decision", the Complaints Committee stated as follows:

> The Complaints Committee is not in a position to make findings of credibility and cannot determine what actually transpired. However, a concern has been raised and the licensee would likely avoid future complaints of a similar nature if the licensee ensured that any experts employed to enhance the level of service did so only under the appropriate supervision of licensed personel.
>
> The Committee noted that there were a number of issues that did not meet the expected level of professional service. One of these issues involved funeral home personnel not being able to close the casket. The Committee believes that a funeral director is trained in how to do this and should have been directly involved in closing the casket, even from the very start of that particular process, which may have alleviated this particular problem.
>
> The Complaints Committee believes that the funeral home personnel including the unlicensed cultural expert failed to provide the level of professional services promised to the consumer. The consumer originally selected the funeral home based on its promise to provide superior service through their experienced, professional and caring staff and their proclaimed expertise in conducting a traditional Chinese Buddhist funeral. In the opinion of the consumer, the funeral home failed to meet that level of service.
>
> The Committee believes the funeral home did not provide the appropriate level of service in several areas, and as such the consumer should not be required to pay for the service charges. The consumer did, however, receive the casket that was selected, so the Committee does not believe that there is any reason for the consumer not to pay for the casket.

(Exhibit 1)

Following the above reasons, the Complaints Committee issued its written decision which decision is now appealed to the Tribunal. The decision states as follows:

> In accordance with clause 14(2)(c) of the *Funeral Directors and Establishements Act*, the Complaints Committee does not refer the matter to the Discipline Committee, but does recommend the licensee reduce the charges to the consumer by the value of all services, i.e. the amount of $3970.00, according to the contract.
>
> The Committee admonishes the funeral director for providing insufficient oversight of the funeral home staff during the funeral and recommends better oversight of unlicensed staff, particularily those dealing directly with consumers.

The Applicant, in her Notice of Appeal, states as follows:

> Cost of Funeral Services – I agree with the Committee's decision to recommend Highland Funeral to waive the charges of all funeral services in the amount of $3,970 according to the contract.
>
> Cost of the Replacement Casket – I do not agree with the Committee's decision that my family should pay tbe same full price for the replacement casket. We were not given any options or any time to examine the quality and model style of the replacement casket. We did not know if it is a dusty floor model or a cheaper model that the funeral home is trying to get rid of. Furthermore, replacing the broken casket can only repair the physical damage, but it was not enough to repair the emotional damage being done to our family and most importantly the spiritual damage being done to our father. We hold Highland

> Funeral Home liable for the additional stress, anguish, pain, and suffering we all had to endure.
>
> Cost of Remediation – the Committee did not address my request to hold Highland Funeral liable for the additional expenses already incurred in 2005 and will be needed in 2006 to remediate the grave situation caused by the series of mistakes made by Mr. Ma, the unlicensed funeral staff assigned by Highland Funeral to conduct the funeral service of my father Kwong-Choi Kwok. In order to remediate these mistakes made by Highland Funeral Home, hundreds of buddist monks have to chant prayer continuely for 21 days to invoke blessing from budda for our father and freeing livestock so that our father's spirit can be at peace. We have already paid $10,000 to the buddist lama for the expenses incurred for the remediation.

THE EVIDENCE:

The evidence introduced at the hearing of this appeal consisted of documentary evidence as well as the testimony of the Applicant and Jason Ladd, Robert Kenneth MacKinnon and Heather Ellen Earle. A summary of the various persons' testimony follows.

LUCIA LAM (the "Applicant")

The testimony of the Applicant was essentially the same as the information gathered from her by the Complaints Committee and contained in the Complaints Committee's decision (Exhibit 1).

The Applicant in her testimony before the Tribunal and in her Notice of Appeal stated that there are three issues which she appeals.

The first issue relates to the cost of funeral services. However, in this regard, she is in agreement with the Complaints Committee's decision relative to the waiver of funeral services in the amount of $3,970.00.

In sofar as the second issue is concerned, she does not agree with the Complaints Committee's decision that the cost of the replacement casket be paid for by the family.

In sofar as the third issue, namely "Cost of Remediation" is concerned, she stated that such costs are over and above the costs of funeral services.

The Applicant went on to testify that on the day of her father's funeral, there was a Buddhist Monk present at the funeral home and also at the mausoleum where the internment took place. A Buddhist Monk was in fact present at all times including when the deceased was moved from the original casket to a replacement casket together with all ceremonial items that had been placed in the original casket. Mr. Ma was also

present at the funeral home during the ceremony and the mausoleum during the internment.

On the day after the funeral, the Applicant complained to Ms. Earle and a few days later met with Ms. Earle together with family members so as to relate her concerns to them.

The Applicant further testified that she has sought the advice of the highest Buddhist Monk who advised her that her father's spirit is not at rest and to assist in alleviating this situation, she has now arranged for many monks to chant prayers for her father's spirit and she has made a donation in his memory. The reason for the deceased's spirit not being at rest is due, according to the Applicant, to the manner in which the funeral was conducted and which has caused the Applicant and the family of the deceased much pain.

She complained that she was not interviewed by the Complaints Committee, and that the Monk who was in attendance at the funeral was not asked by Mr. Ma how the ceremony was to be conducted. She confirmed that the funeral home had been paid the sum of $2,557.00 towards the cost of funeral services and that the latter's total cost was $12,557.00 which sum included the cost of the casket (Exhibit 3). The Applicant went on to testify that she is not in agreement that she should pay for the cost of the casket that was replaced by the funeral home.

She also stated that when the deceased was transferred to a replacement casket, she was not present but two of her brothers were present as well as the Monk. At the time of transfer of the deceased to the replacement casket, all ceremonial items were also transferred. She also confirmed that Mr. Ma, who acted as translator and as a cultural specialist regarding the Buddhist culture for the family of the deceased, was present at both the funeral home during the service as well as at the mausoleum when internment took place.

JASON LADD

Ladd testified that he has been a funeral director since 1997 and has been with the funeral home since 2005 in that capacity.

Ladd stated further that he was present when negotiations took place regarding the funeral and its arrangements. Mr. Ma was present as he speaks both English and Cantonese and he assisted in the negotiations as translator. The contract was duly signed, the Applicant being present during the negotiations. The total price for the funeral services including the cost of the casket was $12,557.00. The sum of $2,557.00 was paid as a deposit by the Applicant.

Ladd went on to state that he was not present at the visitation but was present at the funeral and assisted in carrying of the casket. There were six professional pallbearers who carried the casket and the funeral procession passed the deceased's home as was the Chinese tradition.

Concerning the situation at the funeral home during the service, Ladd stated he witnessed what occurred. Towards the end of the service, when the casket was to be closed, difficulty was experienced in closing it. The difficulty related to one of the latches on the casket which would not "latch on", as a result of which the casket would not close leaving it slightly open. An inspection revealed a hinge had buckled. The family of the deceased was told of the problem and it was offered an identical new replacement casket to which they agreed. During the service, Mr. Ma was present, the Monk was also present as was Mr. MacKinnon of the funeral home. The mourners were taken to an adjoining lounge in the funeral home and the replacement casket was brought into the Chapel. The Monk conducted chanting and prayers over the replacement casket and was present when the deceased was placed in the replacement casket and was also present when the funeral procession was en route to the mausoleum as well as when the casket was placed in the crypt. Ladd was in attendance at all stages.

ROBERT KENNETH MACKINNON

MacKinnon testified that he has been a licensed funeral director since 1989 and is presently with the funeral home in that capacity. He further stated that he was supervising funeral director during the funeral of the deceased.

MacKinnon went on to state that he observed the difficulty experienced in the Chapel with the closing of the casket due to a buckled hinge on the casket. When the problem was identified, the deceased's family, through Mr. Ma, were advised and they agreed to have a new replacement casket used. During the entire time from the noting of the problem to the placing of the casket in the hearse, he kept the family, through Mr. Ma, informed. The Monk was also consulted and consented to the use of a replacement casket.

MacKinnon also testified that he was present to greet the family when they arrived at the funeral home and that the actual Buddhist service was supervised by the Monk. Mr. MacKinnon was present in a supervisory capacity to ensure the funeral was "going smoothy".

HEATHER ELLEN EARLE

Ms. Earle testified that she is a licensed funeral director in the employ of the funeral home. She stated that her duties include the arrangement and direction of funeral services and that she manages the operations of the funeral home.

In referring to the decision letter of the Complaints Committee, Ms. Earle stated that she does not take issue with the findings of the Committee and the decision has not been disputed or appealed by her. She further stated that she met with the Applicant and the family on the Monday after the funeral at which time the Applicant complained that no one had apologized to her for what had occurred at the funeral. The meeting was relatively brief and lasted about thirty minutes and the Applicant requested Ms. Earle to consider her complaint. Pursuant to this meeting, she wrote a letter of apology on December 6, 2005, to the Applicant's mother, reading as follows:

> At Highland Funeral Home, Markham Chapel, we strive for service excellence. It has been brought to my attention that during the funeral for your late husband, Mr. Kwong Choi Kwok we did not meet your expectations and for this we sincerely apologize.
>
> I wish to thank your family for taking the time to discuss your concerns with me. I have brought your concerns to the attention of all of our staff and discussed them at length. It is our goal to continue to improve and enhance the services we offer families in their time of need.
>
> Sincerely Yours

(Exhibit 4)

Ms. Earle went on to state that she later met with the Applicant and a sister of the Applicant. This meeting was lengthy and it was suggested to Ms. Earle at that meeting that there be "remediation" by which she understood a settlement. Earle declined the remediation suggested by the Applicant.

Ms. Earle, in conclusion of her testimony, went on to state that since this occurrence, she has instructed all members of staff as to how to handle a casket. In addition, training of staff members regarding the opening and closing of caskets has been instituted and close supervision of unlicensed staff is maintained and overseen by a licensed funeral director.

FACTS FOUND PROVEN:

The following facts have been found proven by the Tribunal:

1. The original new casket supplied by the funeral home for the funeral of the deceased was not able to be closed upon the conclusion of the funeral ceremony in the funeral home's Chapel.

2. The original new casket supplied by the funeral home was, upon it being discovered that the casket would not close, replaced by the funeral home and the deceased was transferred to the such replacement casket regard being had to traditional and religious beliefs and customs of a traditional Chinese Buddhist funeral

3. The replacement casket was an identical new casket to the original casket.

4. The replacement casket and the necessary transfer of the deceased to such identical new casket was carried out with the express knowledge, permission and consent of the Applicant and the Applicant's family under the supervision and direction of a Monk.

THE LAW:

The *Funeral Directors and Establishments Act* states as follows:

> **7.** (1) The Board shall establish and appoint the following committees:
>
> 1. Executive Committee.
> 2. Licensing Committee.
> 3. Complaints Committee.
> 4. Discipline Committee.
> 5. Compensation Fund Committee.
>
> **14.** (1) The Complaints Committee shall consider and investigate complaints regarding the conduct or actions of any licensee
>
> (2) The Complaints Committee in accordance with the information it receives may,
> (a) consider all or part of the matter;
> (b) direct that all or part of the matter be referred to the Discipline Committee; and
> (c) subject to subsection (9), take or recommend such action that it considers appropriate in the circumstances and that is not inconsistent with this Act, the regulations or the by-laws.
>
> (5) The Complaints Committee is not required to hold a hearing or to afford any person an opportunity for a hearing or to make oral submissions before it prior to it taking action or making a recommendation under this section.
>
> (8) If the complainant or the person complained against requires a hearing, the Tribunal shall appoint a time for and hold a hearing.
>
> (9) After holding a hearing, the Tribunal may by order direct the Complaints Committee to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Complaints Committee ought to take in

accordance with this Act and the regulations and, for such purposes, the Tribunal may substitute its opinion for that of the Complaints Committee

(10) The Tribunal may attach such conditions to its order as it considers proper to give effect to the purposes of this Act.

(11) The Registrar, the person who required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

REASONS FOR DECISION

This appeal arises out of a complaint made by the Applicant to the Board of Funeral Services. The complaint relates to the funeral services provided by the funeral home for the Applicant's father. The Board referred the complaint for consideration and investigation under section 14.(1) of the Act to the Complaints Committee established under section 7.(1) of the Act.

The Complaints Committee considered and investigated the Applicant's complaint and issued a written decision dated March 29, 2006 (Exhibit 1). It is to this decision that the Applicant has appealed. The Applicant's Notice of Appeal appeals three findings in the decision made by the Complaint's Committee. The three findings which are in issue are to be found at the foot of page three of this decision. The onus of proof rests upon the Applicant to prove her case based upon a balance of probabilities.

The Tribunal's jurisdiction in this appeal is restricted to the three issues and beyond those issues, the tribunal has no jurisdiction.

At issue is the conduct of Earle and other employees of the funeral home in as much as such conduct relates to the funeral of the deceased. The findings and the consequent decision of the Complaints Committee have not been challenged by Earle or the funeral home and they have not appealed the decision.

The Applicant, although she notes it and includes it as an issue in her appeal, quite clearly accepts in regard to the "Cost of Funeral Services" what the Complaints Committee ruled in its decision. Therefore, this issue is not considered to be under appeal by the Applicant and will not be dealt with by the Tribunal in this decision.

In sofar as the question of the "Cost of the Replacement Casket" is concerned, the Tribunal notes that the Complaint Committee found that:

- the funeral home's personnel lacked the expected level of professional service in not being able to close the casket.

- the funeral home's personnel was not sufficiently trained regarding the closing of the casket and had the funeral director in charge been adequately trained in this regard the problem experienced may have been alleviated.

There is no doubt in the Tribunal's mind that the analysis and findings by the Complaints Committee regarding this issue is correct. The Tribunal finds the expected level of professional competence was lacking and that this was a direct cause of the distressing situation that the family of the deceased faced at the funeral. The funeral home and Earle who have been admonished for their lack of professional competence, have not appealed this admonishment or finding and have not appealed the Committee's recommendation that they waive the sum of $3,970.00 in respect of service charges. The Tribunal finds that the Committee's decision in regard to this issue is reasonable and displays a sensitivity to the distress caused to the deceased's family. The Tribunal sees no need to interfere with the findings of the Committee on this issue which the Tribunal finds to be fair and balanced.

In addition, it is noted that at an early stage and after completion of an investigation and analysis of Applicant's complaint, Earle did address a written and unreserved apology to the deceased's widow.

The Tribunal finds that the Applicant should be obliged to pay the agreed price for the casket. The Applicant clearly received what she bargained for, for an identical new replacement casket was provided by the funeral home. It would be unreasonable to expect the funeral home to pay for the casket and thereby permit the Applicant to receive a free replacement casket.

In sofar as the third issue in the Applicant's appeal is concerend, namely the "Cost of Remediation", such a claim is not within the Tribunal's jurisdiction. Such a claim is for civil damages arising out of a contract and should be properly dealt with by a civil court. A claim for compensation is not contemplated under section 14 of the Act and does not arise from a discipline matter with which the Act and the Tribunal are concerned.

The Tribunal is of the opinion that the Complaint Committee correctly, fairly and in a sensitive manner dealt with the Applicant's complaints and the Tribunal sees no reason to interfere with the Complaints Committee's findings, recommendations and decision. An unfortunate situation occurred regarding the closing of the casket and the Tribunal is alive to the distress this caused the deceased's family. However, the funeral home responded to this situation immediately and did its best to alleviate the additional stress placed upon the family by dealing expeditiously with the problem.

The admonishment of Earle, as well as the financial penality imposed on the funeral home in sofar as the service charges are concerned amounting to $3,970.00 is reasonable particularly having regard to the new operating procedures of the funeral home as evidenced by the testimony of Earle.

In conclusion and in particular reference to the onus of proof, it is noted by the Tribunal that the Complaints Committee based its decision on interviews with the Applicant and Earle. The Tribunal at the hearing of this appeal had the added advantage of oral testimony of certain witnesses including Ladd of the funeral home. Ladd's testimony, which the Tribunal accepts, afforded the Tribunal with the added perspective of an individual that was at all relevant times in attendance during the funeral and who painted a clear picture of what occurred at the funeral when the deceased's transfer took place. The evidence of Ladd dealt with issues that were not seen or observed by the Applicant and upon which she could not properly testify. These issues related to the transfer of the deceased to a replacement casket which according to the testimony was not observed by the Applicant but was observed by the Applicant's brothers who did not testify at the hearing. The overall result of what the Complaints Committee gathered in its investigation from the Applicant and Earle was that it was unable to make a finding on credibility or what actually transpired. The Applicant called no witnesses to testify on her behalf at the hearing while Ladd among others did testify on behalf of Earle and the funeral home. This additonal testimony by Ladd was compelling and has not influenced the Tribunal in finding that the Applicant has discharged the onus. On the contrary, Ladd's testimony weighs against the Applicant and is of no assistance to her in discharging the onus that rests upon her shoulders.

DECISION AND ORDER

Accordingly, by virtue of section 14.(9) of the *Funeral Directors and Establishements Act*, the Tribunal directs the Complaints Committee to carry out its written decision dated March 29, 2006.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: October 24, 2006

FILE NAME: 3542.FDEA.Lam.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PREHEARING

SUSAN JAMES

APPEAL FROM DECISIONS OF THE COMPLAINTS COMMITTEE MADE UNDER CLAUSE 14.(2) OF THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT.*

IN THE MATTER OF THE COMPLAINT OF SUSAN JAMES REGARDING DONALD HILTS OF DODSWORTH AND BROWN FUNERAL HOME; AND

IN THE MATTER OF THE COMPLAINT OF SUSAN JAMES REGARDING PHILIP SEAGROVE OF CRESMOUNT FUNERAL HOME.

AND

THE REFUSAL TO REFER THE MATTER TO THE COMPLAINTS COMMITTEE.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DAVID A. BROOKER, Counsel, representing Susan James

MATTHEW L.O. CERTOSIMO, Counsel, representing Philip Seagrove

LILY I. HARMER, Counsel, representing Donald Hilts

JULIE A. MACIURA, Counsel representing the Board of Funeral Services.

DATE OF PREHEARING: September 18, 2006 Toronto

ORDER

Following attendances on September 18, 2006 at a pre-hearing before this Tribunal of David A. Brooker, Counsel, representing Susan James ("James"), Matthew L.O. Certosimo, Counsel, representing Philip Seagrove ("Seagrove"), Lily I. Harmer, Counsel, representing Donald Hilts ("Hilts") and Julie A. Maciura, Counsel representing the Board of Funeral Services (the "Board");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday January 23, 2007 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;

1. The Parties to the hearing shall be James, Seagrove, Hilts and the Board.

2. Counsel for James advised the Tribunal, after consulting with his client, that re appealing the decisions of the Complaint's Committee James is seeking to have her complaint considered by the Discipline Committee and for an order by the Discipline committee under section 16. (11)(4) and (5) of the *Funeral Directors and Establishments Act.*

3. Counsel for James further advised the Tribunal that the facts contained and described in the two decisions of the Complaints Committee relative to Hilts and Seagrove and both dated May 3, 2006 are not in dispute save and except that it will be the James' position at the hearing that:

   (a) on August 16, 2005 when James arrived at Cresmount Funeral Home for identification and first visitation the meeting turned confrontational when James pointed out that the body shown to her was not that of her late husband and that the characterization in the decision of what occurred at that meeting will be disputed.

   (b) the statement in the decision letter that "the evening visitation and funeral service the next day went well and the family expressed how pleased they were with the funeral, as far as part of the service was concerned" is not correct and not admitted by James.

4. James, at this time, anticipates calling one Connie Sullivan of Indiana, United States to testify on James behalf and that James will herself testify at the hearing. In the …… of Sullivan not being able to attend at the hearing counsel for James will in advance of the hearing advise the other Parties counsel in writing of such fact. Together with the written advice shall be a duly sworn affidavit of Sullivan contrary the facts to which she deposes. James' two sons will also testify at the hearing.

5. Counsel for the other Parties were unable at this time to advise the Tribunal of who they intend to have testify on their clients' behalf at the hearing.

6. The Parties recorded their consent to a joint hearing of the two appeals of James relative to the decision letters of May 3, 2005 concerning both Seagrove and Hilts.

7. The Parties shall make full and timely disclosures of documents as envisaged by Rule 6.3 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice Chair

RELEASED: September 19, 2006

File Name: 3601.3602.fdea.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

RICHARD J. LORENZI

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 REFUSE TO ISSUE A LICENCE, PURSUANT TO SECTION 22(1).

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: TERESA OWEN, Agent, appearing on behalf of the Applicant

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

DATE OF PRE-HEARING: January 8, 2007 Toronto

ORDER

On January 8, 2007, Teresa Owen, appeared as agent for the Applicant, and Julie Maciura, Counsel appeared for the Registrar, *Funeral Directors and Establishments Act,* at a pre-hearing in the above-noted matter.

The Parties were unable to settle the issues between, and accordingly, this Tribunal makes the following stipulations and Order for the hearing scheduled to commence at 9:30 a.m., on February 26, 2007, at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 27 and 28, 2007, and on March 1, 2007, at the same address.

1. The Parties in this matter are Richard J. Lorenzi, Applicant, and the Registrar, *Funeral Directors and Establishments Act.*

2. The Parties agreed to the following facts:

   a) The Applicant was charged with and criminally convicted of theft under $1,000 in April 1988. As a result of the same incident, the Applicant was

disciplined by the Discipline Committee of the Board of Funeral Services in September 1988, by having his licence suspended for one day.

b) The Applicant was charged with and convicted of impaired driving in September, 1996. In this incident, he was driving a vehicle owned by his employer and damaged it while impaired.

c) The Applicant was charged with, but not convicted of, theft over $5,000 and theft under $5,000 stemming from an incident at Simple Alternative Funeral Centres at a time when the Applicant was employed there in 2001.

3. The facts in this matter are otherwise in dispute, including the allegations arising from an incident during the Applicant's employment at McDougall & Brown Funeral Home.

4. Ms. Maciura advised that the Respondent will be disclosing two additional volumes of materials to the Applicant and agreed to do so at least ten days before the hearing. The Applicant was advised of the provisions of the disclosure rules of this Tribunal for documentary and expert evidence.

5. The Parties agreed to disclose their witness lists to each other. This should be done at least ten days prior to the hearing;

6. If the Applicant chooses to retain counsel to represent him at the hearing, then he should do so very soon to permit the lawyer to properly prepare the case. The Tribunal noted that it would not grant an adjournment of the hearing in this matter if the only reason for it was to permit counsel to prepare.

LICENCE APPEAL TRIBUNAL

_____
Laurie Sanford
Vice-Chair

RELEASED: January 17, 2007

File Name: 3854.fdea.lorenzi.pre-hrg.doc

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



LAT Decisions, Rulings and Orders

April
May
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Decisions under Highway Traffic Act

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

Fiscal Year 2006 - 2007

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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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LAT Decisions, Rulings and Orders

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Decisions under Highway Traffic Act

Section 47(1) (b) - Medical

Fiscal Year 2006 - 2007

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- 3461-MED-ALCL
- 3451 – MED – ALCL - Alcohol
- 3388-MED-MDIS-Mental Disorder
- 3354-MED-Withdrawal
- 3430 MED- ALCL - Alcohol

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3461-MED-ALCL

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1) OF THAT ACT.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. DAVID HURST, Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

EMMANUEL BALTHASAR, Counsel for Applicant

DATE OF HEARING: April 13, 2006 Toronto

DECISION AND REASONS

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

PRELIMINARY MATTERS:

Ms. Beintema presented and reviewed a file summary.

She stated that their information was limited but that they had received a medical report from Physician A on August 9, 2005 in which he described the Applicant as having arrived

in the emergency room with the reason for the referral as an Acute on Chronic Alcoholism.

He described the patient as showing a very high alcohol level but was reasonably lucid. He spoke with the family who described a long history of hiding alcohol and heavy drinking, coupled with other medical problems including Diabetes. Physician A stated this made him a very high driving risk and should have his license to drive suspended until successful completion of an alcohol treatment program. He said the patient was told in the ER not to drive and that this matter would be reported to the Ministry of Transportation (the "MTO" or the "Ministry").

On October 1, 2005, Physician A was sent a letter from the Ministry acknowledging his medical report.

Also on October 1, 2005, the MTO sent a letter to the Applicant indicating that he suffered from a medical condition, which may impair his ability to safely operate a motor vehicle. This report was submitted by a physician in compliance with section 203 of the *Highway Traffic Act.* The Registrar of Motor Vehicles decided to suspend his driving privilege for medical reasons under section 47(1) of the *Highway Traffic Act.* An official notice of suspension was to be mailed under separate cover.

The Ministry indicated they would be pleased to reconsider his case upon receipt of medical information satisfactory to the Registrar. The Applicant therefore was advised that he must arrange for the office of the Deputy Registrar of Motor Vehicles to receive an up to date, detailed report from a Physician who specializes in addictions medicine or his treating Physician. The report must include a physical examination, a complete alcohol use history and an interpretation of biochemical markers (MCV and GGT). It must also confirm that he has completed the treatment program recommended by his Physician, that he has remained abstinent from alcohol for a period of 12 months and that he is participating in a relapse prevention program. In addition, an up to date, detailed assessment from his treating Physician with reference to management of his diabetic condition, current status and confirmation that there are no other disqualifying medical concerns. Please note that in order to give consideration to the reinstatement of his driving privilege all the requested information must be provided.

THE APPLICANT'S PRESENTATION:

The Applicant was accompanied by his lawyer. With questioning from the Chair, the Applicant stated he had been at a Saturday night party on August 9, 2005, where he imbibed three drinks of brandy, staying up quite late, dining quite late. The next day on Sunday morning he went to a luncheon birthday party and again had some drinks, (that was estimated at two brandies). He felt dizzy and sick and his host called an ambulance.

The ambulance attendant did not feel his problem warranted a trip to the hospital but the Applicant insisted to have the matter checked out and he felt sick in the ambulance. At the hospital he described marital problems with his wife and children, who were in attendance and stated that his wife gave a story to Physician A regarding his drinking habits. Blood tests were done and Physician A stated that his blood alcohol levels were very high, necessitating a report to the MTO in that his licence be suspended. The Applicant's lawyer elicited a statement that Physician A did not go into any past medical history and also that he did not discuss the Applicant's problem with him. The Applicant then described marital stresses with his wife and especially with the in-laws and also that her story was very prejudicial and simply not based on facts, claiming that he had not had any licensing problems before. He stated that he did not get a letter regarding Physician A report. When questioned from the chair, he stated that he was not an alcoholic.

He then outlined his drinking habits; drinking no alcohol from Monday to Thursday. Friday's always after work he would have two brandies or two beers, never both. Again on Saturday evening he would on average have two brandies or two beers. Sunday lunch consisted of possibly two brandies or two beers.

He stated that he is 55 years of age and had begun drinking alcohol at the age of 34. He came to Canada at the age of 37 or 38. He stated he had a clean driving record and had received only one driving ticket for an illegal left turn and for not having ownership documents in his car.

The Applicant stated he only drinks at home, never making the bar scene. He admitted that on the Saturday evening in August he might have had 3 to 4 brandies and had a late dinner and went to bed at 4 a.m. His current general practitioner had been seeing him for two and a half years, advising diet to control his borderline diabetes and he was also using Glyburide for five years. He said that his doctor knew about his intake of alcohol and had no problem with it.

MS. BEINTEMA IN CROSS-EXAMINATION:

Regarding the aforementioned August evening, he had his last drink at 2 a.m., went to bed at 4 a.m. and had no breakfast. His first drink was at about 1 p.m. on Sunday, having two drinks total at the party.

In the ER, the Applicant stated that the doctor didn't talk to him in terms of a history, but got detailed information from his wife, who he said was prejudice and was designed to defame him. The Applicant said that his wife's information was not true and that it had persuaded the doctor to say he would suspend him. He categorically stated that the description of a long history of hiding alcohol and heavy drinking was false and absolutely disagreed with the label of alcoholism.

He was asked why he had not complied with the letter from the Ministry in an attempt to regain his licence. His answer stated that he showed the letter to his doctor, who then sent him to a Psychiatrist. The Psychiatrist stated that he had no reports, therefore couldn't appraise the situation; this despite the fact that he had asked his doctor to send his medical report to the psychiatrist. He then decided to simply appeal the matter to the Tribunal. He has not gone to see his doctor his first referral to a Psychiatrist.

The Applicant feels very strongly that it is totally unfair to ask him to abstain for 12 months because he is simply not an alcoholic. His lawyer stated that he was labeled an alcoholic after only one event, which the MTO now wants to put him through a whole series of events for a documented drinking style that is similar to 90% of the population. He stated that this stringent stand by the MTO is simply not fair. He also pointed out that his family doctor had been looking after him for more then two years and was not concerned about his drinking habits.

Ms. Beintema pointed out that if such is the case, a report to that effect from his own doctor with confirmation from another qualified medical expert would go a long way to restoring his driving privileges.

MS. BEINTEMA'S CLOSING ARGUMENT:

She began by clarifying that Physician A medical report to the MTO required no signatures from the Applicant and that the MTO would not send these reports to the driver.

She stated that the MTO had acted properly in sending a letter with its detailed requirements to the Applicant and while the Applicant feels this is unreasonable, she stated that they had no alternative but to act on a medical report that described a long history of alcohol consumption with reference to hiding it, complicated by the presence of Diabetes and that he was described as a high driving risk. She said the MTO does alternative and had acted correctly.

She then again stated that if he is alcoholic, he must undergo the prescribed routine and that if he is not an alcoholic, there would be no problem in regaining his licence.

Regarding his Diabetes, she pointed out that the Applicant has not gone back to his family doctor, as he felt his doctor was responsible for failing to provide documentation.

Ms. Beintema for the Ministry stated the Registrar clearly states that he should follow up on this matter with his doctor and that nothing more can be done until the reports are filed. Ms. Beintema pointed out that only the Applicant states that the reports are erroneous and the Register must apply to regulations.

The Applicant's Lawyer, in rebuttal, stated that the medical report was based on untrustworthy information (from the Applicant's wife) and not on real evidence. Further, even if the Registrar received such a report, it was unfair to be this stringent.

ISSUES:

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

The medical documentation in this case, while strongly stated, is limited, but based on this the Registrar has acted responsibly and in accordance with the *Highway Traffic Act.* The Applicant demonstrates that he is a responsible person in a responsible job (Law Clerk). What is not clear is why the Applicant has failed to pursue the obvious course open to him in being certain that the medical documentation be completed. He has the option of following the program prescribed by the *Highway Traffic Act* and outlined to him in letters from the Ministry. It is also clear today, as described by Ms. Beintema, that there is a real possibility that the Applicant, with the help of the medical profession can document that his drinking habits are responsible and within a safe, normal range. 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 Registrar has acted correctly in accordance with the *Highway Traffic Act* based on a solitary medical report from Physician A who saw the patient in the ER on the night of August 9, 2005. The requirements outlined in the letter from the Ministry are clear and so far the Applicant has failed to comply because they seem unreasonable and because he feels he is not alcoholic. The options of conforming to this, or trusting that the medical profession can demonstrate he is not alcoholic are available.

DECISION:

Upon the application by the Applicant (the "Applicant") to appeal the decision dated October 1, 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

Dr. David Hurst, Presiding Member

RELEASED: April 27, 2006

FILE NAME: 3461.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.

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3451 – 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: KEVIN FLYNN, M.D., Presiding Member

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

THE APPLICANT
Unrepresented

DATE OF HEARING: April 5, 2006 *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) (the "Act" or "HTA").

EXHIBITS:

1. Notice of Suspension of driver's licence, dated October 5, 2005 issued by the Registrar of Motor Vehicles under Section 47(1) of the *Highway Traffic Act* and filed by the Respondent.

2. Notice of Appeal dated January 7, 2006, filed by the Applicant and received at the Tribunal March 6, 2006.

3. Tabbed file of evidence submitted by the Respondent.

FACTS:

Respondent's case:

On January 19, 1993 a cyclical medical report was completed by Physician A, noting under Personal Health History:

> Psychiatric History: yes
>
> Addictions: yes
>
> Alcoholism: yes
>
> History details:
>
> Past history of binge drinking and also neurotic disorder. Has been seen by psychiatric services at (name deleted) Hospital. This information would be pertinent in deciding if this lady should be driving.

On March 18, 1993, the Applicant was advised by letter of the Registrar that a psychiatric assessment was required. A number of extensions were approved.

On November 23, 1994, a medical report was completed by Physician "B", Chief of Psychiatry at a community hospital. The report referred to a history of attendance by the Applicant for psychotherapy and alcohol abuse and depression. He also referred to her abstinence since summer of 1994 and that she had not abused alcohol on a regular basis for several years. She was maintained on Prozac 20 mg daily and he saw no reason to withhold her licence.

On June 26, 1995, the Applicant's Class "B" licence was approved and a follow-up report was required in twelve months. Her medical report on August 21, 1996, completed by a physician unfamiliar with her history, was unremarkable.

Her Class "B" licence was again approved on March 8, 1997 and also in 2000 and 2003.

On September 12, 2005, a cyclical report completed by Physician "C", her Family Physician, noted the following:

> Psychiatric Disorders: yes
>
> Addictions: yes

Instability: yes

Alcoholism: yes

> I have prev. reported a history of EtoH, psych. issues. Son killed in industrial accident 5/05. She decompensated, was drinking heavily, presented to my office intoxicated, never drove while drinking. was admitted on Form 1 due to depression, suicidal. Discharged 20/05. Reports o EtoH last 2/12 , but has drank since hospital Discharge. History obtained that in spite of her history of EtoH use she had been drinking secretively prior to this family tragedy. Did not attend substance abuse counselling. (Sic.)

On October 4, 2005, the Ministry of Transportation (the "MTO" or the "Ministry") advised the Applicant that her licence was suspended under Section 47(1) of the HTA. She was advised that in order for her case to be reconsidered, she must submit an up-to-date report from a specialist in Addictions Medicine. This must include a complete alcohol use history and an interpretation of bio-chemical markers. It also must confirm her attendance and completion of a treatment program and her abstinence from alcohol for twelve months and that she is participating in a relapse prevention program.

Also, she must submit an assessment by her psychiatrist with confirmation of her mental stability.

She was also advised of her right of appeal.

On November 26, 2005, a report was received from a psychologist who noted that the Applicant was dealing with extreme grief at the time of her visit to her Family Physician. She saw no evidence of an addiction problem and no evidence of an addiction problem that would prevent driving.

On November 25, 2005, a report was completed at a regional Addictions Services Centre. This report noted a history of alcohol consumption, approximately three drinks per session, of combining a tranquilizer with alcohol in June 2005, and that the Applicant had been on Effexor and Seroquel since July 2005. She was noted to have a low level of recognition and had a very low level in taking steps toward change. The Applicant was advised to continue to abstain from alcohol, to continue her involvement with her psychologist and to continue participation in a modified Women's Program.

On January 6, 2006, her Family Physician wrote that he was familiar with her history. Her liver function tests were elevated and she had gallstones. Her liver tests had returned to normal since she stopped drinking. She was being treated for depression and had been advised that she should totally abstain and continue with addictions counselling and follow-up with him. He also noted that there was no physician specializing in Addictions Medicine in the region. He appended a note from his records in October, 2005, that indicated that the Applicant and her husband were seen together. Both asserted that she did not have a drinking problem, although he had information that she drank secretively at

home, up to 4 to 6 drinks daily. She had been reluctant to discuss her drinking and asked for repeats of her prescription for a year in order to avoid seeing him. They appeared angry during the assessment.

A note by the Family Physician in November 3, 2005, indicated a GGT level of up to 6 times normal. He had difficulty believing her self-reporting and he stressed the need for avoidance of alcohol. On December 21, 2005, she was visibly more depressed and appeared uncomfortable seeing him. He doubted that she was being open and honest with him.

A letter from her psychiatrist on November 29, 2005, noted that she was on Effexor 75 mg daily and Seroquel 100 mg at bedtime. He advised that she will need to remain on antidepressants for a long time. He also noted that her judgement, concentration and alertness were not impaired and he recommended that she get her driver's licence back.

On March 8, 2006, the Medical Advisory Committee (MAC) recommended that the suspension should continue, and would reconsider following a detailed report from an Addictions Medicine Specialist to confirm ongoing participation in a relapse prevention program and evidence of a twelve-month period of abstinence and normal bio-chemical markers. The twelve-month period might be reduced to six on receipt of a supportive report from the Addictions Specialist. To date, she had not participated in a treatment program and continued to drink.

On March 21, 2006, the Applicant was advised by the Ministry that her driving privileges would remain under suspension pending receipt of a satisfactory report from an Addictions Medicine Specialist confirming twelve months abstinence and an interpretation of bio-chemical markers.

Applicant's case:

The Applicant obtained her Class "B" licence in 1989 and drove a school bus until she was taken on to drive for a municipal transit. She is currently on leave of absence. She had four children and in May 2005, her 19-year-old son was killed in a construction accident. She was given a prescription for lorazepam in the Emergency Room and acknowledged mixing medication with alcohol before her visit to her Family Physician in June 2005. This led to the Medical Report and suspension of her driver's licence. She acknowledged that she has a drinking problem and she states that her last drink was in August 2005. She has taken grief counselling and she states that she attended the Women's Program four times and that she was told that she did not need to attend further. She last saw her Family Physician a week before the Tribunal's hearing. She also acknowledged that she would not have re-applied for her Class "B" licence if she had known that it would lead to her suspension. She did not disclose her past suspension to the physician who completed her Medical Report in 1996.

She has experienced serious depression in the past and has decided that she has used alcohol as a crutch. Also, she has decided to return to complete a program in Social Service Work.

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)(g) of the Act that states:

   > Subject to section 47.1, the Registrar may suspend or cancel,
   > a driver's licence for any other sufficient reason not referred to in clause (d), (e) or (f).

2. A Medical Report dated September 12, 2005, that states that the Applicant has a psychiatric disorder, is addicted to alcohol, attended the physician's office impaired by alcohol and medication, and was believed by him to drink secretively.

3. A history of binge drinking in 1993.

4. A report by a psychiatrist stating that the Applicant will need to remain on antidepressants for a long time.

5. A letter from her Family Physician in January 2006, that notes elevation of liver function tests while on alcohol. He advised that she should totally abstain from alcohol and continue with addictions counselling.

6. There is no evidence that the Applicant has followed the Family Physician's advice regarding addictions counselling.

7. The credibility of the Applicant is questioned by her Family Physician.

8. The Canadian Council of Motor Transport Administrators (CCMTA) Standard for alcohol dependence states:

   > MAY NOT DRIVE ANY TYPE OF MOTOR VEHICLE FOR 12 MONTHS DURING WHICH TIME THE INDIVIDUAL MUST REMAIN SEIZURE-FREE AND ALCOHOL-FREE.
   >
   > EARLIER RE-LICENSURE MAY BE CONSIDERED UPON FAVOURABLE RECOMMENDATION FROM ADDICTION SPECIALIST RECOGNISED BY THE LICENSING

AUTHORITY AND THE SUCCESSFUL COMPLETION OF AN ALCOHOL REHABILITATION PROGRAM.

The Applicant relies on:

1. A history of holding a valid licence from 1972 to 2005 with an excellent driving record.

2. Her recognition that she had a lapse of judgement when she took alcohol with medication that caused her to be impaired.

3. She has taken counselling for grief and has been attending her Family Physician regularly.

4. She has attended a regional Addictions Counselling Service.

5. She objects to old evidence of depression 13 years ago being used by the Ministry in her assessment.

6. She has been “dry” since August 2005.

7. She believes that her rights have been violated and that she has not been treated fairly.

8. She believes that elevation of her bio-chemical markers could be due to gall bladder disease for which she has arranged to have surgical treatment.

9. Her Psychiatrist, Psychologist and her Family Physician have suggested that it would be reasonable for her to have a Class “G” licence.

The Tribunal finds as fact:

1. The Registrar was justified in suspending the Applicant’s licence to drive under Section 47(1) of the HTA, on receipt of a Medical Report dated September 12, 2005, that reported her addiction to alcohol.

2. The Registrar was justified in continuing her suspension under Regulation 340/94, Section 14 that states:

> An applicant for or a holder of a driver’s licence must not,
>
> (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and

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

3. The Applicant has failed to meet the requirement by the Registrar that she submit a detailed assessment by a specialist in Addictions Medicine that confirms completion of a recommended treatment program for alcohol abuse, ongoing participation in relapse prevention and evidence of a twelve-month period of abstinence from alcohol supported by normalised bio-chemical markers.

DECISION:

Upon the application by the Applicant to appeal the decision effective October 14, 2005, of the Registrar of Motor Vehicles (the "Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* 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 25, 2006

FILE NAME: 3451.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.

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 or other third parties (unless they took part in the hearing in a

professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3388-MED-MDIS-Mental Disorder

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1) OF THAT ACT

TO APPEAL A SUSPENDED LICENCE

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

APPEARANCES: APPLICANT, unrepresented

KYLE M. BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: April 21, 2006 *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 "Registrar") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario) (the "HTA").

EXHIBITS:

1. Notice of Suspension of Driver's Licence effective October 4, 2005, issued by the Registrar of Motor Vehicles, filed by the Applicant;

2. Notice of Appeal form received at the Tribunal on January 31, 2006, filed by the Applicant;

3. Registrar's Submissions, tabbed file (tabs 1-11), filed by the Respondent;

4. Driving Assessment Evaluation of the Applicant dated April 6, 2006, filed by the Respondent.

FACTS:

On August 15, 2005 the Registrar of Motor Vehicles received an unsolicited report from Dr. A. Braun that the Applicant suffered from dementia. The Registrar advised him that his driver's licence was being suspended and that reconsideration would depend on favourable medical information as requested. A report was submitted from Dr. C. Patterson's consultation of May 10, 2005 to the Applicant's family doctor confirming the diagnosis of dementia, noting some degree of depression and alcohol consumption. He outlined current therapy and referred him to Dr. Luthra – Geriatric Psychiatry – whose report of July 12, 2005 confirms the diagnosis. The Applicant is suffering from behavioural changes and emotional disturbances.

The C.T. Scan and M.R.I. results indicate chronic microangiopathic changes in the brain with subcortical problems. Resting tremor was noted. He is being treated with a variety of medications for his cognitive impairment and side effects.

On December 2, 2005 the Registrar advised the Applicant that an up-to-date medical assessment was required with special reference to his alcohol consumption and current cognitive status.

On December 28, 2005 Dr. Luthra reports ongoing care and recommends a Driving Assessment. On January 23, 2006 the Ministry's Alcohol Assessment Form was completed by his family doctor, which does not indicate alcohol dependence. Lab results of January 10, 2006 were normal.

On February 14, 2006 the Registrar advised the Applicant to submit a driving evaluation from a rehabilitation centre.

On March 1, 2006 this hearing was adjourned to allow the Applicant sufficient time to complete a driving evaluation.

On April 6, 2006 this evaluation report was submitted with the following significant findings:

- some difficulty performing co-ordinated movements with the left hand and foot
- upper extremity tremor
- partial impairment of perceptual/cognitive status especially multi-tasking
- turning was slow and unsure

The recommendation was that he not return to driving.

ISSUE:

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 doctor's report to the Ministry of Transportation ("MTO") in compliance with Section 203 of the HTA states that the Applicant suffers from a medical disability, which may affect his ability to drive a motor vehicle safely. Since this contravenes Regulation 340/94, section 14(a), the Registrar was obliged to suspend the Applicant's driver's licence as per section 47 (1) of the HTA.

The Applicant is receiving treatment but is not totally in control. The recommendation following a driving assessment is that he not return to driving. The Tribunal concurs with this finding.

DECISION:

Upon the application by the Applicant to appeal the decision effective October 4, 2005 of the Registrar of Motor Vehicles (the "Registrar") to suspend his driver's licence pursuant to Section 47(1) of the HTA, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

_____

Roy Melvin, M.D.
Presiding Member

RELEASED: April 27, 2006

FILE NAME: 3388.med.mdis.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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3354-MED-Withdrawal

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 47(1) OF THAT ACT

TO APPEAL A SUSPENDED LICENCE

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

APPEARANCES: The Applicant

KIM BEINTEMA, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: March 29, 2006 *By teleconference*

ORDER

WHEREAS a hearing was scheduled to be heard on March 29, 2006 in Toronto in the above matter, having been adjourned from February 20, 2006;

WHEREAS the Applicant was to ensure that he is represented and provide an up-to-date medical report from his attending doctor;

WHEREAS, at the onset of this hearing, the Applicant's wife who has his power of attorney advised the Tribunal that he is presently in hospital being treated for complications of stroke and that she wishes to withdraw his appeal;

WHEREAS this withdrawal was not opposed by the Agent for the Registrar;

NOW THEREFORE, the Tribunal Orders that this matter before the Tribunal is concluded.

LICENCE APPEAL TRIBUNAL

_____
Roy Melvin, M.D.
Presiding Member

RELEASED: April 4, 2006

FILE NAME: 3354.med.withdraw.doc

This decision will also be available on Quicklaw at a later date. However, the Applicant's name does not appear in the decision nor does the name of any witnesses or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3430 – 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: KEVIN FLYNN, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

THE APPLICANT
Unrepresented

DATE OF HEARING: March 29, 2006 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) (the "Act").

EXHIBITS:

1. Notice of Suspension of Driver's licence effective September 4, 2004, issued by the Registrar of Motor Vehicles.

2. Notice of Appeal Form received at the Tribunal on February 20, 2006, filed by the Applicant.

3. Tabbed file #1 - #33 of evidence documents prepared and filed by the Respondent.

FACTS:

The Respondent's case:

On March 3, 2003, a Medical Report required for a Class A driver's licence was received from Physician A, Family Physician to the Applicant since 1997.

It stated:

> History Details and Summary: Patient admits drinking mostly on weekends. Liver test done, Feb. 27/2003 AST-79, ALT – [not readable to the Tribunal], GGT – 444. Patient consulted with psychiatrist, [name deleted], re: marital problems. No medication required. (Sic.)

On June 22, 2003, the Respondent advised the Applicant by letter that he was required to file an up-to-date assessment from a Physician specializing in Addictions Medicine regarding his consumption of alcohol. This report must indicate if the disease of alcoholism is present and if so, what is the recommended form of treatment. It must also include an interpretation of bio-chemical markers and provide a medical explanation for elevation beyond the normal range.

On August 6, 2003, the Ministry of Transportation's ("MTO") Alcohol Assessment Form completed by Physician A was received.

Positive responses to the questionnaire were:

- Elevated cholesterol; psychiatric consultation in December 2002 re: marital problems; Adjustment Disorder and depressed mood; beer after work and on weekends; unemployed;

- Elevated liver test; GGT= 438 in August 8, 2003, normal range 5 - 50; MCV=98.7 normal range 80-97. Criteria DSM-IV: #4. Unsuccessful efforts to reduce alcohol use.

- Age of first regular use of alcohol: 20 years of age. Last use August 10, 2003. First intoxication April 8, 2003. Pattern of use: social. Reasons for drinking: social. Reasons for stopping: concerns about health.

- Consequences of drinking: legal problems on April 8, 2003. Medical consequences: elevated liver test, Adjustment Disorder (due to marital problems)

- Treatment:

  Previous treatment in June 2003 at Mississauga Alcohol treatment centre. 12 Step Program not indicated.

- Recommended Goal for Alcohol Consumption:

  Reduced Drinking.

- Comment: the patient is advised to abstain from use of any alcohol.

On November 23, 2003, the Applicant was advised by the Respondent that his Alcohol Assessment Form was reviewed and that he was required to file a detailed assessment from a physician specializing in Addictions Medicine.

On February 3, 2004, a Medical Report from Physician B, a psychiatrist, was received. He noted that he had seen the Applicant in December 2002, following removal of his children and separation by his wife of 13 years. This was followed by sleep disturbance, drinking more and loss of work. Diagnosis then was: Adjustment Disorder with depressed mood and the Applicant probably was drinking more than he admitted. He went on a drinking binge in April 2003 and smashed a car as a result of which he spent some time in jail. He was not going to a treatment program or AA. He denied drinking since he got out of jail.

His DSM IV diagnosis was Alcohol abuse now in remission.

Liver tests showed GGT of 291 (normal 0-50), AST 38 (normal below 35).

The Applicant showed a serious lack of judgement in going on a binge in 2003. He was prone to relapse and if so, was clearly at risk of further irresponsible behaviour, which might include driving while intoxicated. He advised that he enrolled in a treatment program.

On May 14, 2004, the Applicant was advised that he must file an up-to-date assessment by an Addictions Medicine Specialist.

On July 21, 2004, a medical report was received from an Addictions Medicine Specialist, Physician C. He advised the Applicant that the abnormal liver test might be due to use of Tylenol and that he should stop it. Repeat GGT showed a reduced level of GGT after stopping Tylenol but further repeat testing showed elevation: the Applicant was drinking again despite having said earlier that he was abstinent. He was unable to prove that the Applicant was an alcoholic but could be labelled an alcohol abuser and was probably drinking more than he says.

On August 25, 2004, MTO advised the Applicant that his licence was suspended under

Section 47(1) of the *Highway Traffic Act* for medical reasons. He was advised of his right to an Administrative Appeal and also of his right of Appeal to the Licence Appeal Tribunal.

On February 23, 2005, the Applicant requested and was granted a copy of the MTO's files

under the *Freedom of Information Act*. The Ministry advised him on April 8, 2005, that the suspension was based on medical information filed and that an up-to-date assessment by an Addictions Medicine Specialist was required. It must include the recommended form of treatment and confirmation that he has complied with all the recommendations by the specialist, and an interpretation of bio-chemical markers.

On November 11, 2005, a Medical Report was received from Physician D, a physician at a walk-in clinic, who stated that she saw no evidence that the Applicant was addicted to alcohol and that he was never seen while drunk at the clinic, and that he had an increased liver enzyme test.

On November 30, 2005, MTO again advised the Applicant that an up-to-date assessment was required from an Addictions Medicine Specialist.

On February 27, 2006, the Applicant's driving record showed no convictions or demerit points.

The Applicant's case:

He came to Canada in 1982 and obtained a Class G driving licence. In 1992-1993, he was helping a friend to study for a Class A licence and decided to take it himself. He was accident free and had no traffic tickets issued against him. He "drank a bit" but never drank and drove. He was advised that he had a weak liver and that he should not take Tylenol, which he was using to relieve sore muscles due to his work with heavy equipment. He stated that he stopped drinking on his own and did not see a need to attend AA or enter a treatment program. After he got out of jail, he was on probation for 2 years and was not to drink. He went back to drinking in 2004. Also, the Applicant said that he stopped seeing his family doctor. He believed that his licence was suspended because of the abnormal liver test, rather than alcohol use.

ISSUES:

Should the decision of the Registrar of Motor Vehicles 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.

EVIDENCE

The Respondent relies on:

1. The medical report required for a Class A licence holder, which drew attention to a possible medical problem. The Applicant was requested to provide further information and was advised by an Addictions Medicine Specialist to abstain from

alcohol and Tylenol.

2. Regulation 340/94 that states:

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

3. Section 47(1) of the Highway Traffic Act that states:

> Subject to section 47.1, the Registrar may suspend or cancel,
>
> a driver's licence on the grounds of any other sufficient reason not referred to in clause (d), (e) or (f).

4. The medical report by a psychiatrist that stated the Applicant suffers from a condition which is prone to relapse and if so, he was clearly at risk of further irresponsible behaviour which might include driving while intoxicated. He recommended that he enter a treatment program.

5. The medical report from an Addictions Medicine Specialist that suggested that the Applicant was drinking more than he said and was unwilling to stop drinking even though his liver showed evidence of impairment. He was unable to state that he was safe behind the wheel and could be labelled an alcohol abuser.

6. The Canadian Council of Motor Transport Administrators (CCMTA) Standard 13.2 applies to alcohol dependence:

> Persons habitually dependent on alcohol should not 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 recommencing driving.
>
> STANDARD: MAY NOT DRIVE ANY 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 RECOGNISED BY THE LICENSING AUTHORITY AND THE SUCCESSFUL COMPLETEION OF AN ALCOHOL REHABITITATION PROGRAM.

The Applicant relies on his clean record and his statement that he has never driven while impaired. He believes that MTO has suspended his driver's licence because of the abnormal liver test, which was revealed only during his 3 yearly medical examinations. He stated that he would be satisfied to regain his Class G licence.

APPLICATION OF THE LAW TO FACTS:

The Tribunal finds as fact that:

1. The Respondent was justified in suspending the Applicant's licence to drive on receiving a medical report of abnormal liver tests associated with the use of alcohol.

2. The Respondent was justified in continuing the suspension on failure by the Applicant to submit an up-to-date assessment by an Addictions Medicine Specialist that confirms that he has complied with all the recommendations by the specialist and an interpretation of results of bio-chemical markers.

3. The Applicant has not complied with recommendations by his physicians that he abstains from alcohol.

DECISION:

Upon the application by the Applicant to appeal the decision effective September 4, 2004 of the Registrar of Motor Vehicles (the "Respondent") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* (the "Act"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Kevin Flynn
Presiding Member

RELEASED: April 6, 2006

FILE NAME: 3430.med.alcl.doc

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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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Decisions under Highway Traffic Act

Section 47(1) (c) or 17(2) - Commercial Vehicle Operator's Registration (CVOR)

Fiscal Year 2006 - 2007

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

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- JELFTON C. WILLIAMS AND GLOBAL DESTINY TRANSPORT & RECYCLING INC. AND J.W. EXPRESS CARTAGE INTERNATIONAL INC. - ADJ - Adjournment
- NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST. CO. LTD., 1138802 ONTARIO INC. and NATIONAL SUPPLY CENTRE LTD.
- 1341102 ONTARIO INC. O/A BARN TRUCKING AND 1676400 ONTARIO INC. O/A UNIQUE TRUCKING.
- 1649313 ONTARIO LTD.
- NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD, 1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE LTD - ADJ - Adjournment
- 1552221 ONTARIO INC.
- S.P.G. HAULAGE INC.
- S.P.G. HAULAGE INC.
- 2080797 ONTARIO INC. O/A ALL KIND TOWING
- 1687563 ONTARIO INC.
- 3731-CVOR-S.P.G. HAULAGE INC.-ADJ-Adjournment
- 2056126 ONTARIO INC.
- 1552221 ONTARIO INC.
- 1649313 ONTARIO LTD.
- THISTLETOWN MOTOR FREIGHT (2003) INC. - ADJ - Adjournment
- 1552221 ONTARIO INC.
- LIONS MOTOR FREIGHT LTD.

- THISTLETOWN MOTOR FREIGHT (2003) INC.
- THISTLETOWN MOTOR FREIGHT (2003) INC. – ADJ - Adjournment
- NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD, 1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE LTD
- M.J. JONES INC. AND 942225 ONTARIO LIMITED
- THISTLETOWN MOTOR FREIGHT (2003) INC.
- LIONS MOTOR FREIGHT LTD.
- S.P.G. HAULAGE INC.
- U-HAUL CO. (CANADA) LTD.

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

JELFTON C. WILLIAMS AND GLOBAL DESTINY TRANSPORT & RECYCLING INC. AND J.W. EXPRESS CARTAGE INTERNATIONAL INC. – ADJ – Adjournment

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

JELFTON C. WILLIAMS AND GLOBAL DESTINY TRANSPORT & RECYCLING INC. AND J.W. EXPRESS CARTAGE INTERNATIONAL INC.

AND IN THE MATTER of the
CANCELLATION AND SEIZURE ORDER by
the Registrar of Motor Vehicles pursuant to the
Highway Traffic Act
TO CANCEL AND SEIZE
- Order dated: December 6, 2006

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

JELFTON C. WILLIAMS AND GLOBAL DESTINY TRANSPORT & RECYCLING INC.
AND J.W. EXPRESS CARTAGE INTERNATIONAL INC.

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter to commence at 9:30 a.m., on Thursday, March 29, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Wednesday the 4th day of April, 2007.

LICENCE APPEAL TRIBUNAL

_____
Lynda Tanaka, Acting Chair

RELEASED: March 13, 2007

FILE NAME: 3933.cvor.jelfton_global destiny_ express cartage.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

NATIONAL TRANSPORTATION CARRIERS INC.,
ROBERT HIGGINS CONST. CO. LTD., 1138802 ONTARIO INC. and
NATIONAL SUPPLY CENTRE 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: J. PAUL R. CASSON, Counsel, appearing on behalf of National Transportation Carriers Inc., Robert Higgins Const. Co. Ltd., 1138802 Ontario Inc. and National Supply Centre Ltd.

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

DATES OF HEARING: August 24 and 25, 2006,
January 17 and 18, 2007 Sault Ste. Marie

REASONS FOR DECISION AND ORDER

National Transportation Carriers Inc. (hereinafter "NTC") appeals to this Tribunal from the decision of the Registrar to suspend its Commercial Vehicle Operator's Registration (hereinafter "CVOR") for a period of ten days on the basis of a chronic poor safety rating. The other Applicants appeal from the decision of the Registrar to suspend their CVOR registrations contemporaneous with the NTC suspension. The grounds for their suspension are solely that they are related corporations. The factual enquiry in this application will focus on the record and history of NTC and determine, as a threshold, if the Registrar was justified in levying the suspension. Assuming that a suspension is warranted, the reasons will then proceed to deal with the relationship between the various Applicants and whether a contemporaneous suspension should be levied against them.

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).

Power to seize out-of-province permits and plates

(10) The Registrar may, at any time, for misconduct or contravention of this Act or 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.

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 January 27, 2006.

Exhibit 2 Notice of Appeal of the Applicants received at the Tribunal February 3, 2006.

Exhibit 3 Respondent's Appeal Book.

Exhibit 4 Applicant's Documentary Disclosure Brief.

Exhibit 5 Applicant's Appeal Book Volume I.

Exhibit 6 Applicant's Appeal Book Volume II.

Exhibit 7 Applicant's CVOR summary current to August 11, 2006.

Exhibit 8 Letter from Royal Tires to Applicant, undated.

Exhibit 9 Collection of 90 photographs taken by Robert Hagen showing various defects in Applicant's fleet when the vehicles were first inspected by TMS Truck Centre.

Exhibit 10 Royal Tire Service Tag.

Exhibit 11 Royal Tire Fleet Report Sheets.

Exhibit 12 NTC CVOR Abstract print date January 8, 2007.

Exhibit 13 Resume for the Safety Officer.

Exhibit 14 Training and Additional Costs Sheet.

Exhibit 15 Updated Five Year Point Trend.

Exhibit 16 NTC CVOR Abstract print date January 4, 2007.

Exhibit 17 Analysis of CVOR Data and Trends.

FACTS:

Adele DiPaolo testified on behalf of the Registrar. Ms DiPaolo is a CVOR Analyst. In this position Ms DiPaolo prepares files to be forwarded to the CVOR Program Manager for consideration of the need for sanctions. The Program Manager may then forward the file to the Deputy Registrar.

Ms DiPaolo reviewed the "Ontario Safety Rating and Commercial Vehicle Operator's Registration System" found at Tab 29 of Exhibit 3 and the related CVOR safety threshold system. She stated that there is a computer system that automatically tracks the on-road performance of CVOR holders. It tracks accidents, convictions and safety incidents against a standard threshold that is set for each holder based on the size of the holder's fleet. The standard is based on live data covering trucking operations on Ontario roads for the period from 1995 to 1997. All operators with the same fleet size have the same safety threshold.

Data with respect to any given commercial operator is automatically entered into a computer. The system will generate reports at certain point levels as follows: 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 and consider further sanctions. Once the points level exceeds 100% of the safety threshold, the Registrar will seek to levy sanctions.

Ms DiPaolo testified that the first step taken is to do an integrity check. An integrity check involves ensuring that the information entered into the automatic computer system is indeed correct. Once satisfied that the computer data is, in fact, correct, she will then refer the file to the Program Manager for appropriate action: i.e. either an interview or proposal of sanctions. Carriers are given an overall safety rating depending on their CVOR records. An "Excellent" rating indicates a score of over 80% in a facilities audit, a violation rate under 65% and an accident rate under 10%. Ratings then descend through "Satisfactory," "Satisfactory – Un-audited," "Conditional," indicating a failed audit, and "Unsatisfactory" indicating their CVOR is under suspension.

From time to time the Registrar may carry out a facilities audit. An auditor will attend at an operator's facility and meet with the corporate officer. Ms DiPaolo identified Alberto Giommi as the corporate officer for the Applicant, NTC. The scope of the audit is reviewed with the corporate officer. The auditor will then conduct a sample review of the operator's records, identify deficiencies, if any, and write up the audit findings. The auditor will then conduct an exit interview with the corporate officer who reviews the findings. Finally, the auditor leaves a copy of the audit report, together with the findings, with the corporate officer. It is part of the procedure during an audit to provide the operator with a copy of the "Ontario Safety Rating and Commercial Vehicle Operator's Registration System" found at Tab 29 of Exhibit 3.

Counsel directed Ms DiPaolo to the provisions of section 17 (4) of the Act defining related companies. He asked if it was the Registrar's policy to seek the suspension of CVOR certificates of all related companies. Ms DiPaolo answered in the affirmative. She stated that the purpose was to prevent circumvention of any suspension by removing the ability of a suspended CVOR holder to transfer its trucks to a related company and carry on business as usual.

Ms DiPaolo reviewed the report she prepared. She stated that it came from information in the Ministry of Transportation database. She started with the most notable entry in the report, the fact that the Registrar had proposed to suspend the Applicant, NTC, in 2004. A show cause hearing was held, in which NTC convinced the registrar that it had turned a corner and its record would improve. On December 10, 2004, the Registrar informed NTC that it would not be subject to a suspension. The Registrar set a series of conditions for NTC to meet to avoid sanctions. It was to keep its out-of-service rate below 35%. Ms DiPaolo produced a copy of NTC's record since that date. It shows that NTC failed to meet the conditions of the December 10, 2004 decision.

Subsequently, in December 2005, the Registrar again proposed to suspend the CVOR for a period of thirty days. At another show cause hearing Mr. Giommi was able to prevail upon the Registrar to reduce the suspension to ten days by convincing the Registrar that this time the operator had turned a corner, identified the management problem that was the cause of its earlier failure to comply and now had good people in place to carry on a safe operation. It appears that the presentation at this later show

cause hearing was largely a repeat of the 2004 presentation. The ten-day suspension was to commence on February 10, 2006.

In reviewing the safety violation rate after December 10, 2004, Ms DiPaolo noted that it exceeded the threshold as set by the Registrar. In the ten and a half months between December 10, 2004 and November 2005 the rate was approximately 120%. The Registrar had required a rate of 65%. In addition, out-of-service issues were well in excess of the 35% required by the Registrar. Indeed in the two years from July 2004 to July 2006 out-of-service conditions ran at 56.5% and overall sat at 103.3%. In the twelve month period to August 11, 2006 the out-of-service rate was 60% as opposed to 53.8% the previous rate.

Following the evidence of Ms DiPaolo the Registrar closed his case. NTC then proceeded to lead evidence. By way of review, it was NTC's position that prior to July 2005 the owner, Albert Giommi, had hired what he thought to be competent management. He had put in place programs to ensure that his trucks and drivers were safe, he had hired a third-party maintenance facility with a mandate to carry out whatever maintenance was necessary to ensure his trucks were safe and he had contracted with a third-party tire company to check the truck tires and wheels regularly to ensure on-road safety. In the spring of 2005 Mr. Giommi discovered that his trusted manager was running another company out of NTC's premises, that he was not managing NTC properly or enforcing the safety program and the third-party maintenance company was charging for maintenance that it did not perform. The tire company was trying to carry out the tire safety check program without cooperation from the manager so it did not have access to all trucks and trailers, as it should. The result of all these problems was a deteriorating safety record. The manager was terminated in July 2005, and Mr. Giommi took over as manager. He has since refocused the company on safety and turned a corner. In light of the "Herculean" efforts expended by the new management, in Mr. Giommi's view, the company should be given another chance and the suspension should not be upheld.

NTC put forward seven witnesses, Albert Giommi, the president of NTC, two witnesses from the third-party maintenance facility, one witness from the tire company, two truck owner/operators with trucks at NTC and the NTC safety manager. They all told a similar tale of the pre-July 2005 regime and the post-July 2005 regime.

Evidence of Albert Giommi

Albert Giommi is a co-owner of NTC. Since July 2005, he has been the terminal manager, responsible for full oversight of company operations. In general, he was a very credible witness with a passionate commitment to make NTC into a good and safe carrier. He was somewhat vague about dates, especially in relationship to the start and termination dates of a number of employees.

He testified that he had started NTC in 1998 after a local carrier had gone bankrupt. He had been approached by two former employees of the bankrupt who suggested he start

a trucking business. He found trucking to be a highly regulated business in which he had no experience. In the first years, he employed a number of different managers. Early on he operated his own garage, but in 2002 or 2003 he closed the garage and sought an outside maintenance shop. In and around 2003, after a number of management changes, Mr. Giommi hired DJ as manager. DJ had worked as a trucker for a courier service and had then taken an MBA degree; he offered his services as one knowledgeable in the specific industry, and with business training. Mr. Giommi placed his confidence in DJ and gave him a mandate to run the business and stay on top of safety and the ever-changing regulatory issues. He sent DJ for a number of safety related training courses to ensure that he had the tools to do the job. Thereafter, Mr. Giommi did not get involved in the day-to-day operations of NTC.

In 2004, Mr. Giommi received the package in the mail from the Registrar concerning the proposed thirty-day suspension. He immediately contacted DJ, who produced extensive records in preparation for the meeting with the Registrar. Meetings were held with the third-party maintenance facility and the third-party tire contractor to question how a tire separation could occur, as had happened to one driver. A satellite tracking system was instituted. Governors were installed limiting top speed to 65 miles per hour. Plans were put in place to ensure that maintenance was properly carried out and the whole package was put together to present to the Registrar. Based on the presentation, the Registrar wrote to NTC stating that he would not levy a suspension but he would impose terms. NTC was required, from December 10, 2004 onward to maintain its violation record at 65% or below and its out-of-service record at 35% or below. The delegation returned to Sault Ste. Marie and Mr. Giommi left DJ to implement the agreed program while he got on with running his other businesses.

Mr. Giommi admits that, following the meeting with the Ministry, NTC did not comply with the terms set by the Registrar. He pointed to two areas in which he was defrauded both by DJ and his then third-party maintenance provider. He stated that DJ was running another business out of NTC's offices. He also was not implementing the safety program agreed upon, and was hiding that fact from Mr. Giommi. Mr. Giommi stated he discussed the running of the company with DJ and was always assured that things were in order. Matters came to a head, when, following an audit in April 2005, by NTC's insurers, Mr. Giommi was informed that the insurers were not prepared to provide coverage as the action plan agreed with the Ministry was not being followed. In May and June 2005, Mr. Giommi conducted an investigation and discovered DJ's activities, which were, at the very least, gross incompetence and may, in fact, have been fraudulent. DJ was terminated in July 2005 and subsequently denied UIC because his termination was deemed to be for cause. Mr. Giommi then reviewed the out-of-service record and could not understand why it was so high when his third-party maintenance provider had a mandate to fix any problems. He took the fleet to another maintenance provider and asked for a complete review. The review highlighted the fact that the fleet was in a sorry state and would require extensive maintenance. He terminated his previous maintenance supplier. Further investigation has indicated that that supplier may have extensively billed for work that it did not perform. There is now a lawsuit to recover the amounts incorrectly or fraudulently overcharged.

From that time forth, Mr. Giommi has been a hands-on manager and he is now the Terminal Manager for NTC. He has empowered the safety officer to ensure that drivers and operators fulfill all their log and maintenance obligations and to put on regular safety meetings. He feels he has now turned the company around.

With respect to the related companies, Mr. Giommi stated that Robert Higgins is a financial investor in the firm but he is not involved in the day-to-day operations. Mr. Higgins' main business is construction. In that business he has a CVOR for his trucks. It is in no manner related to NTC, other than Mr. Higgins' ownership, nor does it operate similar equipment. Its yard is about eight kilometres from NTC's. The balance of the Applicant companies is made up of companies owned by Mr. Giommi. National Supply is a building supply company located about three blocks from NTC. It has a CVOR and a couple of trucks to deliver building supplies. The numbered company operates one cement-pumping truck that travels far and wide on cement pumping contracts. Neither of these companies is in any manner related to NTC or its operations other than common ownership.

In cross-examination, Mr. Giommi confirmed the deteriorating safety record and his knowledge of it but felt that he had taken reasonable steps to address the problem by hiring first, DJ, and later a safety officer. He confirmed numerous meetings with the maintenance supplier to address the out-of-service problems but believed the explanations he was given as to the cause. Along the way he learned that he had to dispose of older equipment sooner and to update earlier. The satellite tracking system, he recalled, was installed in 2003 or 2004. In November 2004, a brake indicator program was instituted.

The next two witnesses were employed by the new third-party maintenance facility. The first was the General Manager and the second was the Service Manager. They testified about the move from the previous maintenance facility and the state of NTC's fleet at that time. They also testified about the new program to track maintenance problems. The second of the witnesses, the Service Manager, introduced a bundle of photographs that showed the state of the fleet when it was moved to the new maintenance service provider. In his view, the only possible explanation for the state of the fleet was that the previous service provider had not, in fact, performed the maintenance it billed for. In many cases he pointed out accounts for servicing of vehicles and photographs that showed those same vehicles in a deplorable state a few days or weeks after the earlier service had allegedly been done. Both witnesses testified that it is Mr. Giommi's specific instruction that NTC's fleet be kept in top shape. The maintenance facility has the authority to remove a vehicle from service and carry out necessary repairs before it is returned to the road.

Evidence from the representative of the tire contractor was to the same effect. The difference between the two organizations is that the tire contractor was involved with NTC prior to the termination of DJ, and had essentially the same mandate. The witness testified that vehicles were supposed to be made available when they were at the yard

on the weekend. The contractor had a mobile service unit that would attend and carry out tire condition and pressure checks and check the wheels. Any defective tire or wheel was to have been removed and replaced. On Monday the results of the weekend findings were faxed to NTC and the problems discussed. At this time, tires and wheels that were removed were more closely examined and may have been returned to service if it was determined, on closer inspection, that they were still within the specifications. The witness also testified that the contractor's mandate is to use only top of the line tires that are designed for the specific type of carriage undertaken by NTC. There was a retread program. NTC tire casings from top quality manufacturers could be used once for retreading. NTC will not permit the casing to be used a second time. The tire contractor purchased the casings after they have been used once for retreading and sale to other operators.

Much of the tire program remains unchanged from the DJ era. According to the witness, while it was felt the weekend inspection program would guarantee that all NTC vehicles would be inspected at least every three weeks, vehicles were often not parked where they were supposed to be parked. When this issue was raised with DJ, he would undertake to look into it but failed to do so. As a result, many vehicles were not inspected for long periods of time. The number of tire and wheel problems under the DJ regime almost caused a rift between Mr. Giommi and the tire contractor, once it became clear that the program was not being followed under DJ. Mr. Giommi felt that the failure to follow the program should have been brought to his attention and was extremely angry that it had not been. Eventually the contract was reaffirmed. The witness stated that of all the companies he deals with, he is only aware of one with standards as high as NTC.

The next two witnesses were owner operators. They both testified to the new, no nonsense regime following the departure of DJ. In the old regime, safety meetings were irregular and discipline almost non-existent. The first of the two owner operators is a mechanic. Interestingly enough he had worked for some time with the first maintenance service provider but had left because he did not like their business practices. He had not drawn this discomfort to the attention of Mr. Giommi, despite the fact that he was operating several trucks with NTC. Under DJ, if he failed to forward maintenance records to indicate that he had complete the statutory maintenance on his trucks, there were no consequences. Under the present regime, if he does not forward records in a timely manner, his trucks are put on a "no load" status until they are in compliance. The maintenance program requires trucks to undergo a "C" service every six weeks. If the service is performed late, it does not extend the time for the next service. The service must be done every six calendar weeks, even if the previous service had been delayed for some reason. The current safety officer insists that the service schedule be maintained and the services done every six calendar weeks regardless of when the previous service had not been done. This evidence was echoed by the other owner operator witness.

In addition, both witnesses testified about the regular safety meetings. They were at first reluctant to attend but by now recognize the value of these meetings. They both

spoke with some admiration of the safety officer who is persistent and shows high standards when it comes to safety. Safety is further enhanced by strict oversight of driver logbooks. All logbooks are reviewed and any discrepancies addressed. Logbooks are reviewed weekly and hours are tracked daily. The result is that all drivers are now running legally, a good thing according to one of the witnesses. If reported hours and log sheets do not tally, the driver is put on "no load" status until matters are sorted out. Through the satellite tracking system a driver can be linked instantly with the dispatcher.

Both of these owner operators stated that, in their view, a ten-day suspension would be financially crippling. Their drivers would leave and owners would move trucks to new CVOR holders, as they could not afford to lose income and make the overhead payments that are due.

With respect to maintenance, both owners reported a new attitude. In the case of the first witness, he is a mechanic and has always done his own maintenance. For him, the difference is as set out above – he must provide maintenance records. In the case of the second witness, there has been a complete change of circumstances. After a few incidents he was given an ultimatum. He could move all of his maintenance to the NTC maintenance service provider and come under the same maintenance regime, or he could move his trucks elsewhere. He chose the former and accepts that in the long run, better-maintained trucks are cheaper to operate and contribute more to the bottom line.

The final witness for the Applicants was the Safety Officer. She provided personal insight into the operation of NTC under DJ. Prior to working with NTC, she had been on the safety committee with National Steel Car. In that role, she had received extensive safety training and carried out safety audits summer and winter, inside and outside, and in the evening. She received a safety manual from the Industrial Accident Prevention Association and has updated her knowledge constantly by attending various seminars. She started with NTC part time in 2003, entering driver logs. She would then provide DJ with a report on the logs. She prepared reports to be ready for the 21st of every month for both the Ontario Ministry of Transportation and the Michigan Department of Transport. A copy of the report was given to the driver and a copy to DJ. In 2003, she noted that logbooks were often not signed off by the driver accounting for each 24-hour period while on the road. It was DJ's job to chase the drivers to ensure that logbooks were correctly filled in. She would produce the reports with comments and deliver them to DJ. To summarize her evidence on this point, DJ ignored her comments, took no steps to chase drivers and simply filed the reports.

At that time, in 2003 and 2004, she was not responsible for safety. DJ was. Her job with respect to drivers was to review the logs, review the policy manual with new drivers, and deliver the new drivers to DJ for a road test. She did find herself in conflict with DJ on occasion. In August 2004, DJ delegated her the responsibility to ensure that the maintenance records from one owner operator were brought up to date. Numerous calls produced no response from this owner operator so she fired him and all of his drivers. When DJ took credit for this issue on the drive to the first show cause hearing,

the witness spoke up. On other occasions, when Mr. Giommi called to confirm that issues were being addressed she would advise if matters were not done. DJ took the position that she had "ratted on him." DJ's feelings became prevalent throughout the company and the witness found herself somewhat ostracized by drivers and staff alike. Drivers were told not to talk to her. DJ would yell at her on the phone and told her not to tell Mr. Giommi anything. On Tuesday, April 26, 2005, the insurance company attended to conduct a safety audit. DJ gave her a list of things the insurers wanted to see and left. He appeared in the evening and when she asked him for information she had been unable to locate, he told her it was all in the files and he would produce it the next morning. DJ could not produce the records and, as stated above, this fact led the insurers to refuse to renew. When records were discovered on DJ's computers, the records were old. There was nothing more recent than 2003.

With DJ's departure in July 2005, the witness's role changed significantly. She took over responsibility for licensing and discipline. Her title was changed to Manager of Safety and Compliance. After initial reluctance, she managed to win the drivers over to the new view of how to run a transportation carrier. This was confirmed by the obvious respect the two owner operator witnesses had for this person. She conducts regular safety seminars. She ensures that all drivers take the annual road test from a third-party testing centre and new drivers are tested before they go on the road. From a disciplinary standpoint, she has terminated three owner operators and nine trucks as a direct result of the discipline tracking system. She has conducted defensive driving courses for drivers. Insurers had required a defensive driving course and DJ was sent on a course to come back and teach, but he failed to implement this requirement. She feels that the drivers have enjoyed the course and have learned from it. New driver orientation is now quite a protracted process. She spends three hours or so going over company policies and procedures with new drivers. They are then sent for alcohol and drug testing and finally, they must take a driving test from the third-party test facility. If the new driver has less than two years of experience he or she will be required to spend between thirty and ninety days as a second driver before going solo. The witness now has full authority over discipline. She does discuss matters with Mr. Giommi but finds that he empowers her by backing her decisions.

The witness in examination-in-chief and in cross-examination reviewed the CVOR abstract. She noted that the trend is generally downwards. She showed figures that indicate that the recent out-of-service rate has fallen dramatically in absolute numbers while at the same time the number of trucks and the number of miles driven has increased dramatically. Notwithstanding that fact, the overall violation rate is still 97.65% as of January 2007. The CVOR record has an OOS rate of 52.3%. She is hopeful that by the end of 2007, this number will drop to the provincial average of 35%. Since the record reflects offences for a period of two years, it is still reflecting infractions from the first seven months of 2005, when DJ was the Terminal Manager. She is hopeful that in 2007, the overall rate will drop to 72-75%.

ANALYSIS AND FACTS FOUND PROVEN:

Notwithstanding four days of evidence, the facts in this matter are not seriously in dispute. NTC does not take issue with the Ministry records as they record past failures and warnings leading to the first proposed suspension in late 2004. It takes issue with the apparent inability of the records to reflect the seriousness of out-of-service events. In the view of NTC, the same points are levied for wheel problems that may run the gamut from very serious to relatively minor. The answer to this objection, however, is "minor in whose eyes?" When a truck is found to have an out-of-service defect, it is because the inspecting officer believes that it cannot be operated safely on the road. No safety problem can be minor even though it manifests itself solely in a loose wheel nut. If the vehicle is permitted to continue on the highway, then there is a real possibility of harm to other road users.

NTC does not take issue with the fact that the 2004 suspension was averted due to submissions made by NTC and that the submissions made to the Ministry in late 2005 were essentially the same submissions, with the added dimension that DJ had been the cause of the failure to turn the operation around. The Tribunal accepts that Mr. Giommi and his current staff are taking major steps to turn around the operation of NTC and the record indicates that they are starting to have their efforts rewarded by a change in corporate culture and a significant drop in out-of-service defects. This change was obvious in the evidence of the owner operators who confirm that the safety officer has now won their respect for her efforts and that the drivers are now buying into the safety program. It appears that once he puts his mind to problem-solving, Mr. Giommi is an impressive manager. The difficulty NTC must confront is why Mr. Giommi did not take a “hands on” management approach well before he did.

A review of the evidence shows Mr. Giommi was aware of the deteriorating record of the company. As early as 2001, he was present at a facilities audit. He was the “corporate officer” with whom the Ministry auditors consulted after each audit. He states he trusted DJ and his third-party maintenance provider to ensure that his trucks and drivers were safe. Notwithstanding his trust, he had available the means to track the on-road safety performance of the company by reviewing the CVOR abstract each month. According to his evidence, he appointed DJ as terminal manager in 2003 with a mandate to improve safety. It was obvious by October 2004, when the Registrar proposed the first suspension, that DJ was not performing well. The Tribunal cannot understand why, at that point, with a suspension narrowly averted, Mr. Giommi did not become intimately involved with his business. Rather, he permitted DJ to stumble on for another 10 months. It was not until he faced the possibility of not being able to insure his company that he decided to take action. In argument, Counsel for the Registrar characterized this aptly. He stated that several years of letters and threats from the Ministry had been totally ineffective in mobilizing Mr. Giommi. Only the threat of losing insurance coverage moved him. The Tribunal accepts this proposition as valid and amply supported by the evidentiary record.

The hearing was conducted approximately two years after the Registrar set conditions for the continued operation of NTC without a suspension and NTC has still failed to reach the level required. From January 2005 to January 2007, the overall safety violation rate was 97.65%, not the 65% mandated by the Registrar. Granted that approximately six months of this period involved the management of DJ, there have been fluctuations in the overall safety record, both up and down. There is work yet to be done. The difficulty facing the Registrar and the difficulty facing this Tribunal is to set a penalty that brings home to NTC the seriousness of continuing unsafe operations and the importance of complying with the Ministry's, not the insurer's, expectations and yet, does not stifle the excellent work done by the new management – work that is just now beginning to show results. The Registrar came to the conclusion that a ten-day suspension would achieve that end. In light of the long record of NTC and its failure to improve, despite repeated warnings, it might be argued that the Registrar was overly lenient. The Tribunal is of the view that the Registrar's position struck the necessary balance between accountability for past poor performance and encouragement for future improved performance. The Tribunal is of the opinion that a ten-day suspension is warranted. It is the Tribunal's sincere hope that Mr. Giommi and his staff will continue their excellent work in improving the carrier's performance and that NTC will not be before the Tribunal in the future.

The situation changes somewhat when the rest of the Applicants are considered. No evidence was put before this Tribunal to suggest that any of the other Applicants had an unsafe record. The Registrar rested his case with respect to these Applicants on the prevention of circumvention. In the eyes of the Registrar it is a simple matter for NTC to transfer its trucks to one of the other CVOR holders and continue operations as before. There are numerous cases before the Tribunal where this position is more than justified, in that the related company operates similar equipment on similar routes carrying similar goods, or has a ready potential to do so. Often the operation is from the same address. In other cases before this Tribunal the Applicant has been closely involved with the operation of a carrier that has demonstrated a total disregard for safe operation on the Province's highways and there is every reason to assume that the Applicant will carry over the poor corporate culture and safety performance to any future operation. These facts do not apply to the current situation. The Applicants other than NTC have all been in business for a number of years in operations located apart from NTC's facilities and in quite unrelated businesses. The goal of non-circumvention can be achieved by far less draconian means that a blanket suspension. Section 47 (2) of the Act states:

> (2) As an alternative to a suspension or cancellation under subsection (1), the Registrar may, subject to section 47.1, restrict the number of commercial motor vehicles that may be operated by a holder of a CVOR certificate during the period that the Registrar stipulates.

In view of this section, it is a simple matter to restrict the number of trucks operated by the non-NTC Applicants during the period leading up to and during the suspension period to prevent circumvention. The commencement of the restriction period shall be the date of release of these reasons to the parties and it shall terminate contemporaneously with the end of NTC's suspension.

DECISION:

Having reviewed all of the evidence and taken into account the submissions of the parties, pursuant to the authority granted to it in section 50 of the Act, this Tribunal orders that the Registrar shall carry out that part of his Notice of Proposal relating to the suspension of National Transportation Carriers Inc. for a period of ten days, commencing on a date to be set by the Registrar. With respect to the other Applicants, the order of the Registrar is hereby varied to provide that each of them shall be limited to operating no more than the number of commercial motor vehicles that they have in their respective fleets on the day of the release of these reasons, such limitation to commence on the date of the release of these reasons and to continue until National Transportation Carriers Inc. has completed its ten day suspension.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: February 22, 2007

File Name: 3399.cvor.National Transportation Carriers.order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1341102 ONTARIO INC. O/A BARN TRUCKING AND 1676400 ONTARIO INC. O/A UNIQUE TRUCKING.

IN THE MATTER OF THE CANCELLATION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED NOVEMBER 17, 2006.

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: MANOHAR SINGH, Agent representing the Applicants, was not present

PATRICK MOORE, Counsel representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended

DATE OF PRE-HEARING: January 17, 2007 Toronto

ORDER

Following the attendance on January 17, 2007, at a pre-hearing before this Tribunal of Patrick Moore, Counsel, appearing on behalf of the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (the "Deputy Registrar");

AND WHEREAS, Manohar Singh (the Applicant's agent) was not present at the Pre-hearing;

AND WHEREAS, Notice of Pre-hearing dated December 15, 2006, was addressed to the Applicant's agent, and the counsel representing the Deputy Registrar of Motor Vehicles and which Notice of Pre-hearing was transmitted to the Applicant's agent and counsel representing the Deputy Registrar of Motor Vehicles by facsimile on December 15, 2006;

AND WHEREAS, the transmission report of the above facsimile confirmed receipt of the above facsimile by the Applicant's agent and counsel representing the Deputy Registrar of Motor Vehicles on December 15, 2006;

AND WHEREAS, the Notice of Pre-hearing informed the aforesaid Parties that the pre-hearing was due to be held at 9:30 a.m., on January 17, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

NOW THEREFORE, the Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Friday the 16th day of February, 2007 at the Tribunal's aforementioned address;

1. The pre-hearing conference was not proceeded with and was terminated due to the absence of the Applicants agent and no order was made regarding the hearing which remains scheduled for February 16, 2007, as above;

2. The Tribunal does draw the Parties' attention to the necessity of all Parties complying with the disclosure requirements in terms of Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

_____
Donald Benninger, Member

RELEASED: January 26, 2007

File Name: 3907.cvor.Barn Trucking & Unique Trucking

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1649313 ONTARIO LTD.

IN THE MATTER OF the refusal of the Deputy Registrar of Motor Vehicles to issue a Commercial Vehicle Operation Registration (CVOR) certificate to 1649313 Ontario Inc.

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

AND IN THE MATTER of the Failed MTO Facility Audits of Propane Levac Propane Inc. CVOR 114-484-169, dated November 15, 2002, 1443635 Ontario Inc., CVOR 138-113-408 dated October 22, 2002, 698185 Ontario Inc. CVOR 095-537-857, dated December 18, 2002 and MacEwen Petroleum Inc, CVOR 017-506-851; dated October 3, 2002, operators directly or indirectly related to the applicant;

AND IN THE MATTER of the "Conditional" Safety Ratings issued to Propane Levac Propane Inc, 1443635 Ontario Inc, and MacEwen Petroleum Inc., operators directly or indirectly related to the Applicant.

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

APPEARANCES: CAROLE McAFEE WALLACE representing 1649313 Ontario Ltd.

PATRICK S. MOORE, Counsel representing the Deputy Registrar of Motor Vehicles

DATES OF HEARING: October 11, 2006
November 6, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

On June 7, 2006 the Deputy Registrar of Motor Vehicles, acting under s17 of the *Highway Traffic Act* R.S.O. 1990, C. H.8 (the "Act"), refused to issue a Commercial Vehicle Operator's Registration Certificate (CVOR) to 1649313 Ontario Inc. (the "Applicant") because the Deputy Registrar was not satisfied that the Applicant would operate its commercial motor vehicles safely and in accordance with the Act, the regulations, and the other laws relating to highway safety based on:

- The Failed MTO Facility Audits of Propane Levac Propane Inc., CVOR 114-484-169, dated November 15, 2002, 1443635 Ontario Inc., CVOR 138-113-408 dated October 22, 2002, 698185 Ontario Inc., CVOR 095-537-857, dated December 18, 2002 and MacEwen Petroleum Inc., CVOR 017-506-851, dated October 3, 2002, operators directly or indirectly related to the applicant;

- The "Conditional" Safety Ratings issued to Propane Levac Propane Inc., 1443635 Ontario Inc., 698185 Ontario Inc. and MacEwen Petroleum Inc., operators directly of indirectly related to the applicant.

- The opinion that Jean Marc Levac and Allan MacEwen, Corporate Officers of Propane Levac Propane Inc. and Allan MacEwen, a Corporate Officer of MacEwen Petroleum Inc., 698185 Ontario Inc. and 1443635 Ontario Inc., directly or indirectly control or manage or will directly or indirectly control or manage the applicant.

The Deputy Registrar invited the Applicant to make written submissions to show cause why the refusal to issue the CVOR certificate should not be effected.

On June 13, 2006, George Tutecky-McDougall, the principal behind RHI Safety and Compliance (RHI), responded to this invitation on behalf of the Applicant and requested that the Applicant be granted a temporary CVOR certificate with a full audit to be conducted no later than October 2006.

The Deputy Registrar considered the Applicant's submissions and on June 22, 2006 refused to issue a CVOR certificate to the Applicant for those reasons previously stated.

EVIDENCE

Adele Di Paolo

Adele Di Paolo is a carrier safety administrator for the Ministry of Transportation (MTO) who is familiar with the CVOR process. Towards the commencement of her testimony she referred to the document entitled Ontario Courier Safety Policy and Commercial Vehicle Operator's Registration System Guidelines as it appears in the Respondent's Appeal Book (Exhibit 4, Tab 18).

The Guideline, which has been in effect since 1997, states that a "Carrier Safety Rating" is a public label issued by the Registrar of Motor Vehicles to operators of commercial

motor vehicles using Ontario roadways. Ratings are assigned to truck and bus operators (carriers) including operators based outside of Ontario. The ratings publicly identify the on and off road safety performances of commercial motor vehicle operators. There are five safety ratings, namely: excellent, satisfactory, satisfactory – unaudited, conditional and unsatisfactory.
Ms. Di Paolo stated that a conditional safety rating is a poor safety rating applicable to about 3% of the carriers registered in Ontario. Carriers holding an unsatisfactory safety rating are not permitted to operate on Ontario roads.

The facility audit is an important component of the Ministry's highway safety programme. This audit compliments the on-highway enforcement programme and provides the carrier with an educational opportunity to increase the awareness of its highway safety responsibilities. During a facility audit, Ministry personnel will examine carriers' records and documentation related to various National Safety Code components to create a profile, and the carriers' safety performance.

Carriers that need to improve their audit score may apply to the Ministry for a voluntary audit, but must wait six months from their last audit to do so. A score of less than 55% on either of the driver or vehicle component of the facility audit constitutes a failure. Facility audits will not be considered for an upgrade to a Satisfactory or Excellent safety rating, if the audit was completed more than 36 months ago. Carriers may also obtain a copy of a Ministry produced self-audit guide that may be of assistance in preparing for a Ministry enforced audit. The Ministry can discern if there has been an improvement in the carriers safety rating only if and when a Ministry improved audit is performed.

When an application for a CVOR certificate is made by a corporation, Ministry officers look at the corporate officers and discern if these officers are related to the officers of related corporations that have been issued CVOR certificates as described in subsection 17(4) of the Act. This is done to prevent multiple CVOR certificates being issued to related corporations.

The Guideline provides (at pages 181 and 182) that a carrier may be considered for a conditional safety rating if any of the following circumstances occur:

- If the carrier's on-road performance level exceeds 65% of its overall CVOR threshold.
- If the carrier does not achieve at least 55% in each of the driver and vehicle profiles of a facility audit.
- Upon the expiry of a suspension or plate seizure.
- If a person or company related to/affiliated with the carrier has an on-road performance level that exceeds 65% of its overall CVOR threshold or does not achieve at least 55% in each of the driver or vehicle profiles of a facility audit.

Ms. Di Paolo referred to the Applicant's CVOR application and noted that the Applicant proposed to carry bulk liquids including dangerous goods (compressed gases) while operating a fleet of 31 trucks. She referred to the reasons given by the Deputy Registrar for refusing the application for the CVOR certificate and particularly to the fact that Propane Levac Propane Inc. (Propane), 1443635 Ontario Inc. (1443635), 698185

Ontario Inc. (698185) and MacEwen Petroleum each have failed facility audits. Ms Di Paolo stated that the Deputy Registrar would rather see these corporations improve their safety ratings prior to the issuance of a new CVOR certificate to a related corporation. These corporations could have requested, but did not request, a facility audit. If the facility audits were successful, then there would be no concerns with respect to the issuance of a CVOR certificate to the Applicant.

Ms. Di Paolo referred to the CVOR Applications Review, the Carrier Entities Report, the Facility Audit Findings, the Commercial Vehicle Operations Summary, and the Commercial Vehicles Operators Record for the related corporations (as found in Exhibit 4) and which documentation reveals that:

Petrole Levac Petroleum Inc., (Petrole) has no CVOR vehicles and has an excellent safety rating; Propane, 698185, MacEwen Petroleum and 1443635 each have conditional safety ratings and failed facility audits dating back to 2002.

Company A is a corporation in which Mr. MacEwen is an officer. It had a satisfactory unaduited safety rating. It failed its facility audit conducted on August 27, 2006.

Messrs. Levac and MacEwen are officers of Petrole and Propane. Mr. Levac is not associated with the other related corporations. Mr. MacEwen is Secretary of 1443635, the President/Owner of MacEwen Petroleum, the Secretary of 698185 and the President of Company A.

The Facility Audit reports revealed that –

a) Propane achieved 41.87% compliance on the drivers' portion of the facility audit and a 58.1% compliance. The aggregate compliance rate was 50.1%. The Safety Programme and Compliance rate was 11.1%. No bonus points were awarded for Safety Program and Training. Propane, which formerly had a satisfactory unaudited rating, was given a conditional rating as a result of this audited report. The safety rating was changed in January 2003. The conditional rating was proposed in December 2002, and was not disputed.

   The conditional safety rating was based on the result of Propane's facility audit. The on road performance was satisfactory and there were nine on road inspections involving four out of service inspections. The out of service rate was 44.4%, which is higher than the standard out of service rate of 35.3%. This performance was of concern to the Deputy Registrar because the Applicant proposes to carry dangerous goods.

b) 1443635 received a drivers' compliance rate of 55.6%, a vehicle compliance rate of 37.8% for an aggregate audit compliance rate of 46.7%, and received no safety bonus points. The on road performance conditional a violation rate was 6.5%, which is good. There were five inspections yielding two out of service violations. The out of service (00S) rate was of concern to the Deputy

Registrar, not the accident and conviction rate. This Applicant hauls dangerous goods – bulk liquids.

c) 698185 received a 52.2% compliance rate (failed) based on a drivers' compliance rate of 22.2% and a vehicle compliance rate of 82.2%. This company received no bonus points for safety. The on road performance for the corporation presented no concerns to the Deputy Registrar.

d) MacEwen Petroleum Inc. received a 46.3% compliance rate (failed) based on a drivers' compliance rate of 36.2% and a vehicle compliance rate of 54.2%. Its Safety Programme and Compliance was 55.6%. The on road performance for this corporation presented no problems. The failed audit was of concern to the Deputy Registrar.

e) Company A achieved an audit compliance rate of 61.37% based on a drivers' compliance rate of 51.9% and a vehicle compliance rate of 66.9%. It received a 77.8% compliance rate under the Safety Programs and Training category. It was awarded bonus points. This corporation received a failed audit rating because the driver's compliance rate was less than 55%. This corporation is not one of the related corporations referred to by the Deputy Registrar in his decision to deny the Applicant a CVOR certificate.

f) Petrole passed its facility audit. This is a small corporation operating two trucks. It was not one of the four related corporations referred to by the Deputy Registrar.

In cross-examination, Ms Di Paolo was referred to that portion of the Proposal wherein the Deputy Registrar stated that he was of the opinion that Messrs. Levac and MacEwen "directly or indirectly" control or manage or will directly or indirectly control or manage the Applicant (emphasis added). She was then referred to sub-section 17(4) of the Act, which states that an applicant is related if 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. This subsection refers to the present and past tense.

Ms Di Paolo was asked what weight the Deputy Registrar gave to the phrase future conduct. She replied that there is an unwritten policy that a company related to a conditional CVOR carrier will not receive a new CVOR certificate. She then referred to sub-sections 17(2) and (3) of the Act which define the circumstances where the Registrar may refuse to issue the CVOR certificate. The Registrar also has to have regard to the Applicant's safety record, which is defined in sub-sections (5), (7), (8), (9), (11) and (12) of Regulation 414/97, which refer to the safety rate assigned to an operator and the results of the audits of the operator. She then stated that Propane has a violation rate of 20.2%, which is one of the important factors that the Deputy Registrar looks at in considering a CVOR application. She then referred to the various rates applicable to the related companies as herein before referred, and noted that there has

been no follow up since the audits were performed as well as the fact that the carriers transport dangerous goods.

Gerard Tutecky-McDougall

Gerard Tutecky-McDougall, a former police officer, is the principal behind the firm known as RHI Safety and Compliance (RHI), which provides safety, and compliance services for Propane and Petrole. Mr. Tutecky-McDougall commenced his involvement with Propane and Petrole in 2003 upon being referred to those corporations by Mr. MacEwen. The referral arose because Mr. Levac was concerned that Propane received a failed audit. Mr. Tutecky-McDougall deals with enforcement issues, documentation issues, monitors the drivers' vehicular conduct, and reviews and analyses the CVOR records quarterly, following which, he makes his recommendations. He also provides training courses to Propane's drivers who, upon completion of each course, receive certificates of participation. (Exhibit 3, Tab 4) Although he reports to Mr. Levac, Mr. Tutecky-McDougall has a working relationship with two of Mr. Levac's employees. He will continue providing his services to the Applicant Corporation. He provides safety/compliance consulting services for the MacEwen companies upon request. The MacEwen companies have their own in-house safety compliance officer. Mr. Tutecky-McDougall provided some services for Company A but was not intimately involved in its failed safety audit.

Mr. Tutecky-McDougall stated that he spoke to Mr. Levac about a voluntary audit on at least two occasions prior to the submission of the CVOR application. Mr. Levac knew that Petrole had a conditional safety rating but was satisfied that he was now doing the right things and following proper guidelines. He stated that there was no pressure put on Mr. Levac by Propane's insurers to do a new safety audit.

William Alan MacEwen

William Alan MacEwen has been in the business of marketing and distributing petroleum and agricultural products to consumers for over 30 years. Mr. MacEwen stated that he owns fifty percent of the shares in Petrole and Propane and that Mr. Levac owns the remaining shares in these two companies. Mr. MacEwen, who has known Mr. Levac for more than twenty years, is not involved in the management of these two corporations on a day-to-day basis. That task is reserved for Mr. Levac pursuant to the terms of a management agreement he entered into with Mr. Levac. Mr. MacEwen gets involved with the strategic and investment decisions relating to these two corporations. He would become more involved in the management of these companies in the case of Mr. Levac's incapacity. He is aware, in general terms, of the issues in this case. He took no part in the preparation of the within application. He is confident in Mr. Levac's ability to manage and feels there is no need for him to become more involved with these businesses. He confirmed Mr. Tutecky-McDougall's role in providing safety and compliance services for Propane and Petrole.

The Applicant Corporation was established so as to separate the transportation aspect

from the marketing and distribution aspects of propane and other products. The Applicant Corporation would send its trucks to Sarnia to obtain the propane for sale and distribution by Propane in Eastern Ontario.

Mr. MacEwen is the President and only shareholder of MacEwen Petroleum Inc., which buys and sells refined Petroleum products and which operates a fleet of 40 trucks in conjunction with Company A, an associated company. He is involved with these companies on a daily basis. He is aware that Company A has a failed facility audit, which arose, in part because two of the firm's broker drivers were cheating on the hours they drove without the company's knowledge. These drivers were disciplined for this conduct. Mr. MacEwen stated that his insurers are aware of his company's safety ratings. His companies take safety issues seriously and retain the assistance of persons to help assure compliance with safety matters. His drivers must pass a safety course before commencing employment with his companies.

Mr. MacEwen is also a 50% shareholder in 698185 and 1443634. The remaining shares in each of these companies are owned by others who are involved with the day-to-day operation of these businesses including safety and compliance issues. Mr. Levac has no involvement with MacEwen Petroleum or with the other companies with which Mr. MacEwen is involved.

In cross-examination, Mr. MacEwen stated that he is aware of the conditional safety ratings his companies have received and that he has taken measures to improve these ratings. He feels that his staff does a good job on safety and compliance issues but it is still not good enough. He admitted that there is a room for improvement and that his companies have not been audited since 2002.

Jean-Marc Levac

Jean-Marc Levac, who has extensive trucking experience, is the 50% shareholder of the Petrole and Propane and is responsible for their day-to-day operation. He confirmed that Mr. MacEwen is his "silent partner." Petrole, which operates two large trucks and one pick up truck, sells Petroleum products to homes and farms in eastern Ontario.

Propane is in the business of selling propane to commercial enterprises, farms and homes. It carries on business in Ontario and in Quebec. Propane operates 34 vehicles.

Mr. Levac is not involved with any other businesses. He stated that the Applicant Company was incorporated to separate the transportation from the marketing and other aspects of his businesses. He conceded that Propane's safety audit was "not good". As a result of this audit, he cancelled the contracts his firm had with broker drivers, bought the drivers' trucks and retained the services of RHI to help with safety and compliance matters.

Mr. Levac referred to the Applicant's Book of Documents (Exhibit 4) and to the numerous monthly statements Propane has received from RHI since 2003. Mr. Levac

stated that Mr. Tutecky-McDougall reviews the drivers' logbooks, corrects their errors and advises them of the proper procedures to follow. Mr. Tutecky-McDougall also gives courses of the transportation of dangerous goods and advises on changes in the law relating to safe driving. Propane has three employees that deal with safety and compliance issues. Mr. Levac is in regular contact with Mr. Tutecky-McDougall. A local garage services Propane's trucks. Mr. Tutecky-McDougall reviews the garage bills and is thus able to discern the nature of the work done on the trucks. He also checks on issues relating to mileage and time spent driving.

Petrole and Propane have a policies and procedures manual, which all employees are given. Each employee must acknowledge in writing that he/she understands and agrees to abide by the rules, failing which, sanctions, including dismissal may sometimes be imposed. Safety Training classes are conducted by staff bi-yearly and certificates are presented to the attendees. These companies also provide their drivers with safety and compliance material provided by the Ministry of Transport.

Mr. Levac stated that the high out-of-service rating that Propane received was attributed to air value problems with a trailer's brakes, which caused Ministry officials to take the truck off the road on three occasions. This problem has now been fixed.

RHI will provide safety and compliance services to the Applicant Corporation if it gets its CVOR certificate. Mr. MacEwen will remain a "silent partner".

In cross-examination, Mr. Levac stated that George Tutecky-McDougall never suggested to him that Propane request a new audit. He did not know of the six-month waiting period before requesting a new audit. Propane's insurance rate did go up because Propane received a conditional safety rating. The Applicant will operate the trucks now owned by Propane. He only became aware Propane's conditional safety rating in 2006.

THE LAW

The relevant provision of the *Highway Traffic Act* provide as follows:

> 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.

(5) The Registrar may issue a CVOR certificate subject to any terms and conditions set out in the regulations that the Registrar considers appropriate.

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.

The provisions of Ontario Regulation 424/97, as amended, relevant to this appeal read as follows:

5. (1) The safety record of an operator shall contain a record of the following information:

1. Any suspension or cancellation of the plate portion of the permit under clause 47 (1) (a) of the Act.
2. Any suspension or cancellation of the operator's CVOR certificate under clause 47 (1) (c) of the Act.
3. Any restriction imposed under subsection 47 (2) of the Act on the number of commercial motor vehicles that may be operated by the operator.
4. Any order under subsections 47 (8.1) or (10) of the Act for the seizure of the plate portion of permits, permits or number plates.
5. Any notice sent to the operator under section 47.1 of the Act.
6. Any warning letters sent by, or interviews held with, Ministry officials relating to the operator's safety performance and practices.
7. Any conviction related to the operation of a commercial motor vehicle or a vehicle drawn by it, for an offence committed by an operator, its agents or employees,

i. under this Act or under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them, or

ii. for an offence under a municipal by-law regulating traffic on the highways, or orders made under any of them, except convictions for offences for standing or parking.

8. The particulars of any accident involving a commercial motor vehicle operated by the operator or a vehicle drawn by it.

9. The results of any inspection under section 82 or 82.1 of the Act or any similar inspection of a commercial motor vehicle operated by the operator, or a vehicle drawn by it.

10. The results of any investigation or inspection of the records of the operator,

i. under the Act, the *Compulsory Automobile Insurance Act*, the *Dangerous Goods Transportation Act*, the *Public Vehicles Act*, the *Truck Transportation Act*, the *Fuel Tax Act*, the *Trades Qualifications and Apprenticeship Act*, the *Motor Vehicle Transport Act* (Canada), or

ii. under any other Act of the Legislature or the Parliament of Canada or any regulation or order made under any of them if, in the Registrar's opinion, the results of the investigation or inspection contain information described in paragraphs 14, 15 or 16, or relate to the safe operation of its commercial motor vehicles or vehicles drawn by them.

11. Any safety rating that has been assigned to the operator.

12. The results of any audits of the operator.

13. Any record from another jurisdiction in respect of the operator that is comparable to that described in any of paragraphs 1 to 12.

14. The operator's fleet size.

15. The total number of kilometres travelled in the previous 12 months by all the commercial motor vehicles operated by the operator in Ontario.

16. The total kilometres travelled in Ontario in the previous 12 months by all the commercial motor vehicles operated by the operator.

17. Any compilations or analyses of any of the information in paragraphs 1 to 16. O. Reg. 197/99, s. 4.

(2) The following do not form part of a safety record:

1. A record that is not in the possession of the Registrar.

2. A record originating outside of Ontario that, in the Registrar's opinion, is unreasonably difficult to refer to (because of its form or medium of storage, or for any other reason).

3. A record described in paragraphs 1 to 7 of subsection (1) if, in the Registrar's opinion, the record does not relate to the safe operation of the operator's commercial motor vehicles, or vehicles drawn by them. O. Reg. 197/99, s. 4.

10. (1) The Registrar shall assign to an operator one of the following safety ratings, as determined in this Part:

1. Excellent.

2. Satisfactory.

3. Satisfactory Unaudited.

4. Conditional.

5. Unsatisfactory. O. Reg. 197/99, s. 5.

(2) A safety rating set out in a paragraph of subsection (1) is a higher rating than a rating set out in a later paragraph. O. Reg. 197/99, s. 5.

14. (1) The Registrar may assign a Conditional rating to an operator where, in the Registrar's opinion, the operator's safety record shows that the operator's performance and practices are less than satisfactory with respect to the safe operation of its commercial motor vehicles and vehicles drawn by them. O. Reg. 197/99, s. 5.

(2) The Registrar shall assign a Conditional rating to an operator when nothing described in paragraph 1, 2 or 3 of subsection 15 (1) which resulted in an Unsatisfactory rating under subsection 15 (1), is any longer in effect. O. Reg. 197/99, s. 5.

(3) The Registrar shall not assign to an operator a higher rating sooner than six months after the Registrar assigns to the operator a Conditional rating. O. Reg. 197/99, s. 5.

15. (5) If the Registrar assigns a Conditional rating to an operator immediately after assigning the operator an Unsatisfactory rating under this section, the Registrar may, despite subsection 14 (3), assign a new rating to replace the Conditional rating at any time that the Registrar considers appropriate. O. Reg. 640/05, s. 2.

16. (1) In assigning a safety rating, the Registrar shall have regard to the operator's safety record. O. Reg. 197/99, s. 5.

(2) In assigning a safety rating, the Registrar,

(a) may have regard to the safety record of a person related to the operator;

(b) need not consider audit results from an audit completed less than six months after the date on which a previous audit was completed; and

(c) need not consider audit results where he or she is of the view that the records audited do not adequately reflect the operator's safety performance and practices in Ontario. O. Reg. 197/99, s. 5.

(3) Subsection 17 (4) of the Act applies, with necessary modifications, for the purpose of determining who are related persons under clause (2) (a). O. Reg. 197/99, s. 5.

ANALYSIS

The hearing before the Tribunal, brought under section 50 of the Act, is a hearing *de novo.* The Tribunal owes the Deputy Registrar no deference. It determines the action to be taken and directs the Deputy Registrar accordingly. *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales* 2003 CanLII 11437 (Ontario Superior Court Divisional Court).

There is no dispute that Messrs. Levac and MacEwen are the Corporate Officers of Propane and the Applicant Corporation. Mr. MacEwen is also a Corporate Officer of MacEwen Petroleum, 698185 and 1443635. The Applicant is therefore a related corporation under section 17(4) of the Act. It is also undisputed that Propane, MacEwen Petroleum, 698185 and 1443635 each received failed facility audits during the last quarter of 2002 and that each of these corporations retains a conditional safety rating to date.

Messrs. Levac and MacEwen directly or indirectly control or manage Propane. Mr. Levac is responsible for the day-to-day management of Propane under the terms of a management agreement that he has with Mr. MacEwen. Mr. MacEwen's involvement with Propane is less direct. He is involved in the strategic and investment decisions.

The Tribunal finds that the Applicant Corporation was incorporated in good faith and for a genuine business purpose, namely, to separate the distribution and marketing and other functions of Propane. The Applicant will carry out the distribution aspect of the business. It will transport dangerous goods; namely, bulk liquids. It will operate what until now has been Propane's fleet of trucks. These trucks will travel an estimated 1178400 kilometers, ninety percent of which will be in Ontario.

The Deputy Registrar, acting pursuant to an unwritten guideline, has refused to issue the Applicant a CVOR certificate because the related corporations have conditional safety ratings and because they have done nothing to improve their conditional safety ratings for the past four years.

Counsel for the Applicant takes issue with the fact that the proposal to refuse to issue a CVOR certificate to the Applicant refers to the fact that Messrs. Levac and MacEwen, "directly or indirectly control or manage or will directly control or manage the Applicant" (emphasis added). It is submitted that the reference to the future conduct, apparent from the phrase "will directly control or manage", is not authorized under paragraph 17(4)(c) of the Act. The Tribunal does not accept this submission. The word "or" as found in the quoted phrase is ordinarily given a disjunctive meaning. Messrs. Levac and MacEwen control or manage the Applicant at the present time. Until such change occurs in the future, they will continue to control or manage the Applicant. It is the commonality of the corporate officers that forms the basis for the finding of related corporations under paragraph 174c of the Act. It is not disputed that the Applicant is a related corporation.

Counsel for the Applicant also submits that by relying upon an unwritten policy guideline that mandates the refusal to issue a CVOR certificate to a new company when related companies have conditional safety ratings, the Deputy Registrar erred in law by fettering his discretion. Counsel relied on the decision of the Honourable Mr. Justice MacKay of the Federal Court of Canada, Trial Division, (now, the Federal Court) in the case of *Griffin v. Canada (Agriculture Canada, Inspections Division)* (1989), 26 F.T.R.185. In that case, an Agriculture Canada inspector condemned 16 growing crops of seed

potatoes where one lot of seed potatoes was contaminated by bacterial ring rot. The inspector was acting under a policy guideline that stated that all crops of seed potatoes from all lots of a person's farm should be condemned when bacterial ring rot was found on only one lot.

His Lordship found that the policy guideline under which the inspector acted was inconsistent with the discretionary authority given the inspector under the regulations to the *Seeds Act* R.S.C. 1970, c S-7. The discretion was not exercised in this case or was fettered by reliance upon the policy guideline. The Applicant in that case was found to have been denied fairness for reasons not relevant to this matter.

In the case before the Tribunal, the Registrar, acting under subsection 17 (2) of the Act, has a discretion to refuse to issue a CVOR Certificate to an Applicant if the Registrar has reason to believe that having regard to the Applicant's safety record and any other information he considers relevant, the Applicant will not operate a commercial motor vehicle in accordance with the Act, the regulations or other laws relating to highway safety. In his proposal refusing to issue a CVOR certificate to the Applicant, the Deputy Registrar referred to the failed facility audits and the conditional safety rating of the related corporation which is a relevant consideration more particularly addressed in paragraphs 5(1) (6) (7) (8) (9) (11) and (12) of Ontario Regulation 424/97. The Deputy Registrar referred to matters authorized by law and accordingly did not fetter his discretion. The Tribunal finds that the within case is therefore distinguishable from the *Griffin* case.

It has been over four years since the related corporations received their failed facility audit and conditional safety ratings. Since that time, these corporations, acting through Messrs. Levac and MacEwen, have taken proactive steps to rectify the deficiencies inherent in the failed facility audits and conditional safety ratings. Broker drivers who did not conform to safe driving practices have been fired. The MacEwen companies have an in-house safety compliance officer. Propane has retained RHI to assist it in improving their safety and compliance issues. Their drivers take courses and are given written material on safety and compliance issues. Mr. Tuckety-McDougall is in contact with officials at Propane on a regular basis. He reviews matters relating to safety and compliance and makes recommendations. Messrs. Levac and MacEwen are aware of the importance of transporting dangerous goods in a safe manner. They appear to be successful businessmen with considerable experience in trucking dangerous goods. They have not treated safety and compliance issues in a cavalier manner. The Applicant Corporation was incorporated for valid business reasons. It was not created to circumvent safety and compliance issues. The Applicant will take over the transportation of dangerous goods from Propane. The Applicant will operate Propane's fleet of trucks. There is no change in the management of the Propane and the Applicant Corporations or in the matters relating to safety and compliance. This amounts to a distinction without a difference.

The Tribunal is prepared, in the circumstances of this case, to exercise the discretion afforded it under subsection 50 (2) of the Act in favor of the Applicant. The Tribunal accordingly directs the Deputy Registrar to issue a CVOR certificate to the Applicant.

LICENCE APPEAL TRIBUNAL

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

RELEASED: January 31, 2007
File Name: 3669.cvor.1649313.doc

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

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

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

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 hearing in the above matter to continue on December 11 & 12, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to recommence at the Verbatim Reporting Services, 123 March Street, Sault Ste. Marie, Ontario, at 10:00 a.m., on Wednesday and Thursday, the 17th and 18th days of January, 2007.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek, Chair

RELEASED: November 21, 2006

FILE NAME: 3399.national_transportation_et_al.cvor.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION

1552221 ONTARIO INC.

AN APPEAL BY 1552221 ONTARIO INC. UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT,* R.S.O. 1990, CHAPTER H.8, AS AMENDED, FROM A CANCELLATION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES UNDER SECTION 47(1) OF THAT ACT.

TRIBUNAL : LAURIE SANFORD, Vice-Chair

APPEARANCES: KULDIP GUPTA, Agent, for 1552221 Ontario Inc., the Applicant

MURRAY G. FORBES, Counsel, for the Registrar of Motor Vehicles, the Respondent

DATE OF MOTION: September 19, 2006 Toronto

DECISION AND ORDER

This is a motion for costs brought by the Respondent under Section 14 of the Licence Appeal Tribunal's (the "Tribunal") Rules of Practice, November 3, 2003 (the "Rules of Practice").

BACKGROUND

On March 28, 2006, the Deputy Registrar of Motor Vehicles issued a Cancellation and Seizure Order cancelling the Commercial Vehicle Operator's Registration certificate and ordering the number plates of the Applicant, 1552221 Ontario Inc., seized under section 47(1) of the *Highway Traffic Act,* 1990, as amended (the "Act").

On May 11, 2006, the Applicant appealed the Order to the Tribunal under section 50(1) of the Act. A pre-hearing in this matter was held on June 30, 2006 and the hearing was

set for September 19, 2006. On the day before the hearing, the Applicant withdrew its appeal. On that day, September 18, 2006, the Chief Administrative Officer and Registrar of the Tribunal faxed a letter to the agent for the Applicant, with a copy to the counsel for the Respondent, the body of which reads as follows:

> Thank you for your fax dated September 18th, 2006, notifying the Tribunal that your client is withdrawing its appeal in the above matter.
>
> Due to the above, this will confirm that we are cancelling the hearing scheduled for September 19th, 2006, and are closing our file in this matter, as of today's date.

On September 19, 2006 the Respondent brought this motion for costs. No sworn evidence was heard during the motion. On order of the Tribunal, both parties submitted further, written arguments.

DECISION

There are two issues in this motion: does the Tribunal have the jurisdiction to hear this motion; and, if so, does the motion succeed on its merits.

The Tribunal gains jurisdiction by virtue of the Applicant's appeal to the Tribunal under Section 50(1) of the Act. The question is whether anything has extinguished the Tribunal's jurisdiction. Generally, the Tribunal loses jurisdiction when it issues a final decision or order in a matter. The Respondent submitted that exceptions to this general rule exist when a decision is in error or when the rules of natural justice dictate that a decision must be reviewed. Counsel for the Respondent argued that these exceptions apply to this motion. This line of argument is premature. The more fundamental question is whether a final decision or order has been issued by the Tribunal. The only communication to the parties by the Tribunal that might arguably affect jurisdiction is the September 18th letter by the Chief Administrative Officer and Registrar of the Tribunal. This letter is not a decision or order of the Tribunal.

It is not a decision or order in form. The *Licence Appeal Tribunal Act*, 1999 (the "LAT Act"), read in conjunction with the *Statutory Powers Procedure Act*, R.S.O., Ch. S. 22 ("SPPA"), provides that only "members" of the Tribunal appointed by the Lieutenant Governor in Council have the "statutory power of decision" which is defined in the SPPA as:

> "statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not

Only persons with the statutory power of decision may issue decisions and orders that would function to end the jurisdiction of the Tribunal.

Likewise the September 18th letter is not a decision or order in the ordinary meaning of those words. The letter does not purport to determine the legal rights and privileges of the parties nor does it direct that action shall be taken or refrained from. The September 18th letter is a notice to the parties that the Chief Administrative Officer and Registrar intends to take certain administrative actions internal to the Tribunal; to wit, cancelling the hearing and closing the Tribunal's file. As such, it is an appropriate and proper use of the Chief Administrative Officer and Registrar's authority but it does not remove the jurisdiction of the Tribunal to hear this motion.

Does the withdrawal of the appeal by the Applicant extinguish the jurisdiction of the Tribunal to hear this motion? The Act, the LAT Act, the SPPA and the Rules of Practice are all silent as what rights the Applicant has to withdraw its appeal and what effect a withdrawal has on the jurisdiction of the Tribunal. By practice, the Tribunal takes the position that an Applicant under section 50(1) of the Act may withdraw its appeal at any time as of right. However, this right should not be construed as removing the jurisdiction of the Tribunal to hear a motion for costs, the grounds of which arise as a direct result of the withdrawal itself. Indeed, Section 14.1 of the Rules of Practice expressly stipulates the right of a party to request costs "prior to the release by the Tribunal of its final order in the proceedings", which as noted above, has not yet occurred in this matter.

In addition to the specifics of Section 14 of the Rules of Practice, there is the general provision of Section 23(1) of the SPPA, which reads, "A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

To permit a party to withdraw at any time without consequence would give rise to potential abuses of the process established under the Act for appeals. For example, an applicant might commence an appeal for reasons that are entirely vexatious, such as putting the respondent to the burden and expense of supporting its decision under the Act. The applicant could then withdraw during the hearing itself leaving the respondent no possibility of seeking costs. Section 23(1) of the SPPA operates to permit the Tribunal to conclude that a withdrawal by one party, which has not been consented to or accepted by the other party, cannot extinguish the right of that other party to seek costs if it does so prior to the issuance of a final order.

It is important to note that the Respondent has done nothing that would undermine its claim to be heard on this motion. The Respondent did not consent to the withdrawal or acquiesce in it and the motion was brought promptly.

For all of these reasons, the Tribunal does have jurisdiction to hear this motion.

Concerning the merits of the motion, Section 14.3 of the Rules of Practice reads:

> Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.

There is no suggestion that the appeal itself is unreasonable, frivolous, vexatious or in bad faith. The question is whether the withdrawal, and its timing, constituted unreasonable conduct justifying the award of costs.

Mr. Forbes, counsel for the Respondent, stated that he learned of the withdrawal at the end of the day before the hearing was scheduled. He was out of town at the time preparing witnesses for the hearing. One of those witnesses had already left for Toronto. There is no question that Mr. Forbes, his witnesses and his client were put to considerable trouble and expense as a result of the timing of the withdrawal.

Mr. Gupta, agent for the Applicant, asserted that he and his principal believed that they had withdrawn the appeal during the pre-hearing in June. Mr. Forbes was constrained in replying to this assertion by Section 9.6 of the Rules of Practice, which reads as follows:

> Unless the parties consent in writing, or are otherwise directed by the Tribunal, or ordered by the Tribunal, all discussions and statements made at a pre-hearing conference are confidential and without prejudice and shall not be communicated to the panel of the Tribunal that presides at the hearing in the proceedings.

However, the pre-hearing Order makes it clear that the Applicant was considering whether or not to proceed and that a decision to withdraw the appeal had either not been made or had not been unequivocally communicated to the Tribunal and the Respondent at the pre-hearing. When questioned about why he had not clarified matters when he received the pre-hearing Order, Mr. Gupta stated that he had not received the Order. Communications in this matter were being sent by fax, Mr. Gupta said, and his fax was old and unreliable. If his principal had received a copy of the Order, he had not sent it to Mr. Gupta. Mr. Gupta's principal, the owner of the Applicant, is a man of limited education and poor English who might not have understood the import of the Order. Thinking the matter concluded, Mr. Gupta was surprised on September 18 when a member of the Tribunal staff contacted him to "remind" him that a hearing in this matter was set for the following day. Mr. Gupta immediately faxed a letter to the Tribunal formally withdrawing the appeal.

The Tribunal accepts Mr. Gupta's account of events. While the Tribunal sympathizes with the Respondent for the trouble and expense that has arisen as a result of this misunderstanding, the Applicant cannot be said, on the facts available to the Tribunal, to have acted unreasonably in this matter.

ORDER

Accordingly, this Tribunal orders that this motion for costs is dismissed. The Tribunal further specifies that the application is withdrawn and that these proceedings are concluded.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford
Vice-Chair

Released: November 7, 2006

File name: 3569.cvor.1552221 Ontario Inc.

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

S.P.G. HAULAGE INC.

IN THE MATTER OF an application by the Applicant dated August 8, 2006, for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated July 26, 2006.

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: T. EDMOND CHAN, Counsel for the Applicant

MURRARY FORBES, Counsel for the Registrar

DATE OF PRE-HEARING: October 5, 2006 Toronto

ORDER

WHEREAS a pre-hearing between the Parties was held on October 5, 2006, in Toronto at the Ontario Rental Housing Chambers, 79 St. Clair Avenue East, 2nd Floor, Toronto, Ontario as set forth in the Tribunal's Notice of Pre-hearing conference dated August 29, 2006;

The Tribunal Orders:

1. The Parties at the hearing will be the Applicant and the Respondent.

2. There was no agreement between the parties regarding the issues outlined in the Seize and Suspend letter from the Registrar dated July 26, 2006

3. The Parties were advised that in the event the matter is settled prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Party that the matter has been settled and a hearing in the matter will not be required.

4. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal by no later than 10 days prior to the hearing.

5. By no later than 10 business days prior to November 24, 2006, the Parties shall advise the other of the full names of witnesses they propose to call to testify at the hearing and such advise shall also contain a brief synopsis of the proposed testimony of such witnesses. The Applicant intends to call up to two witnesses including one expert witness; the Respondent intends to call up to two witnesses including one expert witness.

6. The Applicant will submit his expert report to the Respondent by no later than October 25, 2006 and the Respondent shall submit his expert report to the Applicant by no later than November 14, 2006.

7. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Friday, November 24, 2006 and if necessary, will continue on Friday December 8, 2006.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: October 16, 2006

File Name: 3731.cvor.SPG Haulage Inc.Prehrg.order

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

S.P.G. HAULAGE INC.

IN THE MATTER OF an application by the Applicant dated August 8, 2006, for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated July 26, 2006.

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: T. EDMOND CHAN, Counsel for the Applicant

MURRARY FORBES, Counsel for the Registrar

DATE OF PRE-HEARING: October 5, 2006 Toronto

ORDER

WHEREAS a pre-hearing between the Parties was held on October 5, 2006, in Toronto at the Ontario Rental Housing Chambers, 79 St. Clair Avenue East, 2nd Floor, Toronto, Ontario as set forth in the Tribunal's Notice of Pre-hearing conference dated August 29, 2006;

The Tribunal Orders:

1. The Parties at the hearing will be the Applicant and the Respondent.

2. There was no agreement between the parties regarding the issues outlined in the Seize and Suspend letter from the Registrar dated July 26, 2006

3. The Parties were advised that in the event the matter is settled prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Party that the matter has been settled and a hearing in the matter will not be required.

4. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal by no later than 10 days prior to the hearing.

5. By no later than 10 business days prior to November 24, 2006, the Parties shall advise the other of the full names of witnesses they propose to call to testify at the hearing and such advise shall also contain a brief synopsis of the proposed testimony of such witnesses. The Applicant intends to call up to two witnesses including one expert witness; the Respondent intends to call up to two witnesses including one expert witness.

6. The Applicant will submit his expert report to the Respondent by no later than October 25, 2006 and the Respondent shall submit his expert report to the Applicant by no later than November 14, 2006.

7. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Friday, November 24, 2006 and if necessary, will continue on Friday December 8, 2006.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: October 13, 2006

File Name: 3731.cvor.SPG Haulage Inc.Prehrg.order

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

2080797 ONTARIO INC. O/A ALL KIND TOWING

IN THE MATTER OF an application by the Applicant dated August 2, 2006, for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated June 12, 2006.

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: HARPREET SINGH SEKHON, Applicant, representing himself

MURRARY FORBES, Counsel for the Registrar

DATE OF PRE-HEARING: October 2, 2006 Toronto

ORDER

WHEREAS a pre-hearing between the Parties held on October 2, 2006, in Toronto at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing conference dated August 17, 2006;

The Tribunal Orders:

1. The Parties at the hearing will be the Applicant and the Respondent.

2. There was agreement between the parties that the Applicant and the wife of the owner of A.K. Towing had jointly purchased a tow truck. The Applicant has since bought out her share and is now the sole owner of the tow truck.

3. The issues at the hearing are the suitability of the Applicant to be registered as well as the company safety record and the non-payment of fines.

4. The Parties were advised that in the event the matter is settled prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Party that the matter has been settled and a hearing in the matter will

not be required.

5. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal.

6. By no later than 10 business days prior to November 10, 2006, the Parties shall advise the other of the full names of witnesses they propose to call to testify at the hearing and such advise shall also contain a brief synopsis of the proposed testimony of such witnesses. The Applicant intends to call up to two witnesses; the Respondent intends to call one witness.

7. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Friday, November 10, 2006.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: October 4, 2006
File Name: 3723.cvor.all kind towing.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1687563 ONTARIO INC.

IN THE MATTER OF AN APPEAL BY 1687563 ONTARIO INC. TO THE LICENCE APPEAL TRIBUNAL UNDER SECTION 50(1) OF THE HIGHWAY TRAFFIC ACT FROM:

1) AN ORDER OF SUSPENSION AND SEIZURE BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED JULY 28, 2006 ISSUED TO JHUTY BROTHER TRANSPORTATIONS INC., J.B. BROTHERS TRANSPORTATION INC. AND 1687563 ONTARIO INC. SUSPENDING THE PLATE PORTIONS OF PERMITS OF 1687563 ONTARIO INC., AND

2) AN ORDER BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED AUGUST 14, 2006, REFUSING TO ISSUE A CVOR CERTIFICATE TO 1687563 ONTARIO INC.

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JAMES LEE, Agent, representing 1687563 Ontario Inc.

MURRAY G. FORBES, Counsel, representing the Ministry of Ministry of Transportation

DATE OF PRE-HEARING: September 28, 2006 Toronto

ORDER

During the Pre-hearing of this matter, there was no settlement of the issues between the parties. However, certain procedural matters were agreed to.

Accordingly, the Tribunal orders that:

1. By October 23, 2006, Mr. Lee, on behalf of his client, will provide Mr. Forbes and the Tribunal with a letter setting out in detail the basis on which his client appeals the decisions of the Deputy Registrar of Motor Vehicles.

2. By December 1, 2006, each side shall disclose all documents which it intends to introduce in the Hearing of this matter to the other side and to the Tribunal.

3. The Hearing in this matter will commence at 9:30 a.m. on December 18, 2006 at the Tribunal's offices and will continue, if necessary, on December 19th, and on the 20th from 9:30 a.m. to 11:30 a.m.

4. If the Applicant chooses at any time to withdraw or abandon its appeal, Mr. Lee shall notify the Tribunal and Counsel for The Ministry of Transportation as soon as practicable.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

RELEASED: October 5, 2006

FILE NAME: 3735.cvor.1687563 Ontario Inc.Prehrg.order

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

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

3731-CVOR-S.P.G. HAULAGE INC.-ADJ-Adjournment

IN THE MATTER OF the COMMERCIAL VEHICLE OPERATOR'S REGISTRATION of
S.P.G. HAULAGE INC.

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 26, 2006,

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

S.P.G HAULAGE INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place to continue the hearing in the above matter on November 3, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Ontario Rental Housing Tribunal, 79 St. Clair Avenue East, Suite 212, Room B, Toronto, Ontario, at 9:30 a.m., on Friday, November 24, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek
Chair

RELEASED: September 28, 2006

FILE NAME: 3731.cvor.S.P.G. Haulage Inc.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

2056126 ONTARIO INC.

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED FROM A REFUSAL, PURSUANT TO SECTION 17(3), IN RELATION TO A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION (CVOR)

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: IQBAL SINGH LALLY, Agent, appearing on behalf of the Applicant, 2056126 Ontario Inc.

PATRICK MOORE, Counsel, appearing on behalf of the Registrar of Motor Vehicles

DATE OF HEARING: August 29, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal under section 50 (1) of the *Highway Traffic Act* (the "Act") by the Applicant from a refusal of the Registrar of Motor Vehicles dated May 2, 2006 refusing to grant the Applicant a Commercial Vehicle Operator's Registration ("CVOR"). Since the Applicant has not held a CVOR before, the grounds for the refusal are based solely on the fact that the officers and directors of the Applicant are or have been officers and/or directors of New Bhandal Transport Inc., a CVOR holder with a conditional safety record. The Registrar is currently considering sanctions against New Bhandal Transport Inc. and is concerned that to permit the grant of a CVOR to the Applicant will act as a means to circumvent any sanctions imposed on New Bhandal Transport Inc.

THE EVIDENCE:

The Tribunal heard evidence from Adele DiPaolo on behalf of the Registrar.

The Registrar filed one exhibit, entitled the Respondent's Appeal Book and entered as Exhibit #3 subject to identification of the documents contained in its nine tabs. The Applicant filed no exhibits and put forward no evidence.

Testimony of Adele DiPaolo

Ms. DiPaolo is a CVOR Analyst in the Carrier Safety Investigation Office. She has been in her current position for four years and has been with the Ministry of Transportation for ten years. In her current position Ms. DiPaolo prepares files to be forwarded to the CVOR Program Manager for consideration of the need for sanctions. The Program Manager may then forward the file to the Deputy Registrar.

Ms. DiPaolo testified that the file with respect to this Applicant was first handled by her colleague, Lynn Poste. Ms. Poste has moved to another position so Ms. DiPaolo took over the file and prepared the analysis that was forwarded to the Program Manager. She indicated that she had had extensive discussions about the file with Ms. Poste and was personally aware of all elements in the file.

Ms. DiPaolo reviewed the "*Ontario Safety Rating and Commercial Vehicle Operator's Registration System*" found at Tab 9 of Exhibit #3 and the related CVOR safety threshold system. She stated that the carrier safety rating is a public label issued to CVOR holders that allows shippers and insurance companies to know the safety record of carriers with whom they deal. Safety ratings are the basis upon which sanctions are considered and imposed by the Registrar.

According to Ms. DiPaolo, there is a system in place to automatically track the on road performance of an operator. It tracks accidents, on road safety inspections and convictions for traffic violations. It then assigns points for each infraction. Points are calculated against a safety threshold based on the fleet size of the operator and kilometres driven in Ontario. The safety rating is expressed as a percentage of the safety threshold. The system will generate reports at certain points levels as follows:

- 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 and consider further sanctions and assign a conditional safety rating to the operator and to all companies related to the operator.
- Once the points level exceeds 100% of the safety threshold, the Registrar will seek to levy sanctions.

Carriers are given an overall safety rating depending on their CVOR records. An "Excellent" rating indicates a score of over 80%[1] in a facilities audit, a violation rate under 65% and an accident rate under 10%.

[1] This use of 80% should not be confused with the penalty rating of 80% of threshold. It indicates that the audit showed a pass mark of 80% compliance on audited items.

Ratings then descend through “Satisfactory”, “Satisfactory – Un-audited”, “Conditional” indicating a failed audit and “Unsatisfactory” indicating the CVOR is under suspension. She stated that of 105,341 CVOR holders licenced in Ontario, 3,920 (3.5%) have a “Conditional” safety rating.

Counsel directed Ms. DiPaolo to the provisions of section 17 (4) of the Act defining related companies. He asked if it was the Registrar’s policy to seek for the suspension of CVOR certificates of all related companies. Ms. DiPaolo answered in the affirmative. She stated that the purpose was to prevent circumvention of any suspension by removing the ability of a suspended CVOR holder to transfer its trucks to a related company and carry on business as usual.

Ms. DiPaolo reviewed the CVOR Application of the Applicant found at Tab 1 of Exhibit #3. At page 5 of Exhibit #3 she pointed out that Iqbal Singh Lally is shown as the president of the Applicant. He signed the Application and dated it July 31, 2005. The Certificate of Incorporation is found at page 8 and the Articles are at page 9 and 10. It is a requirement of the application process that a corporation include a Certificate of Incorporation and Articles. Ms. DiPaolo pointed out that the Articles as filed show Iqbal Singh Lally and Jagdev Singh as directors of the Applicant. Both Iqbal Singh Lally and Jagdev Singh were involved with New Bhandal Transport Inc., a carrier with a poor safety rating. Currently New Bhandal Transport Inc. has a safety rating of “Conditional” and has received a warning letter in lieu of a suspension based on its short period of operation and the fact that its record is greatly affected by a single four point accident. After the issuance of the warning letter the rating fell to 67.5%, still in the conditional range.[2]

Tab 3 of Exhibit #3 reviewed by Ms. DiPaolo details the dealings between the Ministry and the Applicant with respect to representations made in the Application. It was prepared by Ms. Poste using records of the Ministry. It indicates that Mr. Lally has changed his story as the Ministry has raised concerns about the involvement of Mr. Jagdev Singh in the Applicant. Initially the plan was for Mr. Lally and Mr. Singh to operate a truck. This information was not included in the Application so Mr. Lally was asked to update his application. He called back to say Mr. Singh would no longer be involved. This statement created a tension with the Articles of Incorporation showing Mr. Singh as a director. Mr. Lally was asked to provide updated information about officers and directors. He failed to update the Application.

The safety record of New Bhandal Transport Inc. is set out at Tab 4 of Exhibit #3. In her review of this document, Ms. DiPaolo pointed out that New Bhandal Transport Inc. had been granted a CVOR on May 13, 2005. By August 4, 2005 they had managed to achieve membership in that exclusive but undesirable club, the 3.5% of operators who have a conditional safety rating and have received a warning letter. New Bhandal Transport Inc.’s record indicates one at fault accident, three convictions and, that, of five on road inspections, three resulted in an out of service finding.

[2] Exhibit #3, Tab 3, page 13

By March 31 of this year the safety rating had improved from a low of 149.7% to 67.5%. Over the summer it deteriorated to 83.2% effective August 28, 2006. Details of the accident are found at Tab 5 of Exhibit #3.

Tab 6 shows that on March 13, 2006 a Change Notice was filed on behalf of the Applicant with the Companies Branch removing Mr. Jagdev Singh as a director. Why this information was not provided to the Ministry when it was requested is unknown. In any event, the impact of the change is that Iqbal Singh Lally is now the sole officer and director of the Applicant.

Ms. DiPaolo directed the Tribunal to the corporate profile report for New Bhandal Transport Inc. at Tab 7 of Exhibit #3. The report was generated on the 13th of July of this year. It clearly indicates Iqbal Singh Lally as an officer and director. He held the position of General Manager. The information in the report is current to the last filed document, the Annual Return filed on June 24, 2006.

Finally Ms. DiPaolo pointed out the fact that, notwithstanding that the Applicant received the Notice of Refusal to Issue a CVOR dated April 4, 2006 found at Tab 2 of Exhibit #3 and was given the opportunity to make submissions by April 27, 2006, no submissions were received. Accordingly the Registrar issued the Refusal dated May 2, 2006, which gave rights to this appeal.

The Applicant chose not to cross-examine Ms. DiPaolo and elected not to testify or call any witnesses.

In his closing submissions the Applicant stated that he was intending to operate his own truck under a new CVOR totally separate from New Bhandal Transport Inc. He is currently driving under the New Bhandal Transport Inc. CVOR. He blamed his accountant for the fact that his name is still associated with New Bhandal Transport Inc. as he stated he is no longer associated as a director or officer. When the Tribunal pointed out to Mr. Lally that his submissions were evidentiary in nature and invited him to take the stand and give evidence he declined.

FACTS FOUND PROVEN:

After a careful review of the evidence, the Tribunal finds the following facts have been proven:

1. The Applicant was incorporated on October 8, 2004;

2. At the time of incorporation the directors of the Applicant were Iqbal Singh Lally and Jagdev Singh;

3. New Bhandal Transport Inc. was incorporated on February 17, 2005;

4. At the time of incorporation of New Bhandal Transport Inc., Iqbal Singh Lally and Jagdev Singh were both officers and directors;

5. As of the date of the CVOR Application in July 2005, both Iqbal Singh Lally and Jagdev Singh were common directors of both corporations;

6. Jagdev Singh was removed as a director according to Companies Branch records in March 2006;

7. The Applicant failed to notify the Registrar of the removal of Jagdev Singh as a director of the Applicant;

8. New Bhandal Transport Inc. was granted a CVOR in May 2005;

9. By August 2005 New Bhandal Transport Inc. had reached a safety threshold of 149.7%;

10. New Bhandal Transport Inc. has a "Conditional" safety rating that after some improvement has deteriorated during the summer months of 2006;

11. As of the date of the hearing, Iqbal Singh Lally is still an officer and director of New Bhandal Transport Inc.; and

12. The Applicant and New Bhandal Transport Inc. are related companies.

ANALYSIS:

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 17 and 50 of the *Highway Traffic Act.* The Tribunal will set them out here for clarity.

> 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.

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.

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.

The evidence clearly indicates that the Applicant and New Bhandal Transport Inc. are related persons as that term is defined in section 17. (4) of the *Highway Traffic Act*. They share a common officer and director, Iqbal Singh Lally. It remains to be determined if the Tribunal should confirm, modify or set aside the Registrar's refusal. To confirm the Registrar's decision, the Tribunal must be satisfied that, on a balance of probabilities, the Applicant is related to a person who the Registrar has reasonable grounds to believe will not operate a commercial motor vehicle safely and in accordance with the Act and other legislation relating to highway safety.

On a thorough review of the evidence this Tribunal is satisfied that there is reason to believe, having regard to the safety record of the related company, that the Applicant is related to a company that 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 record of New Bhandal Transport Inc. during the short period of its existence is abysmal and showing a deteriorating trend. New Bhandal Transport Inc. has been given warnings and opportunities to improve but has indicated an inability to maintain a safe on road presence. In the absence of evidence from the Applicant the Tribunal is satisfied that Mr. Lally, in his capacity as General Manager, operated or is involved in the operation of New Bhandal Transport Inc. and is, thus, directly involved in the unsafe operation of a related company. This Tribunal confirms the Registrar's decision to refuse to grant a CVOR to the Applicant.

DECISION:

By virtue of the authority vested in it pursuant to the provisions of section 50 of the *Highway Traffic Act*, the Tribunal confirms the decision of the Deputy Registrar of Motor Vehicles dated the 2nd day of May 2006, to refuse the Commercial Vehicle Operator's Registration Certificate of 2056126 Ontario Inc.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude, Vice-Chair

RELEASED: September 18, 2006

FILE NAME: 3600.cvor.2056126 Ontario Inc.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1552221 ONTARIO INC.

In the matter of the appeal by 1552221 Ontario Inc. under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Cancellation and Seizure Order of the Deputy Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A CANCELLATION AND SEIZURE ORDER BY THE DEPUTY REGISTRAR OF MOTOR VEHICLES.

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: KULDIP GUPTA, Agent for the Applicant.

MURRAY G. FORBES, Counsel for the Respondent

DATE OF MOTION: September 19, 2006 Toronto

ORDER

On September 19, 2006, at Toronto, Ontario, a motion was brought by the Respondent for costs to be awarded under Section 14 of the Licence Appeal Tribunal's Rules of Practice, November 3, 2003.

In attendance at the motion were Murray G. Forbes for the Respondent and, by telephone, Kuldip Gupta, Agent for the Applicant. During the motion, the issue of the jurisdiction of the Tribunal to hear this matter was raised.

Accordingly, the Tribunal orders:

1. The Respondent shall provide written submissions on the question of the Tribunal's jurisdiction in this matter by September 29, 2006. These submissions will be provided to the Tribunal in the usual way and to the Applicant's Agent by email.

2. The Applicant shall provide his written reply, if any, by October 6, 2006, to the Respondent and the Tribunal.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford
Vice-Chair

RELEASED: September 19, 2006

FILE NAME: 3569.cvor.1552221 ontario inc.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1649313 ONTARIO LTD.

IN THE MATTER OF an application by 1649313 Ontario Inc. dated July 7, 2006, 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 Refusal to Issue an Operating Licence dated June 22, 2006;

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

AND IN THE MATTER of the Failed MTO Facility Audits of Propane Levac Propane Inc. CVOR 114-484-169, dated November 15, 2002, 1443635 Ontario Inc., CVOR 138-113-408 dated October 22, 2002, 698185 Ontario Inc. CVOR 095-537-857, dated December 18, 2002 and MacEwen Petroleum Inc, CVOR 017-506-851; dated October 3, 2002, operators directly or indirectly related to the applicant;

AND IN THE MATTER of the "Conditional" Safety Ratings issued to Propane Levac Propane Inc, 1443635 Ontario Inc, and MacEwen Petroleum Inc, operators directly of indirectly related to the Applicant.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: CAROLE McAFEE WALLACE representing 1649313 Ontario Ltd.

PATRICK S. MOORE, Counsel representing the Deputy Registrar of Motor Vehicles

DATE OF PRE-HEARING: September 5, 2006 Toronto

ORDER

Following attendances on September 5, 2006, at a pre-hearing before this Tribunal of Carole McAfee Wallace, Counsel appearing on behalf of 1649313 Ontario Ltd. (the "Applicant") and Patrick Moore, Counsel appearing on behalf of the Deputy Registrar of Motor Vehicles (the "Respondent");

The Tribunal makes the following order respecting the hearing to commence at 9:30 a.m. on October 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 Respondent.

2. Ms. McAfee Wallace noted that Mr. MacEwen is a silent partner and only involved in the day-to-day operations of MacEwen Petroleum Inc. In addition, the facility audits are from 2002 and there are no other safety record issues from that time. The CVOR records for all companies are currently considered to be in good standing.

   The issue in this matter, as stated by Ms. McAfee Wallace, is seen as having to do with the safety record of the companies and that there is more to such record than only the facility audits of 2002. She noted the conditional safety rating was a result of the 2002 failed facility audit.

3. Mr. Moore noted the issue is the safety rating and the conditional rating makes it a poor record.

4. While the parties concluded there was no resolution of the issue they agreed to retain contact in an effort to determine whether a resolution could be found prior to the hearing date.

5. Ms. McAfee Wallace indicated she might have 3 witnesses while Mr. Moore said he expected to have only one witness.

6. The parties were made aware of their obligations for full and timely disclosure under the Rules of Practice and both parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6.3 and Rule 6.4 of the Rules of Practice of the Tribunal. In the event a resolution is found prior to the scheduled hearing, all parties must be advised in writing of same and that the appeal is withdrawn

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: September 13, 2006
File Name: 3669.cvor.1649313.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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

THISTLETOWN MOTOR FREIGHT (2003) INC. – ADJ - Adjournment

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

THISTLETOWN MOTOR FREIGHT (2003) INC.

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 20, 2006

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

THISTLETOWN MOTOR FREIGHT (2003) INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on September 8, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday the 20th day of November, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek, Chair

RELEASED: September 7, 2006

FILE NAME: 3485.thistletown.cvor.adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1552221 ONTARIO INC.

IN THE MATTER OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED MARCH 28, 2006.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DEEP GUPTA, Agent appearing on behalf of 1552221 Ontario Inc.

MURRAY G. FORBES, Counsel representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended

DATE OF PRE-HEARING: June 30, 2006 Toronto

ORDER

Following attendances on June 30, 2006 at a pre-hearing before this Tribunal of Deep Gupta, Agent, appearing on behalf of 1552221 Ontario Inc. (the "Applicant") and Murray G. Forbes, Counsel, appearing on behalf of the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (the "Deputy Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on September 19, 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 Deputy Registrar;

2. The agent advised the Tribunal on behalf of Kulwinder Grewal who was present at the pre-hearing, that Kulwinder Grewal is the President and sole Director and shareholder of the Applicant.

3. The Tribunal advised the Applicant's agent that should the Applicant and/or Grewal require an interpreter at the hearing, the cost thereof shall be borne solely by the Applicant and the interpreter should neither be a friend nor relative of Grewal or associated with the Applicant.

4. The Tribunal was advised by the Applicant's agent that, in the event of this matter proceeding to hearing, the Applicant will probably retain counsel to represent it at the hearing. In such event, the Tribunal advised the agent and Grewal that it is their duty to inform the proposed counsel that she/he should not accept the mandate to represent the Applicant at the hearing unless she/he is available on the date of the hearing and shall have sufficient time to prepare the Applicant's case. The Tribunal shall not consider the convenience of the proposed counsel to be sufficient reason for an adjournment and "convenience of counsel" does not include a conflict with a previously scheduled court or tribunal hearing date.

5. The Applicant, if unrepresented or its counsel or agent if represented shall no later than 30 days prior to the date of hearing (September 19, 2006) advise counsel for the Deputy Registrar in writing of the precise details and nature of the Applicant's defence.

6. The Parties shall fully and in a timely manner comply with Rule 6 of the Tribunal's Rules of Practice regarding Disclosure.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: July 4, 2006

File Name: 3569.cvor.1552221 Ontario inc.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

Ontario

PREHEARING

LIONS MOTOR FREIGHT 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: DON GILLETT, Agent, appearing on behalf of LIONS MOTOR FREIGHT LTD.

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

DATE OF PREHEARING: JUNE 16, 2006 TORONTO

ORDER

Following attendances on June 16, 2006 at a pre-hearing at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, Don Gillett, Agent, appearing on behalf of the Applicant (the "Applicant) 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 6, 2006 and to continue if necessary at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The parties to the hearing are the Applicant and the Registrar.

2. The parties shall exchange all documents upon which they intend to rely and provide the Tribunal with copies of any such documents by July 5, 2006.

3. The parties will fully comply with the Rules of Practice of this Tribunal, and, in particular, will comply with the rules relating to disclosure of expert and other evidence.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude
Vice-Chair

RELEASED: June 20, 2006

FILE NAME: 3576.cvor.lions motor freight.prehrg.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

THISTLETOWN MOTOR FREIGHT (2003) INC.

IN THE MATTER OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED MARCH 20, 2006.

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: CAROLE MCAFEE WALLACE, Counsel representing Thistletown Motor Freight (2003) Inc.

MURRAY G. FORBES, Counsel representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended

DATE OF PRE-HEARING: May 15, 2006 Toronto

ORDER

Following attendances on May 15, 2006 at a pre-hearing before this Tribunal of Carole McAfee Wallace, Counsel, who appeared on behalf of Thistletown Motor Freight (2003) Inc. (the "Applicant") and Murray G. Forbes, Counsel, who appeared for the Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on June 28, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue, if necessary, on June 29, 2006 at 9:30 a.m., at the Tribunal's above chambers:

1. The parties to the hearing are the Applicant and the Registrar;

2. There was no resolution of the issues in this matter;

3. The Registrar shall disclose copies of all the documents to be utilized at the hearing to the Applicant and the Tribunal by no later than May 26, 2006;

4. The Applicant shall disclose copies of all documents to be utilized at the hearing to the Respondent and the Tribunal by no later than June 5, 2006;

5. The Parties to the hearing presently advised that their witnesses will be as follows:

    - for the Applicant: Robert Thompson and Peter Steuernol

    - for the Respondent: John Miller

6. The main issue for the Tribunal is whether the Suspension and Seizure Order issued by the Deputy Registrar on March 20, 2006, should be confirmed, modified or set aside pursuant to section 50(1) of the *Highway Traffic Act*.

LICENCE APPEAL TRIBUNAL

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Donald Benninger
Presiding Member

RELEASED: May 15, 2006

File Name: 3485.cvor.thistletown.pre-hrg.doc

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

THISTLETOWN MOTOR FREIGHT (2003) INC. – ADJ - Adjournment

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

THISTLETOWN MOTOR FREIGHT (2003) INC.

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 20, 2006

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

THISTLETOWN MOTOR FREIGHT (2003) INC.

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on June 16 and 19, 2006;

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 and Thursday, the 28th and 29th days of June, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek, Chair

RELEASED: April 19, 2006

FILE NAME: 3485.thistletown.cvor.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PREHEARING

NATIONAL TRANSPORTATION CARRIERS INC., ROBERT HIGGINS CONST CO LTD, 1138802 ONTARIO INC. AND NATIONAL SUPPLY CENTRE 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 of the Deputy Registrar dated January 27, 2006, pursuant to section 47(1), in relation to four Commercial Vehicle Operator Registrations

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: J. PAUL R. CASSAN, Counsel for the Applicants, by telephone

MURRAY FORBES, Counsel for the Respondent, in person

DATE OF PREHEARING: April 11, 2006 Toronto

ORDER

A pre-hearing between the Parties was held on April 11, 2006 in Toronto at 1 St. Clair Avenue West as set forth in the Tribunal's Notice of Pre-hearing dated February 21, 2006. Applicants' Counsel appeared by telephone; Counsel for the Registrar appeared in person.

The Tribunal makes the following Order:

1. The hearing shall take place in Sault Ste. Marie on August 24th and 25th, 2006 at a location to be determined.

2. Suspension of all four Applicants' CVOR Certificates remains in issue for the Tribunal.

3. The Applicants' operation record to 2004 is not disputed.

4. The main issue for the Tribunal is whether the Suspension and Seizure Order issued by the Deputy Registrar on January 27, 2006 should be confirmed, modified or set aside pursuant to Section 50(1) of the *Highway Traffic Act* considering evidence of the Applicants' more recent operations.

5. The Registrar will provide disclosure materials to the Applicants by May 8, 2006.

6. The Applicants will provide disclosure materials to the Registrar by July 5, 2006, including any expert evidence upon which they intend to rely at the hearing.

7. The Applicants intend to present six or seven witnesses and the Registrar, one or two.

LICENCE APPEAL TRIBUNAL

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Jane Weary,
Vice-Chair

RELEASED: April 13, 2006

File Name: 3399.cvor.National_et_al.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

M.J. JONES INC. AND 942225 ONTARIO LIMITED

IN THE MATTER OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED NOVEMBER 23, 2005.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SANJ SOOD, Counsel representing M.J. Jones Inc. and 942225 Ontario Limited

MURRAY G. FORBES, Counsel representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended

DATE OF PRE-HEARING: March 31, 2006 Toronto

CONSENT ORDER

Following attendances on March 31, 2006 at a pre-hearing before this Tribunal of Sanj Sood, Counsel, appearing on behalf of M.J. Jones Inc. and 942225 Ontario Limited (the "Applicants") and Murray G. Forbes, Counsel, appearing on behalf of the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (the "Deputy Registrar");

AND WHEREAS after the commencement of the pre-hearing, the Tribunal was advised by Counsel for the Applicants and Counsel for the Deputy Registrar that a resolution of the Appeal lodged with the Tribunal by the Applicants to the Suspension and Seizure Order dated November 23, 2005 issued by the Deputy Registrar, had been arrived at by consent of the parties;

AND WHEREAS the consent of the Applicants and the Deputy Registrar has been reduced to writing, signed by both Counsel and is hereto attached marked "Annexure A";

AND WHEREAS upon the application to the Tribunal at the pre-hearing by Counsel for the Applicants and Counsel for the Deputy Registrar, the Parties consent to the

Applicants' appeal being allowed and the Deputy Registrar's Order of Suspension and Seizure being modified in terms of "Annexure A" hereto attached;

AND WHEREAS the Tribunal has reviewed "Annexure A" hereto attached;

NOW THEREFORE, upon the consent of the Parties, the Tribunal orders that:

1. The Applicants' appeal to the Deputy Registrar's Order of Suspension and Seizure dated November 23, 2005 is hereby allowed;

2. The Deputy Registrar's aforesaid Order of Suspension and Seizure is modified in terms of "Annexure A" hereto.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: April 4, 2006

File Name: 3274.cvor.m.j. Jones.doc

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

“ANNEXURE A”

IN THE MATTER of the *Highway Traffic Act* R.S.O. S.0.1990, Chapter H-8 as amended (the "Act");

AND IN THE MATTER of the Commercial Vehicle Operator Registration ("CVOR") certificate number 108-457-488 issued to M.J. Jones Inc. and CVOR number 111-584384 issued to 942225 Ontario Limited;

AND IN THE MATTER of the plate portion of permits for all commercial motor vehicles and trailers registered in the name of M.J. JONES INC. and 942225 ONTARIO LIMITED (the "Appellants");

WHEREAS on October 5, 2005 a Notice of Cancellation and Seizure was issued proposing a cancellation of the CVOR certificate issued to the Appellants and seizure of the plate portion of permits for all commercial motor vehicles and trailers registered in the name of the Appellants;

AND WHEREAS on November 14, 2005 the Appellants had the opportunity to make submissions at a meeting with the Deputy Registrar to show cause why the Cancellation and Seizure Order should not be issued;

AND WHEREAS on November 23, 2005, pursuant to a Suspension and Seizure Order issued by the Deputy Registrar on behalf of the Registrar of Motor Vehicles pursuant to Section 47(1) of the Act ("the "Suspension Order"), the Deputy Registrar ordered that as of December 7, 2005, CVOR certificate number 108-457-488 issued to M.J. Jones Inc. and CVOR number 111-584-384 issued to 942225 Ontario Limited be suspended for 21 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized;

AND WHEREAS the Appellants appealed the Suspension Order;

AND WHEREAS the Appellants and the Registrar of Motor Vehicles consent to an Order modifying the Suspension Order.

IT IS THEREFORE ordered that the Appeal be allowed and the Order of Suspension and Seizure issued by the Registrar of Motor Vehicles be modified as follows:

1. Pursuant to Section 47 and 47.1 of the *Highway Traffic Act,* R.S.O. 1990, c. H.8 as Amended that as of April 28, 2006, CVOR certificates .# 108-457-488 and # 111-584-384 and plate portion of permits for all commercial motor vehicles and trailers issued to M.J. Jones Inc. and 942225 Ontario Limited be suspended for 10 days and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

   The Suspension and Seizure will be effective April 28, 2006 at 9:00 a.m. Eastern Standard Time to May 8, 2006 at 8:59 a.m. Eastern Standard Time.

31 March, 2006
Consent of the Registrar of Motor Vehicles: Murray Forbes, Counsel

31 March, 2006
Consent of M.J. Jones Inc. and 942225 Ontario Limited: per Counsel for the Appellant, Sanj Sood

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

THISTLETOWN MOTOR FREIGHT (2003) INC.

In the matter of the appeal of Thistletown Motor Freight (2003) Inc. under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

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

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: CAROL MCAFEE WALLACE, Counsel, representing Thistletown Motor Freight (2003) Inc.

MURRAY G. FORBES, Counsel, representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act,* R.S.O. 1990, c.H.8 as amended

DATES OF HEARING: June 28 and 29, 2006
November 20, 2006 Toronto

DECISION

BACKGROUND:

Thistletown Motor Freight (2003) Inc. (the "Applicant") appeals the decision of the Deputy Registrar of Motor Vehicles to issue a 7-day Suspension and Seizure Order of the Applicant's Commercial Vehicle Operator Registration ("CVOR") certificate pursuant to section 47 and 47(1) of the *Highway Traffic Act* (the "Act").

The CVOR certificate permits a commercial carrier to legally transport goods over Ontario's roads. One certificate covers a registered carrier's entire fleet. The Applicant is an Ontario-based trucking company which operates some 10-12 trucks, primarily over Ontario and northern U.S. state roads.

Initially the Deputy Registrar had issued the Applicant a Notice of a 30-day Suspension and Seizure Order on January 26, 2006. The Notice advised that it was based upon the safety record of the Applicant, including its violation rate, safety rating, accidents, convictions, inspections, warning letter of July 2004, and a failed Ministry of Transportation Facility audit of March 31, 2005. The Applicant was invited to attend at the Registrar's office on March 3, 2006, to show cause why the Order should not be issued. The Applicant did so. After considering the Applicant's submissions, on March 20, 2006, the Deputy Registrar issued a 7-day Suspension and Seizure Order to take effect April 10, 2006. The Applicant appeals the Order.

EVIDENCE:

John Miller

John Miller is a Carrier Safety Rating Administrator employed with the Ministry of Transportation since 1985. His employment duties include following-up on public complaints against carriers, interviewing carriers, and preparing files for the issuance of Orders against carriers. He is a National Safety Code Auditor and conducts facility audits for the Ministry.

Mr. Miller testified that the Applicant had automatically been flagged for his attention once it approached its threshold rating with the Ministry. Mr. Miller explained that in order to effectively regulate licensed operators, the Ministry establishes thresholds for safety records of each operator. This is based on a computer analysis derived from points assigned to a given carrier for each driver impropriety determined in a conviction, accident or mechanical inspection of that carrier, the latter derived from system audits as well as on-road inspections. Accidents only trigger the imposition of points where they are "reportable" in that they involve property damage over $1,000.00 and/or personal injury. The points are assigned based on the information included by the Police Officer in the Accident report generated and depend on notations of improper driver action and/or condition and/or vehicle condition.

Points in each category remain on the record for a floating two-year period. The average in each category, and the overall weighted average, are compared to those of all CVOR carriers in order to establish a "threshold" of 100%. As a carrier approaches this threshold, the Ministry will be alerted to take intervening actions such as a warning letter or a facility audit. When the threshold is exceeded, sanctions will normally be imposed which may range from a specified suspension period to the cancellation of the CVOR certificate.

Information concerning the computation of a fleet's threshold, and hence evaluation, are disclosed to carriers as well as the public in a document entitled *Ontario's Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline*, published by the Ministry of Transportation (Exhibit 3, Tab 17).

As well as sanctions, the Ministry is required to assign each carrier a Safety Rating. These range from Excellent to Unsatisfactory, the latter assigned to any Carrier under

sanction for the duration of the sanction period. On completion of the period, the carrier is assigned a Conditional rating, the second lowest available. Figures for 2004, the most recent available, demonstrate that out of 113,000 operators currently operating with a CVOR certificate, only 160 were assigned an Unsatisfactory rating.

Mr. Miller testified that the Applicant had first been provided a CVOR certificate in November, 2003. The "Carrier Record Review" maintained by the Ministry (Exhibit 3, Tab 9) illustrates its record since registration. This disclosed the following Ministry interventions since registration:

July 21, 2004: A warning letter signed by the Registrar is sent to the Applicant. Mr. Miller explained that this document is generated from the CVOR Inspection History Report for the year April 1, 2004 through March 31, 2005, which revealed numerous safety violations. The warning letter advises sanctions could be forthcoming if the Carrier does not institute procedures to reduce unsafe and non-compliant activities.

March 30, 2005: A facility audit is conducted in which the auditor gives the Applicant a finding of 56.7% - based on 38.9% for driver compliance rates; 67.6% for vehicle compliance, and 87.5% for safety programs and training. A review of the low level of compliance for drivers indicates numerous inaccuracies and omissions in driver's logs.

April 5, 2005: Carrier Safety Rating decreased from Satisfactory to Conditional.

August 3, 2005: A follow-up Audit triggered by driver John Thompson's involvement in a fatal accident in July. Auditor noted six false log entries out of thirteen canvassed for June, 2005 (Exhibit 3, Tab 11); however only two are actually explained by the Ministry auditor; a further seven false entries are found out of eleven days for July - although, again, only four incidents are described in detail by the auditor. The auditor notes that the false findings are based on inaccurate or insufficient log tracking by the driver.

January 25, 2006: The tragic fatal driving accident of July 28, 2005 in which John Thompson, driver, killed a mechanic working on the side of the road as a result of "inattentive" driving, followed by a second "inattentive driver", Richard Mitchell, who caused an accident in September, 2005 led to the Applicant's violation rate now exceeding the threshold by 44%.

January 26, 2006: Issuance by the Registrar of the Proposal to Suspend and issuance of Safety Rating downgrade to Unsatisfactory (Exhibit 3, Tabs 8 and 9).

Mr. Miller testified that he was present at the Show Cause Hearing requested by the Applicant in response to the Proposal and held at the Registrar's office on March 15, 2006. The Applicant was represented by its President, Mr. Robert Thompson, and

Counsel, Ms. McAfee Wallace. Mr. Miller acknowledged receipt by the Registrar of the Applicant's submissions presented at the meeting and reproduced in Exhibit 3, Tab 6.

At that interview, the Applicant advised that it had conducted its operations on an informal basis when it began operation given its relatively small size. It acknowledged that this was no longer effective to ensure safety and compliance with its regulatory obligations such that it had instituted more formal review procedures. The Applicant noted that it was largely the driver accident fatality involving John Thompson last July which had placed the overall violation rate over the threshold as without it, the rate would be reduced to 79.35%, and thus under the 100% threshold. The Applicant advised that the driver involved, the father of Robert Thompson, operates as a "spare" driver who will fill in when a driver requires time off. He is defending the charges. Moreover, as a result of the accident, the Applicant has changed its policies to now require written accident reports be completed anytime a driver is involved in an accident and further, that each such driver be required to complete a Defensive Driving Course. Both John Thompson and Richard Mitchell had completed such courses and Certificates attesting to such were produced.

The Applicant further advised that each of its drivers would be given an annual road test to ensure driver competence and would, further, be required to participate in some form of re-training should the result of the test indicate such was necessary.

The Applicant further acknowledged that the audits conducted by the Ministry had revealed concerns with the logbooks compiled by drivers. In order to improve and correct these findings, the Applicant had retained one Peter Steuernol, a retired Ministry of Transportation inspector who had previously provided occasional log audits for the carrier, to now conduct monthly random log inspections as of March 2006. The carrier also had hired an Operations Manager whose duties included daily monitoring of all logs for accuracy and completeness.

A written Discipline Policy has now been implemented and will be reviewed with all drivers prior to June 2006, to ensure that compliance with laws and company policies is reinforced.

The Applicant has also introduced a preventative maintenance program effective March, 2006, whereby all tractors are inspected every 30,000 kilometers and all trailers inspected every 60 days by an independent mechanic where the Applicant's own monthly inspection is not possible due to the trailer being outside the area. Each driver is to receive a monetary bonus for every "clean" CVOR.

An Action Plan outlining all of these initiatives with their implementation dates was provided to the Registrar.

Mr. Miller acknowledged that no one had disputed the adequacy of the Action Plan as presented at the Show Cause Hearing nor had anyone for the Ministry suggested any other steps which the Applicant would be advised to consider implementing. In fact, the witness acknowledged in cross-examination that he found no fault with the Action Plan presented by the Applicant.

Mr. Miller acknowledged that his discussions with the Registrar giving rise to the issuance of the Proposal did include his review of the pending charges against Mr. John Thompson with regard to the accident.

Mr. Miller was not able to advise why, after the Show Cause Hearing, the Registrar had still considered it necessary to issue a Suspension Order against the Applicant, albeit for a much shorter time period than originally was the case. He did, however, testify that he had never seen the Registrar issue a suspension for a period of less than seven days. The Registrar could have alternatively set aside the Suspension Order and opt instead to issue terms and conditions or a fleet limitation.

Mr. Miller acknowledged that the Order did not specify what still concerned the Registrar following the submission by the Applicant of the Action Plan, and its submission to the Registrar at the March Show Cause interview.

Motion for Non-Suit

At the completion of the Registrar's case, Counsel for the Applicant moved for a non-suit based on her submission that the Registrar had failed to establish sufficient grounds to reasonably issue his Order against the Applicant.

The Tribunal denied the motion. Sufficient evidence had been adduced to establish a prima facie case against the Applicant that its business organization and competence was insufficient to meet the clear standards of operation imposed by the legislation and enforced by the office of the Registrar prior to the Show Cause Hearing. After that Hearing, Mr. Miller's evidence included the Deputy Registrar's on-going concern that the Applicant's efforts to improve its operation appeared in the majority to have been instituted following the issuance of the original Order despite clear indications months prior of significant inadequacies. Such impacts the possible credibility and good faith of the Applicant. There was also the fact that Mr. Steuernol had been employed by the Applicant prior to the original Order and yet, notwithstanding the log problems then in effect, he was again relied upon by the Applicant to somehow ensure future compliance. The Hearing by this Tribunal is an opportunity to canvass these issues, hear sworn testimony, test credibility and assess facts in an open and independent forum. It is a hearing de novo whereby the Tribunal can assess the reasonableness of the Registrar's actions in all the circumstances. The Applicant was asked to present its evidence.

Robert Thompson

Mr. Thompson testified he had been born into the trucking business, his father having owned a large moving company. In 1994, he purchased his own truck and slowly familiarized himself with the business eventually buying Thistletown in 2003. His company commenced operation as a registered truck company in November of that year with 4 trucks and some 5 drivers. Within the first year, he basically doubled these numbers such that today he now has between 9 and 11 units, depending on the number of contract drivers, and 11 – 13 drivers, four of which are owner-operators. This rapid

growth has resulted in his operating in Ontario, Quebec and the northern US states with 99% of his units traveling within a 50-mile radius of the Canada/U.S. border.

At the commencement, Robert Thompson ran everything in the business himself, including dispatch, payroll, mechanical (he holds a mechanic licence) and marketing. He did however subcontract much of the safety and compliance matters to a third party, TransAudit tax, a consulting company which performs regular audits of all driver logs with a view to improving driver compliance (Exhibit 4, Tab 6). These monthly statements were then passed on to the Mr. Thompson, for review. It was Mr. Thompson's evidence that, following his review of the consultant's quarterly report, he would call individual drivers in for a discussion with a view to performance improvement whenever it was his opinion such was required.

On receipt of the Ministry warning letter in mid 2004, Robert Thompson stated he panicked and called up the Registrar's office. He spoke with a Ministry employee who advised the warning letter was a standard computer-generated letter sent to registrants who reached 35% of threshold. The individual further advised the Applicant that in his case due to the relative small size of his fleet and the rapid growth not accounted for in the Ministry's first annual figures, the one violation recorded caused his threshold to immediately reach the 100%. This should, he was assured, drop once more inspections of his operation took place. Mr. Thompson testified he had asked if there was any remedial action available for him at this point as he was desirous of ensuring his operation had a clean safety record, but was told that there was not. Nonetheless, Mr. Thompson provided all drivers with downloaded Ministry information concerning driver hour limitations as well as safety booklets.

As 2004 drew to a close, the business had grown to such a degree that Robert Thompson hired a full time office worker to assist with the office paperwork. He testified that he was busier as his fleet grew in size and delegated more and more work to this employee who he finally let go in March 2005 as it became increasingly clear he was not capable of proper performance. As a consequence, Robert Thompson had more work than usual such that, when he was advised by the Ministry that a Facility Audit would occur after Easter that year, he was concerned. As a result, he contacted both TransAudit and Mr. Steuernol to get advice as to how he best could prepare. Mr. Thompson testified, that despite these efforts, the company failed the Audit. He was extremely disappointed.

Following the audit Mr. Thompson hired a fulltime bookkeeper, still with the company, who is also an accountant. This allows him more time to supervise drivers and personnel. He also fired two of three drivers with poor compliance records. The third, Mr. Thoroval, was kept on despite numerous violations noted in his logs as he had expressed grave regrets and concern and was anxious to undertake further retraining in how to comply with logbook and time requirements. Losing two of ten drivers meant a 20% reduction in his productivity which, Mr. Thompson testified, was a good wake-up call for significant efforts to improve company operations. He instituted a new computer system in early April whereby he is able to pre-run trips and thereby calculate driver hours in advance. Finally, it was at this time that Mr. Thompson retained Mr. Steuernol

to review all safety/log records on a quarterly basis as another set of eyes to double check the compliance rates of his drivers and their record-keeping.

His father's accident that summer resulted in charges still pending against him and his father. The second accident in September involved a separate driver and consisted of damage to a Bell telephone line. After investigation by the insurance company, it was determined that Bell was at fault such that no insurance payout was made.

With his fleet again growing, Mr. Thompson hired an operations manager in January 2006, to assist with the day-to-day management of the business. This is an individual with over 20 years experience as a fleet operator-manager. At first, this individual was expected to also perform monthly internal log and maintenance audits, but this has proved too heavy of a workload, such that by the spring, Mr. Steuernol was asked to perform this task.

On receipt of the Order in late January, Mr. Thompson immediately called Mr. Miller to request a Show Cause Hearing. He then discussed the issues with his operations manager and Mr. Steuernol who together formulated the Action Plan. It was his belief the issue for the Registrar revolved around the log keeping and paperwork, both of which were exacerbated by the two accidents over the summer. His Action Plan thus focused on these elements of his operation. At no time in his dealings with the Registrar was he ever advised that his efforts to abide by the Ministry expectations, including the substance of his Action Plan, were in any way inadequate.

The Action Plan, as presented to the Registrar, was thoroughly presented in the Applicant's evidence. It demonstrated numerous company initiatives to ensure all drivers are checked out on their driving competence when first hired, annual testing thereafter and – in the event of any accident – further driver training. It reflects the change in reporting of any accident as well as discussing ramifications of such incidents with the driver involved. It also documented the Applicant's altered reporting requirements of the consulting company TransAudit, whereby more detailed and frequent reporting of driver log keeping and violations are made available to Mr. Thompson (Exhibit 4, Tab 6). As well, Mr. Steuernol's quarterly reviews of audited logs are further supplemented by his additional retention to provide random spot checks, the reports of which, beginning in March, 2006, were submitted to the Tribunal. When reviewed with the amended and clarified discipline policies of the business, these demonstrate improved effective supervision of driver operations. In April, the company acted on these procedures and suspended a driver for repeated compliance violations.

Since the Show Cause Hearing, Mr. Thompson has received monthly CVOR records for May and June 2006, which show only one violation in each case. Since the Ministry Audit in 2005, the Applicant has received a U.S. Department of Transport audit, which was successful with the Applicant scoring 98% compliance.

The Applicant stated that a seven-day suspension would seriously damage his operation to the extent that he might never recover. Mr. Thompson noted that there is a driver shortage in the industry such that his drivers' might well move on to a competitor; further, that his small operation is reliant on one major client who provides 75% of the

Applicant's business revenue. Three to five daily hauls are performed by the Applicant for this client alone. A seven-day hiatus would result in the client moving to a competitor.

In cross-examination Mr. Thompson testified that he had reviewed the TransAudit records for his father for July, 2005, where no violations in compliance were recorded. The Ministry Audit for that month and driver revealed seven false logs and this allegation is part of the court review taking place. Mr. Thompson stressed that the Ministry Audit findings are not acknowledged as accurate by him or his business, although he did admit that they are sufficient for the Ministry CVOR record under the legislation.

The witness further noted that a number of the drivers' inaccuracies in logs, found to be "false" by the Ministry, were in fact the result of drivers' lack of competence with "split screen" hour settings due to change-overs between Canada and the U.S.A. He stressed that all drivers were being retrained on this system commencing in 2005, and completed by June of this year. Others were in fact true inaccuracies as was the case where a driver's log might demonstrate it was off-road from 12:00 to 13:00, whereas bridge sticker illustrates was on road at 12:25. Such negligence was at issue and hence the efforts being made by the Applicant to ensure drivers realized the importance of being accurate in all records and their consequent training, re-training and discipline.

Peter Steuernol

Mr. Steuernol retired from the Ministry of Transportation in 2000. He had held numerous roles in the Ministry over his twenty-eight years of employment there, ranging from an area enforcement officer to a driver examiner to supervisor audit position in Scarborough for weight reviews enforcement. Since January 2001, he has run his own incorporated consultancy in trucking and bussing. He reviews documentation of such companies to ensure they are in compliance. He also provides legal, technical and training assistance to over 50 clients, 98% of which are trucking operations.

Mr. Steuernol was a convincing witness who gave clear, careful and consistent evidence. He corroborated the evidence of Mr. Thompson that he had first been contacted by the President of the Applicant in early 2005, that the business was about to receive a Ministry Audit and needed advice as to the procedure to expect. This was provided over the telephone. Mr. Steuernol also corroborated the evidence of Mr. Thompson as to his company's successful American Transportation audit.

In 2006, Mr. Steuernol's company was placed on a retainer to ensure the Applicant reached Ministry compliance. Part of these efforts included the creation of the Action Plan as presented to the Registrar in March of 2006. It was the witness' evidence that he had recommended the imposition of Driver Defensive training after any accident, more thorough driver training on log-keeping, and regular human review of records being maintained. One of the problems already noted was drivers' confusion concerning the differences in log requirements in American/Canadian jurisdiction resulting in one-on-one driver retraining on log compliance by Mr. Steuernol himself.

The witness testified that, since the Show Cause Hearing, he has followed up on the procedures outlined in the Action Plan. Except for the months of September and October of this year when he was kept busy with other clients' requirements, Mr. Steuernol has conducted audits and training monthly. He testified he has noted an improvement in CVOR compliance already although such won't be noted on the Record maintained by the Ministry for some time to come, as the points received remain in place for a two year period.

In cross-examination, Mr. Steuernol stated that his experience illustrated that many smaller operations do not know what is needed for a Facility Audit. In this operation, it was largely the father who had advised the son of trucking requirements, but this knowledge was based on his experience with larger moving company. Mr. Steuernol stated that all his instructions and reporting was to Mr. Robert Thompson and his experience with the Applicant was that the father, John Thompson, may offer advice but was primarily just an occasional driver.

THE LAW:

The *Highway Traffic Act*, R.S.O. 1990 c. H-8 as amended, provides in part:

> 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 valid CVOR certificate.
>
> 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).

> 47.1 (1) Before taking any action under clause 47 (1) (a) or (c) or subsection 47 (2), the Registrar shall notify the person whose plate portion of a permit or CVOR certificate is to be affected of his or her proposed action.
>
> 50. (1) Every person aggrieved by a decision of the Minister under subclause 32 (12) (b) (i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
>
> (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

Cases presented in submissions included:

Shine (2003), a decision of this Tribunal upheld by the Ontario Superior Court. Lane J. concluded that the Tribunal, in deciding whether to uphold the administrative decision of the Registrar, approaches the matter unencumbered by the Registrar's position to which it owes no deference: *"The Registrar is the investigator. The Registrar is not the trier of fact whose opinion is based upon a hearing and so entitled to deference."*

Transport Provost Inc. (1996), a decision of a Board precursor to this Tribunal, involved a similar question. The Board found that the evidence established continuing mechanical defects of the sort, which had led to the original Order of the Registrar and confirmed the Registrar's decision although modifying both the length of the term of the suspension as well as the amount of the fleet limitation imposed. In doing so, the Board found evidence of activity by the operation since the imposition of the Registrar's Order was germane. It stated in the decision that:

> The purpose of any sanction under s 47(2) is to improve, assist and encourage compliance under the HTA. The Board has already ruled in other cases that it cannot disregard or ignore evidence concerning a carrier's operations beyond the Order to evaluate the appropriateness of the extent of the sanction in a manner reminiscent of penal sentencing. In the Board's mind licence restrictions or any disciplinary sanctions under the HTA resemble such sentencing.

Hislop (2004) involved a similar fact situation to the one under consideration. Vice-Chair Power considered the efforts undertaken by the Applicant to improve its safety and compliance rates and chose not to uphold the Registrar's Order of a seven day suspension as he concluded such was "merely punitive" of past conduct and unlikely to improve public safety, found to be the aim of the legislation.

ANALYSIS:

The burden is on the Registrar to provide convincing evidence of the reasonableness of his Order. While the broad powers granted to him under s.47 of the Act include authority to suspend a carrier's licence, and thus its business, as noted by Counsel for the Registrar this is an enforcement measure made available to the Registrar whose overall mandate under s. 3 of the Act is to ensure Ontario roads are kept safe for public use.

Such significant action, impacting as it does on a registrant's ability to continue operation, is therefore not to be undertaken lightly.

The Registrar is of the position that this Carrier was not inexperienced, having been in the business for some years prior to commencing his own operation. As well, the evidence demonstrated that his father, with numerous years as an owner-operator, played a very active role in providing the Applicant advice and assistance. Nonetheless, within seven short months of operation a warning letter was issued to the Carrier. An audit, undertaken by the Ministry within the following year, was failed by the Registrant with the result that its licence standing was reduced from "satisfactory" to "conditional".

Despite such regulatory reaction, compliance efforts allegedly undertaken by the Applicant seemed limited to telephone consultation with Mr. Steuernol who was not actually retained until January, 2006, the time of the issuance of the initial suspension order. In the meantime of course, the horrific accident involving Mr. Thompson Sr. had taken place, the very occurrence which the legislative scheme seeks to avoid. The Registrar further submits that more recent attempts to improve the operation are not necessarily convincing. In this respect, the accident review allegedly now undertaken by the Applicant does not appear to differ in any substantial manner from what was allegedly in place prior; neither is the discipline policy defined with any clarity such that Mr. Thoroval with numerous log violations remains an employee while other drivers with less infractions on their record appear to have been fired.

The Tribunal does not agree. It finds the Applicant a credible witness who demonstrated valid and continuing efforts to comply with the Ministry requirements in order to ensure the continued success of his operation. The evidence established that, from the initial warning letter received in July of 2004, Mr. Thompson attempted to consult with Ministry officials to improve his operation. These early efforts were met by Registrar staff with the reassurance that downplayed the significance of the warning letter and discouraged Mr. Thompson from instituting any remedial action.

Until failing the Ministry audit the following year, evidence before the Tribunal illustrated that the major issue of non-compliance was improper recording/falsification of driver log records which the Applicant attempted to improve by initially hiring a book-keeper to allow him more time to supervise driver records. After failing audit, Mr. Thompson took more drastic action. He instituted a new computer system whereby he was able to double-check information recorded by drivers. He also hired Mr. Steuernol, clearly very experienced and competent, to review logs quarterly in an effort to better track drivers' records than had previously been the case with the prior practice of a simple monthly verification check by an outside consultant. Finally, the Registrant fired 20% of his workforce, being two out of three drivers, with consistently poor violation rates.

It was the Applicant's position that were it not for his father's accident in 2005, the company would not have ever surpassed Ministry threshold. Mr. Thompson noted that while the Ministry point value thereby allocated to his company was due to the alleged cause being driver inattentiveness, this has not been established to be the case as the matter is still pending before the courts. However, regardless of who bears the fault for

the accident, Mr. Thompson has instituted procedures to ensure something similar will never re-occur. To this effect, he has hired an expert to review and retrain drivers operations on a regular basis. That expert, Mr. Steuernol, testified before the Tribunal. He was forthright, open and responsive. His credibility and experience in the industry is not disputed. He has assisted the Applicant prepare more detailed log keeping records which are now personally reviewed by him on a monthly basis and discussed with individual drivers where necessary. As well, Mr. Steuernol conducts spot audits on a random basis, which result in drivers' review interviews where determined required. He is also retraining all drivers to ensure their competence in log keeping requirements. He has further assisted Mr. Thompson to complete driver performance evaluations, which, he testified, were to take place on an annual basis.

These procedures were instituted over time from July 2004, the date of the Warning Letter, through to January 2006, the date of the original Suspension Order. They are not insignificant. They attempt to reduce the two problems revealed to exist in the company compliance failures, being: (1) poor log keeping; and, (2) accidents. All were included in the Action Plan presented to the Registrar at the Show Cause meeting to which the Applicant was invited last March. The Tribunal is not able to agree with the Registrar that this evidence demonstrates a "last minute" attempt by the Applicant to ensure its operations meet compliance.

It is apparent that this Applicant has attempted to improve its operations since first receiving Ministry attention, although not always with success. It is also clear that its efforts in this regard have become more meaningful with each increasingly punitive regulatory sanction it has received. While not ideal, such a response is nonetheless valid if it attains the desired result of bringing the carrier into compliance with the legislation. There was no evidence that this was not the case. The Applicant's evidence that its violation rates were considerably reduced since the Show Cause Hearing was not disputed. It was further corroborated by the able and credible testimony of Mr. Steuernol, an individual surely not unfamiliar to the Registrar, who testified that the interventions instituted by the Registrant since the original Order last January, have been implemented consistently and with obvious results. The evidence showed that compliance with log records were improved such that, save for the one driver, no infractions had been noted since the Action Plan was implemented and that neither had any accident occurred. Thus, the evidence showed that, not only had the Applicant taken concrete steps to improve its operation, but that it had actually done so.

If the aim of the Registrar's available sanctions is, as has been held in earlier decisions, to attain compliance, then the Registrar's actions up to the Show Cause Hearing effectively succeeded. In this regard, issuance of the original Order was appropriate and in keeping with the Registrar's duty under the Act. However, to continue to insist on applying a suspension in the face of credible and detailed evidence of actions undertaken to improve compliance, and, more importantly, the passage of time illustrating actual improved performance outcomes, is indeed punitive. Especially in the circumstances present here where, to do so will, according to the Applicant's uncontradicted testimony, significantly damage, if not destroy, the Applicant's ability to remain in the business. Certainly, there are no grounds upon which the Tribunal can

conclude the upholding of the seven day suspension as proposed will in some way further improve public safety.

DECISION

Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act,* this Tribunal directs the Registrar of Motor Vehicles not to carry out his Suspension and Seizure Order of March 20, 2006, against the Applicant.

LICENCE APPEAL TRIBUNAL

_____

Jane Weary
Vice-Chair

RELEASED: December 20, 2006

FILE NAME: 3485 cvor.thistletown.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

LIONS MOTOR FREIGHT LTD.

In the matter of the appeal of Lions Motor Freight Limited under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

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

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DON GILLETT, Agent, appearing for the Applicant on September 6, 2006 and EDMUND CHAN, Counsel appearing for the Applicant on December 7, 2006

MURRAY FORBES, Counsel, for the Respondent

DATES OF HEARING: September 6, 2006 and December 7, 2006 TORONTO

REASONS FOR DECISION

An oral hearing was held on September 6, 2006 and December 7, 2006 at Toronto, Ontario to consider the Applicant's appeal pursuant to section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar of Motor Vehicles (the "Deputy Registrar") pursuant to section 47 (1) of the HTA.

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Lions Motor Freight Limited (the "Applicant") respecting the decision and order of the Deputy Registrar dated May 8, 2006, which reads as follows:

> **WHEREAS** a Notice of Suspension & Seizure dated the 23rd day of March, 2006, was issued proposing a **30-day** Suspension and Seizure of CVOR certificate 147-962-649 issued to Lions Motor Freight Ltd. And the Suspension and Seizure of 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 7th day of April 2006, (subsequently changed to April 26, 2006 at your request) to show cause why the Suspension and Seizure order should not be issued;
>
> **AND WHEREAS** I have considered your undertaking and past Ministry interventions including and audit, warning letter and safety record, including, 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 23rd day of May, 2006, CVOR certificate 147-962-649 and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Lions Motor Freight Ltd. be suspended for **15 days** and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.
>
> (Exhibit 4, tab2)

EVIDENCE:

Testimony of Adele Di Paolo:

The only witness for the Deputy Registrar was Adele Di Paolo, who testified that she is employed by the Ministry of Transportation (the "Ministry") as a Carrier Safety Rating Administrator. In that capacity Di Paolo reviews and analyses files of commercial vehicle operators for compliance in operations. If intervention is required pursuant to her review and analysis of an operator's file she would refer the file to her supervisor namely a Program Manager. Following this a decision is made and the file is placed before the Deputy Registrar for his attention. This procedure was followed in this matter. In this matter the Deputy Registrar approved the Suspension and Seizure Order and signed it on May 8, 2006. The analysis was prepared by John Miller the Carrier Safety Administrator and not by Di Paolo.

Di Paolo stated further that the grounds for the Suspension and Seizure Order were based upon the record of unpaid fines and the safety record of the Applicant including violation rate, safety rating, accidents, convictions, inspections, the warning letter of November 23, 2004 and the Ministry's facility audit dated September 16, 2005.

Di Paolo briefly reviewed the Ministry's publication titled "Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline" which ratings are applied to operators of commercial motor vehicles using Ontario's roadways and their ratings identify safety performance of commercial vehicle operators. She stated that one of five possible ratings are issued by the Registrar to such operators. The five ratings, which the Registrar may assign, are from highest to lowest:

- Excellent
- Satisfactory
- Satisfactory- Unaudited
- Conditional
- Unsatisfactory

An automated carrier system contains information on a carrier's performance and tracks convictions, inspections, and other relevant information. All information is taken into account when reviewing and analyzing an operator's performance and rating including violation rates and accidents involving property damage, injuries and convictions resulting from a driver's performance.

Violation rates are based upon accidents and convictions of an operator as well as other factors over a 24-month moving window.

An unacceptable violation rate will trigger a warning letter where the violation rate exceeds 35% of the operator's threshold while a facility audit is triggered if the operator's violation rate exceeds 65% of it's threshold. An operator's violation rate that exceeds 100% of it's threshold will result in sanctions being considered. A conditional rating will be applied to an operator where the violation rate of that operator is in excess of 65% but less than 100%. Such a rating is considered a very poor rating close to the stage of sanction. The "threshold" represents 100% of a carrier's allowable violation rate based on industry performance data. The violation rate is the measure of a carrier's safety performance as compared to the carrier's threshold and expressed as a percentage of the threshold.

Di Paolo further stated that prior to a facility audit the corporate officers of an operator are told when such audit will take place. On the completion of a facility audit the findings arising from the audit are communicated to the operator and a copy of the findings are left with its corporate officer. Following such audit it has been found that generally there is an 84% improvement in an operator's performance.

Di Paolo reviewed the Applicant's record (Ex 4. tab 6, page 15) and stated this record showed an overall violation rate of 208.3% which is more than twice times the threshold and was arrived at taking into account accidents, convictions and inspections.

Also noted on the review record were fines incurred by the Applicant including a fine of $240.00 that was unpaid as of March 2006. Further fines totaling $12,250.00 as of September 14, 2006 were registered against the Applicant under a guilty plea entered on February 14, 2006 to 25 charges under the HTA laid pursuant to the Ministry's Facility Audit of September 16, 2005. The Applicant was allowed 6 months to pay those fines, which as of September 6, 2006 have not been paid, and the Applicant is accordingly in default.

After the Applicant was issued a "satisfactory-unaudited" safety rating in April 2004, which is the usual rating issued to a newly registered operator, a warning letter was sent to the Applicant on November 23, 2004 (Exh. 4 tab 12). This letter addressed for the attention of Ghangas, Rajdeep, Singh reads:

> A review of your safety record indicates unacceptable performance. A CVOR record is attached for your information. This record shows 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.
>
> Further events on your record may result in a change to your safety rating, a facility audit being conducted on your premises, and/or yourself being required to attend an interview with an official of the Ministry to show cause why your privileges of operating commercial motor vehicles in Ontario should not be suspended or cancelled.
>
> If you require further information regarding the Ministry's Commercial Vehicle Operator Registration program, please contact a representative at the above address or as noted below:

On September 12, 2005 a Facility Audit was conducted by the Ministry and pursuant to that audit, Facility Audit Findings were issued and given to Ghangas on September 16, 2005. The findings are stated as follows:

> Operator to record the date and particulars of every accident reported to him by a Driver and retain that record of report for not less than two years.
>
> Operator has not implemented any form of driver training program to familiarize drivers with all relevant rules and regulations respecting the operation of commercial motor vehicles on the highway.
>
> Operator has not established a monitoring system to identify occasions when driver's violate the provisions of the HTA relating to the Hours of Work.
>
> Operator does not require all drivers maintain complete and accurate records of duty status as recorded on the daily log.
>
> Operator does not require all drivers completing daily logs to submit copies within twenty days to the place the driver normally reports to for work.
>
> Operator is not maintaining the daily logs and the time records on file along with supporting documents (any record, document or receipt received or issued by the driver of a commercial motor vehicle during a trip) for six (6) months.
>
> Operator is not ensuring the record of the times drivers go on or off duty during the day are indicated on the driver time records and the total time on-duty.
>
> Operator does not have any measures in place to ensure that all logs and time records are accurate.
>
> Operator has failed to maintain a complete file for each driver that contains the required information such as Driver's Abstract, a copy of the driver licence and a list of the current convictions, accidents and detentions.

Operator has not established an adequate periodic inspection, repair and maintenance program to ensure that all subject vehicles are systematically repaired, maintained and inspected in accordance with their maintenance program (statement) and relevant provincial legislation.

Operator does not maintain identification records for each subject vehicle, including the unit number, the vehicle make, the Vehicle Identification Number, the year, a record of any axle or suspension modifications which affect the manufacturer's gross vehicle weight rating or gross axle weight rating and if the vehicle is not owned by the operator, the name of the person who supplies the vehicle.

Operator has not prepared a written statement or description of the preventative maintenance program for each vehicle operated.

Operator has not ensured that all power units and trailers operated, including owned, leased and those operated by owner operators, meet the prescribed standards set out in Schedules 1 and 2 of Reg. 611.

Operator has not ensured that all prescribed records and statements are current and kept at your principal place of business in Ontario for the prescribed period. Vehicle records must be kept for two (2) years or if the vehicle is sold, destroyed or returned to the lesser, the records may be destroyed after six (6) months.

Operator has not ensured that every commercial motor vehicle and trailer operated is inspected before they are operated on a highway.

Operator has not instructed all drivers to conduct prescribed pre-trip inspections.

Operator does not ensure every defective component detected during the inspection or observed during the day is noted on the inspection report.

Operator does not ensure they receive the inspection report from each driver as soon as possible after the trip report is completed.

Operator does not ensure the inspection reports completed are maintained on file for at least three (3) months from the date of completion.

(Exhibit 4, tab 11)

The Facility Audit also revealed under "Driver Score" that the Applicant's four drivers were non-compliant regarding licence records, trip inspections, load security, road testing and hours of work. In addition three of the four drivers' daily logs/time records were missing and the fourth driver's daily log/time records were falsified. Written details of the Applicant's driver's records were recapped in the Facility Audit Findings and were left with the Applicant, (Exhibit 4, tab 11, pages 74-90). Pursuant to the audit some 129 offences under the HTA were listed and having failed the Facility Audit the Applicant's Safety Rating was changed to Conditional the lowest rating prior to suspension. In addition to the above the Applicant's vehicles were found to have been involved in six accidents and fifty-four convictions were registered against the Applicant.

As a result of the failed Facility Audit the Deputy Registrar issued a Notice of Suspension and Seizure dated March 23, 2006, in terms of which it was proposed the Applicant's CVOR registration as well as the plate portion of the permits for all commercial vehicles trailers registered in the Applicant's name be suspended for 30 days. A meeting, pursuant to the above notice, was held on April 26, 2006, at which the Deputy Registrar and other officials were present and the Applicant's President, Ghangas and the Applicant's agent were also present. Full notes of what transpired at that meeting were produced pursuant to the hearing (Exhibit 4, tab 3, pages 9 through 11). No action plan was provided by the Applicant at that meeting and the Deputy Registrar remained concerned for highway safety having considered the failed Facility Audit, the warning letter to the Applicant and the Applicant's safety record including convictions, accidents and vehicle out-of-service rates. Accordingly, the Deputy Registrar issued a Suspension and Seizure Order.

Di Paolo went on to state that according to the records of the Ministry Ghangas acted as the Applicant's agent in his capacity as President and Director of the Applicant when the Applicant applied for registration at which time it filed with the Ministry, a copy of it's articles of incorporation (Exhibit 4, tab 13). She went on to state that according to the ICON report, produced by the Ministry of the Attorney General, the Applicant on February 14, 2006 pleaded guilty to the twenty-five counts under section 190 (6) of the HTA and was fined $490.00 on each count for a total of $12,250.00. The Applicant was given six months to pay the fines and is at the date of Di Poalo's testimony in default under the order (Exhibit 4, tab 10).

Di Paolo advised that the overall violation rate of the Applicant for the period commencing the issue of its CVOR certificate to February 14, 2006 was 223.8% of the threshold. The violation rate is the measure of the Applicant's safety performance as compared to their threshold expressed as a percentage of threshold. The threshold represents 100% of the Applicant's allowable violation rate based on industry performance data.

Under cross-examination Di Paolo contended that since the Facility Audit there has been little improvement in the Applicant's performance and its out-of-service rate is still high.

TESTIMONY OF RAJDEEP GHANGAS

Ghangas stated in his testimony that Manmohan Gill is the director of the Applicant. He and Gill, the latter who had been driving commercial vehicles for some other party, together started operating the Applicant. Ghangas had no prior experience in the trucking business and relied upon Gill who had experience. Together they started Applicant's operations in March 2004, initially with two vehicles expanding to five vehicles by October 2004. At the time of the Facility Audit the Applicant's fleet size was seven.

Ghangas stated that the Ministry warning letter to the Applicant dated November 23, 2004 was received by the Applicant but no steps were taken by the Applicant to comply with the letter. He went on to state that he was involved in the hiring of drivers for the Applicant. Gill determined if drivers selected by Ghangas were qualified to fill the position of driver. After receipt of the warning letter the Facility Audit was the next intervention by the Ministry. The United States' authorities had audited the Applicant and the Applicant passed that audit. The passing of such audit lead Ghangas to believe that "all was well". He was present at the Ministry's Facility Audit but the auditors did not inform him of any problems that they observed. He does not recall if the auditors went through their findings with him. They did not inform him of charges that they intended to lay against the Applicant. Subsequent to the audit the Applicant "received a stack of summonses" issued under the HTA. Don Gillett as agent for the Applicant commenced monitoring the Applicant in April 2006 and " training was supplied to drivers" of the Applicant. The drivers were trained in defensive driving, rules of the road, formal log completion by drivers, log book reviews and pre-trip inspections. The Applicant is implementing the strategies given in the training by Gillett.

Ghangas went on to state that the Applicant "can't survive" with a two-week suspension order, will loose it's main customers and will have to "shut down operations".

In so far as the unpaid fines are concerned Ghangas stated that the Applicant is awaiting a GST refund in order to pay the fines imposed upon the Applicant.

Ghangas referred to a certain accident involving one of the Applicant's vehicles (Exhibit 4, tab 16, page 126). He stated that the driver of the Applicant's vehicle was intoxicated when driving and was not "at work" when the accident occurred. The driver took the vehicle without the knowledge of Ghangas who did not know of the accident occurrence until the police telephoned the Applicant to "pick up" the vehicle. Ghangas stated further that the Applicant's vehicles are parked in an unfenced yard that has no security. This accident happened on a Saturday after the driver's shift had ended on the Friday. The driver has been terminated according to Ghangas.

Ghangas stated in concluding his testimony in chief that, "we did not know" that the Applicant had to keep logs of "driver's hours of work". The Applicant did not obtain copies of it's drivers' logs from the drivers, did not know logs were required to be kept and he was never told that the Applicant needed to keep logs. His primary function at the Applicant is sales, payroll and accounts.

Upon cross-examination, Ghangas stated that: he and Gill together started the Applicant's business in 2004 with one truck each. The Applicant now has seven trucks and thirteen trailers, all owned "outright" by the Applicant and not leased. Gill is a driver of commercial vehicles and drives for the Applicant and ensures that the drivers have the necessary skills to drive.

Ghangas went on to state that the Applicant obtained its CVOR registration in February 2004, at which time the Applicant owned and used two trucks. Gillett no longer represents the Applicant before the Tribunal. He commenced assisting the Applicant in January 2006. Gillett no longer "carries out that function". Previously, Gillett came into the Applicant's office and did the training of the drivers, reviewed their hours of service and accidents. He came in about "once a month – whenever necessary". When the Applicant received a "conditional rating", the lowest rating, Gillett started "coming in to help us". Ghangas conceded that some of the driver logs were "a fabrication and false". Gillett appeared for the Applicant at the show cause meeting with the Ministry on April 26, 2006, and he also appeared on behalf of the Applicant "when the various fines were imposed" by court. Those fines have not been paid as yet although Ghangas says "some $4000.00 odd" has been paid. He conceded that the Applicant has not disputed the "unsatisfactory" or "conditional" rating assigned to it.

Ghangas went on to state that the Applicant pays $900.00 per month rental for the office occupied by it and the yard where it keeps and stores its vehicles. The keys to the Applicant's vehicles are kept in a box in the office and they are accessible to the drivers.

In regard to the Applicant's driver Atwal, Ghangas stated that the latter was dismissed by the Applicant due to his convictions and poor record including speeding fines and an impaired driving charge. Ghangas also referred to driver Brar's record and stated that he had convictions against him but was still driving for the Applicant. In referring to Gill, he stated that the latter continues to drive for the Applicant but has numerous driving infractions registered against him including working too long hours, driving unsafe vehicles and being involved in a driving collision.

On re-examination, Ghangas stated he is prepared to have Gillett "work with us" regarding the improvement of operations being conducted by the Applicant. Since the facility audit conducted by the Ministry, Ghangas has a "different perspective and understanding" necessary to comply with the requirements of the Ministry and his knowledge of "CVOR system has grown".

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal:

1. A Suspension and Seizure Order dated May 8, 2006, issued by the Deputy Registrar in terms of sections 47 and 47.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended was duly served upon the Applicant.

2. An "unsatisfactory" safety rating was assigned to the Applicant on March 23, 2006, by the Deputy Registrar in terms of section 17.1(1) of the *Highway Traffic Act* and in addition, the Applicant has been assigned a "conditional" safety rating.

3. The carrier review record of the Applicant for the period April 1, 2003, to March 31, 2004, and for the period April 1, 2004 to March 31, 2005, as well as for the period April 1, 2005 to March 15, 2006, indicate an "out of service" record of 100%, 75% and 75%, respectively.

4. On or about February 14, 2006, the Applicant plead guilty to 25 counts under the section 190 of the *Highway Traffic Act* and was fined $490.00 on each such count, in a total of $12,250.00.

5. Payment of the aforesaid amount of $12,250.00 was to have been paid by the Applicant by September 14, 2006.

6. The Applicant has not paid the amount of $12,250.00 as ordered by court and on the admission of Ghangas, has only paid the sum of $4000.00, which payment has not been confirmed by the Deputy Registrar of Motor Vehicles.

7. Ghangas has at all material times been the President of the Applicant and together with Mahomar Gill is a director and the controlling mind of the Applicant.

8. The duties of Ghangas in the operations of the Applicant are administrative which inter alia includes monitoring procedures, record keeping and the hiring of drivers.

9. Mahomar Gill's duties in the Applicant's operations are the training of drivers, maintenance of the Applicant's vehicles and driving trucks in the course of the Applicant's business.

10. Gillett was retained by the Applicant in or about June 2006 to institute an action plan for the Applicant and to plan training, maintenance of vehicles, hours of work of drivers and compliance with the *Highway Traffic Act* and regulations in sofar as they affect or apply to the Applicant.

11. For the period of February 18, 2004, to February 14, 2006, the Applicant has suffered 54 Safety related convictions.

12. The Applicant, over the period from March 2004 to January 2006, employed drivers to drive the Applicant's vehicles, which drivers consistently and repeatedly contravened various sections of the *Highway Traffic Act*. One driver was found guilty of impaired driving and some 5 speeding convictions; another operated vehicles not in accordance with regulations under the *Highway Traffic Act*; yet others who also contravened the regulations, including Mahomar Gill who exceeded 13 hours driving time, drove the Applicant's trucks with defective brakes and components, exceeded the speed limit and who also drove with a defective suspension system and contaminated brake linings/pads.

13. The Applicant's record of operations reflect an overall violation rate, taking into account accidents, convictions and inspections which rate is more than twice times the threshold of the Applicant.

14. A Facility Audit conducted by the Ministry on September 12, 2005, found the following relative to the operations of the Applicant:

    a) the Applicant had not implemented any form of driver training program.

    b) the Applicant had not established a monitoring system to identify driver violations relating to hours of work.

    c) the Applicant did not require all drivers to maintain complete and accurate records in the daily log.

    d) the Applicant failed to maintain daily logs and time records as required by the *Highway Traffic Act*.

    e) the Applicant failed to maintain the required information such as Driver's Abstracts, copy of driver licence and current corrections and accidents.

    f) the Applicant failed to establish an adequate inspection, repair maintenance program.

    g) the Applicant failed to maintain identification records for its vehicles as requested by the *Highway Traffic Act*.

    h) the Applicant failed to ensure that all prescribed records are current and kept at the Applicant's place of business.

    i) the Applicant failed to ensure that its vehicle are inspected before operation on a highway.

    j) the Applicant failed to instruct its drivers to conduct prescribed pre-trip inspections.

    k) the Applicant failed to ensure that it receives an inspection report from each driver as soon as possible after a trip report is completed.

THE LAW:

The Highway Traffic Act, R.S.O. states as follows:

17.(2) The Registrar may refuse to issue a CVOR certificate to an applicant if the Registrar has reason to believe, having regard to the applicant's safety record and any other information that the Registrar considers relevant, that the applicant will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety

(3) The Registrar may refuse to issue a CVOR certificate to an applicant if the applicant is related to,

(a) a person whose CVOR certificate has been cancelled, is or has been under suspension or is or has been subject to a fleet limitation;

(b) a person whose CVOR certificate suspension, cancellation or fleet limitation is under appeal; or

(c) a person who the Registrar has reason to believe, having regard to the person's safety record and any other information that the Registrar considers relevant, will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety.

(4) An applicant is related to a person for the purpose of subsection (3) if,

(a) the applicant and the person are related individuals;

(b) either the applicant or the person is a partner of the other or was a partner of the other or they have or have had partners in common;

(c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or

(d) the applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.

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

(a) the plate portion of a permit as defined in Part II;

(b) a driver's licence; or

(c) a CVOR certificate,

on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(e) conviction of the holder for an offence referred to in subsection 210 (1) or (2);

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

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

(10) The Registrar may, at any time, for misconduct or contravention of this Act or 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.

22. (1) The Lieutenant Governor in Council may make regulations,

(e) governing the suspension or cancellation of CVOR certificates under subsection 47 (1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47 (2);

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.

The undermentionned regulation states as follows:

Regulation 574

3. (3) Upon receipt of a notice of appeal under subsection (1), the Board shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the Board with all relevant documents and other material in his or her possession.

(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through a solicitor.

(7) At any hearing under this section, the Board shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.

APPLICATION OF LAW TO FACTS

The onus of proof rests upon the Registrar to prove that the evidence presented to the Tribunal affords reasonable grounds for the order sought by the Deputy Registrar dated May 8, 2006. The Tribunal has analysed and considered the issues involved in this matter as well as the testimony presented by the Registrar's witness and by the Applicant and the documentary evidence filed of record.

The Tribunal is cognizant of Southey J.'s decision in the matter of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* 1983 O.J. No. 1017 in which the learned Judge stated:

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

In referring the matter back for rehearing, the learned Judge stated:

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

In the matter of *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales and Omar Hassan Rahim*, Lane J. sitting in the Divisional Court with Then J. and J. Wright J. on February 11, 2003, in a unanimous decision stated that while the test in the Brenner case "*remains the proper test*" "*the Tribunal owes no deference to the Registrar's opinion*". The Registrar, the court concluded, is the investigator and not the trier of fact whose opinion is based upon a hearing and so entitled to deference.

Having considered the issues and evidence presented in this matter, the Tribunal's reasons and conclusions follow.

The Applicant commenced its transport operations in March 2004. Within a matter of months, the Ministry found it necessary to write to the Applicant regarding the Applicant's performance, which the Ministry found to be unacceptable (Exhibit 4, Tab 12). The Applicant, at this early stage was already in non-compliance with the regulations under the Act. The non-compliance involved, according to the Ministry, operational activities that were considered unsafe. The Applicant was warned that its safety rating may well be adversely affected by the Ministry's findings and the Applicant was urged to rectify the unsatisfactory position that the Ministry found. The Applicant was clearly made aware of the adverse results due to continuting or further non-compliance by the Applicant with the Ministry's requirements. The Applicant chose to ignore the warning given by the Ministry and the Applicant's performance did not improve. On the contrary, the Applicant's performance continued to decline.

Pursuant to the ongoing performance deterioration of the Applicant, a Facility Audit was conducted by the Ministry on September 12, 2005, at which audit the Applicant's Ghangas was present and upon completion of which Ghangas was given the written findings of the audit (Exhibit 4, Tab 11). The audit's findings revealed a plethora of ongoing non-complance by the Applicant in its operations. The audit dealt with three profiles namely Driver profile, Vehicle profile and Safety programs. The detailed audit results of the aforementionned profiles indicated unacceptable performance by the Applicant and a serious lack of compliance with the rules and regulations governing carrier transportation in Ontario. The testimony of Ms. Di Paolo, a carrier Safety Rating Administrator, in the employ of the Ministry, and whose testimony is accepted by the Tribunal, speaks graphically as to the Applicant's non-compliance with the regulations.

Pursuant to the failed Facility Audit, the Registrar issued a Notice of Suspension and Seizure on March 23, 2006, for a 30-day period.

Following the issuance of the Notice of Suspension and Seizure, a meeting was held on April 26, 2006, at which the Deputy Registrar and other representatives of the Ministry were present as well as Ghangas and Don Gillett, an agent representing the Applicant and Ghangas (Exhibit 4, Tab 3). Gillett informed the meeting that he had only recently been approached by Ghangas to represent the Applicant and requested time to enable the Applicant to become compliant with the Ministry's requirements and the Regulations under the Act. The Applicant and Gillett had, even at this late stage, no proposed action plan for the Applicant nor could Gillett give dates of when such plan would be available.

Not having heard from the Applicant or Gillett, the Deputy Registrar proceeded to issue a Suspenson and Seizure Order dated May 8, 2006, for a period of 15 days and it is to this Notice that the Applicant has appealed to the Tribunal.

At the commencement of the hearing of the Applicant's appeal to the Tribunal, the Applicant was represented by Gillett as agent and at that time, in answer to a specific question asked him by the Deputy Registrar's counsel, he stated that he would not be testifying on behalf of the Applicant at the hearing, but would only be representing the Applicant in the hearing. Gillett accordingly represented the Applicant at the hearing on September 6, 2006. On the adjourned dated of the hearing, Gillett was not present and the Applicant was represented by counsel who advised the Tribunal that he intended to call Gillett as a witness on behalf of the Applicant. Counsel for the Deputy Registrar objected on the basis that Gillett had clearly and explicitly stated he would now be testifying on behlaf of the Applicant and it would be inappropriate and irregular for him to now testify. Pursuant to submissions, the Tribunal ruled to exercise its discretion and refused to permit Gillett to testify. Ghangas did however testify in chief on the first day of hearing and was cross-examined on the adjourned date.

The totality of the evidence in this matter, both the oral testimony of Ms. Di Paola and the documentary evidence of the Ministry, is compelling and overwhelming. In fact, it was not seriously, if at all, disputed by Ghangas in his testimony. The Ministry's evidence as presented remained to all intents undisturbed and such evidence is accepted by the Tribunal. The conduct of the Applicant, as represented by the Applicant's controlling mind, Ghangas, has shown a complete disregard for safe operations and compliance with the rules and regulations governing the operation of commercial vehicles in Ontario. The Applicant ignored the various warnings given to it regarding its unsatisfactory operations. It ignored and failed to rectify safety concerns and in so doing placed the safety and welfare of the public at risk. Other than the verbal statement of Ghangas that efforts are being made to deal with the Ministry's concerns, there has been no acceptable or convincing evidence placed before this Tribunal to persuade it to believe that genuine and meaningful rectification of past proven unsatisfactory operations are being instituted or have been instituted.

Accordingly, there is no sound and compelling reason for the Tribunal to disagree with the Deputy Registrar's Decision and Order of Suspension and Seizure of May 8, 2006.

The Deputy Registrar's Suspension and Seizure Order dated May 8, 2006, made no reference to unpaid fines that were imposed by court against the Applicant pursuant to charges brought under the *Highway Traffic Act*. The Registrar's counsel was requested by the Tribunal, when final submissions were being made, to deal with whether the Tribunal has jurisdiction to deal with the aspect of unpaid fines when the Deputy Registrar's order made no reference to that aspect. The Registrar's counsel has dealt with this question in further submissions made to the Tribunal and counsel for the Applicant has responded in further submissions furnished by him.

After full consideration of the submissions made by both counsel, the Tribunal has concluded that it does have the jurisdiction to "modify" the Deputy Registrar's order. This power is allowed to the Tribunal by section 50(2) of the *Highway Traffic Act*. The power to modify the order sought by the Registrar is in the discretion of the Tribunal and having regard to the nature of the Legislation governing this hearing (which is in place to promote and ensure safety in carrier operations) there is no doubt that the evidence presented regarding the unsafe operations of the Applicant supports the Tribunal exercising its discretion in favour of the Registrar's request. The evidence was clear that at the very least some $8,500.00 was and is still due and owing by the Applicant in respect of fines levied under the *Highway Traffic Act*. The Applicant's counsel is incorrect in his submission to the Tribunal that "the evidence regarding unpaid fines was actually borne out by the Appellant himself and was never proffered by the Ministry of Transportation". The documents filed of record by the Ministry specifically dealing with the charges and convictions as well as Di Paolo's clear and concise testimony show that this evidence was most certainly part and parcel of the allegations made at the hearing. There is authority that section 50 (2) of the *Highway Traffic Act* requires a *de novo* hearing where the Tribunal is required to make a fresh determination after listening to and considering all the evidence placed before it. In so doing, the Tribunal may "modify" the Deputy Registrar's order and may incorporate in its decision and order that outstanding fines be paid and until such time, the Suspension and Seizure Order will apply.

DECISION:

For the reasons stated above, the Tribunal makes the following Order:

1. Confirms the Suspension and Seizure Order of the Deputy Registrar of May 8, 2006, in which CVOR certificate 147-962-649 and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Lions Motor Freight Ltd. be suspended for 15 days; and

2. Orders that the plate portions of permits or, if issued by a jurisdiction other than Ontario, the permits and the number plates be seized; and

3. Modifies the Suspension and Seizure Order of May 8, 2006, to include that such order shall remain in force and effect until such time as payment is made to the court for all outstanding fines imposed against the Applicant under the *Highway Traffic Act*.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel
Vice-Chair

RELEASED: December 21, 2006

FILE NAME: 3576.cvor.lions motor freight.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

S.P.G. HAULAGE INC.

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

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

TRIBUNAL: KENNETH W. KOPROWSKI

APPEARANCES: MARK REYNOLDS, Agent for the Applicant

MURRAY FORBES
Counsel for the Respondent

DATES OF HEARING: November 24, 2006
December 8, 2006

Toronto

REASONS FOR DECISION

An oral hearing was held on November 24 and December 8, 2006, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50. (1) of the *Highway Traffic Act*, R.S.O., 1990, Chap, H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Deputy Registrar of Motor Vehicles (the "Registrar") made a decision to issue a suspension and seizure order, dated May 31, 2006, for 30 days, under section 47(1) of the Act. The Applicant, at its request, made submissions to the Deputy Registrar at a meeting held on June 29, 2006, to show cause why the Suspension and Seizure order should not be issued.

After this meeting, the Deputy Registrar, considering the undertaking given by the Applicant at the meeting and past Ministry interventions including warning letter, interview and safety record, including convictions, accidents, inspections and vehicle out-of-service rate, remained concerned for highway safety.

The Deputy Registrar, therefore, after the meeting on June 29, 2006, issued an amended Suspension and Seizure Order dated July 25, 2006, for a period of 15 days.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required $100.00 filing fee.

There was one preliminary issue that this Tribunal was asked to deal with.

A Pre-hearing on this appeal had been held on October 5, 2006. At the Pre-hearing, a schedule was imposed to exchange documents and witness statements by ten days before the hearing commenced. The Respondent complied with that schedule; the Applicant had not. However, at the Pre-hearing, the Applicant had a different representative than the agent who represented the Applicant at this Hearing. The current agent had been retained only one week before the first day of this hearing, November 24, 2006, and could not comply with the Pre-hearing Order. However, with the co-operation of Respondent's counsel, it was agreed that the Respondent would present its case on this day, November 24, and the Applicant could present its case on the second day scheduled for this matter, December 8, 2006. By that time, the Applicant's agent would have been able to provide the required material to the Respondent.

Therefore, this Tribunal ordered that copies of the Applicant's documents were to be given to the Respondent by Wednesday, November 29, 2006 by no later than 4:00 p.m. that day.

This Tribunal also granted an Order excluding witnesses from this hearing until they were called upon to testify.

The hearing then proceeded.

ISSUE:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order for 15 days?

EXHIBITS

Exhibit 1 Suspension and Seizure Order dated July 25, 2006.

Exhibit 2 Notice of Appeal

Exhibit 3 Respondent's Appeal Book

FACTS:

Evidence of Adele Di Paolo

Ms. Di Paolo was the Respondent's only witness. Ms. Di Paolo has been a carrier safety rating administrator with the Ministry of Transportation ("Ministry") since 2005. Before then, she was a Commercial Vehicle Operator's Registration (CVOR) analyst for the Ministry. In all, she has been with the Ministry since 1995.

In her current position, her tasks include analyzing reports on carriers, enforcing safety net reports, and investigating drivers' records and convictions. She deals with integrity checks of CVOR records, to ensure they are correct, and does intervention, if that step is found to be necessary. She presents her findings to the programme manager.

As an analyst, she used to ensure that the data recorded in the ministry's records relating to carriers is correct. Her tasks included having to review police and accident reports to ensure they are properly recorded on a carrier's record, to check fleet size, and to have discussions with her programme manager if an intervention were necessary, such as suspension. Once the decision is made to suspend, the matter would be sent to the Deputy Registrar for his decision on the action to be taken, if any, against a carrier.

Found at Tab 14 of Exhibit 3 is a copy of the CVOR system Public Guideline. At page 15 of the guideline, page 120 of Exhibit 3, it is explained that the CVOR system is an automated monitoring system that tracks the on-road safety performance of commercial vehicle operators. The system was developed following extensive industry consultation

and was first implemented by the Ministry in October, 1986. Commercial carriers (operators) that operate in Ontario must register for a CVOR Certificate. It s the order to suspend the Applicant's Certificate and to seize the plate portion of his vehicle permits that is the subject of this Appeal.

The CVOR system maintains a carrier's CVOR Record over a two-year period. The automated computer system contains information that includes carrier information, convictions, reportable accidents, vehicle mechanical safety inspections and other Ministry interventions such as letters, interviews, audits and sanctions. The CVOR system automatically triggers a carrier for review when poor performance is identified, based on a carrier's overall violation rate as a percentage of its overall CVOR threshold. Predetermined intervention stages have been established at which point carrier interventions or sanctions would be considered. When one of theses stages is reached, a detailed analysis is conducted by Ministry staff to verify the carrier's profile information and the appropriateness of the type of intervention being considered, such as warning letter, interview or audit. Other events may be used to bring a carrier to the Ministry's attention such as significant incidents, including impoundments, wheel separations, unpaid fines or habitual non-compliance.

Based on a carrier's performance, the Ministry can propose one of five safety ratings for a carrier: Excellent, Satisfactory, Conditional, Unsatisfactory Unaudited and Unsatisfactory. An Unsatisfactory rating means there exists a 100% violation of the CVOR threshold rate. A Conditional rating means that the violation rate is over 65% of the CVOR threshold rate. At the time of this hearing, the Applicant had a Conditional Safety rating.

When a carrier's violation rate rises to an unacceptable level, certain disciplinary interventions and sanctions will be triggered by the CVOR system. The interventions and the level of the violation rate at which the intervention will be triggered are listed at page 27 of the Public Guideline, being page 132 of Exhibit 3, as follows:

1. A warning letter is triggered if a carrier's overall violation rate exceeds 35% of its overall CVOR threshold.

2. A facility audit is triggered if a carrier's overall violation rate exceeds 65% of its overall CVOR threshold. However, an interview may be considered at this stage instead of an audit.

   The Applicant's agent criticized this intervention stage because he submitted that the Ministry should have conducted an audit instead of having conducted an interview.

3. An interview is triggered if a carrier's overall violation rate exceeds 80% of its overall CVOR threshold. However, an audit may be considered instead of an interview at this stage.

4. A sanction is triggered if a carrier's overall violation rate reaches 100% of its overall CVOR threshold level.

Ms. Di Paolo testified that all carriers can obtain a copy of the Public Guideline on the Ministry's website or at the office of the Carrier Sanctions and Investigation office in St. Catherines, Ontario.

Once a violation is recorded against a carrier, points are associated with it, depending on the severity of the violation. This point system corresponds to a North America wide standard set up by a joint committee. The points allotted to a particular violation are listed in detail in Appendix F to the Public Guideline. Appendix F is found at pages F3 to F22 of the Public Guideline, being pages 234 to 253 of Exhibit 3.

Therefore, according to Ms. Di Paolo, the CVOR system will keep a record of accidents, convictions and safety inspections, even those inspections that do not reveal a problem, and points will be calculated based on the severity of those incidents. The carrier will then receive one of the five ratings described earlier. Ms. Di Paolo noted that, out of 107,236 carriers rated in the system, only 130 were Unsatisfactory. The lowest rating that a carrier could have, yet still be able to operate, is a "Conditional" rating. Once a carrier receives a notice of a Conditional rating, Ms. Di Paolo stated that there is an 84% success rate of improving that rating.

A suspension will be imposed when the overall violation rate is more than 100% or if there is a serious fatal accident involving the carrier. In the case of this Applicant, a suspension was proposed because the overall violation rate was more than 100%.

If the violation rate is 80% to 100%, an interview with the carrier is conducted, although a financial audit may be done, instead, depending on the nature of the events giving rise to the violation rate.

A financial audit is an in-depth examination of such things as the carrier's records, accidents, convictions, inspections, out-of-service rates, driver's licences, hours of work, outstanding fines and physical examinations of the carrier's vehicles. It is described in detail at pages 8 and 9 of the Public Guideline, being pages 113 and 114 of Exhibit 3. A score is assigned that reflects the carrier's safety performance and practices.

Having regard to the CVOR and safety rating system, Ms. Di Paolo then dealt with the concerns relating specifically to this Applicant.

She first referred to the “Carrier Record Review” found at page 59 of Exhibit 3. In the Carrier Record Review, there is reference made to a warning letter having been sent to the Applicant on July 8, 1996. A sample warning letter is found at page 286 of Exhibit 3. Although there was no direct evidence that the wording of the sample letter is the same as the wording that would have been used in the letter actually sent to the Applicant in 1996, nevertheless, this Tribunal is satisfied, on the evidence of Ms. Di Paolo, that the letter in 1996 would have been equally firm and would have stated the same type of information. In any event, the Applicant did not raise any objection on that point, so the issue seems to be moot, especially in the absence of any contrary testimony from any officer on behalf of the Applicant carrier. Besides, a further letter, using the wording of the sample letter found at page 286, was sent to the Applicant on July 12, 2004.

Continuing with the concerns that Ms. Di Paolo had, in the Carrier Record Review, a performance analysis is shown to have been done for the period April 30, 2004, to April 29, 2006. Ms. Di Paolo stated that she typically does a review for a two-year period. The overall threshold standing of SPG Haulage during that time period was 118.7%. This overall average was drawn from the record shown in that two-year period, namely:

Accidents	5 events	16 points	149.8% of threshold
Convictions	16 events	54 points	118.0% of threshold
Inspections	4 events	10 points	57.4% of threshold

The details of the 5 *accidents* are set out in the summary found at page 60 of Exhibit 3. These all occurred in the period June 28, 2004, to April 4, 2006, a period that is within the two-year performance analysis. From the summary, it can be seen that points were allotted only to the accidents where it is noted that the driver of the owner’s truck was charged. Two of the accidents attracted no points. Where property damage only was done in two of the accidents, four points were assessed for each one. But, where there was an injury, and the driver was charged, eight points were assessed for that accident, since it involved a more serious result.

The details of the 16 *convictions* in the period April 30, 2004, to April 29, 2006, are found at pages 64 to 70 of Exhibit 3. The more recent of the convictions in that time period is found at page 66, and the earliest of those convictions is found at page 70. The points allotted are in accordance with the points designated for each offence in Appendix F of the Public Guideline at Tab 14 of Exhibit 3.

It should be noted that the second warning letter sent to the Applicant was sent on July 12, 2004, a date that fell within the two-year performance analysis running from April 30, 2004, to April 29, 2006. Although no evidence was presented that detailed the violation rate, Ms. Di Paolo stated that such a warning letter would have been sent out if the rate

were 35% or more of the threshold value. This is quite in accordance with the provisions found on page 27 of the Public Guideline, being page 132 of Exhibit 3, where there are outlined the circumstances that should exist before such a letter is sent out. In any event, there was no cogent evidence from the Applicant that indicated that the letter was sent out improperly. It should be noted that the letter had been sent out after a conviction was recorded on June 28, 2004, for disobeying a traffic control. A total of 8 points were allotted to that conviction because there was an injury involved. No doubt this was a contributing factor in having the warning letter of July 12, 2004, sent to the Applicant.

Continuing with a review of the carrier Record Review, Ms. Di Paolo pointed out that, at page 68 of Exhibit 3, in Tab 8, there is a record that a rating letter had been sent on September 12, 2004, to the Applicant indicating that the Applicant had been given a Conditional rating. It is noteworthy that there is no evidence before this Tribunal to indicate that the Applicant disputed the rating in that letter or even responded to the warning letter of July 7, 2004. The Applicant's rating still remained as Conditional at the time of this hearing.

Next, in the chronological sequence of events, there occurred an interview with the Applicant on March 29, 2005. It must be remembered that, as at the date of this meeting, the performance analysis revealed that the Applicant had an overall rating of 118.7%. Of that, its accident rating was 149.8% of threshold. The conviction rating was 118.0% of threshold, and its inspection rating was 57.4% of threshold.

The interview sheet relating to this meeting is found at Tab 9 of Exhibit 3. In attendance were Sebastian and Patricia Genova on behalf of the Applicant. Louis Janetos, a carrier safety administrator, conducted the interview. Attached to the interview summary is a two-page action plan signed by Mr. Genova. It is entitled, "Steps that we have taken/are taking to improve." There then followed a performance analysis for the 13-month period after the interview, namely, from March 30, 2005, to April 29, 2006. This, too, is found at Tab 7, page 59 of Exhibit 3. For that period, the Applicant's overall rating fell to 86.7%, down from the earlier rating of 118.7%. The number of accidents dropped from 5 to 3, and from 16 points to 4 points, and from a rating of 149.8% to a rating of 69.1% of threshold.

The number of convictions dropped from 16 to 7, and from 54 points to 30 points, but the safety rating rose to 121% of threshold from the previous 118.0%. The safety inspection rating also rose from 57.4% of threshold to 87.7% of threshold. The Ministry seems to have taken no further action on those figures at that time.

Subsequently, a further performance analysis was done for the 6-month period, October 30, 2005, to April 29, 2006. Despite the stated desire in the action plan to improve, and signed by Mr. Genova on March 29, 2005, the overall rating of the Applicant again

increased. The overall rating rose to 107.7% from 86.7%. The accident rating rose to 149.8% of threshold from 69.1%, although the number of accidents fell to 2 from 3. The conviction rating also rose to 131.1% of threshold from 121.0%, although the number of convictions fell to 3 from 7. The inspection rating fell to 0% of threshold in that period.

As well, the Carrier Record Review revealed that there were outstanding fines in the sum of $243.75. There were also four outstanding charges before the Court as at August 9, 2006, under the *Highway Traffic Act* or its Regulations.

In addition, for the fiscal period April 1, 2004, to March 31, 2005, the Applicant's vehicles failed one of 2 inspections, resulting in one out-of-service violation. In the following fiscal year, April 1, 2005, to March 31, 2005, there were three inspections resulting in three out-of-service violations.

In view of these out-of-service defects and in view of the increase in the carrier's overall rating to 107.7%, the Suspension and Seizure Order dated May 31, 2006, was issued, calling for a suspension of 30 days. The Notice refers to both safety matters and unpaid fines.

Ms. Di Paolo testified that she had checked on November 23, 2006, the day before the first hearing date in this Appeal, and ascertained that the outstanding fines had not been paid and that there was an additional fine of $216.25 outstanding. The agent for the Applicant, on cross-examination, challenged the accuracy of those records; however, in the absence of evidence from the owners of the Applicant carrier, who could have advised this Tribunal with certainty whether or not those fines had been paid, the evidence of Ms. Di Paolo stands as the only evidence before this Tribunal that the fines were yet unpaid.

After the Notice of Suspension and Seizure dated May 31, 2006, had been sent out, a Show Cause Hearing was held on June 29, 2006. Mr. And Mrs. Genova and Mr. Don Gillett attended on behalf of the Applicant. Ms. Di Paolo made notes of that meeting, found at Tab 4 of Exhibit 3, pages 29 and 30. On page 30, it is indicated that Mr. Genova would pay the outstanding fines. But, as stated, this Tribunal accepts the evidence that they were not paid as at November 23, 2006.

Reference is also made in the notes to a discussion about an accident that occurred on November 17, 2005 and to an inspection that occurred on March 24, 2006.

At the Show Cause Hearing, the Applicant, through the work of Mr. Gillett, filed extensive materials, found at Tab 5 of Exhibit 3.

After the Show Cause Hearing was held, a Suspension and Seizure Order dated July 25, 2006, was issued, calling for a suspension for 15 days instead of the original 30

days. In it, the Deputy Registrar of Motor vehicles, who signed the document, stated that he still had concerns for highway safety.

During cross-examination of Ms. Di Paolo, the agent for the Applicant challenged Ms. Di Paolo on her credentials and experience as a carrier safety rating administrator. Without going into details, suffice it to say that this Tribunal did not consider that the evidence of Ms. Di Paolo had at all been discredited.

Concerning the Public Guideline, the agent for the Applicant established that the Applicant had been registered in August, 1989, but that the Public Guideline came out only in 1997. Ms. Di Paolo did not know if the Public Guideline material was available in 1989 or whether it was on any website, as it is now. Furthermore, Ms. Di Paolo did not know if any notice of the Public Guideline had been sent to existing registrants after 1997. Nevertheless, the material is available on line to the public and certainly to Commercial Vehicle Operators, so that carriers, including the Applicant, could have access to the Guideline if they were serious enough about wanting to know its contents. Regrettably, no officer of the Applicant carrier testified in this proceeding. Thus, this Tribunal has no evidence before it to help determine whether the Applicant made any effort to access the Guideline on the Ministry website or whether it did not know of the Guideline.

The Applicant's agent also seemed to make much of the fact that no facility audit had been done of the Applicant's operation. But, even the Public Guideline, at page 27 of the document, being page 132 of Exhibit 3, states that, although a facility audit could be performed if a carrier's overall violation rate exceeds 65%, the Guideline provides specifically that, in such a circumstance, an interview can be held instead of a facility audit. The standard form letter, found at page 286 of Exhibit 3, states the same thing. The Public Guideline also states that either an audit or interview can be held even if a carrier's overall violation rate exceeds 80%. Therefore, on such evidence, this Tribunal saw no significance, nor anything sinister, in the fact that the Ministry performed no facility audit on this Applicant. Besides, the testimony of Ms. Di Paolo confirmed, and the information in the Public Guideline indicated, that a carrier could voluntarily request that a facility audit be done on its operation. Therefore, if the Applicant is now insisting that an audit should have been done before the Notice of Suspension and Seizure had been issued, the Applicant could have requested that one be done. There is no evidence before this Tribunal that such a request had been made or, if made, had been denied.

Concerning the interview itself, the Applicant's agent confirmed, by way of cross-examination, that one of the purposes of the interview is to educate the carrier on the CVOR system, and another was to warn the carrier of problems. On being questioned on the matter, Ms. Di Paolo stated that she saw nothing in the interview notes found at Tab 9 of Exhibit 3 to indicate the Guideline was given to the Applicant or that he was

informed that it was available on a website. However, by the same token, neither is there any evidence from the Applicant to indicate that he was not so informed.

Concerning the Show cause hearing on June 29, 2006, the Applicant's agent pointed out that the carrier's Record that is reviewed at such a meeting normally covers only a two-year period of time. But, at this Show Cause Hearing on June 29, 2006, the accident of June 28, 2004, referred to on page 69 of Exhibit 3, and which attracted 8 violation points, would have been outside the two-year period by one day. Therefore, why should it have been included in the information discussed at the Show Cause Hearing on June 29th, and possibly form the basis for the Suspension and Seizure Order of July 25, 2006? In response, Ms. Di Paolo pointed out that the Commercial Vehicle Operator Record was printed out on May 29, 2006, just 2 days before the first Suspension Notice dated May 31, 2006, was given, and well within the two-year period. The Show Cause Hearing was supposed to have been held on June 12, 2006, which date also fell within the two-year period, but it was the Applicant who requested the hearing be delayed until June 29th. In view of this sequence of events, this Tribunal is not persuaded that the incident on June 28, 2004, was improperly before the parties on June 29, 2006.

Furthermore, the agent pointed out that, by the time the second Notice was issued on July 25, 2006, the June 28th conviction should not have been a consideration because the July 25th date was then 25 months, not just 24 months, after that infraction. However, this Tribunal would conclude that, whether that infraction should have been omitted misses the point that, by the time of the second Notice, the Applicant's violation rate of the CVOR threshold in the 6-month performance analysis ending June 29, 2006, had increased from the immediately previous 13-month performance analysis, also ending June 29, 2006, so as to justify concerns that the Deputy Registrar had before he issued the second Suspension Order. There is ample evidence to allow this Tribunal to conclude that there was more involved in the Deputy Registrar's decision than the June 28, 2004, conviction.

The Applicant's agent also brought up the fact that there are different levels of inspection done on a carrier's operation. A Level 1 inspection relates to safety matters. Any out-of-service defects would show up on the Commercial Vehicle Operation summary. However, the Applicant's agent pointed out that there are also Level 3 and Level 5 inspections. No details were provided on what criteria are considered in Level 3 and Level 5 inspections. But, as this Tribunal understands the argument, results of those inspections do not show up on the Record. Therefore, if there were more inspections other than Level 1 inspections, the out-of-service rate could very well be lower once those additional inspections were factored into the out-of-service calculation rate. However, this Tribunal considers that the CVOR system and the Level 1 inspections relate to safety on the highways and, as such, the Level 1 violations directly

relate to that issue and should not be watered down by matters that might not relate to that issue.

Evidence of Don Gillett

Mr. Gillett was the only witness to testify on behalf of the Applicant. No officer or other person associated with the operation of the Applicant's business gave evidence.

It was obvious, from his stated credentials, that Mr. Gillett had extensive experience with the CVOR system. Having acknowledged that, this Tribunal sees no need to detail all his experiences; nevertheless, it should be pointed out that he had been an area enforcement officer with the Ministry. He performed ten years of highway enforcement of commercial vehicles. He trained police officers on how to perform commercial vehicle safety inspections. He had appeared as an expert witness in commercial vehicle fatality cases. He became a CVOR commercial analyst and then a carrier safety rating administrator, which is the same position held by Ms. Di Paolo, who was the Respondent's sole witness. He also became a National Safety Code Facility Auditor.

On retirement from the Ministry, he became a safety and compliance consultant, focusing on training companies and their drivers on how to avoid getting involved in situations leading to prosecutions. In fact, on cross-examination, Mr. Gillett acknowledged that the Applicant had hired him in about the beginning of June 2006, after the Applicant had received its Notice of Suspension and Seizure dated May 31, 2006. He actually worked for five different carriers, of which the Applicant was one. He spends about 40% of his time working for those companies, and the rest of the time doing group presentations. It was Mr. Gillett who prepared the material that was presented when he and Mr. Genova appeared at the Show Cause Hearing on June 29, 2006. This material is found at Tab 5 of Exhibit 3.

It was apparent that Mr. Gillett, in appearing with the Applicant at the Show Cause Hearing, and on the Applicant's behalf at this hearing, was advocating on behalf of the Applicant. The Applicant's agent had not advised this Tribunal before this hearing that the Applicant intended to qualify Mr. Gillett as an expert witness. There was no compliance with the Rules of this Tribunal, which require a party to provide, before a hearing takes place, a summary of the qualifications of the proposed expert and a copy of his report or a summary of it. Nor did the Applicant's agent, before Mr. Gillett began to testify, advise this Tribunal that he intended to qualify Mr. Gillett as an expert, nor were any steps taken to so qualify him as such. In fact, no doubt at least partly because of that, the Respondent objected to Mr. Gillett giving any expert testimony, and this Tribunal agreed with that objection. This Tribunal would question whether Mr. Gillett could, in fact, be qualified as an expert, in the circumstances of this case, in view of his very obvious role as advocate on behalf of the Applicant.

The substance of Mr. Gillett's evidence appeared to deal with two main complaints.

One complaint was that the Ministry should have performed a facility audit on the Applicant's operation before it issued the Suspension and Seizure Order. In fact, his testimony was clear in that, based on his experience, it was unusual for an audit not to have been done, even when the Applicant reached 65% of its overall CVOR threshold. In fact, he stated, even after the interview of the Applicant was completed on March 29, 2005, an audit could still have been ordered, but was not. He testified that the Ministry should have performed an audit notwithstanding the fact that Mr. Gillett, using his years of experience and training, had performed such an audit of the Applicant's business and had presented it at the Show cause Hearing. It will be remembered that, after the Show Cause Hearing, during which this audit had been presented, the Ministry reduced its proposed suspension period from 30 days to 15 days.

Notwithstanding Mr. Gillett's suggestion that an audit should have been done, the question of an audit is referred to in both the warning letter, a sample of which is found at page 286 of Exhibit 3, and in the Public Guideline, found at page 102 of Exhibit 3, and more particularly, page 132. This Tribunal has already stated earlier in these Reasons that both documents state that, once an overall rating exceeds 65% and 80%, either an interview could be held or an audit could be done. Both documents state that an audit *may* be done, but not that it *must* be done. There is no cogent evidence before this Tribunal that the Ministry acted improperly in not conducting an audit.

The second complaint deals with the allegation that the Applicant was unfairly "targetted" by the Ministry for offences. This argument arises from the fact that the Applicant was an Overweight/Oversize ("O/O") carrier. Such a carrier carries large and heavy loads. Therefore, its vehicles are highly visible, more so than those of carriers that run smaller vehicles that are not subject to such extreme exposure.

Special permits are obtained from the Ministry or municipalities through which the vehicles travel. Special permits deal with such things as the need for flags, signs, securement of load, number of axles and their positions, restrictions on the roadway and speed limits, the hours of operation and the requirement to stop at inspection stations. In fact, Mr. Gillett stated that there could be anywhere up to 15 or more different provisions with which such an O/O carrier would have to comply. They are highly visible to enforcement officers because of such things as their size, need for escort vehicles, special lighting and the very size of the load.

Yet, according to Mr. Gillett's testimony, despite these particular attributes, the vehicles are subject to the same criteria as those that apply to carriers that use much smaller vehicles.

On cross-examination, however, Mr. Gillett acknowledged that, despite the extra large size of the Applicant's loads, it still must operate safely, as do all other, even smaller, carriers. That requirement is consistent for all. In fact, he also agreed that the reason for all the special permits is that O/O loads are more dangerous, so that, from a safety point of view, the public would want them to be safer. In fact, Mr. Gillett further acknowledged that the CVOR system Guideline was a product of a joint consideration of industry interests and standards. The Guideline evidenced an agreement with the Ministry as to how operators were to be tracked in its monitoring system. The object was mainly to avoid accidents. Even if the Applicant's vehicles were inspected frequently, nevertheless, if they were safe, they would pass inspection no matter how often they were inspected.

Further, Mr. Gillett also agreed that, if the Applicant's vehicles are extra large, they must operate in a more controlled way simply because they are bigger and more dangerous.

Having regard to the number of inspections done on the Applicant's vehicles, the number of accidents, convictions and outstanding charges, this Tribunal cannot conclude that the evidence is sufficient enough to suggest that this company was "targetted" by the Ministry in any way. The violations of the Applicant are recorded on the carrier's record automatically; it is not because the Ministry takes pains to single it out. But, once the violation is recorded, the CVOR system requires definite steps to be taken by the Ministry.

Other Grounds for Appeal

The Applicant's Notice of Appeal also stated that the proposed 15 day suspension and seizure will result in loss of clients, business cash flow; drivers and families will suffer. However, during this hearing, no evidence whatsoever relating to this ground was led. No officer or director of the Applicant carrier, who could give evidence on that ground of appeal, testified. Nor was argument presented on that ground at the conclusion of this hearing. Therefore, this Tribunal finds it is unnecessary to rule on that ground of appeal in these Reasons.

THE LAW

The power of the Registrar to issue a suspension is provided for in section 47 of the Act, 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) 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).
>
> (emphasis is added)

The right to appeal a notice of suspension is contained in section 50(1) of the Act, which provides:

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

The "tribunal" refrred to in that section is the Licence Appeal Tribunal, as defined in section 1 of the Act, which provides:

> 1. (1) In this Act,
> ...
> "Tribunal" means the Licence Appeal Tribunal;

The powers of this Tribunal on hearing such an appeal are set out in section 50(2) of the Act:

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

CONCLUSION

Having regard to the Carrier Record Review, found at Tab 7 of Exhibit 3, it is apparent that, after the interview was held on March 29, 2005, the Applicant's record did improve. However, by the time another year had passed since the interview, the Applicant's record shows that its violation rate again exceeded 100% of the CVOR threshold. Inspections had been performed resulting in 3 out-of-service violations. Accidents continued to accur as did convictions. There were, as well, four outstanding charges under the Act and its regulations, as at August 9, 2006. There were still fines that had to be paid.

There was no evidence given by the officers or directors of the Applicant carrier. Thus, this tribunal had no up-to-date information on any new or amended action plan that the Applicant intended to implement. This Tribunal also had no evidence as to the status of the action plan that the Applicant had presented during its interview on March 29, 2005. All that this Tribunal has are the figures and records presented by the Respondent. There was no cogent evidence before this Tribunal to suggest that those records were incorrect.

Considering all of the above matters, it is this Tribunal's finding that the Deputy Registrar was not in error in remaining concerned for highway safety in matters relating to this Applicant, having regard to the Applicant's current record, and past Ministry interventions, such as warning letter, interview and having regard to the Applicant's safety record, including convictions, accidents, inspections and vehicle out-of-service rates.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order for 15 days.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski
Vice- Chair

RELEASED: December 22, 2006

FILE NAME: 3731.cvor.S.P.G. Haulage

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

U-HAUL CO. (CANADA) LTD.

IN THE MATTER OF THE SUSPENSION AND SEIZURE ORDER OF THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED SEPTEMBER 14, 2006.

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

APPEARANCES: PETER J. PLISZKA and CHARLES TOTH, Counsel representing U-Haul Co. (Canada) Inc.

MURRAY G. FORBES, Counsel representing the Deputy Registrar of Motor Vehicles under the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended

DATE OF PRE-HEARING: December 21, 2006 Toronto

ORDER

1. The appeal brought by the Applicant in this matter is hereby withdrawn on consent of the parties hereto without prejudice to the Applicant.
2. The abeyance order made by the Deputy Registrar dated September 14, 2006 is deemed not to be an order made under Section 47 of the *Highway Traffic Act* R.S.O. 1990 C.H. 8.

LICENCE APPEAL TRIBUNAL

_____

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

RELEASED: December 22, 2006

File Name: 3810.cvor.U-Haul.pre-hrg.doc

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



Decisions under Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

Fiscal Year 2006 - 2007

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

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

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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

Fiscal Year 2006 - 2007

- 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 95(1) - Motor Vehicle Inspection Licence - (GARAGE)

Fiscal Year 2006 - 2007

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

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- JOSE ORELLANA dba SANTA ANA AUTOMIVE and JOSE ORELLANA
- RAY TEK MOTORS INC. AND RAYMOND BETNOVIN
- JOSÉ ORELLANA DBA SANTA ANA AUTO MAINTENANCE AND ORELLANA, JOSÉ
- BEST DEAL MOTORS COLLISION CENTRE INC. and GREGORY RABKIN
- JOSÉ ORELLANA DBA SANTA ANA AUTO MAINTENANCE and JOSÉ ORELLANA
- AHMAD KHAN DBA KHAN AUTO & TRUCK REPAIRS
- JOSEPH ABOAGYE DBA GOLDEN TOUCH GARAGE
- G. GAGNON & R. GAGNON DBA GAGNON & SON ENTERPRISE AND GAETAN GAGNON
- AHMAD A. KHAN DBA KHAN AUTO & TRUCK REPAIRS
- 724718 ONTARIO INC. DBA ROYAL MOTORS AND STEPHEN TRUSZKOWSKI
- LEPAGE TEST INC. AND FAREEBORZ ZARAINEH
- G. GAGNON & R. GAGNON DBA GAGNON & SONS ENTERPRISE. AND GAETAN GAGNON
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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JOSE ORELLANA dba SANTA ANA AUTOMIVE and JOSE ORELLANA

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS TO REVOKE TO A MOTOR VEHICLE INSPECTION STATION LICENCE AND TO REVOKE A MOTOR VEHICLE INSPECTION MECHANIC LICENCE

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, presiding,
HARINDER GAHIR, Vice-Chair

APPEARANCES: LARRY YOUNG, Agent, for the Applicant

MURRAY FORBES, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF HEARING: February 9, 2007 Toronto

REASONS FOR DECISION AND ORDER

This appeal arises out of a Notice of Proposal to Revoke the Applicant's motor vehicle inspection station ("MVIS") licence which is registered in the name of his sole proprietorship and to revoke his MVIS mechanic licence. Since the sole proprietorship is indistinguishable at law from Jose Orellana, the term, Applicant, will be used throughout, notwithstanding that the Notice of Proposal proposes to revoke two licences. The Notice of Proposal is dated October 3, 2006 and is Exhibit 1 to these proceedings. The Notice of Proposal arises out of a number of incidents testified to by Ontario Ministry of Transportation ("MTO") officers. Some of the incidents have resulted in convictions under the *Highway Traffic Act* R. S. O. 1990 chap. H. 8 (the "Act"). The Applicant admitted his convictions and the essential facts set out in the proposal but based his appeal on the ground that the penalty is too harsh.

There was evidence from five MTO officers. In most cases their evidence related to safety defects found on vehicles shortly after the vehicles had been inspected by the Applicant. The first officer, Glen Dodwell, was the officer with primary responsibility for the Applicant's area. He is a trained mechanic licensed to issue motor vehicle inspection certificates. His mechanic's training qualifies him to two standards, 310-S

enabling him to work on vehicles up to 9000 kilograms without air brakes and 310-T allowing him to work on vehicles in excess of 9000 kilograms with air brakes.[1] He joined MTO in 2001 and works out of the Toronto District Office with responsibility for inspection stations in the western part of Toronto. His area of responsibility is west of Yonge Street and east of Highway 427. This area includes Toryork Road at Finch Avenue and Weston Road where the Applicant's premises are located. His dealings with the Applicant largely arose out of complaints received from officers in other areas in the Province.

In his evidence Officer Dodwell reviewed the conviction record of the Applicant as found in MTO records.[2] He noted that there were three convictions for breach of s. 99 (2) of the Act relating to the making of a false statement on a safety certificate and one for breach of s. 90 (3) for the issuance of a certificate not in accordance with the Act.[3] He was the author of a letter of recommendation to revoke the Applicant's licences when he found safety certificates signed in blank with no vehicle details. He also found a number of certificates for which there were no corresponding work orders or no price on work orders that were present. Signing blank certificates is, in Officer Dodwell's view, like signing a blank cheque. Officer Dodwell felt that the number of convictions, the lack of proper paperwork and the blank signed safety certificates called the Applicant's honesty and integrity into question.

He reviewed evidence received from an MTO inspector in London concerning safety certificate # 4826469. Nine days and approximately 350 kilometres after the Applicant issued this safety certificate, the vehicle was examined in London and found to have a large hole in the floor under the carpet. The London field officer's notes indicate that the hole was approximately 6½" by 4½" with no sign of tampering. The condition of the hole convinced the officer in London that it had been there for some time. When Officer Dodwell attended at the Applicant's premises, he noted that the Applicant had a work order indicating that the vehicle required tires and exhaust and a safety check, all for $35.00. The Applicant admitted that he had signed the safety certificate and stated that he had inspected the vehicle at a location other than his premises. Pursuant to the Act, inspections must be conducted at the motor vehicle inspection station, i.e. the Applicant's premises. Charges were laid arising out of this incident and convictions registered.

Officer Dodwell went on to review a number of other incidents. One involved an annual inspection sticker for a vehicle in excess of 4500 kilograms where the inspecting officer, Karl Kaseloo, removed the vehicle's plates. A second involved a Ford pick-up inspected near Sault Ste. Marie. The odometer had only a few kilometers on it since the issuance of the safety certificate by the Applicant in Toronto, despite the fact that Sault Ste Marie is approximately 700 kilometres from Toronto. In each instance, the

[1] The distinction between the "S" and "T" licences is of importance for the Applicant as he possesses a 310-S licence. He is not entitled to work on heavy vehicles with air brakes.
[2] Ex 3 Tab 6
[3] The offence section of the Act with respect to safety certificates is s. 99. Strictly speaking, the 90 (3) offence is an offence under s. 99 for breach of 90 (3).

Applicant admitted that the applicable safety or inspection certificates had been signed by him. The actual inspecting officers testified in each of these cases.

The final issue covered by Officer Dodwell involved a tractor-trailer that was inspected on Highway 401 near London. The tractor had a recent annual inspection sticker. It was found to have no mufflers. When Officer Dodwell attended at the Applicant's premises with respect to this complaint, he found that there was no work order relating to the annual inspection. It was during this attendance that he discovered the pre-signed safety certificates. The inspecting officer testified before the Tribunal in this matter.

On cross-examination, Officer Dodwell reviewed the audit and inspection history of the Applicant. He stated that the Applicant had operated continuously since 1998. He had had previous MTO inspections that had been found to be satisfactory. There were no previous work order deficiencies and no previous incidents of pre-signed safety certificates. On the last inspection, Officer Dodwell questioned the Applicant about where the work orders might be. The Applicant informed him that they were with his bookkeeper but he could get them if necessary. It was Officer Dodwell's position that the Applicant is required to keep his books and records on site at all times and available for a spot inspection.

Karl Kaseloo has been a Transportation Enforcement Officer with MTO since 2001. In addition to inspection training when he was first hired, he has had ongoing training and periodic updates. On July 28, 2004 he pulled over a Chevrolet cube van and conducted a level one inspection. He found a number of mechanical deficiencies with seven defects being out of service defects. He took the plates off the vehicle. He noted a flat tire, cracked brake lines, signal and brake lights out, lateral movement of the ball joints in excess of 1/8", stone chips, seeping brake fluid and a hole in the floor under the driver's seat. He noted that the vehicle had an annual inspection sticker dated for June 2004. He was concerned that many of the defects he noted had been present for some time and should have been addressed at the June annual inspection. He decided to contact Michael Janson, an MTO officer who is a qualified inspection station mechanic. Officer Janson attended the scene and conducted a further inspection.

Cross-examination of Karl Kaseloo largely addressed two competing inspection standards, one applied by him at the scene and one applied by Officer Janson at the scene. Officer Kaseloo is trained to a standard that he referred to as "CVSA." He applied that standard which allows a lateral movement of not in excess of 1/8" in the ball joint. Officer Janson applied the inspection standard set out in Regulation 611.[4] Officer Kaseloo has been informed that the Reg. 611 standard provides for no lateral movement in the ball joints and that the 611 standard is more rigorous than the CVSA standard.

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[4] *SAFETY INSPECTIONS* R.R.O. 1990, Regulation 611 as amended by O. Reg. 214/03

Michael Janson attended at the scene where Officer Kaseloo had taken the plates off the Chevrolet van. He has been qualified as a 310 – T and S mechanic since 1984 and has been a Transportation Inspector for six years. He found a great number of defects and agreed with Officer Kaseloo that the vehicle should have its plates removed. He found that half of the power steering belt was missing. The power steering reservoir had only about one inch of fluid when it should have four inches. He found excessive movement in the ball joint and 0.075" play in the tie rod end. The inspection standard is zero movement. Since the vehicle had recently been inspected by the Applicant, it should have met the inspection standard. He found the rear brake line badly corroded, a rust hole under the driver's seat, cracked front flex hoses, lights out and the rear brake shoe separating. Some of the conditions he found had the potential to result in a loss of steering or brake failure.

Officer Janson then attended at the Applicant's premises and spoke to the Applicant. He asked to see the annual inspection sticker. He noted that the inspection had been carried out thirty-three days before the vehicle had been stopped and that it had only been driven one hundred and four kilometers in that time. He stated that the noted defects could not have developed in such a short time frame. The Applicant was charged for making a false statement and was convicted.

Officer John Ainsworth works out of the Sault Ste. Marie office. He has been a Transportation Enforcement Officer for ten years. He holds 310 S and T mechanic's licences as well as a 421-A heavy equipment licence. He was contacted by a mechanic in Thessalon, a town in his region some miles east of Sault Ste. Marie. The mechanic was repairing the clutch on a vehicle which the owner informed him had just been put on the road with a fresh safety certificate. The mechanic had grave concerns about the state of the vehicle. Officer Ainsworth attended to do an investigation. He checked the safety certificate and noted that it had been issued twenty-two days earlier and the car had been driven eighty-eight kilometres in that time. He noted that the safety certificate had been issued by the Applicant in Toronto and that it is approximately six hundred kilometers from Thessalon to Toronto. Officer Ainsworth carried out a partial inspection of the vehicle and noted the right headlight was out, the licence plate lights were out and the frame cross-member was completely gone. The only thing holding the radiator in place was the radiator hoses and it was leaking brake fluid. Following this inspection, the owner was able to get his money back and he returned the car. Officer Ainsworth summed up his impressions of the vehicle in the following words: "Any mechanic viewing this vehicle would have had a blatant disregard for public safety and the MVIS program." He was of the view that the vehicle would fetch $100 at a wrecker's yard. In his view, it certainly was not valuable enough to have been shipped by car carrier from Toronto.

The file was then referred to Officer Dodwell in Toronto for follow up. He knows that the Applicant was charged as he attended court on two occasions. He believes the Applicant pleaded guilty.

Officer John Tomasone testified concerning a vehicle he had examined. Officer Tomasone has a 310-S and T mechanic qualification as well as a 421-A qualification for

heavy equipment. He was asked to attend at a company called Bimmersport Automotive. A consumer had purchased a vehicle with a fresh safety certificate. The consumer discovered that the parking brake would not hold the vehicle. On inspection, Officer Tomasone determined that there were numerous safety defects. He was unable to remove the rear wheels as the wheel lug key was not available. On the right front he found that the brake rotor was too thin and there was corrosion and ridges present. The corrosion indicates that there is insufficient contact between the brake pads and the rotors. He was unable to remove the left front wheel because there was no key but he could see corrosion on the rotor similar to the right. He examined the vehicle again about a week later when the rear wheels were removed. He noted that the rear brake shoes were worn down to the metal.

When Officer Tomasone attended at the Applicant's premises and met with the Applicant, the Applicant identified his signature on the safety certificate. A review of the work order indicated that only lights and exhaust were identified as problems. The Applicant informed Officer Tomasone that he had noted all of the deficiencies that had been found on the vehicle and had returned the vehicle to the dealer for repairs. He had provided the certificate without re-inspection when the dealer had informed him that the repairs had been completed. Officer Tomasone conducted an inspection of the tools available at the premises and noted the lack of a two inch micrometer, a necessity for conducting inspections on large vehicles. Officer Tomasone laid charges under the Act but, for some reason, he was not informed of the trial date so the charges were dropped for lack of evidence.

The last witness for the Director was Officer Peter Dodsley. Officer Dodsley is an MTO Enforcement Officer working out of London, Ontario. He has held 310-S and T licences since 1970 and joined MTO in 1987. On July 16, 2006 he was on duty at the Putnam Scale when a tractor-trailer pulled in. The tractor had no mufflers. Officer Dodsley described the lack of mufflers as unmistakable as the noise shook the windows of the inspection station. He pulled the vehicle over and conducted a level 1 inspection. He noted that the right side wiper on the tractor was not working and that the tractor had no mufflers. He noted that the safety certificate was issued on April, 2006. He then reviewed the details of the issuing MVIS and mechanic and noted that the Applicant's mechanic's licence was a 310-S licence, in other words the Applicant was not entitled to issue certificates for vehicles over 9000 kg with air brakes. The tractor-trailer Officer Dodsley was inspecting had a gross weight of 39,500 kg and was equipped with air brakes. He questioned the driver about the lack of mufflers and was informed that the vehicle was unchanged since its April inspection by the Applicant and, in fact, had been in that condition for two years. Officer Dodsley referred the matter to Officer Dodwell in Toronto for follow-up with the Applicant.

The Applicant testified on his own behalf. He is not a native English speaker, Spanish being his first language, but testified that his wife is fluent in English. His wife assists him in the business. He stated that he has been a mechanic for most of his life. He has been repairing vehicles of all sizes for about eighteen years and has run his sole proprietorship for about 12 years.

The Applicant applied for the MVIS licences in 1998. His wife filled out the form. An officer attended at the premises he occupied at the time and provided him with an MVIS manual. He stated that he did not review the manual with the officer at the time and did not read all of it. His English skills were not good in 1998. He stated that the attending officer advised him that he could issue certificates for any size of vehicle as long as he had the proper tools.

The Applicant admitted pleading guilty to two charges arising out of the hole found in the floor of a Toyota pick-up truck that was the subject matter of safety certificate #4828469. One charge was for carrying out the inspection at a location other than his premises and the second was for making a false statement. He stated that he hired an agent, Stop All Traffic Tickets. He was advised to plead guilty. With respect to the Chevrolet cube van that was pulled off the road by Officer Kaseloo and inspected by Officer Janson, he stated that he saw no problems when it was inspected at his premises. He stated that he put it on the hoist and found no play in the ball joints. He also admitted that he signed a safety certificate for the vehicle found to be defective by Officer Tomasone. He re-affirmed what he told the officer. He had noted defects in the vehicle and returned it to the dealer to have the work completed. It was his intention to re-inspect once the work was completed but the dealer called and asked him to provide the certificate urgently and told him that all the work had been done. He believed the dealer. He also stated that the tractor-trailer inspected by Officer Dodsley at the Putnam weigh scale had mufflers when he inspected it. He went on to state that the mufflers were new at the time of his inspection. Finally, he was silent about the vehicle inspected by Officer Ainsworth in Thessalon.

With respect to the pre-signed certificates, the Applicant stated that he had two customers waiting for safety inspections and his mechanic was working on the vehicles. He had to go to the bank so he signed the certificates so the mechanic could give them to the owners when he was done. It is common ground that the Applicant is the only MVIS licensed mechanic working at the premises. With respect to one of the vehicles he merely removed the wheels when the customer informed him that he could wait no longer. He re-installed the wheels and charged $20 for the work done this far. He stated that he did not give the certificate to this customer nor was it his intention to do so unless he had completed the safety inspection.

In cross-examination the Applicant testified that his mode of operation for dealers had been to conduct an inspection and return the car to the dealer for repair and installation of necessary replacement parts. He never actually replaced parts. He now knows that he has to carry out the repairs or at the very least inspect the work. He further admitted that he did not read the MVIS manual but is reading it now. He stated he could not read it because of his poor English before but can now. He also admitted that he had never reviewed Reg. 611 or looked at the schedules to it. As stated above, this regulation defines the inspection standards. He admitted that he really had no idea what was required of him. Finally he admitted that he had pleaded guilty with respect to all of his convictions.

THE STATUTORY PROVISIONS AND THE LAW

The Act sets out the legislative scheme for the licensing of an MVIS, revocation and refusal of licensing and appeal rights to this Tribunal as follows:

> 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.

Issuance of licence

> (2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence.

Grounds for refusal

> (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, 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 station 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; or
>
> (d) the equipment and premises are not suitable for the performance of the inspections for which the licence is sought.

Expiration and renewal of motor vehicle inspection station licence

Revocation of 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 purpose 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;

(f) the inspections that can be performed by the motor vehicle inspection station are misrepresented;

Motor vehicle inspection mechanic

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

Registration

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

Expiration of registration

(3) The registration of a motor vehicle inspection mechanic expires with the licence of the motor vehicle inspection station to which the mechanic is registered.

Grounds for refusal

(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.

Revocation of registration of motor vehicle inspection mechanic

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

(a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate 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 registrant;

(b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or

(c) the registrant does not comply with this Act or the regulations.

Hearing re. terms of licence

94. (1) Where the Director issues a licence under this Act and the licensee is dissatisfied with the conditions thereof prescribed by the Director, he or she may by written notice given to the Director and the Tribunal require a hearing by the Tribunal, and the Tribunal shall appoint a time for and hold a hearing.

Decision of Tribunal

(2) After a hearing under subsection (1), the Tribunal may affirm the conditions prescribed for the licence by the Director or may cancel the conditions or may prescribe the other conditions for the licence in the place of those prescribed by the Director that it considers proper and the conditions shall be conditions of the licence.

Proposal to refuse to issue or revoke licence or registration

(1) Where the Director proposes,

(a) to refuse to issue or renew a licence;

(b) to refuse to make a registration; or

(c) to revoke a licence or registration,

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

(d) in the case of a proposal to refuse to issue a licence, upon the applicant;

(e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;

(f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and

(g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

Notice

> (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

Power of Tribunal where 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.

ANALYSIS

At the outset of the hearing and at the outset of these reasons, it was confirmed that the Applicant was not taking issue with the factual allegations against him. The Tribunal heard extensive evidence concerning the substance of the various convictions and on that basis it is in a position to determine how egregious his behaviour in the past has been. It also has considered Officer Tomasone's evidence of infractions that did not result in a conviction because Officer Tomasone was not informed of the court date. When the evidence is considered in its totality, the Tribunal is forced to the conclusion that the Applicant has operated his business without the least regard to his obligations. This fact is hardly surprising since he has admitted that he does not know his obligations and is only now putting in the effort to learn what they might be.

The only incident over which the Tribunal has doubts relates to the truck inspection at the Putnam scale. The Tribunal has some difficulty concluding that a vehicle that rattled the inspection station windows could operated on provincial highways without detection from April to July. The Tribunal accepts the Applicant's evidence that the vehicle had mufflers when inspected. What remains at issue is the fact that his 310-S licence did not give him the privilege of inspecting this vehicle in the first place. With respect to the inspection in Thessalon, the Tribunal is forced to the conclusion that the Applicant never saw this vehicle and simply mailed a completed certificate.

The provisions of the Act which deal with the licensing and operation of an MVIS are for the protection of the public of Ontario. Users of Ontario's highways are entitled to comfort arising out of the fact that large vehicles are subject to annual inspection requirements and that smaller personal vehicles are inspected on a transfer of ownership. The purpose of the scheme is to minimize incidents of the failure of a safety related system of vehicles operating on the public highway. At its core, the system operates on the basis of enlightened self interest. Mechanics and MVIS operators are extended a privilege to issue safety and inspection certificates in return for fees. It is an underlying assumption that no business person or mechanic will threaten his or her

livelihood by falsifying documents for the relatively minor amount earned in issuing a false certificate. The penalty for doing is the revocation of the privilege. The system is then backed up by either a consumer driven complaint mechanism or spot checks on commercial vehicles. It appears nothing in this scheme deterred the Applicant.

In setting out matters for consideration when revocation is considered, the Act clearly puts the emphasis on the past behaviour of the Applicant. Notwithstanding the Applicant's statements that he will operate within the law in the future and that he is now taking steps to learn and understand his obligations, the Applicant's past behaviour damns him. Promises of future good behaviour are easy to make. What is more in issue, on these facts, is that the Applicant failed to change his behaviour even when faced with charges that clearly established for any thinking person that his actions were wrong. He has had ample opportunity to consider his behaviour and correct it. He has failed to do so. Before this Tribunal he showed little remorse about his past actions. He suggested that at least some of his guilty pleas were based on poor legal advice from his agent. This Tribunal cannot conclude that he fully understands the risks to which he has exposed the Ontario public by his wrong-minded approach to his obligations. The Tribunal is not prepared to expose the Ontario public to further risks.

ORDER

On all of the evidence, this Tribunal has no hesitation in concluding that the Director, based on the past conduct of the Applicant, has reasonable grounds for the belief that if the Applicant were allowed to continue with an MVIS licence, the MVIS will not be operated in accordance with the law and with honesty and integrity. Further, with respect to the Applicant's continued licensing as an MVIS mechanic, the Tribunal has no hesitation in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not act as an MVIS mechanic in accordance with the law and with honesty and integrity. Accordingly the Tribunal orders the Director to carry out the provisions of his Notice dated October 3, 2006 and revoke the Applicant's licences as an MVIS or an MVIS mechanic.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude, Vice-Chair

RELEASED: March 19, 2007

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

RAY TEK MOTORS INC. AND RAYMOND BETNOVIN

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

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: DANNY MORTON, Counsel, for the Applicants

PATRICK MOORE, Counsel, representing the Director of Vehicle Inspection Standards (the "Director")

DATE OF HEARING: January 3, 2007 Toronto

ORDER

Following attendances on January 3, 2007, at a pre-hearing at the Tribunal's Chambers at 1 St. Clair Avenue West, Toronto, of Danny Morton, appearing as counsel for the Applicants and Patrick Moore, appearing as counsel for the Director of Vehicle Inspection Standards;

The Tribunal makes the following order respecting the hearing scheduled to commence on Wednesday, February 14, 2007, at 9:30 a.m. at the Tribunal's Chambers:

1. The parties to the hearing are Ray Tek Motors Inc., Raymond Betnovin and the Director.

2. No issues were resolved at the pre-hearing.

3. The parties shall otherwise abide by all of the Tribunal's Rules of Practice 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: January 16, 2007

File name: 3853.gar.Ray Tek.pre

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

JOSÉ ORELLANA DBA SANTA ANA AUTO MAINTENANCE AND ORELLANA, JOSÉ

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 JOSÉ ORELLANA DBA SANTA ANA AUTO MAINTENANCE

AND IN THE MATTER OF THE MOTOR VEHICLE INSPECTION STATION MECHANIC'S REGISTRATION OF JOSÉ ORELLANA

TRIBUNAL: IRVIN H. SHERMAN, Vice-Chair

APPEARANCES: LARRY YOUNG, representing the Applicant, José Orellana

MURRAY FORBES, Counsel, appearing on behalf of the Director of Vehicle Inspection Standards

DATE OF PRE-HEARING: December 5, 2006 Toronto

ORDER

Following attendances on December 5, 2006 at a pre-hearing before this Tribunal of Larry Young, appearing on behalf of the Applicant and Murray Forbes, 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 February 9, 2007 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 advised the Tribunal that he may present testimony and evidence from three witnesses while Counsel for the Director advised he may present four witnesses.

3. The Parties were reminded of the Tribunal's disclosure rules and timing, and that they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

_____
Irvin H. Sherman
Vice-Chair

RELEASED: December 12, 2006

FILENAME: 3835.Orellana.gar.pre-hrg.doc.

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PREHEARING

BEST DEAL MOTORS COLLISION CENTRE INC.
and GREGORY RABKIN

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES 91(8)(a), (c), (e) AND 93(a)(c) OF THE *HIGHWAY TRAFFIC ACT*.

TO REVOKE MOTOR VEHICLE INSPECTION STATION LICENCE No. 21-28493 ISSUED TO BEST DEAL MOTORS COLLISION CENTRE INC., AND REGISTRATION AS A MOTOR VEHICLE INSPECTION MECHANIC OF GREGORY RABKIN (T.C. #310S-126690).

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: RON SHULMAN, Counsel, representing Best Deal Motors Collision Centre Inc. and Gregory Rabkin

MURRAY FORBES, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF PRE-HEARING: November 27, 2006 Toronto

ORDER

Following attendances on November 27, 2006 at a pre-hearing before this Tribunal of Ron Shulman, Counsel for Best Deal Motors Collision Centre Inc. and Gregory Rabkin (the “Applicants") 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 January 5, 2006.

1. The Parties to the hearing are:

   (a) Best Deal Motors Collision Centre Inc. (“Best Deal”) and Gregory Rabkin;

   (b) The Director of Vehicle Inspection Standards.

2. Mr. Shulman reviewed the five reasons listed in the Notice to revoke of September 12, 2006, and noted that three dealt with failing to affix stickers and other incidents "are quite dated". He added that regarding reasons one and two, the vehicles were inspected and there were no charges.

   Mr. Shulman said that the charge and conviction noted in reason three is under appeal and all the documents required to have met the inspection cited in reason four were available but Mr. Rabkin was out of the country at that time. Regarding reason five, Mr. Shulman referred to the convictions as dated and that overall, the position of the Applicants is that the Ministry's action "is excessive".

3. Mr. Forbes confirmed the details of the Ministry's submitted disclosure documents and noted that he had not received information regarding the Applicants' basis of appeal.

4. Mr. Forbes advised that he may present testimony and evidence from four witnesses while Mr. Shulman advised he may present two to three witnesses.

5. Due to scheduling conflicts, Mr. Forbes requested an adjournment of the January 5, 2006 hearing and as Mr. Shulman had no objection, the hearing was rescheduled to commence at 9:30 a.m. on January 10, 2006, and if necessary, continue on January 12, 2006.

6. The Tribunal recorded that there was no resolution of the issues between the Parties.

7. The Parties were reminded of the Tribunal's disclosure rules and timing, and that they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: December 5, 2006

FILE NAME: 3798.gar.best deal motors.pre.hrg.doc

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

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

IN THE MATTER OF an application
by José Orellana dba Santa Ana Auto Maintenance and José Orellana to appeal the Notice of the Director of Vehicle Inspection Standards pursuant to Section 91(8)(a), (b) and (e) and Section 93(a), (b) and (c) of the *Highway Traffic Act*;

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

JOSÉ ORELLANA DBA SANTA ANA AUTO MAINTENANCE and JOSÉ ORELLANA

Applicants

- and -

DIRECTOR OF VEHICLE INSPECTION STANDARDS

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on November 29, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at 10:30 a.m. on Tuesday, the 5th day of December, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: November 21, 2006

FILE NAME: 3835.gar.Orellana.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

AHMAD KHAN DBA KHAN AUTO & TRUCK REPAIRS

Appeal From a Notice of Proposal of the Director of Vehicle Inspection Standards

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: AHMAD A. KHAN, Unrepresented

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

DATES OF HEARING: October 16 and 18, 2006 Toronto

REASONS FOR DECISION AND ORDER

This appeal outlines the story of Khan Auto & Truck Repairs, a sole proprietorship, operated at various times by the Applicant's son, Azam Khan and by the Applicant's brother, Amzad Khan. The Applicant, Ahmad Khan, has worked in the business as a mechanic registered to sign inspection certificates and as an unregistered person preparing vehicles for inspection by the registered mechanic. While the Applicant has held a motor vehicle inspection station mechanic's licence in the past, he personally has never been the licence holder with respect to a motor vehicle inspection station ("MVIS"). On March 23, 2006, he made an application under the *Highway Traffic Act* (the "Act") for an MVIS licence with him acting as the sole registered mechanic. By Notice dated April 6, 2006, the Director of Vehicle Inspection Standards (the "Director") refused to issue the licence and the Applicant appealed to this Tribunal. In reviewing this matter, the Tribunal was cognizant of the fact that neither the Applicant's licence as a mechanic nor his right to repair cars at the facility were in issue. The issue before the Tribunal related solely to the Applicant's right to act as an MVIS and an MVIS mechanic to issue safety certificates and annual safety inspection certificates for cars and commercial vehicles.

The grounds for the refusal are set out fully in the Notice but fall into the following broad areas:

1. Seven convictions under the Act starting in September 1979, with the last conviction entered on June 20, 2000;

2. A suspension of the Applicant's MVIS mechanic's licence in1998 in respect of eight improper inspections;

3. A false statement made on an application for an MVIS Licence by Amzad Khan and signed by the Applicant; and

4. Nineteen improper certificates signed by the Applicant as mechanic after December 24, 1999, when he was not a registered mechanic under the inspection station scheme.

The grounds for the appeal are set out in Schedule "A" to the Notice of Appeal. In pith and substance they are an attempt to re-open earlier proceeding wherein findings were made against the Applicant. For ease of reference the Tribunal will set them out verbatim here:

1. The convictions listed at sub-paragraphs 1 (a), 1(b), and 1 (c) in the Notice of Refusal are false.

2. The convictions listed at sub-paragraphs 1(d), 1(e), 1(f) and 1(g) in the Notice of Refusal were obtained in violation of the Applicant's rights under the *Charter of Rights and Freedoms* (the "Charter") and were also obtained by abuse of power and process, malicious prosecution and in absentia.

3. The violations listed in paragraph 2 in the Notice of Refusal resulted from investigations and inspections carried out by Officer John Tomasone who is incompetent.

4. The allegations made in paragraphs 3 and 4 in the Notice of Refusal are false.

5. With regards to the ground stated in paragraph 5 in the Notice of Refusal, Amzad Khan's MVIS Licence was revoked by fraud, abuse of process and power, malicious prosecution and violation of rights conferred under the *Charter of Rights and Freedoms*.

6. In relation to the Notice of Refusal issued by Michael Weir (Director, Vehicle Inspection Standards) dated September 24, 1997, no recommendation to refuse was made by Officer John Tomasone as required by the MVIS Programme Procedure and the recommendation purportedly made by Senior Counsel, Mr. Ross Burns, dated July 21, 1997, was done, among other things, to effect a remedy in a Civil Law Suit commenced by the applicant and violates the applicants rights conferred under the *Charter of Rights and Freedoms.*

It must be noted at the outset that, in the Notice of Appeal, the Applicant does not deny the convictions set out in paragraph 1 (d), (e) and (f), nor does he deny the allegations set out in paragraph 2 and paragraph 5 of the Notice. His position is that they were obtained by fraud, abuse of process and power, malicious prosecution and violation of rights conferred under the *Charter of Rights and Freedoms*. It must also be noted at the outset that the Applicant cited no section of the *Charter of Rights and Freedoms* which he alleged was violated and made no argument with respect to the breach or violation of any particular section of the Charter or of the Charter generally. Accordingly, this Tribunal did not consider a Charter argument and, in effect, this aspect of the appeal was abandoned.

The Applicant denied the allegations concerning his pre-1993 convictions, a false statement and denial of licence in November and December 1999, and breach of the Act and Regulations in 2000 by virtue of the fact that he had signed safety certificates as mechanic when his licence to do so had been refused in December 1999. The difficulty faced by the Applicant with respect to the allegations in issue in this matter, is that they have been reduced to court judgments or final orders of the predecessor of this Tribunal, the Licence Suspension Appeal Board ("LSAB"). Indeed, in some cases guilty pleas were entered.

As a housekeeping matter, it appears that all male members of the Khan family have a first and second initial A. To prevent confusion, the Tribunal will refer to Ahmad A. Khan as the Applicant throughout these reasons; it will refer to Amzad A. Khan, the Applicant's brother, as Amzad Khan or Mr. Khan; and it will refer to Azam A. Khan, the Applicant's son, as Azam or Azam Khan.

The Tribunal heard from three witnesses; John Gee on behalf of the Director and, on behalf of the Applicant, Amzad Khan and the Applicant himself. In addition, 10 exhibits were entered as follows:

Exhibit 1: Proposal to Refuse dated April 6, 2006 issued by the Director
Exhibit 2: Notice of Appeal Form received by the Tribunal on May 24, 2006
Exhibit 3: Director's Book of Exhibits
Exhibit 4: Applicant's Documents – Bound
Exhibit 5: Applicant's Documents – Stapled
Exhibit 6: Certificate of Ministry with Docs attached regarding record of the Applicant
Exhibit 7: Certificate of Ministry with Docs attached regarding record of Amzad Khan
Exhibit 8: Bundle of 22 Summonses against Amzad Khan regarding the wrongful signature of the Applicant on inspection certificates as mechanic
Exhibit 9: Bundle of 22 Summonses against Amzad Khan regarding use of the Applicant to sign as licensee
Exhibit 10: Transcript of Trial before Barnes JP in *Her Majesty v. Khan*

THE EVIDENCE

Before reviewing the evidence, it should be noted that the Applicant admitted that he signed 19 safety certificates during the period of May to June 2000. He admitted that

he signed these certificates as both an MVIS mechanic and on behalf of Amzad Khan as the MVIS licence holder. The certificates are found at Tab 14 of Exhibit 3 commencing at page 65.

Evidence of John Gee

John Gee is a Vehicle Inspector Mandatory Vehicle Branding Unit. Mr. Gee was licensed as a mechanic in June 1990, and has worked in a number of garages. He joined the Ministry as an inspector in 2001, and is currently a Vehicle Inspector in the Mandatory Vehicle Branding Unit. Until about a year ago, he worked in Peel Region. His role there was to take telephone complaints from consumers after the issuance of a vehicle safety inspection certificate and to follow up the complaints by inspecting the issuing MVIS.[1] If the complaints are found warranted, he might issue a warning or lay charges. He has carried out between 1700 and 2000 such inspections.

In addition to his role as an inspector, Mr. Gee also conducts seminars and training courses under the Mandatory Vehicle Branding Salvage Programme. His seminars are directed to garages and repair shops. He fills in on an *ad hoc* basis for a commercial training company called Auto Aid.

Mr. Gee's personal dealings in this matter are limited to dealing with Amzad Khan and in dealing with an application by the Applicant's daughter, Rozanna Khan. He also was involved in the current application. He reviewed Ministry records with respect to other dealings with inspectors. Mr. Gee had testified at the 2005 hearing before this Tribunal with respect to an application by Azam Khan to set aside the denial of a licence by the Registrar.

Mr. Gee reviewed the application dated March 23, 2006.[2] The application sets out the fact that Ahmad Khan dba Khan Auto & Truck Repairs is the Applicant, the premises are located at 211 Wilkinson Road, Unit 6, Brampton, and the proposed inspecting mechanic is to be the Applicant. Mr. Gee had attended at the premises on March 23, 2006 with a colleague, Mike Jansen, and it was Mr. Jansen who actually took the application with Mr. Gee present.[3] Prior to the visit, documentation concerning the use and licensing of the property had been received by the Ministry. This documentation indicated that the Applicant sublet the premises from his son, Azam Khan, was licensed by both the province and the city, and that the Applicant was a licensed mechanic.[4]

Mr. Gee described the physical attributes of the premises. He stated it was in a strip mall type building with four units. The Khan premises were second last with a truck service centre on the end and a muffler shop next door. The premises were shared with Khan Paralegal offices. Mr. Gee described the working area as cramped for commercial vehicle access.[5] The cramped commercial vehicle access caused him

[1] For full details of Mr. Gee's experience see his CV at Tab 6 of Exhibit 3
[2] Ex 3 Tab 2
[3] Ex 3 Tab 3 set out Mr. Jansen's notes of the visit
[4] Ex 3 Tab 4
[5] Ex 3 Tab 21 is a series of photos of the premises

some concern because the business licensed to Amzad Khan in that area had issued hundreds of commercial vehicles safety certificates. When raised with the Applicant, the Applicant indicated that he would only inspect cars. Mr. Gee felt that there was no separate licence for cars and commercial vehicles. Shortly after receiving the application and the prescribed fee, the Director served a Notice on the Applicant informing him that his application was refused.

The witness then reviewed some of the very lengthy and litigious dealings between the Applicant, members of his family and the Director. Firstly, the Tribunal was referred to the 1998 decision of the LSAB in the matter of *Azam Khan dba Khan Auto Motive Repairs and Ahmad A. Khan*.[6] In that matter, the Tribunal was asked to revoke the Applicant's mechanic's inspection licence on the ground that he had issued a number of safety certificates for vehicles that had serious safety defects at the time the certificates were issued. The safety certificates in issue were those referred to in paragraph 2 of the current Notice. A review of that decision indicates that the Applicant raised all of the arguments he now advances as grounds in this appeal, that is, breach of Charter rights and a malicious motivation for the charges arising out of the fact that the Applicant had commenced a civil action against the Ministry. The Tribunal rejected the Applicant's arguments and found as a fact that the Applicant had issued safety certificates for defective vehicles. His licence to act as a MVIS mechanic was revoked.

The Applicant did nothing to appeal the 1998 decision. What he did do, after a lapse of 5 years was to apply to Divisional Court for judicial review.[7] It appears from reading the grounds for judicial review that Amzad Khan had been successful in winning a retrial with respect to one earlier conviction wherein Judge Andre of the Ontario Court of Justice had found on an appeal that Officer John Tomasone's inspection had many deficiencies. The grounds for judicial review also set out many of the other issues that are before this Tribunal, particularly the fact that Mr. Tomasone had not recommended the revocation of the Applicant's licence, but that this decision was made by Ross Burns (Senior Counsel), and victimization of the Khan's. In oral reasons the Divisional Court dismissed the application with costs in the amount of $2,000.00. It found the allegations concerning Mr. Tomasone to be irrelevant.

Mr. Gee led the Tribunal through the evidence regarding the charges against Amzad Khan arising out of the actions of the Applicant in May and June 2000. It appears that Amzad Khan had been granted an MVIS licence for the premises in 1998 shortly after Azam Khan and the Applicant had been revoked by the LSAB. By application dated November 3, 1999, Amzad Khan applied for renewal of his MVIS licence effective January 1, 2000.[8] As part of the application, Amzad applied to have the Applicant appointed as an MVIS mechanic. The appropriate area on the application form asks:

> Has the Mechanic ever been refused registration or renewal thereof or has his registration ever been revoked.

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[6] Ex 3 Tab 7
[7] Ex 3 Tab 8
[8] Ex 3 Tab 10

The Applicant answered "No" and signed the form which was then submitted to the Director for processing. On receipt of the form, the clerk at the Ministry's offices processed the application and issued a renewal to Amzad Khan showing the Applicant as a licensed MVIS mechanic. When the matter came before the Director and it was noted that the Applicant had falsely answered the question concerning previous revocation, the Director prepared and mailed a Notice to both Amzad and the Applicant advising them that the registration of the Applicant was being refused, and that any documents issued with respect to registration were superseded.[9] The Applicant appealed the Notice to the LSAB and advised he was available for hearings in mid-March 2000. Abruptly, in and around March 1, 2003, the Applicant advised the LSAB that he was withdrawing his request for a hearing in the following words: "*Based on information in the registrant* [sic], *Ahmad A. Khan, possession the registrant believes that the said hearing is no longer warranted.*" The effect of withdrawing the appeal is, of course, that the Director's Notice is carried into effect and the Applicant is denied licensing. Thereafter, the Applicant issued nineteen safety certificates where he signed both as the MVIS mechanic and on behalf of the licensee.[10] As the holder of the MVIS licence, Amzad Khan was charged with violations arising out of the incorrectly signed certificates. It appears that the Applicant was not charged.

Mr. Gee then entered Exhibit 6, a certified record from the Director of Motor Vehicles relating to the convictions of the Applicant.[11] The record indicates that the Applicant was convicted as set out in paragraph 1 of the Notice with convictions under the Act dating back to January 11, 1979. It also sets out the registration history of the Applicant as an MVIS mechanic with a number of terminations. The record of convictions identifies the Applicant by name, by driver's licence number and by mechanic's registration number. Mr. Gee explained that the use of the code 999A in the mechanic trade code defines the Applicant as a mechanic licensed to deal with cars and trucks and coaches. According to Mr. Gee, the section of the Act referred to in the earlier convictions, 58L(2), is the equivalent of the current section 99(2) and relates to false statements in a safety certificate. In the Mechanic's Record, Mr. Gee pointed out the last two entries, the penultimate showing a registration dated November 30, 1999, and the last showing a termination dated July 14, 2000. Mr. Gee advised the Tribunal that these entries relate to the false declaration and indicate that, after the initial clerical entry indicating registration in November 1999 that stimulated the Director's December 1999 Notice, the internal Ministry records were not update until July 2000.

Mr. Gee reviewed the Ministry's dealings with Amzad Khan. Mr. Gee stated that Khan Auto Repairs, when operated by Amzad Khan, had about two to three complaints per week, in his experience more than any inspection station before or since. On November 24, 2001, the Director issued a Notice to revoke the MVIS and MVIS Mechanic's Licence of Amzad Khan. The grounds set out deficiencies with respect to three safety certificates and also set out the certificates from the year prior improperly signed by the Applicant. According to the certified record of Amzad Khan, entered as Exhibit 7,[12] at the

[9] Ex 3 Tabs 11 and 13
[10] Ex 3 Tab 14
[11] The record is also found at Ex 3 Tab 15
[12] Also found at Ex 3 Tab 18

time of issuance of the Notice, there were approximately 27 charges pending against Amzad Khan and one earlier conviction. A final charge was laid in June 2002. 28 of these charges resulted in convictions for the most part during the summer of 2002. Amzad Khan appealed to this Tribunal but following the convictions in the summer of 2002, the appeal was withdrawn. It appears that the withdrawal came after the commencement of the hearing of the appeal.[13]

In reviewing the record of the period when Amzad Khan operated the business, Mr. Gee noted that the business carried out 1860 safety inspections in 2001 and 350 truck annual safety inspections. The rate of inspections amounts to approximately 5 per day for cars and one per day for trucks, seven days per week. From his experience as a working service manager, Mr. Gee stated that a truck annual safety inspection takes approximately a day to perform and a car safety inspection takes approximately an hour or so. He stated that when he was service manager in a 3 bay repair shop, they would only perform about 2 safety inspections per day. In a sampling of the MVIS stations in Peel Region, he found the Amzad Khan numbers extremely high.

In the course of his duties, Mr. Gee had visited the premises about 10 to 15 times. He testified that he had never seen a truck in the shop despite the issuance of approximately 1 annual safety sticker per day. He also stated that he never came across Amzad Khan in his visits to the premises. He explained that Amzad Khan had a full time job elsewhere. An employee of Khan Legal Services, Terry Singh, appeared to "*run the show*." Indeed, Mr. Singh represented both Azam Khan and Rozanna Khan in their dealings with the Ministry.

In addressing the performance of the business when it was run by Amzad Khan, Mr. Gee noted that of the 1860 car inspections and 350 truck inspections performed in 2001, it appears that Amzad Khan never failed a single vehicle. He had serious doubts that the business was even inspecting the vehicles at all, as opposed to just carrying out a cursory inspection or providing certificates sight unseen. He cited one case where a vehicle for which a safety certificate had been issued by the business in Brampton was found in a body shop in Scarborough. It was found covered with a layer of grime blocked into a corner of the shop, a position from which it obviously had not moved in months. Employees of the body shop confirmed that it had not moved in months, yet the safety certificate was dated shortly before the visit.

The final area covered by Mr. Gee in his examination in chief dealt with the applications by Rozanna and Azam Khan. As stated above, Rozanna Khan is the daughter of the Applicant and Azam Khan is his son. It appears that when Rozanna Khan applied, she was asked to attend a video-taped interview, which she refused to do. The Director refused to process Rozanna's application without an interview, and she applied to Divisional Court for judicial review and an order in the nature of mandamus. The court upheld the Director's right to insist on an interview and the application process stopped at that point. Azam Khan then applied. He was subjected to a video-taped interview where he was asked to measure a brake rotor for compliance with safety specifications. He refused. He was refused licensing by the Director. Not surprisingly, he launched an

[13] Ex 3 Tab 19

appeal to this Tribunal, which was heard before Vice-Chair McIntosh over four days in September 2005. At that hearing, Azam Khan was represented by the Applicant wearing his hat as a paralegal. He advanced a similar argument to the one he advances here, that is, the whole process is a vendetta by the Ministry against the Khan family because the Khan family has sued them. Vice-Chair McIntosh upheld the Director's decision and in so doing, found a total lack of evidence of any vendetta. That Tribunal found that the evidence was consistent with the Director carrying out his duties in a reasonable manner.

Mr. Gee concluded his testimony by stating that following the 2002 revocation of Amzad Khan's licence, the number of complaints fielded by the Peel office decreased noticeably.

In cross-examination, Mr. Gee acknowledged that it is not illegal, *per se*, to issue 1860 safety certificates and 350 truck annual inspections. When asked if he had taken statements from the complainants he answered "*No*." He took notes and then investigated. He was of the opinion that the vehicle would speak for itself. He did not have a definitive number of complaints against Amzad Khan. Mr. Gee was referred to a letter dated August 21, 2000, where the author, Paul Brown, Coordinator for the Peel Area stated: "*We are currently looking into the operation of your MVIS for the purposes of Revocation.*"[14] Mr. Gee did not agree with the Applicant that there had been no violation of the law. When asked who gave him the authority to carry out investigations, Mr. Gee answered that he is a peace officer. No-one authorizes an investigation, it is complaint driven. Mr. Gee did confirm that he was unaware of any complaints against the Applicant personally.

In covering the events of the summer of 2000, where the Applicant had signed certificates as mechanic and on behalf of Amzad, Mr. Gee was referred to a Ministry document entitled "List of Registered Mechanics" dated February 8, 2000, and confirmed that it did show the Applicant as a licensed mechanic under Amzad's MVIS. He was then asked if the Ministry would reject a certificate if it was issued by a mechanic whose record is flagged. He felt that it would not be rejected in such circumstances. He stated that it would be rejected for an error or in the event it had expired.

Mr. Gee was taken through his concerns about the ability of the premises to accommodate a commercial vehicle for inspection. He acknowledged that the doors were wide enough and high enough to admit a semi-trailer. His concern was with respect to clearance from the fence. When examined on his belief that the Director could not limit an MVIS to inspections of cars only, he did state that he was aware that the Director can restrict an MVIS authority to vehicles under 3000kg.

Mr. Gee reviewed a number of allegations in the current Notice and did confirm what appeared to be an error in one of the certificate numbers improperly executed by the Applicant. It appears the error arose out of a mistake in an LSAB decision and has been carried forward since that time.

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[14] Ex 4 Page 98

Evidence of Amzad Khan

The next witness to testify was Amzad Khan. Mr. Khan had operated Khan Auto Repairs as an MVIS from 1997 to 2002 when his licence was revoked. He stated that he operated between 1997 and 1999 with no problems. He stated that his problems started in 2000. An inspector, Bob Lickers, attended at his premises and took away all of his books and records. He reviewed a memo from Mr. Lickers concerning a visit on August 17, 2000.[15] The Memo indicates that after a number of discussions and attempts to set a date, Mr. Lickers attended to carry out an inspection. Amzad Khan was not present, so Mr. Lickers contacted his superiors and they confirmed that he should immediately suspend the MVIS of the operator by removing all Crown property. After complaint by Amzad Khan, it was ultimately deemed improper for the Ministry to retain all of the books and records and they were returned a few days later. As a result of the examination of the books and records, Mr. Lickers laid 44 charges against Amzad Khan. As was seen in the evidence of Mr. Gee, some 27 resulted in convictions.

Mr. Khan stated that he was totally unaware of any complaints regarding his MVIS licence until August 21, 2000, when charges were laid. He stated that the charges arose out of a review of his used books. He has never seen a written complaint and no-one at the Ministry has ever told him there was a complaint.

Mr. Khan then went on to review the appeal where it was found that John Tomasone had serious deficiencies in his knowledge. The matter related to a 1985 Chevrolet Blazer.[16] He stated that Mr. Tomasone had used the wrong instruments and did not know the specifications for ball joints and steering linkage. The conviction relating to that count was overturned on May 12, 2003, and a new trial ordered. On May 20, 2003, Mr. Khan entered into a plea bargain agreement with the Crown which resulted in a plea of guilty to one charge, abandonment of an appeal on other charges with joint submissions on penalty, the withdrawal of 7 pending charges and forbearance by the Crown with respect to the collection of $2,000.00 in costs awarded in a judicial review application for an order in the nature of certiorari.[17] It is not clear from the evidence if the guilty plea relates to the retrial ordered in the Chevrolet Blazer charge.

One of the raft of charges against Mr. Khan involved the execution of safety certificates by the Applicant as licensee and mechanic while he was not authorized to do so. Mr. Khan referred the Tribunal to page 96 of Exhibit 4 which is entitled “Circular to Motor Vehicle Inspection Stations.” The Circular attaches a form for recording signing authorities. It was Mr. Khan’s evidence that he had executed the form and, indeed the document provided showed his signature dated December 7, 1999, appointing the Applicant as an authorized signatory. The next page, however, page 97, is stamped with a Ministry stamp certifying it as a true copy. It is blank. It was Mr. Khan’s evidence that a Ministry inspector removed the signed form in his books and substituted the blank form.

[15] Ex 4 Page 102
[16] The particular vehicle is Item # 8 at page 84 of Ex 4
[17] Ex 4 pages 87 and 88

Perhaps the key point from the standpoint of the defence advanced by the Applicant is a statement by Bob Lickers that he was asked to investigate Amzad Khan because he had commenced a civil law suit against the Ministry.[18] At the time, Amzad Khan was not suing the Ministry. The Applicant was. The action was commenced in 1997. At this Tribunal, the Applicant took the position that Officer Gee should not testify as he was being sued; it apparently being his position that any officer whom he was suing would give tainted evidence or be biased in their inspections and evidence. The Tribunal considers the comment by Bob Lickers in the February 2001 Memo as no more than a confirmation that the regional coordinator, Paul Brown, had heard the Applicant's complaints and decided accede to the Applicant's wishes. He got an outsider to investigate Khan Auto Repairs. Mr. Lickers was from Halton Region.[19] The deficiency with respect to both Amzad Khan and Bob Lickers has now been remedied such that Amzad Khan and the rest of the family are now suing Bob Lickers and anyone else who has had involvement with Khan Auto Repairs.[20]

In cross-examination, Mr. Khan reviewed his work history and confirmed that while he operated the MVIS, he was employed full-time elsewhere. He stated that Azam Khan and the Applicant were paid by the hour and did mechanic work. They would put the cars to be inspected up on the hoist and prepare them for Mr. Khan's inspection in the evening. He could do 80 inspections per month working in the evenings.[21] He denied that he did not actually do the inspections. He stated that over the five years he operated the business, he lost money.

Counsel then took Mr. Khan through the events of December 1999 when he was mailed the Notice to refuse to register his brother, the Applicant, as a mechanic. According to Mr. Khan, he had not been aware of the document and did not recall seeing it before. It was a surprise to him that, not only was the document served on his business, but that he was charged with making a false statement along with his brother. He was unaware of his brother's previous convictions. He was also unaware that his brother had represented him both in provincial offences court and at the LSAB. He categorically stated that his brother had not brought these matters to his attention.

According to Mr. Khan, he also had no idea why he was charged with 44 counts by Bob Lickers. He was represented by his brother and by counsel during the proceedings but he did not know the substance of the charges until he went to court.

In dealing with his statement that he had had no problems until 2000, counsel drew Mr. Khan's attention to a charge under s. 8(4) of the Act. This charge was laid in 1999 with a conviction date of June 20, 2000. Mr. Khan acknowledged that he had been charged in 1999.

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[18] Ex 4 Page 99 starting at the last paragraph
[19] At Ex 4 Page 108 John Tomasone suggests Mr. Licker's was brought in to deal with a backlog
[20] Ex 4 Pages 21 - 38
[21] It is worthy of comment that 80 inspections per month turn out to be 960 per year – approximately half of the number actually carried out on cars alone.

On re-examination, Mr. Khan testified about his reasons to withdraw his appeal. He stated that he had a problem getting inspection certificate books. In the normal course, the Ministry sends blank books to an MVIS on request. When Khan Auto Repairs ordered new books they were asked to attend at the Ministry offices on Airport Road, a short drive from the shop's location. Mr. Khan spoke with a person named Ventura at the Ministry who told him to attend by 4:00 p.m. He could not do so until shortly after because of his full time employment and was informed by Mr. Ventura that he would be unavailable after 4:00 p.m. After this one attempt, Mr. Khan decided he was being singled out and that without books he was effectively closed down. He decided to close down and withdraw the appeal.

Evidence of the Applicant

The Applicant commenced his testimony by addressing the application of his daughter, Rozanna. He felt she was singled out because of her relationship to him. In support of that position, he referred the Tribunal to a statement by Officer John Tomasone where he states "*This was due to her connection to a previous licensee (her uncle)*." The quote, of course, refers to Amzad Khan and not the Applicant.

In reviewing the conviction record set out in paragraph 1 (a) to (c) of the Notice, the Applicant's evidence was somewhat less strong that the position he set out in his Notice of Appeal. In the Notice of Appeal, the Applicant states the convictions are false. In his evidence, the Applicant testified that he has no knowledge of these convictions. The Applicant then reviewed his other convictions and the termination of his MVIS mechanic's licence. He was charged on April 2, 1997. Motions were brought on July 21 and August 25, 1997, to dismiss for an incorrect information. One information was withdrawn, and a new one was issued. The Trial took place two years later and a conviction was entered. The Applicant appealed but failed to perfect the appeal.

On at least one inspection conducted by Officer Tomasone, there was a civil law suit. The Applicant referred me to the transcript of Mr. Tomasone's evidence in the case of *Toolaram Sinanan v. Allpro (Handy Harripresad – Owner)*, action number 1157/97. In his evidence in that case, Mr. Tomasone deposed to finding serious deficiencies with a 1983 Honda twelve days and two hundred kilometers after it had been issued a safety certificate by Khan Auto Repairs and the Applicant. While the Tribunal did not have the whole transcript or even the result before it, it appears the plaintiff won since the Applicant's evidence was that if the court had heard that Judge Barnes had questioned Officer Tomasone's qualifications, the result may have been different.

The bulk of the Applicant's evidence came in through cross-examination. In answer to questions from counsel, the Applicant testified that he had been both a mechanic and a paralegal for many years. Prior to that, he was a policeman in Guyana. In his police and paralegal roles, he has appeared in courts and tribunals. In the 1990's, he was employed by Independent Auto, a company owned by one Stephen Sugrin. Mr. Sugrin sold the company in 1994. When counsel suggested that the 1993 conviction related to his work at Independent Auto, the Applicant denied it. He also denied that the MVIS licence for Independent Auto was revoked.

The Applicant testified that Azam Khan had started his MVIS work in 1995 at the age of 21. The Applicant was a registered mechanic and Azam apprenticed under him. The Applicant stated that he did not finance Azam, nor did he get paid by him while working as a mechanic. He made a living from his paralegal business. The company was originally started in Mississauga, but in 1997 it moved to its current location in Brampton. Azam's MVIS licence was revoked in 1997. In July 1997 Amzad Khan applied to use the same premises and the same name, Khan Auto Repairs, as an MVIS. The Applicant stated that Amzad Khan made his own decision to apply. With respect to management and compensation, the Applicant stated that there was no arrangement for him to manage or for him to be paid. An arrangement was made to pay Azam ten per cent.[22] The Applicant stated that he lived off his savings.

The Applicant acknowledged receipt of the Director's December 1999 Notice of Refusal. In his view, it was incorrect as it should have been a revocation, not a refusal. In his mind the renewal entered into the Ministry records by the receiving clerk was effective immediately in November 1999, and not from January 1, 2000, as alleged by the Director. In any event, it is a matter of record that he appealed and a hearing date was set for March. As part of the documentary disclosure provided by the Ministry in preparation for the hearing, the Applicant received the form dated February 8, 2000, showing him as an MVIS licensed mechanic in Amzad's shop. He took no steps to contact counsel at the Ministry to ask why there appeared to be a discrepancy in the Ministry's position, on the one hand refusing to renew and on the other recording him as registered. What he did was take the position that he was registered, and abandoned his appeal by the letter of March 1, 2000, to the LSAB and the Ministry. When he became aware that the refusal was entered into the record on July 14, 2000, he took no steps to assert any of the rights he believed he had. He asserted that he worked according to the Ministry documents, but he did confirm that, other than the receipt of the February 8, 2000 document in Ministry disclosure, he did not receive it directly for the Ministry.

The Applicant could not recall either the first three convictions or the period when he was first convicted. He was working at Chrysler Truck Centre at the time, but was not registered under its MVIS licence.

The Applicant stated that he is currently involved in six law suits against ten Ministry employees involved in one way or another with the MVIS programme. He thinks that once sued these employees should have no further regulatory involvement with him or his family. He alleged that the Ministry is inventing complaints against him. He alleged that Azam did everything properly, Amzad did his job properly and that he did his job properly. He stated that all of the convictions were *ex parte*. He takes the position that he has a good record and that all of the allegations were manufactured by the Ministry.

He reviewed the closure of Amzad Khan's station. A letter was received from the MTO advising Mr. Khan that he had to come to the office to pick up the books. He stated that office was about a mile from the premises. In a conversation with Dan Ventura just

[22] Note that this evidence contradicts his brother's evidence in this regard

before 4:00 p.m. Mr. Ventura refused to deliver the books because it was late. MTO wanted Amzad to pick up the books. Mr. Khan decided not to pick up the books.

THE STATUTORY PROVISIONS AND THE LAW

The Act sets out the legislative scheme for the licensing of an MVIS, revocation and refusal of licensing and appeal rights to this Tribunal as follows:

> 91. (2) 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.
>
> Issuance of licence
>
> (2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence.
>
> Grounds for refusal
>
> (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, 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 station 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; or
>
> (d) the equipment and premises are not suitable for the performance of the inspections for which the licence is sought.
>
> Expiration and renewal of motor vehicle inspection station licence
>
> (4) A motor vehicle inspection station licence expires with the 31st day of December in the year in which it is issued and a renewal shall be issued where the applicant is not disqualified under subsection (8).
>
> Revocation of 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 purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;

(d) there is a breach of a condition of the licence;

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

(f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or

(g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3) (a).

Motor vehicle inspection mechanic

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

Registration

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

Expiration of registration

(3) The registration of a motor vehicle inspection mechanic expires with the licence of the motor vehicle inspection station to which the mechanic is registered.

Grounds for refusal

(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.

Revocation of registration of motor vehicle inspection mechanic

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

(a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate 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 registrant;

(b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or

(c) the registrant does not comply with this Act or the regulations.

Hearing re terms of licence

94. (1) Where the Director issues a licence under this Act and the licensee is dissatisfied with the conditions thereof prescribed by the Director, he or she may by written notice given to the Director and the Tribunal require a hearing by the Tribunal, and the Tribunal shall appoint a time for and hold a hearing.

Decision of Tribunal

(2) After a hearing under subsection (1), the Tribunal may affirm the conditions prescribed for the licence by the Director or may cancel the conditions or may prescribe the other conditions for the licence in the place of those prescribed by the Director that it considers proper and the conditions shall be conditions of the licence.

Proposal to refuse to issue or revoke licence or registration

95. (1) Where the Director proposes,

(a) to refuse to issue or renew a licence;

(b) to refuse to make a registration; or

(c) to revoke a licence or registration,

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;

(e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;

(f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and

(g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

Notice

(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.

Powers of Director where no hearing

(3) Where the applicant, licensee, registrant or proposed registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Director may carry out the proposal stated in the notice under subsection (1).

Power of Tribunal where 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.

Extension of time for requiring hearing

(5) The Tribunal may extend the time for the giving of notice requiring a hearing by the applicant, licensee, registrant or proposed registrant under this section either before or after the expiration of the time where it is satisfied that there are apparent grounds for granting relief to the applicant, licensee, registrant or proposed registrant, pursuant to a hearing and that there are reasonable grounds for applying for the extension, and the Tribunal may give the directions that it considers proper consequent upon the extension.

Tribunal hearings, general

Parties

96. (1) The Director, the applicant, licensee, registrant or proposed registrant who has required the hearing and the other persons that the Tribunal may specify are parties to proceedings before the Tribunal under this Act.

Notice of hearing

(2) Notice of a hearing under section 94 or 95 shall afford the applicant, licensee, registrant or proposed registrant a reasonable opportunity to show or to achieve compliance before the hearing with all lawful requirements for the issue or retention of the licence or for the registration or continuation of the registration, as the case may be.

Examination of documentary evidence

(3) Any party to proceedings under section 94 or 95 shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing.

Members holding hearing not to have taken part in investigation, etc.

(4) Members of the Tribunal holding a hearing shall not have taken part before the hearing in any investigation or consideration of the subject-matter of the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person or with any party or the party's representative except upon notice to and opportunity for all parties to participate, but the Tribunal may seek legal advice from an adviser independent from the parties and in that case the nature of the advice should be made known to the parties in order that they may make submissions as to the law.

Recording of evidence

(5) The oral evidence taken before the Tribunal at a hearing shall be recorded and, if so required, copies of a transcript thereof shall be furnished upon the same terms as in the Ontario Court (General Division).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (5) is amended by the Statutes of Ontario, 1999, chapter 12, Schedule R, subsection 16 (1) by striking out "Ontario Court (General Division)" at the end and substituting "Superior Court of Justice". See: 1999, c. 12, Sched. R, ss. 16 (1), 21.

Findings of fact

(6) The findings of fact of the Tribunal pursuant to a hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15 and 16 of the *Statutory Powers Procedure Act*.

Only members at hearing to participate in decision

(7) No member of the Tribunal shall participate in a decision of the Tribunal pursuant to a hearing unless the member was present throughout the hearing and heard the evidence and argument of the parties and, except with the consent of the parties, no decision of the Tribunal shall be given unless all members so present participate in the decision.

Release of documentary evidence

(8) Documents and things put in evidence at a hearing shall, upon the request of the person who produced them, be released to the person by the Tribunal within a reasonable time after the matter in issue has been finally determined.

The extensive provisions concerning the role and procedure of the Tribunal do nothing more than mirror this Tribunal's practice. With respect to the evidence advanced by the parties, the Director relied heavily on business records and hearsay testimony from Officer John Gee. This Tribunal may receive hearsay testimony and give consideration to the weight to be afforded to such testimony. For the most part, the testimony of

Officer Gee was supported by contemporaneous records produced from the files of the Ministry and, in the Tribunal's view, the testimony was inherently reliable.

The specific provisions of the Act relating to MVIS licences and MVIS mechanic's licences lack a provision found in many other matters which come on appeal to this Tribunal, a reverse onus provision. In many appeals to this Tribunal, there is a provision that once a licence refusal or revocation becomes final, either by way of exhaustion of appeal rights or as a result of a failure to appeal, the Applicant must then demonstrate the existence of new or other evidence or a material change of circumstances to justify re-registration.[23] In the absence of such a provision, the onus remains squarely on the Director to show that the Applicant should not be licensed based on the grounds for refusal set out in sections 91 and 92 of the Act.

In dealing with the evidence, the Tribunal has been asked to review earlier decisions of the courts and this Tribunal. While many of these decisions relate to relatives of the Applicant, several relate to the Applicant. In *Registrar, Motor Vehicles Act v. Jacobs* (2004) 69 O. R. (3d) 462, the Divisional Court had occasion to examine how this Tribunal deals with previous convictions. After reviewing the Supreme Court of Canada decisions in *Toronto (City) v. Canadian Union of Public Employees (C. U. P. E.), Local 79*, [2003] 3 S. C. R. 77, 2003 SCC 63, and in *Ontario (Minister of Community and Social Services) v. Ontario Public Service Employees Union (O. P. S. E. U.)*, 2003 SCC 64, [2003] S. C. J. No. 65, which held that those guilty of criminal convictions cannot relitigate the convictions before an administrative tribunal, the Divisional Court looked at the Jacobs' attempt to cast his behaviour in a new light. In that case Jacobs had been found guilty of a number of offences including odometer tampering. The Registrar moved to deny him licensing and Jacobs advanced in argument the position that while he was responsible as the business owner for the tampering, the tampering had been done by others and his fault was poor supervision. Poor supervision denies an essential element of a criminal offence, *mens rea*. Notwithstanding that the argument was advanced to cast the conviction in a *"new light"* and not to negative the conviction, by accepting Jacobs' position, the Tribunal was essentially coming to the conclusion that he had been wrongfully convicted. At paragraph 69 of the decision the Court states:

> It was fully open to the Tribunal to consider any factors which, in its view, mitigated the fraud. It was not open to the Tribunal to relitigate the matter and to let Jacobs pass the fraud off as an innocent mistake.

On the present facts, the Applicant is asking the Tribunal to conclude that numerous convictions were obtained by fraud. This position is none other than a collateral attack on the earlier proceedings and, based on the principles in Jacobs, cannot succeed in this Tribunal.

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[23] See LAT decision *Tran v. Registrar, Real Estate and Business Brokers Act* heard January 6, 2006, for a discussion of the reverse onus provision in the REBBA.

REVIEW OF EVIDENCE AND FACTS FOUND PROVEN

A great deal of evidence in this matter related to the actions of other members of the Applicant's family. The Tribunal does not consider evidence regarding acts of various family members to be probative of whether the Director has grounds to deny the requested licences to the Applicant. It is probative of the position put forward by the Applicant that he is the victim of a conspiracy by the Director directed against him and his family members because of the fact that they had filed a law suit in 1997. While it is clear that the Applicant has a deep seated belief that there is such a conspiracy, the facts do not support such a conclusion. It was the Applicant's evidence that he first commenced a law suit in 1997. Presumably the basis for such a law suit is the actions by the Director in 1997/1998 to revoke the MVIS licence of Azam and the Applicant's MVIS mechanic's licence. It follows from that fact that the 1997/1998 enforcement action could not have been stimulated by the existence of the law suit as there was no law suit when the Director first took steps against Azam and the Applicant. Between 1997 and 2002, the business was run by Amzad Khan. Notwithstanding the existence of the law suit, it appears that Amzad Khan was not subject to any Ministry enforcement action until July 1999, when he was charged with a breach of section 8(4) of the Act. A conviction was registered against him on that charge in June 2000. The fact of the conviction establishes conclusively that Amzad Khan had committed all of the elements of the offence charged. It is not the role of this Tribunal to retry that charge or to question the competence of the court hearing it. It is now writ in stone that the charge was not made up by the Ministry but, indeed, had substance.

The next group of charges centers around the fact that the Applicant signed 19 safety certificates as both inspecting mechanic and licensee on behalf of his brother. The fact that he did so is admitted so it could not be made up by the Ministry. What was at issue in the cases against Amzad Khan was whether the Applicant had authority to do so. Before this Tribunal, the Applicant relied on the fact that he had received a document as part of the Ministry's disclosure that indicated that he was registered. He then dropped his appeal and proceeded under the belief that he was licensed. He is, of course, a paralegal who had acted on his own behalf before this Tribunal in June 1998. He is not only deemed to know the legal effect of withdrawing his appeal as an adult member of the community, but had dealt with the applicable statutory provisions in his earlier hearing. Since the legal effect of withdrawing the appeal was that the refusal of the Director to register him became final, no level of sophistry can save the Applicant. To put it quite simply, the Applicant thought he could pounce on a clerical error on the part of the Ministry without taking any steps to check his facts. He tried to pull a fast one and his brother suffered by being convicted of numerous offences under the Act. At its highest, the Applicant's behaviour constitutes willful blindness. Further, his behaviour then became a cornerstone of the Director's 2002 action to revoke Amzad Khan's licence. Indeed, the Tribunal is asked by Amzad Khan to believe that he was totally unaware of the Director's December 1999 notice because the Applicant had kept from him the fact of the Notice and the fact that he had appealed and then withdrawn the appeal. While the Tribunal views this evidence with some degree of skepticism in view of 27 convictions and a denial of licensing, if true, such underhand action by the Applicant with respect to his own family speaks volumes about his honesty and integrity in dealing with the strangers who make up the public at large.

With respect to dealings with the Applicant's children, Rozanna and Azam, there is a total lack of evidence of any form of vendetta. As can be seen from the statutory provisions, above, competence is a factor in determining suitability for a licence.[24] Rozanna had no background or training as a mechanic. The Director quite rightly enquired into her competence. It is here that the fact of existing litigation may have played a part. Knowing the Applicant's penchant for litigation, it was not unreasonable for the Director to require a videotaped interview of Rozanna both as a protection for the Director and as a protection for Rozanna. Rozanna refused and sought judicial review. She lost. The fact of requiring a videotaped interview could not form the basis for a vendetta. The request was within the Director's rights.

In considering the application by Azam and the videotaped interview, the Director asked Azam to demonstrate his competence. In light of the fact that Azam had had his previous licence revoked, a test of his competence was not unreasonable. He refused and was not issued a licence. On appeal to this Tribunal the issue of an official vendetta was raised and rejected. Vice-Chair McIntosh stated:

> On the issue of persecution the Tribunal finds that the Director's investigation into this matter squares with dutiful inquiry than harassment [sic]….There is no convincing evidence that the Ministry had launched a vendetta against the Khan family based upon race or any other consideration.

If the argument failed when raised on his own behalf by Azam Khan, how can the Applicant now raise it in a third party proceeding? On a thorough review of the evidence, it is clear that there is nothing in the record to support the Applicant's position that he has been singled out or treated harshly because of the existence of litigation. What the record does support is the position that on both occasions, when a member of the Khan family has been issued an MVIS licence, breaches of the Act have been committed in number and severity sufficient to have licences revoked.

What then of the Applicant's record. It appears that every time the Applicant has been in a position to exercise the authority granted by an MVIS mechanic's licence, he has abused that authority. He has a string of convictions that are not only industry specific, but relate specifically to execution of safety certificates. Starting 1979, he has been continually convicted of false statements on safety certificates. In 2000, he put his brother's business at risk when he failed to inform him that he had received the Director's 1999 refusal, and was appealing it to the Tribunal. Amzad Khan was denied the opportunity to make an informed decision about whether he would continue to use the Applicant unsupervised to sign safety certificates. By taking the totally untenable position that he was licensed, the Applicant displayed a high degree of willful blindness. He had received a Notice of Refusal from the Director, and had abandoned his appeal. The effect of the abandonment was that that Notice of Refusal was carried into effect. If we are to believe that he did not inform his brother, he laid the groundwork for his brother to lose his licence and business. He exposed his brother to the regulatory action which came in 2002, when the Director issued a Notice of Revocation

[24] S. 91 (3)(c)

The Applicant argued before this Tribunal that the lapse of time since his last offence should operate in his favour. It was his position that he has not had a conviction since his conviction for making a false statement a number of years ago. In his view, he has had a good record for the last five years or so, as evidenced by the acknowledgement of Officer Gee that there were no complaints against him personally. The Director counters that the Tribunal should not confuse lack of opportunity with reform. Since his last conviction, the Applicant has not been in a position to issue safety certificates so his lack of conviction is not evidence of a change in character. There are, of course, facts upon which the Tribunal can determine if there has been a change of character. Firstly, after his last charge for making the November 1999 false statement, the Applicant acted in a willfully blind manner by insisting he was authorized to sign safety certificates. Secondly, and more importantly, the Applicant, before this Tribunal on his own behalf and as advocate, continues to show a total absence of remorse or repentance. As stated above, the facts of numerous acts of wrongdoing are not really in issue yet, the Applicant insists that neither he nor his family have ever done anything wrong. His indignation seems to flow from the position that the Director and Ministry staff only investigated him because of litigation. In his mind, if they had not investigated they would not have found the extensive evidence of wrongdoing that was, in fact, found. It does not in any manner alter the fact that he has been guilty of wrongdoing.

In approaching matters where there is a lack of repentance and remorse, the Tribunal can take further guidance from the *Jacobs* case. Jacobs led evidence that he had improved his business practices since his conviction to ensure that his employees would not get him into trouble in the future. Jacobs' failure to take responsibility for his criminal actions led the court to the following observation at paragraph 81:

> While Mr. Jacobs' improved business practices cannot, in this court, be given the same weight mistakenly accorded them by the Tribunal by reason of its error, that improvement cannot be ignored and must be given appropriate weight. The evidence of improved business practices would weigh heavily in favour of reinstatement if accompanied by some evidence of repentance or remorse by Mr. Jacobs, some acceptance that there is a difference between fraudulent and honest behaviour, and some insight into his fraudulent behaviour.
>
> The problem here is that the latter evidence is missing. Mr. Jacobs' unrepentant insistence that his criminal fraud was nothing more than bad business practice shows he still fails to appreciate to appreciate the difference between fraudulent and honest conduct. That failure does not bode well for future customers of this convicted fraudsman.

Notwithstanding the findings of the court, Mr. Jacobs at least tried to lead evidence of improved business practices. Such evidence is entirely lacking in this case.

ORDER

On all of the evidence, this Tribunal has no hesitation in concluding that the Director, based on the past conduct of the Applicant, has reasonable grounds for the belief that if the Applicant were to be granted an MVIS licence, the MVIS will not be operated in

accordance with the law and with honesty and integrity. Further, with respect to the Applicant's application to be licensed as a MVIS mechanic, the Tribunal has no hesitation in concluding that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not act as a MVIS mechanic in accordance with the law and with honesty and integrity. Accordingly the Tribunal orders the Director to carry out the provisions of his Notice dated April 6, 2006, and refuse to issue a licence to the Applicant as either an MVIS or an MVIS mechanic.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude,
Vice-Chair

RELEASED: November 27, 2006

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

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

Ontario

JOSEPH ABOAGYE DBA GOLDEN TOUCH GARAGE

APPEAL FROM A PROPOSAL MADE BY THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

TO REVOKE REGISTRATIONS

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

APPEARANCES: CRISTIAN BIRON
Agent for the Applicant

ANDREA WILKINSON
Student-at-Law

PATRICK MOORE
Counsel for the Director of Vehicle Inspection Standards

DATES OF HEARING: May 10, 2006
June 7, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Director of Vehicle Inspection Standards (the "Director") proposes to revoke the Motor Vehicle Inspection Station licence of Joseph Aboagye dba Golden Touch Garage (the "Applicant") and his mechanic's registration for the following six reasons:

- The Applicant issued safety standards certificates for six vehicles that did not comply with the prescribed standards for the issuance of such certificates;

- The Applicant made false statements in Safety Standards Certificates and issued certificates not in accordance with the *Highway Traffic Act,* R.S.O.1990, chapter H.8, as amended and the regulations issued thereunder as evidenced by his having been convicted on thirteen separate occasions during the period March 17, 1981 until September 21, 2000;

- The Applicant breached a condition of his Motor Vehicle Inspection Station Licence by failing to keep charge and control of his garage premises;

- The Applicant breached a condition of his Motor Vehicle Inspection Station Licence by failing to maintain the prescribed tools on the premises contrary to subsection 4(1) of Regulation 601;

- The Applicant breached section 10 of Regulation 601 by failing to keep copies on the premises of safety standards certificates issued by his Motor Vehicle Inspection Station and other required records; and

- The Applicant breached the Act and Regulations by pre-signing safety standards certificates that would be issued by other persons.

THE EVIDENCE

Rob Eric Grabar is a Motor Vehicle Inspection Station Inspector and an experienced automobile mechanic who works for the Ministry of Transportation at the Halton Enforcement District. Inspector Grabar had an occasion in November 2005 to do a limited mechanical safety inspection on a 1987 Cadillac for which the Applicant had issued a safety standards certificate 10 days earlier during which time this vehicle was driven 405 kilometers. He found that the emergency brake had seized and was inoperative while stating that it takes a considerable period of time for an emergency brake to seize. The hydraulic brake lines showed a considerable amount of scaling and had begun to corrode. The extent of this corrosion did not occur over a ten-day period. There was a hole in the trunk attributable to rust perforation that would have been present 10 days earlier. Inspector Grabar had this vehicle transferred to an unfit status.

In cross-examination, Inspector Grabar stated that heavy scaling occurs when a person can run a fingernail over metal and the scaling flakes rub off the metal. He admitted that he visually inspected the brakes. The brake pedal held when stepped upon. He did not road test the Cadillac.

Mark Horton is an experienced mechanic and Motor Vehicle Inspection Station Inspector. He has given expert testimony before courts and the Tribunal on prior occasions. The Applicant did not object to Inspector Horton giving opinion evidence at this hearing. Acting on an anonymous complaint, Inspector Horton performed an audit of the Applicant's garage records in November 2005. Three other inspectors, including Inspector Horton, had occasion to inspect vehicles for which Safety Standard Certificates were issued by the Applicant. Inspector Horton did a cursory inspection on a 1993 Oldsmobile for which a Safety Standards Certificate was issued on November 12, 2005. He opined that this vehicle was not properly certified. The Applicant has been charged with an offence under the Act as a result of his issuing the certificate. Inspector Horton found five defects, namely; (a) a rust perforated hole in the rocker panel in the area of the driver's door; (b) a rust perforated hole in the rocker panel by the passenger side front door; (c) a rust perforated hole was found in the rocker panel near the rear passenger door; (d) the right rear tire displayed signs of excessive wear. The wheel nuts that secured the tire were rusty. It did not appear to Officer Horton that the wheel nuts had been recently removed; and (e) the turn signal lamp/ reflector was missing. The five defects verified by photographs.

It was Officer Horton's expert opinion that the rust perforations did not occur in the nine-day period following the safety inspection. Rust perforations occur over a longer period of time. It would have been proper for the Applicant to remove all wheels from the vehicle during the course of his inspection. Officer Horton did not know when the signal lamp/reflector was removed from the vehicle. No action was taken with respect of this vehicle because the inspector was unable to contact the owner and could not therefore remove the licence plates.

On November 30, 2005, Officer Horton inspected a 1993 Ford Tempo for which a Safety Standards Certificate was issued five days earlier during which time this vehicle traveled 181 kilometers. Three defects were found. The driver's seat back was broken off and insecure. It was supported by a piece of wood. The left rear door did not open. The parking brake was inoperative. These defects were noted to be violative of the provisions of Ontario Regulation 611, which relates to safety standards. The Applicant has been charged with an offence under the Act as a result of the issuance of the Safety Standards Certificate for this vehicle.

Inspector Horton visited the Applicant's garage on December 6, 2005 and was told by a person called the apprentice mechanic that the Applicant was out of the country and would be returning to Canada on December 29, 2005. Inspector Horton was aware that the Applicant, a sole proprietor, had apparently ordered a book of safety standards inspection certificates on December 5, 2005. He returned to the garage on December 8, 2005 in order to find out who ordered the certificates. The apprentice mechanic was uncooperative and would not give Inspector Horton any information regarding the ordering of the book of certificates. Inspector Horton advised the apprentice mechanic that he was going to close the inspection station. The only person who could issue a safety standards certificate was the Applicant who was the authorized inspection station owner and mechanic.

The Applicant must show that he had care and control of his inspection station at all times. If he is absent from his garage, he must assure that an authorized mechanic can issue the Safety Standards Certificate. The apprentice mechanic, who appeared to be in charge of the Applicant's garage, stated that he was an apprentice mechanic. He knew nothing about issuing safety standards certificates. Officer Horton gave the apprentice mechanic his calling card and requested that the Applicant contact him.

On January 11, 2006 Inspectors Mark Horton and Larry Grimaldi attended upon the Applicant at his garage. The purpose of the visit was to find out who ordered the book of certificates in the Applicant's absence and to do an audit. The Applicant was unable to produce copies of the books of safety standard certificates issued to him. An inspection station operator must keep such books on his premises for one year. The Applicant stated that the books of certificates were stolen. Thieves apparently broke into the Applicant's garage and stole an automobile. The books of safety standards certificates were in the stolen car. The Applicant was asked to produce copies of his work orders and a list of defects as required by regulation. He stated that these records were also stolen. The Applicant stated that he did not see the police report relating to the break in which occurred on November 29, 2005. Inspector Horton stated that if the book of certificates were stolen, then the person in charge of the Applicant's garage should

have contacted the Ministry and reported the theft so that the Ministry could act in an appropriate manner.

The Applicant told the inspectors that he left Canada on November 11, 2005 and returned on December 29, 2005. He admitted that he left the apprentice mechanic in charge of his garage and that he pre-signed two and one-half books of safety standard certificates for his old partner, Tom Frido to use. Mr. Frido, an unregistered mechanic, used to visit the Applicant's garage daily. The Applicant also stated that he did not pre-sign the certificates ordered on December 5, 2005. He admitted that there was no authorized person working in his garage that could lawfully issue the safety standards certificates. He stated that the apprentice mechanic was usually working on a vehicle. The apprentice mechanic did not know who did the work on the vehicles for which the safety standards certificates were issued.

Inspector Horton inspected the Applicant's tools and found that the Applicant had a drum gauge, a tread depth gauge and a suspension ball joint gauge that does not meet the regulatory requirements. The Applicant did not have a tread depth gauge, which is a mandated tool. Inspector Horton stated that he would not permit the Applicant to operate his inspection station until he got the proper tools, which he, in fact, obtained a few days later at a cost of less than $200.00.

Inspector Horton, acting on a complaint, inspected a 1986 Honda for which the Applicant issued a Safety Standards Certificate two days earlier during which time the Honda traveled 1057 kilometers. He found several defects stated as follows: (a) the driver's door did not open or close properly because the bottom hinge was not connected to the frame post as required by the regulations; (b) rust had perforated the driver's door post frame allowing the hinge to collapse inside the frame; (c) rust had perforated the front strut tower, the frame at the rear bumper connection to the unibody frame, in the area of the rear bumper connection; (d) there was a hole in the rear trunk leading to the passenger compartment; (e) the rear floor area was repaired/ sprayed with tar over a body filler material which did not constitute a proper patch (f)the frame in the area of the passenger's feet is broken away from the floor and is separated from the firewall; (f) the front passenger seat belt buckle was broken and inoperative; and (g) there was a 12 inch crack in the windshield. These defects compromised the strength and integrity of the car. Inspector Horton opined that all the aforementioned defects except for the defects relating to the seat buckle and windshield would have been apparent when the Safety Standards Certificate was issued two days earlier. The Applicant was subsequently charged with and convicted of an offence relating to his improperly issuing a Safety Standards Certificate for this vehicle. Inspector Horton did a follow-up inspection and found that certain tools that should have been found in the Applicant's garage were not there. The requisite tools were found at the garage later in the day. The Applicant stated to the inspector that he took the tools home with him because his garage had been broken into.

In cross-examination, Inspector Horton stated that he did not have a search warrant. He was acting on an anonymous telephone complaint. Because the owner of the Honda was unable to be contacted, Officer Horton performed a visual inspection on the Honda. He opined that it looked as if the wheels were not removed from the car because of the

appearance of the wheel nuts. Upon reviewing the Safety Standard Certificates and Inspection Stickers Order Form, he believed, but was not certain, that these forms were mailed into the Ministry office and that somebody showed up in person to pick up the new books of Safety Standard Certificates. The signature on the order form appears to be that of the Applicant. Officer Horton was unable to state whose signature in fact was affixed to this form. He had nothing to do with the investigation regarding the issuance of the new books of Safety Standards Certificates.

The Applicant gave a statement to Inspector Horton in which he stated that the books of Safety Standards Certificates, work orders and tools were stolen from his garage during his absence from Canada.

James F. Smith is an experienced mechanic who has been an inspector for the past five years. He was part of the audit relating to the Applicant's inspection station. He inspected three vehicles.

Inspector Smith did a partial inspection on a 1989 Ford, which was situated at the owner's home. The inspection was performed 11 days after the Applicant issued the Safety Standards Certificate during which time this vehicle was driven about 500 kilometers. He found 10 defects with respect to this car. Each defect was in purported violation of the provisions of Regulation 611. These defects are summarized as follows (a) fuel was dripping from the gas tank; (b) there was a hole in the floor in the area beside the driver's seat belt; (c) the sub frame was heavily corroded and cracked open in the area under the driver's feet nard the body mount; (d) the steel brake tubing leading to the rear brakes was heavily corroded and was scaling; (e) the steel brake tubing leading to the fight front brake was heavily corroded and scaling; (f) the left front brake flex hose and steel tuning had been replaced but were no properly routed through the frame and was rubbing on the shock absorber; (g) the driver's seat belt would not retract; (h) the driver's side windshield was cracked; (i) the windshield wipers did not work; and (j) the headlight switch knob was missing from the dashboard. Inspector Smith did not know if the defects relating to the headlight switch knob, seat belt and windshield wipers were apparent at the time of the inspection. It was his opinion that this was an unsafe vehicle. The brakes could fail at any time. Officer Smith was able to get this vehicle classified as an "unfit vehicle."

Inspector Smith partially inspected a 1992 Oldsmobile eleven days after the safety standards certificate was issued for this car during which time this car traveled approximately 5000 kilometers. Mr. Smith recorded the following defects: (a) the right side rocker panel was completely rust perforated and had fallen away from front to rear; (b) there was a rust perforation hole in the floor at the area under the right passenger's feet. The carpet was visible from the underside and could be moved up and down with a finger; (c) the right front stabilizer bar was broken off and heavily corroded while showing no signs of a recent brake; and (d) there was a rust perforated hold in the rocker panel at the area under the driver's door. In the Officer's opinion, this vehicle should not have passed the safety inspection.

The third vehicle partially inspected by Officer Smith was a 1993 Honda for which a safety standards certificate was issued four days earlier, during which time this vehicle

was driven just 23 kilometers. Four defects were uncovered, namely (a) the windshield washer nozzles were missing from the hood of the vehicle; (b) the right front time had cords sticking out the inside sidewall near the tread edge; (c) the right rear tire had a large bulge with cords sticking out; and (d) the right rear fender consisted of bent rusted metal with sharp edges protruding. This vehicle was unsafe and could have been a danger to pedestrians. Officer Smith was unable to speak to the owner of this vehicle.

Larry B. Grimaldi, a Senior Enforcement Policy Advisor, reviewed the Applicant's registration history. The Applicant has been a licenced motor vehicle inspection station operator and mechanic for 20 years. There have been 13 convictions registered against the mechanic as either a licensed operator or mechanic since 1981. He has not been convicted of any offence since 2000.

Mr. Grimaldi partially inspected a 1988 Honda, which had been driven 7 kilometers since the Applicant issued a safety standards certificate four days prior to the inspection. He found 9 defects which included 5 rust perforated holes throughout the car, an exhaust hanger wan partially hanging from its mounting on the trunk floor, the safety hood latch was seized open on the front hood, the left and right side sub frames were perforated by corrosion with large sections completely gone. Mr. Grimaldi caused this vehicle to be place in an unsafe status. An audit of the Applicant's garage showed that certain tools required under the regulations as well as certain records relating to safety standard certificates were missing. The Applicant failed to have some of the required tools at his garage when Mr. Grimaldi returned to the Applicant's garage a few days later.

Mr. Grimaldi had occasion to inspect a 1988 Honda that had been driven 1,134 kilometers in the 12-day period since the Applicant issued a safety standards certificate for this vehicle. The field inspection reports indicate that there were perforations caused by corrosion on the right and left rear wheel wells and on the right side front sub frame. There was also a 20-inch crack on the driver's side windshield. Charges were laid in the Provincial Court against the Applicant as a consequence of this inspection. Mr. Grimaldi referred to an inspection done by another officer with respect to a GMC truck. The vehicle inspection report showed that the right outer tie rod end was loose, both front brake hoses were chaffing, oversized front tires contact certain brake parts, the left and centre brake tubes were chafing, the right rear U bolts were loose and the parking brake seized. All of these defects except for the one relating to the oversize tires were, in the inspector's opinion present prior to the issuance of the safety standards certificate.

These last inspections occurred in 2000. Following the inspections, Inspector Grimaldi cautioned the Applicant who was subsequently charged with and convicted of offences relating to his issuing the certificates and gave rise to certain convictions registered against the Applicant. The Applicant had been cautioned by Mr. Grimaldi. He assured Mr. Grimaldi that he would do a better job in the future.

During cross-examination, Mr. Grimaldi stated that there were no subsequent complaints regarding the Applicant's conduct.

The witness for the Applicant gave testimony on behalf on the Applicant. Upon application made by witness for the Applicant the Tribunal ordered that Witness for the Applicant be afforded the protection given witnesses and persons giving testimony under section 14 of the *Statutory Powers Procedure Act* R.S.O. 1990, c.S.22, under section 9 of the *Ontario Evidence Act* R.S.O. 1990 c. E. 23 and under section 13 of the *Canadian Charter of Rights and Freedoms*.

Witness for the Applicant has known the Applicant for several years. In November 2005, he agreed to stay at the Applicant's garage during such time as the Applicant would be out of the country for which he was paid the sum of $2000.00, calculated at the rate of a $1000.00 per month for two months. Witness for the Applicant was to remain at the garage Monday through Saturday and optional Sundays. He was to tell the Applicant's customers that the Applicant was out of town. He retained the option of calling in a mechanic to do such things as tire repairs or an oil change. Witness for the Applicant is not a mechanic. He called in a mechanic on one occasion only. He remained at the Applicant's garage from mid-November until December 22, 2005. Most times he was bored. He decided to call in a friend, the third party, who was a Spanish-speaking mechanic and who could do his own repairs at the Applicant's fully equipped garage. Witness for the Applicant did not know the third party's given name.

The third party came to the Applicant's garage the next day. He opened a locked bag to access certain tools and found 2 or 3 books of safety standard certificates. Witness for the Applicant did not know if the third party was a licenced inspection station mechanic. In any event, he showed Witness for the Applicant how to complete the certificates. The third party practiced forging the Applicant's signature and ultimately forged the Applicant's signature to several books of safety standards certificates. It was decided that the third party and Witness for the Applicant would sell the certificates to the third party's customers at $100.00 per certificate. The third party also forged the Applicant's signature to the application form and was able to fraudulently obtain two additional books of safety standards certificates from the Ministry of Transportation.

Witness for the Applicant was concerned about the third party's scheming and told the third party that he was going to call the Applicant. The third party told him not to call the Applicant. He decided to feign a robbery. He placed certain tools in a customer's car with the expectation that the police would find the "stolen" tools in that car. The "robbery" was staged on November 25, 2005 and reported to the Hamilton Police the next day. The third party called the police to report the robbery. The police attended the Applicant's garage and completed their written report on the "robbery". It developed that Witness for the Applicant told Ministry officials that the Applicant was in town. The third party became concerned and angry. He left the Applicant's garage with the two books of safety standards certificates never to return there again. Witness for the Applicant never told the Applicant about the incident with the third party. The Applicant tried to telephone on several occasions but was unable to do so because the Applicant was out of town. Witness for the Applicant was shown copies of six safety standards certificates filed as part of exhibit 3 at the hearing. He denied signing any of these certificates but admitted to filling out one certificate. He never met the purchasers of the certificates who were known to the third party and who signed the certificates.

In cross-examination Witness for the Applicant stated that he never worked with the Applicant on prior occasions. He knew that one “the apprentice mechanic” formerly worked part time at the Applicant’s garage and that The apprentice mechanic may have had a key to the garage. He was told (assumedly by the Applicant) to say to the Applicant’s customers that the garage was closed and that the Applicant would be returning. He did not expect that any business would be transacted at the garage during the Applicant’s absence. Contrary to the instructions he received from the Applicant, Witness for the Applicant permitted the third party to repair cars at the Applicant’s garage on his second day at the garage. When they opened the locked tool bag, Witness for the Applicant and The third party found signed two signed safety standards certificates. The Applicant never gave Witness for the Applicant two books of safety standards certificates.

Witness for the Applicant admitted to knowing the third party since 2003. He did not know his first name. He knew that the third party had a reputation for doing car repair work “cheaper than anyone else’. The third party arranged the feigned break in. Witness for the Applicant did not know if the third party is one and the same person as the apprentice mechanic. The police report is dated April 26, 2006 and the complainant was the apprentice mechanic. He did not know who reported the break in to the police as he got to the garage late on the day the police did their investigation. He stated that he met the apprentice mechanic a few weeks after the police investigation. The apprentice mechanic had visited the garage on 3 or 4 occasions when Witness for the Applicant was present. The apprentice mechanic had keys to the garage. Witness for the Applicant admitted knowing the safety standards certificates issued by the third party were false. The third party’s friends fixed their own cars. He knew that one Tom Frido was a mechanic who worked at the garage. He did not ask Mr. Frido who had a key to the garage. Witness for the Applicant and the apprentice mechanic had keys to the garage. Witness for the Applicant admitted making some money from the sale of false safety standards certificates. He repeated that the Applicant only left two signed certificates. Witness for the Applicant had no dealings with Ministry officials except for the Ministry investigators who visited the garage and asked who filled out the certificates. The apprentice mechanic was present at one of the inspections. Witness for the Applicant did not stay long at the garage following the feigned break in. When he came to the garage he would stay up to an hour and leave. The Applicant did not tell Witness for the Applicant to issue false certificates. The two-signed certificates were kept in the locked tool bag. He stated that neither the apprentice mechanic nor Tom Frido signed any certificates. Mr. Frido visited the garage on one occasion.

The Applicant elected to call no other witnesses. He did not give evidence at his hearing.

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;

(d) there is a breach of a condition of the licence;

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

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

(a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate 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 registrant;

(b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or

(c) the registrant does not comply with this Act or the regulations

94. (1) Where the Director issues a licence under this Act and the licensee is dissatisfied with the conditions thereof prescribed by the Director, he or she may by written notice given to the Director and the Tribunal require a hearing by the Tribunal, and the Tribunal shall appoint a time for and hold a hearing.

(2) After a hearing under subsection (1), the Tribunal may affirm the conditions prescribed for the licence by the Director or may cancel the conditions or may prescribe

the other conditions for the licence in the place of those prescribed by the Director that it considers proper and the conditions shall be conditions of the licence.

95. (1) Where the Director proposes,

(a) to refuse to issue or renew a licence;

(b) to refuse to make a registration; or

(c) to revoke a licence or registration,

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;

(e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;

(f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and

(g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

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

(3) Where the applicant, licensee, registrant or proposed registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Director may carry out the proposal stated in the notice under subsection (1).

(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.

ANALYSIS

The Tribunal finds that the evidence given by the Motor Vehicle Inspection Station Inspectors was credible. They were each experienced motor vehicle mechanics and inspectors who gave their testimony objectively and fairly. They were not prone to overstatement; nor were they challenged materially upon cross-examination.

The evidence given by these inspectors clearly indicates that the Applicant improperly issued safety standards certificates for six vehicles, which displayed significant defects compromising safety. The Applicant issued these certificates in circumstances where the vehicles, in the inspectors' view, did meet the criteria for the issuing such certificates as outlined in Ontario Regulation 611. These defects, as hereinbefore described, included significant corrosion and rust –related perforations, improperly working doors

and seats which could compromise ingress and egress from the vehicle and defects relating to the braking system. In some cases, the vehicles for which safety standard certificates were issued were taken off the road as being unsafe vehicles. It appeared to the inspectors that on some occasions, the Applicant did not remove the wheels from the vehicle when inspecting the braking system in clear violation of the Ontario Regulation 611. The Act and the regulations are designed to achieve the legislative objective of requiring persons to drive safe vehicles in Ontario. This objective is achieved, in part, by the licensing of motor vehicle inspection stations and mechanics and the requirement that these licencees adhere to the provisions relating to vehicle safety before safety standard certificates are issued. The Applicant, a licenced operator and mechanic, significantly deviated from the responsibilities imposed upon him under the Act and regulations, by issuing these safety standard certificates.

The Applicant, as either a licensed operator or mechanic, has been convicted on 13 occasions of violating the laws relating to the issuance of safety standards certificates.

The Applicant admitted to Officers Horton and Grimaldi that he pre-signed two books of safety standard certificates for his friend Tom Frido, an unlicensed mechanic, to use during the Applicant's absence from Canada. Witness for the Applicant stated that he found 2 or 3 signed safety standards certificates when he opened the bag in search of tools. The Tribunal is satisfied on the balance of probabilities that the Applicant pre-signed safety standards certificates with the expectation that these certificates would be used by others during his absence from Canada.

Subsection 91(6) of the Act provides that the operation of a motor vehicle inspection station be under the charge and control of the licencee. The licencee is thereby imposed with two responsibilities. He is charged with the obligation of adhering to the provisions of the law relating to the operation of a station. He must also exercise authoritative control or be the dominating influence over the operation of such station. The Applicant, by his conduct, failed to live up to these statutory obligations.

The evidence indicated that the Applicant was absent from Canada from November 11, 2005 until December 29, 2005. He told Officers Horton and Grimaldi that he left a person called an apprentice mechanic, in charge of his station. When Officer Horton visited the Applicant's garage on December 6, 2005, the apprentice mechanic was uncooperative and would not give the officer any information regarding the ordering of books of safety standards certificates. The Applicant admitted that he left no person in charge of his station who had authority to issue safety standard certificates. The apprentice mechanic did not know who worked on the vehicles for which safety standard certificates were issued during the Applicant's absence from Canada. After carefully considering all of the evidence, the Tribunal remains unaware of the apprentice mechanic's surname.

The Applicant admitted to pre-signing certificates for his friend, Tom Frido, an unregistered mechanic, to use while the Applicant was absent from his station. Mr. Frido had used the Applicant's station in the past to do mechanical work on cars.

Witness for the Applicant, a person with no experience fixing cars, stated that he was left in charge of the station during the Applicant's absence. He was to tell the Applicant's customers that the Applicant out of town, He apparently had the authority to call in a mechanic to do such tasks as to do tire repairs or to change the oil. The witness for the Applicant was not on the job long when he called in his friend, a third party, an unlicensed mechanic, to avail himself of the opportunities the Applicant's station presented. Witness for the Applicant and the third party quickly found signed safety standard certificates. They quickly and unlawfully embarked upon a scheme to obtain books of certificates and to issue signed certificates for their pecuniary gain. Witness for the Applicant stated that he became concerned about this misconduct and told the third party that he was going to call the Applicant. The third party did not want Witness for the Applicant to contact the Applicant. In an effort to cover up his unlawful conduct, the third party, with Witness for the Applicant's knowledge, feigned a robbery and called the police. The police investigated the "robbery" and issued a report. When Witness for the Applicant wrongfully told Ministry officials that the Applicant was in town, the third party became concerned and angry and left the station, never to return. Witness for the Applicant stated that he met the apprentice mechanic at the station three or four times and that he and the apprentice mechanic had keys to the station.

The Applicant stated that the apprentice mechanic was in charge of his garage during his absence. Witness for the Applicant stated that he was paid to be at the garage during the Applicant's absence. Both the apprentice mechanic and Witness for the Applicant are not permitted to issue safety standards certificates. The apprentice mechanic is an apprentice mechanic and Witness for the Applicant has no experience working on cars. It can be adduced from Witness for the Applicant's evidence that the apprentice mechanic did not go to the Applicant's station on a regular basis. The apprentice mechanic was uncooperative with the inspectors; while Witness for the Applicant was a party to illegal activity while being in charge of the Applicant's station.

There is no evidence to suggest that the Applicant had anything to do with the feigned robbery or with the improper ordering of books of safety standard certificates in December 2005. He was not party to the unlawful sale of certificates by Witness for the Applicant and The third party.

The Applicant told the inspectors that he did not have the mandated tools at his station because he took such tools home with him because his station had been broken into. He used the robbery as an excuse for not having the mandated records at his station. The Tribunal finds these to be flimsy excuses assuming that the Applicant did not know that the robbery was feigned. It seems odd that the Applicant took home with him only certain mandated tools. He, or no one left in charge of his station, made no effort to report missing records to the Ministry. The assurances the Applicant gave the inspectors about improving his practices proved useless.

The Tribunal concludes that the Applicant has been indifferent to his obligations under the Act as both a motor vehicle inspection station operator and mechanic. His conduct has on occasion compromised public safety. It is appropriate, in the circumstances of this case, that his licences be revoked.

ORDER:

The Tribunal therefore orders the Director to carry out his Proposal to revoke the Motor Vehicle Inspection Station licence of Joseph Aboagye dba Golden Touch Motors and to revoke his motor vehicle inspection station mechanic registration.

LICENCE APPEAL TRIBUNAL

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

RELEASED: August 23, 2006

FILE NAME: 3425.gar.aboagye.golden touch.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION HEARING

G. GAGNON & R. GAGNON DBA GAGNON & SON ENTERPRISE
AND GAETAN GAGNON

MOTION FOR AN ORDER LIFTING THE STAY OF THE DECISION OF THE LICENCE APPEAL TRIBUNAL DATED APRIL 13, 2006, PENDING AN APPEAL TO THE DIVISIONAL COURT

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

APPEARANCES: TED E. TICHINOFF, Counsel representing the Applicants, being the Respondent on the Motion

PATRICK S. MOORE, Counsel, representing the Director of Vehicle Inspection Standards, the Applicant on the Motion

DATE OF HEARING: July 21, 2006
Toronto

REASONS FOR DECISION AND ORDER

This is the hearing of a motion brought by the Director of Vehicle Inspection Standards (the "Director") for an order lifting the statutory stay of the decision of the Licence Appeal Tribunal (the "Tribunal") pending the outcome of an appeal from this decision brought by G. Gagnon and R. Gagnon dba Gagnon & Son Enterprise and Gaetan Gagnon (the "Applicants") to the Divisional Court.

BACKGROUND:

The Applicants operate a licensed Motor Vehicle Inspection Station near Timmins, Ontario. Gaeton Gagnon is the only licensed mechanic at this inspection station. Following an audit of the inspection station in 2005 the Director proposed to revoke the Applicants' licenses. The Applicants appealed the Director's proposal to the Tribunal, which ordered the Direction to carry out his proposal to revoke the Applicants' licences.

The Applicants appealed the Tribunal's decision to the Divisional Court at Sudbury. Under subsection 25(1)(a) of the *Statutory Powers Procedures Act* R.S.0. 1990, c. S 22

(as amended) the filing of the appeal in the Divisional Court operates as a stay of the Tribunal's decision.

In its decision released on April 13, 2006, the Tribunal found that (a) the Applicants issued two Safety Standard Certificates that were not in compliance with the regulatory requirements for the issuance of such certificates; (b) in each case the Applicants made false statements with respect to the certificates; (c) the Applicants had been convicted on nine prior occasions since 1978 of making false statements on Safety Standards Certificates; (d) Gaeton Gagnon had been warned against issuing false certificates on at least two earlier occasions; (e) Mr. Gagnon failed to keep certain tools mandated by regulation at his station; (g) he failed to perform inspections in the manner prescribed by regulation and (h) he failed to keep the records relating to inspections and the issuance of Safety Standard Certificates mandated by regulation. After considering Mr. Gagnon's personal circumstances, his past conduct and the facts of this case, Vice-Chair Jane Weary did not accede to the Applicants' submissions that the Tribunal find a "middle road" whereby the Applicants would be subject to tighter control but not lose their livelihood. The Vice-Chair ordered the Director to carry out his proposals.

The Director's Submissions:

The Director submitted that the stay of execution of the Tribunal's decision pending an appeal to the Divisional Court be lifted because the Director has met, with the necessary modifications, the tripartite test relating to the granting of a stay enunciated by the Supreme Court of Canada in the case of *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311.

The Director submitted that (a) the Applicants have not raised a serious issue in their appeal to the Divisional Court; (b) in the absence of any evidence to the contrary, the Applicants would not suffer irreparable harm were the statutory stay be lifted and (c) the public interest outweighs any pecuniary harm that may befall the Applicants pending the hearing of their appeal in the Divisional Court. It is implicit from these submissions that it is the Director who must establish that there is sufficient evidence based on the RJR-MacDonald criteria for the lifting of the statutory stay.

Upon reviewing the six grounds for appeal referred to in the Notice of Appeal the Director submitted that the Tribunal carefully considered all of the evidence and made the correct decision based on the evidence before it. The Tribunal considered relevant factors and did not base its decision upon consideration of irrelevant matters. The Tribunal did not err in by giving undue weight to prior convictions or to unproven allegations of wrongdoing or other matters that were still before the court. The Tribunal has no jurisdiction to place the Applicants on probation. The Tribunal did not err in its consideration the Applicants' "minor" breaches of Ontario Regulations 601 and 611

enacted pursuant to the provisions of the *Highway Traffic Act* R.S.O. 1990 c.H.8 (the "Act").

The Director also submitted that the Applicants would not suffer irreparable harm were the stay lifted because irreparable harm means something more than the usual

consequences that may befall the Applicants as a consequence of the revocation of their licences. The public interest is paramount. The balance of convenience rests with the lifting of the statutory stay because the issue of safety on Ontario highways outweighs any pecuniary harm the Applicant may suffer were the stay lifted.

In support of his motion to lift the statutory stay, the Director filed the affidavit of Brian Maguire, a motor vehicle inspection station supervisor, who attended and gave evidence at the two day hearing of the Applicants' appeal before the Tribunal. Mr. Maguire gave evidence at the hearing on behalf of the Director. Mr. Maguire deposed that the Applicants continued to violate the provisions of the Act and regulations in the three and one-half month interval between the date of the Directors' proposal and the date of the hearing. During this period Mr. Gagnon violated the regulations by charging an additional fee for re-inspecting a vehicle and by doing brake inspections without removing the wheels of the vehicle prior to the inspection. Mr. Maguire deposed that he is the only inspector in the large Timmins District, which has approximately 300 motor vehicle inspection stations. The Applicants' station is located about 200 kilometers from Mr. Maguire's office. Mr. Maguire swore that there is no action he could take that would prevent the Applicants from continuing to violate the terms of the Act and regulations. The laying of charges in the Provincial Court against the Applicants in the past has not prevented subsequent violations in the past from occurring.

The Applicants' Submissions:

Ted E. Tichinoff, counsel for the Applicants, submitted that the statutory stay should only be lifted in clear circumstances such as fraud. The Director must bear the burden of proof if he seeks to cancel the statutory stay. Upon filing their appeal in the Divisional Court, the Applicants continue to carry on business as they have done in the past. The status quo is maintained. If the status quo is to be disturbed then it should be done on clear and convincing evidence that shows that serious public harm may result were the stay lifted.

Mr. Gagnon has been licenced to issue Safety Standards Certificates for the past twenty-eight years, Ninety percent of his income comes from issuing these certificates. He is an able and experienced mechanic whose health does not permit him to do heavy mechanical work. He keeps those tools mandated by regulation at his station. He is compliant with his record keeping obligations. He no longer relies upon visual brake inspections. His violations of the Act and regulations were relatively minor. He tried to give his customers, which include the young and the impecunious, a break by relaxing safety standards with no financial benefit to himself.

Mr. Tichinoff submitted that the Applicant has raised a serious issue. There was not enough evidence before the Tribunal to support the order to revoke the Applicants' licences. The Tribunal ought to have adopted a middle ground and ordered something less than the revocation of the licences. Public safety is not at issue in this matter. The Applicants will suffer financially were the stay lifted. The balance of convenience rests with maintaining of the stay. Mr. Tichinoff advised that the Tribunal that he expected

that the hearing of the Divisional Court appeal would take place in either April or May 2007.

THE LAW:

The statutory provisions relevant to this motion are found in subsections 95(4) and (5) of the Act and paragraphs 25 (1) (a) and (b) of the *Statutory Powers Procedure Act* which provisions read as follows:

> s. 95 (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
>
> s. 95(5) Any 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**.**
>
> 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.

Analysis:

The stay of execution of a decision of a Tribunal order pending an appeal before the Divisional Court usually arises in two ways, by application to the Tribunal for a stay or by operation of law. For example, an applicant, acting under subsection 7(9) of the *Motor Vehicles Dealers Act,* R.S.O. 1990, c. M.42 or under subsection 14(9) of the *Real Estate and Business Brokers Act*, 2002, S.O. 2002, c.30, Schedule C, must apply to the Tribunal for a stay of the Tribunal's order pending an appeal to the Divisional Court. The Tribunal's order remains operative until it is stayed. In these cases, a stay will be ordered only if the Applicant satisfies the Tribunal that he or she has met each branch of the the tripartite test referred to in the *RJR-MacDonald case*, supra. This situation is to be contrasted with that arising in within the application. In this case, the Applicants' ability to operate a motor vehicle inspection station and to work as a licenced motor vehicle inspection station mechanic was taken away when the Tribunal ordered the Director to carry out his proposals to revoke. The Applicants, acting under subsection 25(1)(a) of the *Statutory Powers Procedures Act*, appealed the decision of the Tribunal

to the Divisional Court . They immediately regained their ability to carry on their licenced activities by operation of law pending their appeal.

The distinction in the manner of obtaining a stay of the Tribunal's decision pending an appeal to the Divisional Court is a significant manifestation of legislative intent. Motor vehicle inspection station operators and mechanics are important instruments in the attainment of the legislative objective of assuring that persons drive safe vehicles in Ontario. Notwithstanding this valid objective, the Director's proposals to revoke the

Applicants' licences are, in the absence of an order cancelling the statutory stay, put in abeyance pending the outcome of the appeal. The Director has seen his proposals upheld by the Tribunal. He remains without a remedy to redress the Applicants' conduct until either the Divisional Court dismisses the Applicants' appeal or he obtains an order cancelling the stay.

The Tribunal must now consider the criteria for cancelling the statutory stay under paragraph 25(1)(b) of the *Statutory Powers Procedures Act.* This matter was considered by the Divisional Court in the case of *Re Schiller and Scarborough General Hospital* (1973), 2 O.R. (2d) 324 where the Court considered a predecessor of the current paragraph 25 (1)(b). The Court held the onus is on the party seeking to cancel the stay order. The Court stated that it must also consider whether the appeal is brought in good faith and on substantial grounds. The court should consider all relevant circumstances that have arisen up to the date of the application to cancel the stay.

A statutory stay also arises under s.195 of the federal *Bankruptcy and Insolvency Act* R.S., 1985, c. B-3; 1992, c. 27 s. 2 in circumstances totally dissimilar from the facts of this case. Nonetheless, the Tribunal draws guidance from the reasoning of the Alberta Court of Appeal in the case of *After Eight Interiors Inc. v. Glenwood Homes Inc.* 2006 ABCA 121 (CanLII) where Madame Justice of Appeal Fruman held that the party seeking a cancellation of the stay bears the burden of establishing compelling reasons for supporting the cancellation. The decision maker is given a broad discretion and may accordingly consider all or part of the tripartite test adopted in case of *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. The decision maker should focus on the prejudice to the parties and to the interests of justice generally. The Tribunal can see no compelling reason why it should deviate from Her Ladyship's reasoning, the reasoning of Fruman JA that, to a great extent, parallels the submissions made by each counsel in this case.

The Tribunal therefore holds that the party seeking the cancellation of the stay must establish on substantial or compelling reasons for canceling the stay. In the exercise of the discretion afforded it under paragraph 25(1)(b) of the *Statutory Powers Procedure Act* the Tribunal considers a panoply of relevant circumstances extending from the personal circumstances of an applicant to the issues of public safety and public convenience. This will undoubtedly involve a weighing of such factors as to whether the appeal raises a serious issue and the nature and extent of the harm to the parties were the stay cancelled. Each case will obviously be dependent upon its own facts.

The Director has acted in good faith and in the furtherance of his public mandate in bringing this motion for stay. On the other hand, the Applicants submit that the Tribunal's decision is too harsh having regard to the Applicants' circumstances and the nature and extent of their statutory transgressions. They advocate a less severe sanction be imposed. The Tribunal is afforded a discretion under subsection 95(4) of the Act as to remedy. The Applicants appeal the decision to revoke the Applicants' registrations as well the Tribunal's consideration of the evidence leading to its decision. Their appeal is not frivolous. The threshold for finding a serious issue is low. The Tribunal finds that the Applicants have raised a serious issue of law.

The Tribunal acknowledges the Applicants' circumstances including Mr. Gagnon's age, experience and health as well as the fact that a significant portion of the Applicants' income is related to the issuance of Safety Standards Certificates. The Tribunal is equally aware of the Applicants' past history with the Director and of the circumstances leading to the revocation of their licences.

It is at this point that the issue of a statutory stay becomes significant. The Legislature has decreed that the Tribunal's decision be stayed thereby permitting the Applicants to carry on their licenced activities pending their appeal to the Divisional Court. This situation may be meaningfully contrasted with that which arose in the case of *Singh (c.o.b.) Sarwan Auto Sales v. Ontario (Motor Vehicle Dealers Act, Registrar)* [2002] O.J. No. 2645 which involved an application to a single judge of the Divisional Court for an order staying execution of the Tribunal's decision pending Mr. Singh's appeal to the Divisional Court. Mr. Justice Blair, as he then was, dismissed the motion for a stay stating that the nature and purpose of the *Motor Vehicle Dealers Act* is to protect the public and that stays were not automatic pending an appeal from a decision of the Tribunal. Accordingly, the public interest in refusing a stay outweighed Mr. Singh's private interest in according one.

The Director has not referred to any new evidence that may have arisen since the Tribunal heard the appeal in early March 2006. He relies upon the evidence that the Tribunal found significant enough to revoke the Applicants' registrations. The administrative difficulties incurred in inspecting a large number of inspection stations over the vast Timmins region, is not the Applicants' responsibility. The Director bears that public duty and must act accordingly. The Tribunal finds on the facts of this case insufficient reasons to cancel the stay.

The Director remains rightfully concerned that it may not be easy for him to act were the Applicants to abrogate their duties and responsibilities under the Act. Prosecutions in the Provincial Court have not acted as a deterrent in the past. That being said, the Director is free to bring a new motion to cancel the stay on short notice were the Applicants to deviate from their obligations under the Act and regulations.

ORDER:

The Tribunal dismisses the motion to cancel the stay without prejudice to the Director to bring a new motion to cancel the stay before the Tribunal on short notice.

LICENCE APPEALTRIBUNAL

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

Released: August 1,2006
File name: 3287.Gagnon.gar.motion.doc

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

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

AHMAD A. KHAN DBA KHAN AUTO & TRUCK REPAIRS

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 AHMAD A. KHAN DBA KHAN AUTO & TRUCK REPAIRS

AND IN THE MATTER OF THE MOTOR VEHICLE INSPECTION STATION MECHANIC'S REGISTRATION OF AHMAD A. KHAN

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: AHMAD A. KHAN, appearing on his own behalf

PATRICK S. MOORE, Counsel, appearing on behalf of the Director of Vehicle Inspection Standards

DATE OF PRE-HEARING: June 30, 2006 Toronto

ORDER

Following attendances on June 30, 2006 at a pre-hearing before this Tribunal of Ahmad A. Khan, appearing on his own behalf (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 October 16, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West,

12th Floor, Toronto, Ontario, and to continue if necessary on October 18 and 19, 2006:

1. The parties to the hearing are the Applicant and the Director.

2. Save for what is stated hereunder, there was no settlement of the issues arising from the Director's Notice dated April 6, 2006.

3. The Applicant, Ahmad A. Khan admitted that he signed the 19 certificates on the dates set out in those 19 certificates which are found at Exhibit 1, Tab 21 being the Director's Disclosure of documents for purposes of the pre-hearing (Exhibit 1).

4. The Applicant informed the Tribunal that at this stage of the proceedings, it is his intention to have 3 persons testify at the hearing on his behalf. In addition to those 3 persons, the Applicant also advised that he will rely upon the testimony of Mr. Tomasoni. It is recorded that the Applicant was advised at the pre-hearing that if he wished Mr. Tomasoni to be subpoenaed, he was to advise the Tribunal, in writing, well in advance of the hearing date that he requires such subpoena to be prepared and issued by the Tribunal. The necessary cost and expense in relation to the service of such subpoena shall be solely that of the Applicant and all arrangements in connection therewith shall be made by the Applicant.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel
Vice-Chair

RELEASED: July 4, 2006

FILENAME: 3591.khan.gar.pre-hrg.doc.

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

Ontario

724718 ONTARIO INC. DBA ROYAL MOTORS AND STEPHEN TRUSZKOWSKI

APPEAL FROM A PROPOSAL MADE BY THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

TO REVOKE REGISTRATIONS

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

APPEARANCES: MICHAEL CZUMA
Counsel for the Applicant

MURRAY G. FORBES
Counsel for the Director of Vehicle Inspection Standards

DATES OF HEARING: February 22, 2006
April 24, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Director of Vehicle Inspection Standards (the "Director") proposes to revoke the Motor Vehicle Inspection Station licence of 724718 Ontario Inc. dba Royal Motors (the "Corporate Applicant") and the mechanic registration of Stephen Truszkowski (the "Applicant") on the grounds that false statements were made with respect to safety standards certificates issued with respect to a 1996 Pontiac and a 1993 Pontiac and on the further ground that the Corporate Applicant and the Applicant (jointly the "Applicants") failed to comply with the provisions of the H*ighway Traffic Act* R.S.O. 1990, c. H.8 (the "Act") and the regulations or permitted an incompetent inspection with respect to a safety standards certificate issued regarding a 1990 Honda.

On May 26, 2005, the Corporate Applicant and the Applicant were each convicted in the Provincial Offences Court of two charges of making a false statement in a safety standards certificate, being an offence under subsection 99 (2) of the Act.

PRELIMINARY ISSUES

REQUEST FOR AN ADJOURNMENT PENDING AN APPEAL

At the commencement of the hearing, Michael Czuma, counsel for the Applicants, requested an adjournment stating that he had brought a motion to late-file a notice of

appeal with respect to the convictions registered against his client in May 2005. The facts leading to the convictions and the facts and issues in this appeal are intimately related. The Applicants would be deprived of fairness were their convictions be overturned. The Applicants pleaded guilty to the charges laid against them under the Act with the assistance of a paralegal who gave them bad advice. The Applicants had intended to plead not guilty.

Murray G. Forbes, counsel for the Director, submitted that the request for an adjournment be denied, noting that the Applicants pleaded guilty to an absolute liability offence. The charges were laid against the Applicants in May or June 2003, and the Applicants were given 9 adjournments. His appeal was adjourned on an earlier occasion by reason of illness and the Applicants freely chose the paralegal to represent them and willingly accepted his advice.

The motion to late-file the motion for leave to appeal the convictions was filed on January 17, 2006, which was almost 8 months after the Applicants pleaded guilty, over 5 months after they received the Director's Proposal to revoke their licences and 4 months after they filed their Notice of Appeal. The motion to late-file was filed well after the 30-day period required to file such motions.

Mr. Forbes cited several cases and one article in support of his submission that the Tribunal deny the request for the adjournment pending the appeal. These cases indicate that administrative hearings need not to be adjourned pending the outcome of a criminal (here, a provincial offence) trial. It was counsel's further submission that the appeal would have little merit having regard to the fact that the Applicants voluntarily chose the paralegal to represent them and willingly accepted his advice to plead guilty. In *R. v. Romanowicz* (1999), 138 C.C.C. (3D) 255, the Ontario Court of Appeal held that an accused who chose to be represented by an agent elects to forego the right to effective assistance of counsel.

The Tribunal found Mr. Forbes' submissions on this issue convincing. In denying the request for the adjournment, the Tribunal finds the statements made by Sara Blake in her book *Administrative Law of Canada* (second edition) relevant and determinative of the issue before the Tribunal. Ms. Blake states at page 40 of her text:

> A tribunal should not adjourn its proceedings to await the outcome of a related civil proceeding. The tribunal has a statutory duty to hold a hearing. The public have an interest in the prompt and just exercise by the tribunal of its powers. The Tribunal's procedures, unlike those of the court, are expected to be simple, summary and expeditious. Likewise, a tribunal should not adjourn its hearing to await the outcome of a criminal proceeding because the two proceedings have two different purposes and different burdens of proof. The respondent's right to remain silent in respect of the criminal proceeding is not infringed by the administrative hearing because testimony given at the administrative hearing cannot be used to incriminate the respondent in the criminal proceeding.

The request for an adjournment was denied.

REQUEST FOR AN INTERPRETER

At the commencement of the second day of the hearing, Mr. Czuma again requested another adjournment; this time to permit the Applicant to acquire the services of an interpreter. Mr. Czuma stated that when he spoke to the Applicant just prior to the second day of the hearing, he realized that the Applicant understood English but had difficulty in speaking English. Mr. Czuma spoke to his client in Polish.

Mr. Forbes stated that he was astounded at the request for an interpreter, noting that such request should have been made months earlier at the pre-hearing conference and not at this late date.

Motor Vehicle Inspector Glen Dodwell stated under oath that he spoke to the Applicant at this garage on two occasions in August 2003, at which time he spoke to the Applicant in English. He also spoke with the Applicant outside the hearing room. On each occasion, he was able to understand the Applicant who made appropriate responses to his comments.

The Tribunal disallowed the request for the adjournment from the Bench. The Applicant thereupon gave his evidence. He appeared to understand the questions put to him during his examination-in-chief and during his cross-examination. He responded appropriately to these questions. During closing submissions, Mr. Czuma conceded that “language was not at issue” in this case.

THE EVIDENCE

Glen Dodwell is a Motor Vehicle Inspector who has been a licensed mechanic since 1990. Inspector Dodwell is familiar with the Applicants’ file and he gave evidence on behalf of the Director. During the course of his testimony, he was referred to the Applicants’ record of convictions and noted that the Applicants have been convicted five times for violating the Act since 2002. He was then referred to the work order prepared by the Applicant with respect to a 1996 Pontiac for which a safety standards certificate was issued. The Applicant wrote on this work order that this vehicle was in good condition.

As a result of a complaint being received with respect to this vehicle, Motor Vehicle Inspector Gerry LaFlamme inspected the 1996 Pontiac and issued a report on June 6, 2003, which was 19 days after the safety standards certificate was issued, and during which time this vehicle was driven 247 kilometers. The inspection disclosed that the rear rotors were badly rusted, the driver’s side power window did not open, the front strut bearing was seizing up and there were holes in both mufflers, which were badly rusted. Inspector LaFlamme took photographs of these defects.

Inspector Dodwell subsequently attended upon the Applicant at his garage with respect to this complaint. The Applicant admitted that he signed the safety standards certificate. He was cautioned and read the list of defects found by Inspector LaFlamme. The Applicant replied that the rotors were perfect. He did not measure the rotors but they looked fine. He took the car for a road test and the steering was fine. He admitted that the mufflers were rusty while stating that there were no holes in them. The Applicant

then stated he measured the rotors by vernier caliper. He offered a refund to his customer.

The Applicant noted in his work order that the 1993 Pontiac was in good condition. As a result of receiving a complaint from the owner of this vehicle, Motor Vehicle Inspector Scott McNaught inspected this car in Port Hope. This Inspector's field inspection report, notes and photographs were referred to in evidence by Inspector Dodwell. The following defects were noted by Inspector McNaught: the left front, right front and left rear flex hoses were damaged in either one or two locations with the chord exposed, the left rear lower ball joint was separated with corrosion visible, there was a break fluid leak, the parking brake cable to left rear wheel was unattached and inoperative, the fuel line was leaking at repair right front and covered with electrical tape, there was an exhaust leak in the manifold and the motor mounts showed excessive wear. This inspection was done 44 days after the Applicant issued the safety standards certificate for this vehicle, and during which time the vehicle was driven 2302 kilometers.

As a consequence of his receiving of Inspector McNaught's report, Inspector Dodwell attended upon the Applicant at his garage. The Applicant stated that he did not remember this vehicle. When shown the inspection report and upon being cautioned by Inspector Dodwell, the Applicant stated that when he inspected the 1993 Pontiac, the rotors were perfect. He did not measure the rotors because they looked fine. The steering was perfect when he took the car for a road test and the mufflers were rusty but had no holes. The Applicant measured the rotors by vernier caliper. The vehicle owner was offered a refund. This car was in excellent condition when he inspected it.

Inspector John Gill, acting in response to a complaint made with respect to a 1990 Honda for which a safety standards certificate had been issued by the Applicant, inspected this car and noted that: both rear wheel cylinders were leaking, the right front coil spring was broken with rusty and corroded surfaces, the right front inner pad was separated from the metal backing to friction material, the left upper ball joint and the right upper ball joint showed unacceptable movement. The Applicant wrote on the work order that this car was in good condition. The estimated cost to repair this car was $1,037.00. Inspector Gill recommended to Ministry officials that charges be laid as a consequence of the Applicant issuing a safety standards certificate for this car.

Inspector Edward Bailey, acting pursuant to Inspector Gill's findings, interviewed the Applicant at his garage. After being cautioned by Inspector Bailey, the Applicant admitted that the Honda was taken to his garage on two occasions for inspection. A safety standards certificate expires 36 days from the date the inspection was done. The Applicant stated that he did not inspect the Honda a second time because he had previously inspected it. When confronted with Inspector Gill's report, the Applicant stated that he found no defects when he inspected the car on the first occasion. He realized that he shouldn't have issued the second safety standards certificate without re-inspecting the Honda but then he had inspected this car only two months earlier.

After referring to the documentary evidence with respect to the two Pontiac and the Honda, Inspector Dodwell referred to the Applicants' licensing history and the mechanic record report which records that the Applicant was convicted on four occasions for violating the Act as it relates to the issuance of safety standards certificates.

Upon being cross-examined, Inspector Dodwell stated that he was unaware of the 1986 conviction registered against the Applicant and that the Applicant was issued licences to operate a Motor Vehicle Inspection Station subsequent to these 1986 and 2002 convictions. The Applicant had the required tools and equipment at his garage on the two occasions Inspector Dodwell visited the Applicant there. The Director did not propose to revoke the Applicants' licences in 2002, however the Director will propose to revoke licences after an applicant has been convicted under the Act three or more times. Inspector Dodwell admitted that he never met the two complainants whose complaints led to his interviewing of the Applicant. The certifications done with respect to these complaints were requested by the former owners of these vehicles. One of these inspections was done outside the 36-day period. Ministry records indicate that the Applicant had issued many safety standards certificates in 2003 without incident.

In re-examination, Inspector Dodwell stated that the 36-day period is relevant to the owner or purchaser of a vehicle and is unrelated to the date of the inspection report. Motor Vehicle Inspectors use their knowledge and experience as a mechanic to examine what has happened to the inspected vehicle since the date of the inspection after taking into account several factors including the time that has transpired since the inspection was done and the distance the car has traveled since the inspection date. Things such as rust and holes in the floor usually occur over a long period of time, as distinguished from a burnt light bulb that could happen at any time.

Gerard LaFlamme has been a mechanic since 1973 and a Motor Vehicle Inspector for the past eleven years. He inspected the 1996 Pontiac at a garage in Whitby, Ontario, where it had been taken by a complainant. He explained in detail, both verbally and by reference to the photographs he took of this car of the defects he found with respect to this car as hereinbefore enumerated. His inspection suggested that the car had not been involved in a recent accident, nor was there any evidence of tampering with the car. It was Inspector LaFlamme's opinion that the defects were apparent at the time the vehicle had been inspected 19 days earlier save and except for the disfunctioning power window. His inspection was confined to those matters to which the mechanics at the garage referred him. The defects did not meet the standards prescribed in Schedule 1 to Ontario Regulation 611 made pursuant to the Act. He stated in cross-examination, that he would have driven the car except for the fact that it was not safe to do so because the car had no brakes. A licensed motor vehicle inspection mechanic is required to remove the wheels from the vehicle as part of his inspection. This act bears no relationship to the amount of rust found on the vehicle.

Scott McNaught is a Motor Vehicle Inspector who has been a mechanic for 27 years. He gave sworn evidence relating to his inspecting the 1993 Pontiac at a garage in Bancroft, Ontario. He, too, gave sworn evidence relating to those defects he found with respect to this car, as found in this inspection report and as shown in the photographs he took of these defects which are hereinbefore referred. All stated defects except for the leak in the manifold and the wear in the motor mounts would have, in his opinion, been present on the date the safety standards certificate was issued. There was no evidence of the car being involved in an accident or of tampering.

During cross-examination, Inspector McNaught stated that the ball joints came apart when the car was being driven to the garage. He does not know how the car was

driven. The car was apparently used as a family vehicle. He opined that the odometer reading was accurate having regard to the age of the vehicle and weather conditions. The defects he uncovered were evident at the time the safety standards certificate was issued. This opinion was based on his experience as a motor vehicle mechanic. The brake fluid lead was caused by wear, the effluxion of time and road conditions. He stated that the Pontiac had low mileage and was a well-made car. The vehicle could not be driven because of the separation of the ball joints. He inspected this vehicle and accurately recorded his findings.

Motor Vehicle Inspector Edward Bailey gave evidence confirming his findings with respect to the 1990 Honda as hereinbefore stated. He recommended the laying of charges as a result of the Applicant's conduct. He had no knowledge of the first certificate issued by the Applicant. The defects he found were violative of the provisions of Schedule 1 to Ontario Regulation 611. He conceded that some of the items found in the estimate represented good practice and did not relate directly to the defects discovered upon inspection. The ball joint problems could compromise safe driving.

The Applicant is an experienced mechanic, aged 65 years, who has suffered from significant health problems, including cancer and visual impairment, during the past decade. He has operated a repair garage in rented premises in Toronto for over 16 years. He has no employees. For the past five years he hires a mechanic to assist him on a part-time basis with the repair work.

The Applicant was shown a copy of the safety standards certificate issued with respect to the 1996 Pontiac. He stated that he inspected this car and that "everything was perfect". He was not in good health when he signed this certificate. The mechanic assisted the Applicant in doing the inspection. He was surprised at and took issue with the inspector's findings which were made 19 days after he issued the certificate during which time the Pontiac had been driven 247 kilometers.

The Applicant admitted signing the safety standards certificate issued with respect to the 1993 Pontiac but stated that he did not remember anything about this certificate.

The Applicant remembered inspecting the 1990 Honda for which he issued a safety standards certificate. He stated that everything about this car was good and that he was surprised that the Ministry inspector found so many defects with this car.

The Applicant stated that he issues about 20 safety standards certificates monthly. He does repair work on about 40 percent of these vehicles. One-third of his income is derived from doing inspections. He now works only 25 hours per week because he gets tired easily.

During his cross-examination, the Applicant admitted to being convicted of an offence relating to his issuing of "a bad safety certificate." He stated that he has since corrected his mistakes. He lives about two kilometers from his garage. The bulk of his business relates to doing work for used car dealers. The safety standards certificate relating to the 1996 Pontiac related to a private sale and that issued for the 1993 Pontiac was given to a regular customer who purchased this vehicle for himself. It took him between one and one-half hours and two hours to do the work required with respect to the 1990

Honda. When the Applicant worked on the Honda in 2002 his hourly rate was $20.00. He now charges $60.00 per hour for his services. Each certificate is purchased in books from the Ministry at a cost of five dollars per certificate. He could not recall many of the details relating to his 1998 conviction but remembered being fined the sum of $400.00. He was fined a similar sum in 2002 for violating 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.

ANALYSIS

In its analysis of the evidence, the Tribunal cannot re-litigate the convictions registered against the Applicant. The Tribunal may, however, look at the mitigating factors, which led to these convictions. *Ontario (Registrar, Motor Vehicles Act) v. Jacobs* (2004), 69 O.R. (3d) 463 (Ontario Superior Court of Justice – Divisional Court).

The Tribunal finds that each of the motor vehicle inspectors gave credible evidence. They did not exaggerate their evidence. They fairly reported on what they saw, while basing their conclusions on their years of experience they garnered as motor vehicle mechanics. They recognized that in some cases, the defects apparent at the time of their inspection may not have been apparent at an earlier date.

The Applicant gave conflicting evidence as to whether he measured the rotors of the 1996 Pontiac. He had no recollection of working on the 1993 Pontiac. When confronted with Motor Vehicle Inspector McNaught's report on this vehicle, the Applicant stated that the steering was perfect and that there were no holes in the mufflers. The Applicant signed two safety standards certificates while sick and unable to attend the Tribunal hearing scheduled for January 28, 2006. He stated that his replacement mechanic inspected the vehicles and took the two certificates to his home for signature. Later, the Applicant stated that he drove to his garage, which was a relatively short distance from his home, and inspected the cars.

Where there is a conflict in the evidence, the Tribunal prefers the evidence of each Motor Vehicle Inspector.

The evidence before the Tribunal is clear. The Motor Vehicle Inspectors found significant defects in the 1990 Honda, the 1993 Pontiac and the1996 Pontiac at the time the safety standards certificates were issued. These defects compromised public safety. In each case, the Applicant stated that the car was in good condition when it was not so. These cars did not meet the safety standards proscribed in Schedule 1 of Ontario Regulation 611. The Applicant knowingly issued three safety standards certificates when he should not have done so. He should have taken more care with each inspection. He gave the owners of each vehicle the false assurance that each vehicle met the safety standards proscribed by law. The Applicant admittedly did not bother to inspect the 1990 Honda on the second occasion. He has been callously indifferent to his obligations under the Act. He has taken the easy way out for his pecuniary benefit.

The Applicant would quite naturally like to keep his licences. He is a senior citizen in failing health who appreciates the revenue generated by his being able to lawfully issue safety standards certificates. However, with privilege comes responsibility. The Applicant has been irresponsible and sometimes indifferent to his obligations under the Act. He should have known better. He is an experienced mechanic. His conduct has merited quasi-criminal sanctions and equally merits administrative censure.

ORDER:

The Tribunal therefore orders the Director to carry out his Proposal to revoke the Motor Vehicle Inspection Station licence of 724718 Ontario Inc. dba Royal Motors and to

revoke the motor vehicle inspection station mechanic registration given to Stephen Truszkowski.

LICENCE APPEAL TRIBUNAL

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

RELEASED: June 15, 2006

FILE NAME: 3176.dba royal motors and Stephen Truszkowski.gar.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

Ontario

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

APPEARANCES: ARIYAN ZARAINEH, Agent for the Applicants.

MURRAY FORBES, Counsel, representing the Director of Vehicle Inspection Standards

ANDREA WILKINSON, Student-at-Law, representing the Director of Vehicle Inspection Standards.

DATE OF HEARING: May 1, 2006 Toronto

DECISION AND ORDER

BACKGROUND

The Director of Vehicle Inspection Standards (the Director) acting under paragraphs 91(3) (a) and (c) of the *Highway Traffic Act* (the Act) refused to issue a Motor Vehicle Inspection Station licence to Lepage Test. Inc. (the Applicant) on the grounds that the conduct of the Applicant's president Ashkon Zaraineh (Ashkon) afforded reasonable grounds for belief that the proposed inspection station would not be operated in accordance with the law and honesty and integrity. Ashkon has been employed by and has associated with Auto Rally Inc., which is a corporation controlled by his father Faramarz Zaraineh, The Director opined that Lepage Test Inc. is not a distinct enterprise from Auto Rally Inc.

The Director had on a previous occasion proposed to revoke that licence of Auto Rally Inc. to operate a motor vehicle inspection station on the grounds that (a) false statements were made with respect to five safety standards certificates issued by that firm, (b) Auto Rally Inc. permitted incompetent inspections to be made with respect to three additional safety standard certificates, and (c) because Auto Rally Inc. failed to

comply with the provisions of the Act and the regulations by not keeping the requisite documents required under section 10 of Ontario Regulation 601 on two occasions.

The Director also indicated that Ashkon's past conduct afforded him reasonable grounds for belief that Ashkon would not act in accordance with law and with honesty and integrity because Ashkon has not been able to consistently maintain a valid driver's licence and to comply with rules and regulations respecting such licences.

Fareeborz Zaraineh

The Director, acting pursuant to paragraph 92(4) (a) of the Act proposed to refuse to register Fareeborz Zaraineh as a motor vehicle inspection station mechanic at Lepage Test Inc. on the grounds that Mr. Zaraineh's past conduct afforded reasonable grounds for belief that he would not act in accordance with law and with honesty and integrity, because he issued two safety standards certificates for vehicles that did not comply with the prescribed standards.

At the commencement of the hearing, Ariyan Zaraineh, agent for Fareeborz Zaraineh, who did not attend the hearing, advised that Fareeborz Zaraineh did not wish to proceed with his appeal. The Tribunal thereupon directed the Director to carry out his proposal to refuse to register Fareeborz Zaraineh as a motor vehicle inspection station mechanic at Lepage Test Inc.

Removal of Counsel From The Record

Prior to the hearing, the Applicants had been represented by Anthony Moustacalis, Barrister and Solicitor. At the commencement of the hearing, Daniel Lawson, Barrister and Solicitor, appeared for Mr. Moustacalis requesting that Mr. Moustacalis be removed from the record as solicitor for the Applicants. The Applicant's agent, Ariyan Zaraineh, acknowledged that Mr. Moustacalis was no longer acting for the Applicants with the consent of the Applicants. The Tribunal thereupon ordered that Mr. Moustacalis be removed as counsel of record for the Applicants.

THE HEARING

Glen Dodwell, an experienced automobile mechanic, is a vehicle inspector for the Ministry of Transportation. Mr. Dodwell was the only person to give evidence on behalf of the Director at the hearing. He was the driving force behind the making of the Director's proposal to refuse to issue the Motor Vehicle Inspection Station licence to Lepage Test Inc.

In September 2005, Mr. Dodwell reviewed an application to operate a motor vehicle inspection station made by Lepage Test Inc. Mr. Dodwell was concerned that the president of Lepage Test Inc. was Ashkon who is the eighteen year old son of Faramarz Zaraineh who, at that time, was appealing the proposed revocation of the licence to

operate a motor vehicle inspection station made by his company Auto Rally Inc. This corporation carries on its business at 18 Lepage Court, Units 9 and 10, Toronto which is just a few doors away from Unit 4 where Lepage Test Inc. carries on its business.

Mr. Dodwell was also concerned that the proposed registered mechanic for Lepage Test Inc. would be Fareeborz Zaraineh, who is the uncle of Ashkon Zaraineh, the brother of Faramarz Zaraineh and whose driver's licence was suspended. A registered mechanic's inability to lawfully drive an automobile would seriously compromise his ability to road test a vehicle, which is a mandatory feature of an inspection. There were then two pending charges laid against Fareeborz Zaraineh for making false statements with respect to the issuance of two safety standards certificates. Mr. Zaraineh operates a motor vehicle inspection station called Auto Display Inc. at 1101 Finch Avenue West, Toronto, which is a relatively short distance from 18 Lepage Court, Toronto. He would have to drive from his inspection station on Finch Avenue West in order to work as a registered mechanic at 18 Lepage Court. Fareeborz Zaraineh is also a registered mechanic for a firm called Auto Happy which is controlled by his brother Kumarz Zaraineh and which is located at 1290 Finch Avenue West, Toronto. This firm has also been convicted in Provincial Offences Court of being in violation of subsection 99(2) of the Act.

Mr. Dodwell reviewed the registration history of Auto Rally Inc. as specifically documented in the Respondent's Appeal Book. In January 2006, the Tribunal ordered the Director to carry out his proposal to revoke the licence given Auto Rally Inc. to operate a motor vehicle inspection station. The reasons for decision indicated that Auto Rally Inc. was first registered in 1999 and received subsequent renewal licences through 2004. Auto Rally Inc. was convicted of six provincial court convictions and five Ministry warning letters. Faramarz Zaraineh is the principal behind Auto Rally Inc., which still carries on business repairing cars and sometimes selling cars. Mr. Zaraineh has been convicted in Provincial Offences Court of three charges of violating subsection 99(2) of the Act and section 10 of Ontario Regulation 601. Fareeborz Zaraineh worked as a registered mechanic for Auto Rally Inc. for a few months in 2004. At the time the Appeal Book was prepared Ashkon and Fareeborz Zaraineh had their driver's licences suspended for unpaid fines. Mr. Dodwell queried the ability of Fareeborz Zaraineh to get from one of his family's inspection stations to another because his driving privileges were suspended. Each of the businesses run by the members of the Zaraineh family relies heavily on the issuance of safety certificates. Several used car dealers come to their garages for safety certificates.

Ashkon Zaraineh, aged 18 years, gave evidence on behalf of Lepage Test Inc. He will be attending community college in Toronto in September 2006 to take a course in car repairs at night. He would be working with this company during the daytime. His driver's licence, which had been suspended for an unpaid fine, was reinstated in February 2006. Fareeborz Zaraineh will not be working for Lepage Test Inc. as its registered mechanic. The company will hire an unrelated licenced mechanic to do its safety inspections. Ashkon stated that he always had an interest in cars and that he would like to pursue a career working with cars. His plans in that regard should not be affected by the

wrongdoing of the other members of his family. He expressed a willingness to abide by all relevant laws and regulations relating to the operation of an inspection station.

During his cross-examination Ashkon stated that he got into the car repair business in mid-2005. Prior thereto he had been under the tutelage of his father for some time. He stated that his position with Auto Rally Inc. was like that of an unpaid apprentice. He conceded that his father carries on the Auto Rally Inc. business in the front part of the building where Lepage Test Inc. is located. The documentation relating to the incorporation of this firm was looked after by his mother and one Ali, who is working for Lepage Test Inc. as a mechanic. Ashkon did not know Ali's surname. He was not sure if his accountant (Ideal Accounting) was his father's accountant. He did not know how much his accounting fees were. He relies on his mother for handling many of the business aspects relating to the operation of Lepage Test Inc.

Ashkon admitted that he did not know what income Lepage Test Inc. has and that he was not familiar with the nature and extent of its expenses.

THE LAW

The provisions of the Act relevant to this appeal are stated as follows:

> **Motor vehicle inspection station licence**
>
> **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.
>
> **Issuance of licence**
> (2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence.
>
> **Grounds for refusal**
> (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, 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;
>
> (c) the applicant is not competent to operate a motor vehicle inspection station in accordance with this Act and the regulations.
>
> **Proposal to refuse to issue or revoke licence or registration**
>
> **95.** (1) Where the Director proposes,
>
> (a) to refuse to issue or renew a licence;

(b) to refuse to make a registration; or

(c) to revoke a licence or registration,

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;

(e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;

(f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and

(g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

Notice

(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.

Powers of Director where no hearing

(3) Where the applicant, licensee, registrant or proposed registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Director may carry out the proposal stated in the notice under subsection (1).

Power of Tribunal where 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

In this appeal, an 18 year old young man, Ashkon, recently out of high school, with no business or formal trades training seeks to operate a Motor Vehicle Inspection Station through a corporate entity called Lepage Test Inc., which is located a few doors away from an automobile repair shop run by his father and tutor, whose corporate licence to operate a motor vehicle inspection station was revoked by order of this Tribunal in January 2006. The Director's proposal to revoke that licence was issued in June 2005. The within application for a licence to operate a motor vehicle inspection station was conveniently made in September 2005, which was just two months prior to date of the Tribunal hearing.

Lepage Test Inc. was set up by Ashkon's mother. Ashkon has no knowledge of the corporate set-up; nor is he familiar with the corporation's finances. He does not know the surname of the mechanic working for Lepage Test Inc. Fareeborz Zaraineh was designated to work as the registered mechanic for this company. He now has been

denied that opportunity by Tribunal Order. No other registered mechanic has been designated or licenced to work for this corporation.

Upon consideration of all of the evidence, the Tribunal finds that the Applicant's attempt at licensure is a ruse to permit Faramarz Zaraineh to lawfully do something that he cannot do just a few feet away in another unit located at 12 Lepage Court, Toronto. It is a colourable attempt to circumvent the registration provisions of the Act relating to the establishment of motor vehicle inspection stations, which is public interest legislation designed to protect the automobile consumer from persons or corporations who cannot or will not operate such inspection stations within the law and within the bounds of propriety.

In arriving at its decision, the Tribunal gave no weight to the fact that Ashkon's driver's licence was at one time suspended for the non-payment of a fine.

ORDER

The Tribunal, acting under subsection 95(4) of the Act, orders the Director to carry out his proposals to refuse to issue a Motor Vehicle Inspection Station licence to Lepage Test Inc. and to refuse to register Fareeborz Zaraineh as a motor vehicle inspection station mechanic.

LICENCE APPEAL TRIBUNAL

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

RELEASED: May 25, 2006

File name: 3333.gar.lepage.

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

Ontario

G. GAGNON & R. GAGNON DBA GAGNON & SONS ENTERPRISE.
AND GAETAN GAGNON

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 G. GAGNON & R. GAGNON DBA GAGNON & SONS ENTERPRISE.

AND IN THE MATTER OF THE MOTOR VEHICLE INSPECTION STATION MECHANIC'S REGISTRATION OF GAETAN GAGNON.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: TED E. TICHINOFF, Counsel representing the Applicants

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

DATE OF HEARING: March 2 and 3, 2006 Timmins

DECISION

BACKGROUND

This hearing arises from a Notice of Appeal filed with the Tribunal by the Applicants on December 14, 2005, pursuant to the Director's Proposal to revoke the Motor Vehicle Inspection Station (MVIS) licence of G. Gagnon and R. Gagnon dba Gagnon & Sons Enterprise as well as the MVIS mechanic's licence of Gaetan Gagnon at the said station.

Under the Act, and MVIS licensee is authorized to issue Safety Standard Certificates ("SSC") for vehicles, which have passed safety testing in accordance with requirements

set out in the regulations under the legislation. The same procedure applies to Annual Inspection Certificates ("AIC") issued by licensees to commercial vehicles. Schedules set out in Regulation 611 specify the standards of performance required by numerous components on various classes of vehicle in order to qualify for the appropriate Certificate.

Although the station in question is registered with the Ministry as a partnership consisting of both Mr. Gaetan Gagnon and his son, Roger Gagnon, in fact Mr. Gagnon has operated it alone for many years. He has also been the sole licensed mechanic responsible for inspections required before certificates can properly be issued by the Station.

The Ministry conducted an audit and inspection of the Station in 2005. As a consequence, the Director proposed to revoke both licenses held by Mr. Gagnon. Mr. Gagnon appeals the Director's Proposal to the Tribunal.

EVIDENCE:

Mr. Paul Heroux was the Director's first witness. His testimony contained his curriculum vitae (Exhibit 3, Tab 2) demonstrating his current employment as an Enforcement Officer with the provincial Ministry of Transportation. He has been a licensed mechanic since 1998 and his qualification as an expert witness concerning the issuance of SSCs was consented to by Mr. Gagnon's Counsel.

Mr. Heroux stated he was responsible for inspecting stations within the Ministry's Northern Region, which included the Applicant's station amongst some 800 other similar stations. Mr. Heroux works with four other Ministry inspectors in the region. It was as a direct consequence of Mr. Heroux's audit of the Applicants' station in September, 2005 that the Director issued the Proposal to revoke Mr. Gagnon's licenses (Exhibit 3, Tab #4).

Mr. Heroux's review of the Applicants' licenses arose out of a complaint received by the Ministry in 2004 from a vehicle owner. While Mr. Heroux concluded from his consequent investigation that there was insufficient evidence of any wrongdoing to lay charges, he stated it is common practice in his department to follow-up on such complaints with an inspection of the station. The result of this inspection was Mr. Heroux's finding that the station issued a high number of certificates compared with other similar such licensed stations in the area; close to six times the average amount of other stations for cars and a lesser, but still high, number of Annual Inspection Certificates for commercial vehicles.

Further checks revealed that Mr. Gagnon had been registered under the Act since 1978, and that between his original registration and 1990, as owner of a licensed station, he had received eight (8) convictions under what is currently section 99(2) and 90 (3)(a) of the *Highway Traffic Act* (Exhibit 3, Tab #7). In 2004, a conviction under section 90(3)(a) was also entered against the station.

Mr. Heroux noted Ministry files on the Applicants contain a letter from then-Ministry Area Manager dated April 18, 1994, warning Mr. Gagnon of recent Ministry investigations into the station's safety inspection procedures and advising that non-compliance by the station with the Act or regulations could lead to revocation of the MVIS license (Exhibit 3, Tab #8). The letter was the result of a standard Ministry Vehicle Inspection Report based on a complaint received by a vehicle owner regarding the condition of brake and steering components. The Officer responsible for that report notes that the complainant does not want to testify in court, hence his recommendation to issue a warning letter to the station.

Mr. Heroux testified to a 1999 Ministry Inspection Report on the station. Under the final section titled "*In order to comply with the Highway Traffic Act and Regulations any corrective measures noted below must be taken*" appears the following:

> Interviewed Mr. Gagnon:
>
> > 1. Written work order to be made on initial safety inspection showing recommended repairs and no second fee charged if repairs done & vehicle returned for insp. within 10 days (except for removing wheels).
> >
> > 2. tractor-trailer inspections must be done in garage or on hard standing surface (ramp) and all wheels must be removed to measure brake drums).
> >
> > 3. left new app. for wrecking yard licence (renew) and issued new garage register.
>
> (Exhibit 3, Tab 9)

Notwithstanding these clear instructions, Mr. Heroux testified that his audit of September 2005 led him to conclude that all issues continue to remain a problem with Mr. Gagnon's business operation.

A year earlier, in October and December, 2004, Ministry Inspector Brian Maguire, a licensed mechanic since 1985, testified to his having investigated both a consumer complaint as well as a spot check of a commercial vehicle. Both revealed safety concerns despite certificates having been issued for both vehicles by Mr. Gagnon.

In December 2004, a contact by Timmins police to the Ministry led to Inspector Maguire's inspection of a second vehicle, which had been in a collision with a light pole after having received a SSC by Mr. Gagnon. The inspection led to subsequent convictions under section 90(3) of the Act by both Mr. Gagnon and the station. In particular, the Inspector concluded that the vehicle exhibited significant safety failings, which could not be attributed to either the accident or the towing from the accident scene. In particular, Mr. Maguire noted that the driver and passenger seat rails were so loose he was able to manually manipulate their location. He noted that the threads on the bolts as well as the nuts did not indicate any trauma attributable to any one excessive occurrence, but rather fatigue from general time and wear. He also testified to a hole in the floor of the vehicle near to the area where the exhaust was released (Exhibit 5, pictures #2 and #3), which he noted could have serious repercussions on

the safety of the interior air quality and was not reasonably attributable to the accident, but rather indicated long-term wear and failure. Mr. Maguire also found the sway bar mount was missing (Exhibit 5, pictures #4 and #5), which he testified has significant impact on the vehicle's safety as it impacts on the functionality of the axel movement. He testified this could not be caused by the accident as a replacement bolt, placed there in a vain effort to correct the problem at some point, still remained on the vehicle.

Mr. Heroux testified that of seven vehicles chosen from the station's records to be examined, three contained significant defects. Mr. Heroux testified to two of the vehicles in his audit. The first was issued SSC# 8063586 by Mr. Gagnon (Exhibit 3, Tab #14). It was inspected by Officer Heroux 9 days and 669 kilometers after issuance of the SSC. Pictures entered into evidence demonstrate that, despite Mr. Gagnon having issued a Work Order stipulating that work was required on the muffler, at the time of the Ministry's inspection, the original muffler assembly remained on the vehicle and exhibited significant rust to the extent that there was perforation on the unit.

A second vehicle was inspected 7 days and 466 kilometers after being issued a SSC by Mr. Gagnon (Exhibit 3,Tab #15). This Certificate had a Work Order issued by the station noting problems with the windshield and bodywork, including the notation "home repair". When inspecting the vehicle, Mr. Heroux testified there was "severe rust". Pictures he submitted (Exhibit 4) reveal perforation of the metal. Mr. Heroux testified that the model of the vehicle employs a uniframe such that this perforated weakness could significantly impact on the integrity of the vehicle body.

In both cases, it was the Inspector's conclusion that there had been no repair as recommended on the Work Orders. Other issues of concern noted by Mr. Heroux consisted of the following:

- ramps used by Mr. Gagnon to perform safety inspections on larger trucks and commercial vehicles are not as helpful as is a hoist where the mechanic can review the underbody;

- the garage manual at the station was obsolete such that Mr. Heroux felt obliged to provide a new one as opposed to the updates generally found sufficient for licensed stations;

- there was no list of mechanics kept by the station as is required under the Regulations;

- there were no tools as prescribed by the Regulations . When asked, Mr. Gagnon advised that his tools had been stolen some eight or nine years previously and never replaced. Mr. Heroux testified that precision in measurement of such components as rotors and brake drums is mandated;

- various SSCs and AICs were found to be missing. Mr. Heroux testified that these are all numbered and issued to each licensee who is required to maintain careful records and advise the Ministry if any document is stolen or found to be

missing. Mr. Gagnon advised the Officer that he would, on occasion, simply throw away a certificate if he made an error. He stated he was not aware of the requirement to keep all records for a 12 month period, but had much of his material burnt each July thinking he only needed to maintain records from one calendar year to another;

- the partnership under which the station was registered had ceased to exist sometime previously, but Mr. Gagnon had failed to advise the Ministry.

Mr. Heroux testified that Mr. Gagnon was not adequately able to inspect motorcycles such that he was not qualified to issue certificates for this category of vehicle. In response, Mr. Gagnon testified he had believed he had the requisite qualifications and had only provided the testing of motorcycles under this, albeit mistaken, good faith belief.

Mr. Maguire also testified to a vehicle he inspected as part of the overall compliance audit undertaken by the Ministry with Mr. Heroux last September. (Exhibit 3,Tab #13). It was a 1994 Chevrolet for which Mr. Gagnon had issued a SSC # 8063582 on September 6th, 2005. Mr. Maguire inspected the vehicle at the home of the owner some two weeks later. On the Work Order attached to the SSC, Mr. Gagnon had noted that work was required on the seat &seatbelt assembly as well as bodywork. All remained outstanding at the time of Mr. Maguire's inspection with the consequence that one provincial offences charge against the Applicant is currently pending.

The first witness to testify for the Applicant was Mr. William J. Burke. He has known Mr. Gagnon for twenty years. Mr. Burke is self-employed in the trucking business and, in this capacity, has had Mr. Gagnon perform safety checks on his vehicles in the past. He stated that he will generally have these performed by other garages if he thinks some work might be required as he knows Mr. Gagnon no longer services vehicles. Mr. Burke stated the last time he had a truck inspected by Mr. Gagnon he observed the inspection undertaken. He found that it was performed with great care and prudence such that a number of issues were found by Mr. Gagnon, which Mr. Burke had not previously noted. In cross-examination, Mr. Burke acknowledged he had not seen Mr. Gagnon remove wheels to observe the wear to brakes. Mr. Burke testified this is done by removal of the inspection cover, the same process used by Department of Transport inspections. In conclusion, Mr. Burke testified that Mr. Gagnon was an honest man who always kept his word.

Mr. Jacques P. Nickner was a By Law Enforcement Officer for the City of Timmins for a number of years. He has known Mr. Gagnon since the early 1970's. He first came into contact with Mr. Gagnon when he was responsible for scrap yard and salvage records and inspected Mr. Gagnon's scrap yard and salvage business in that capacity. Mr. Nickner testified it was his experience that Mr. Gagnon is not a learner by reading, but picks up on requirements quickly once such are verbally explained. (Mr. Heroux corroborated this observation.) Mr. Nickner stated that once Mr. Gagnon was verbally advised of the requirements of the law he was honest and complied in a cooperative manner. This too was corroborated by the testimony of Mr. Heroux.

In cross-examination, Mr. Nickner testified he still remained a customer of Mr. Gagnon to whom he took his vehicles for safety checks when required.

Mr. Nickner also testified to Mr. Gagnon's generosity and community altruism. Mr. Gagnon consistently provided employment and training to people whom Mr. Nickner believed would not have received such opportunities elsewhere. Mr. Nickner corroborated the testimony of Mr. Burke that Mr. Gagnon is a man of honour who always keeps his word.

Ray Fournel testified for the Applicant. He advised that he used to be in the car dealership business in Kirkland Lake but health problems in the mid-90's caused him to move to Timmins where he met Mr. Gagnon in 2000. He testified he was not a mechanic but had been involved with cars all his life and was, therefore, familiar with the terms and requirements of vehicle safety and maintenance. He has had a few vehicle safety inspections performed by Mr. Gagnon and always has found him to be diligent and honest, refusing to provide Safety Certificates until repairs found necessary were performed. In cross-examination, Mr. Fournel stated that he had five or six vehicles inspected by Mr. Gagnon in the last 5 years and that other garages often insisted on parts replacement or service when such was not required; whereas Mr. Gagnon's advice is always sincere, given that he himself does not perform repairs.

Mr. Real Doucet, a heavy equipment operator, testified as to Exhibit 3, Tab 15 – the vehicle inspected by Mr. Heroux. Mr. Doucet explained he had attended at Mr. Gagnon's shop for a SSC for the recently purchased Cavalier. Mr. Gagnon was a good friend of his father's and, according to Mr. Doucet, had a great reputation in the community as an honest man who knew vehicles. Mr. Doucet advised he was aware that there were rust issues with the Cavalier such that Mr. Gagnon's assessment that the rocker panels needed bodywork and the windshield needed replacing did not come as any surprise to him. Mr. Doucet testified he had the windshield replaced and a friend had performed bodywork to the rocker panels when he returned to Mr. Gagnon for the SSC.

Mr. Doucet testified that he realized within a few days that his friend's bodywork on the Cavalier was substandard. Mr. Doucet commenced to remove the body filler used by his friend with the intention of redoing the body repair when he received a visit from Mr. Heroux and Mr. Maguire of the Ministry of Transportation. In reviewing the pictures tendered as Exhibit #4, Mr. Doucet testified that they did not accurately represent the condition of the Cavalier at the time of the SSC because he had, between the granting of the SSC by Mr. Gagnon and the visit by Mr. Heroux and Mr. Maguire, done much to peel back the inadequate body work.

Mr. Heroux in reply evidence testified he did not recall seeing any evidence on the vehicle of recent bodywork.

The witness was unable to explain why the Work Order and the SSC were both dated September 13. He was clear that all the work which had been recommended had been

performed by the time of the SSC. Pictures, which indicated rust within the hood of the Cavalier and indicated body failure by the firewall (Exhibit 5, pictures #9 and #10), were not recognized by the witness as belonging to his vehicle.

Mr. Gaetan Gagnon is 59 years old and lives with his wife on the same property as the MVIS, the salvage yard, a motorcycle raceway, which he developed, and a recycling business. In recent years, due to health concerns, he has transferred the salvage and recycling interests to his sons. Mr. Gagnon testified that he has been a licensed mechanic since the mid 1970's. In the early days he owned his own shop in town and employed two mechanics; today ninety percent of his employment is SSC and AIC inspections. He cannot perform vehicle repairs due to arthritis and circulation issues. He no longer has a tow truck.

Mr. Gagnon testified he tries to help others and has in the past perhaps been too lenient with poorer people as a consequence. He stated since meeting with Mr. Heroux, he realizes the errors he has made in his business and assures the Tribunal he will no longer break the law.

In response to the evidence against him concerning the vehicle belonging to Mr. Doucet, Mr. Gagnon testified that he originally filled out a Work Order stipulating the repairs, which were required before the vehicle could be safety certified. Mr. Doucet returned a few days later with the new windshield and work, however poor, having been performed on the body such that here were no longer any holes. Mr. Gagnon felt he could issue the Certificate and did so, dated the same day as the Work Order since he did not want to charge Mr. Doucet any further money than the $50.00 he had charged on the Work Order. Mr. Gagnon further stated that he did charge $20.00 to issue the Certificate to the consumer, making for a total cost to the consumer of $70.00. The further $20.00 is not however recorded on any receipt or other invoice record.

Mr. Gagnon assured the Tribunal that, though he might from time to time, with a poorer client, "let it go", he would never certify any vehicle which was unsafe. He stressed he was a good mechanic and always carefully checked safety components with the result that all brakes, steering and mechanics of any vehicle certified by him were competent. This had been the case with both vehicles alleged unsafe by the Ministry's audit in Exhibit 3, Tabs 13 and 14. In both cases he had erred in trusting the consumers to perform the repairs as he had advised them, but neither posed an immediate health or safety risk. He testified he had never, in over 2000 Certificates issued by him, been the subject of any complaint of unsafe steering or braking.

As concerns the fact that he has not used specified tools in his trade in recent years, Mr. Gagnon testified he used his common sense and experience to judge whether a rotor or a brake drum or some other component was so worn that it needed service or replacement. He stated that such was easy to judge from visual inspection although he acknowledged a tool was more precise. Nonetheless, Mr. Gagnon testified he has purchased all the tools required since the September audit by Mr. Heroux and uses them to double check his visual accuracy.

Mr. Gagnon gave evidence concerning the vehicle inspected by Mr. Maguire, which had been involved in the accident. It was his position that, in general, the vehicle was safe but that he might have missed one or two points of concern raised by the Ministry's witness. Mr. Gagnon did not recall any perforation in the floor of the vehicle, but did insist that, even were such to be the case, the muffler assembly was positioned such that the exhaust was venting not under, but beyond, the floor of the car. Mr. Gagnon testified that, when it comes to rust, there is no tool for measurement such that all judgments are subjective. With this vehicle, he admitted the rust was borderline, but the owner required the car for work and Mr. Gagnon decided to issue the Certificate.

Since issuance of these certificates comprises Mr. Gagnon's only source of income and, since the MVIS is on his residential property, Mr. Gagnon stated he can spend most of the day in the shop such that issuing 6 or 7 such certificates in any one day is not unreasonable. He stressed each inspection he performed is thorough and, although he was the sole certified mechanic performing the work, he regularly had other people around the shop who would assist him.

With regard to the specifics required in the Manual as to the process of inspection to be followed, Mr. Gagnon testified he had read the Ministry's manuals and had believed he was properly following the requirements. As concerns the 1999 inspection by the Ministry and the written requirements noted in Exhibit 3, Tab #9, Mr. Gagnon testified he did not realize that, even when he checked brakes visually through the dust panels of larger vehicles, he was also required to remove all wheels to inspect the drums. He testified that he relied on his common sense as to whether drum wear was significant and believed he could sufficiently determine this visually. Nonetheless, once reminded by Mr. Heroux of the legal requirement to use tools he has since purchased and is using them. Mr. Gagnon stated he had been financially burdened for many years and has only recently finished paying off a substantial debt, which arose in 1993.

Mr. Gagnon stated he is always very careful with the larger vehicle inspections, having run a trucking business himself a number of years ago. He advised he always has the vehicle placed on the ramp and had two older gentlemen who assist him when needed in removing wheels.

THE LAW:

The *Highway Traffic Act* states:

> **88.** In this section and in sections 89 to 100,
>
> "Director" means the Director of Vehicle Inspection Standards appointed under section 89;
>
> "licensee" means a person who is the holder of a motor vehicle inspection station licence issued under section 91;

"motor vehicle inspection mechanic" means a person who certifies by means of a safety standards certificate that a motor vehicle complies with the equipment and performance standards prescribed by the regulations;

"motor vehicle inspection station" means any premises maintained or operated for the inspection of motor vehicles and the issuance of safety standards certificates or vehicle inspection stickers in respect of the motor vehicles;

"registrant" means a person who is registered as a motor vehicle inspection station mechanic under section 92.

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;

91(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 purpose 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.

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

(a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate 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 registrant;

(b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or

(c) the registrant does not comply with this Act or the regulations.

95(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.

Regulation 601 under the Act provides:

> **10.** A Licensee shall keep on the licensed premises…
>
> (b) a record of all vehicles inspected together with the measurements required to be recorded by the Schedules and, where applicable, a list of defects, recommended repairs and actual repairs carried out by the licensee, for a period of one year from the date of inspection.

Regulation 611 under the Act sets out in Schedules the requirements, including specified measurements, for vehicles to meet compliance with the standards required for Certification by licensees under the *Act*.

FINDINGS OF FACT:

The Tribunal has reviewed the evidence and finds:

1. In September, 2005, Mr. Gaetan Gagnon dba Gagnon & Son Enterprise issued SSC #8063586 to a 1997 Mercury which was not in compliance with the prescribed standards required for the issuance of the Certificate;

2. In September, 2005 Mr. Gaetan Gagnon dba Gagnon & Son Enterprise issued SSC #8063582 to a 1994 Chevrolet which was not in compliance with the prescribed standards required for the issuance of the Certificate;

3. In both of the above instances Gaetan Gagnon was the licensed mechanic performing the inspections;

4. In both instances, the mechanic and the station made false statements in the Certificates granted by the station;

5. Nine convictions for issuing similarly false statements on Certificates have been recorded against the licensees since 1978;

6. Gaetan Gagnon has been cautioned against issuing false statements in Certificates by Ministry officials in writing on at least two occasions in the 1990's;

7. Gaetan Gagnon failed to employ required tools in the operation of his licensed business and failed to perform inspections in accordance with the procedures mandated in the legislation despite having been cautioned of the requirement that he does so in 1999;

8. Gaetan Gagnon failed to keep records as required under the legislation.

DECISION:

The Director and, in turn, this Tribunal, are required to administer the law as set out in the Act and regulations for the purpose of public protection to the citizens of this

province. The Act sets out clear regulatory requirements for ensuring vehicles on our public roads meet certain specified minimum standards of roadworthiness. The individuals empowered to make this determination are licensed to do so. The license is predicated on their complying with specified standards of inspection, failing which their entitlement to license is threatened.

The evidence before us in this hearing, establishes that Mr. Gagnon is a licensed mechanic responsible for a licensed station with significant experience (27 years) in the safety inspection business. The evidence that he has contravened the legislation in terms of (i) the process of completing the inspections (no tools), (ii) complying with administrative requirements (i.e. keeping records) and, most importantly, (iii) certifying vehicles were roadworthy when he knew they were not (issuing SSCs which required repair to meet the legislated minimal standards) is not contested. On such grounds the Director is clearly entitled under section 91(8) of the Act to revoke his licenses.

Mr. Gagnon's response is that these contraventions were, in large count, motivated by only fair and well-meaning intentions whereby he sought to assist his clients. His position is that he has now realized the error of this approach and will in future abide by the Act in all its requirements of licensing. In effect, he relies on his reputation as an honest and highly competent mechanic who broke the law in order to be helpful only and now undertakes to never do so again.

The legislation is predicated on what the licensee has done to date and not on what he/ she may claim will be done in the future. The past conduct of Mr. Gagnon and, as a result, his station, of failure to abide by the Act is repeated and admitted. While we accept that Mr. Gagnon may well have been motivated by a desire to be helpful, he was aware that the actual result of his actions created enhanced danger to the drivers. Moreover, Mr. Gagnon's testimony revealed a man with great pride in his uncontested ability to perform mechanic services, which contributed to a professional confidence which, in turn, resulted in his measurement and inspection without mandated precision tools. The Tribunal finds that such indicates an attitude which leads to a propensity to disregard the law should he deem it unnecessary. Such is apparent when Mr. Gagnon fails to retain records for the 12 month period legislated, or fails to remove wheels as mandated because his visual inspection is, to his mind, perfectly sufficient, or fails to record his further client charge of $20.00. The latter is particularly troubling in this regard, as Mr. Gagnon admitted he continues not to reflect this charge because he believes it to be unfair despite the Ministry's letter advising he do so as far back as 1999.

Further, while the Tribunal has some sympathy with Mr. Gagnon, it is not persuaded that he will in future abide by the set requirements of the legislation. The evidence before us is that Mr. Gagnon has been advised on many occasions throughout his long licensed career that he was not carrying on his business within the law as witnessed by his numerous convictions for issuing false certificates – to no apparent avail. He was informed on at least two occasions in the 1990's of his need for greater prudence in meeting the inspection standards as well as in providing the Certificates, both of which he clearly chose to downplay given his decision to continue to work without prescribed

tools and to maintain his practice of providing Certificates when required work on the vehicle continued to remain outstanding. The Tribunal finds it perfectly reasonable that the Ministry would feel justified in concluding it was unable to trust the good faith of the Applicant to abide by the legislation in the future.

Counsel for the Applicant urged the Tribunal to find a middle road whereby Mr. Gagnon would be subject to tighter control but not lose his livelihood altogether. The Tribunal has considered this, given its sympathy for the age and professional background of the Applicant. However, continued licensing reflects the government's good faith in both the licensee's ability and propensity to abide by the standards required. There is overwhelming evidence that does not provide such grounds. To require the taxpayers to further assist Mr. Gagnon by paying for additional inspections and investigative review in order to reassure the Ministry that Mr. Gagnon is now able to better abide by his licensee requirements is simply unreasonable. The Tribunal finds it prefers the alternative position as posited by Counsel for the Director that the concept of licensing in consumer protection legislation is to provide a community benefit and not a further drain on community resources.

ORDER

As a result, the Tribunal is not persuaded that Mr. Gagnon should retain his license and therefore orders the Director to carry out his Proposal.

LICENCE APPEAL TRIBUNAL

_____

Jane Weary
Vice-Chair

Released: April 13, 2006

File name: 3287.Gagnon.gar.doc

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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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

IN THE MATTER OF an application
by Best Deal Motors Collision Centre Inc. and Gregory Rabkin to appeal the Notice of the Director of Vehicle Inspection Standards pursuant to Section 91(8)(a), (b) and (e) and Section 93(a), (b) and (c) of the *Highway Traffic Act*;

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

BEST DEAL MOTORS COLLISION CENTRE INC.
and GREGORY RABKIN

Applicant

- and -

DIRECTOR OF VEHICLE INSPECTION STANDARDS

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 10 and 12, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at 10:30 a.m. on Tuesday and Wednesday, the 20th and 21st day of February, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: January 5, 2007

FILE NAME: 3798.gar.best deal.adj.doc

LAT Decisions, Rulings and Orders

April
May
June
July
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October
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December
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Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

Fiscal Year 2006 - 2007

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

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- 3494-MVIA-NUSP-EXHP-Not Under Suspension-Exceptional Hardship
- 3472 - MVIA – DUDI – EXHP- Due Diligence and Exceptional hardship
- 3477-MVIA-EXHP
- 3476-MVIA-STLN
- 3465 – MVIA – EXHP – Exceptional Hardship
- 3448 – MVIA – EXPH – Exceptional hardship
- 3441 MVIA DUDI Due diligence

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Ontario
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Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3494-MVIA-NUSP-EXHP-Not Under Suspension-Exceptional Hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SUBSECTION 55.1(3) OF THE ACT

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

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: APPLICANT, unrepresented

ERROL M. MASSIAH, Agent
Representative for the Registrar of Motor Vehicles
(the "Registrar" or the "Respondent")

DATE OF HEARING: April 21, 2006

DECISION RELEASED: April 27, 2006 *by teleconference*

REASONS FOR DECISION

A hearing was held on April 21, 2006, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended (the "HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to subsection 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

This is an appeal under Section 50.2 of the HTA.

The Registrar of Motor Vehicles (the "Registrar"), made an order under Section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1991 Plymouth Acclaim (the "vehicle")
Date of Appeal:	April 4, 2006

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

The owner appeals on the basis that the driver's licence was not under suspension and that the loss of the vehicle will result in exceptional hardship as provided in subsections 50.2(3)(b) and (d) of the Act.

This matter came before the Tribunal on April 21, 2006 and proceeded as an electronic hearing.

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

The Respondent submitted a set of original certified documents, copies of which had previously been filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as Exhibits with the consent of both Parties.

The hearing proceeded.

ISSUE:

The Applicant's Notice of Appeal filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

> First, I am fully licenced and insured. To date I do not have a sticker but was saving to get it at the end of the month of February. Police officer advised me <name of driver> was arrested in my car. Apparently their was a invalid sticker on my plates. I was not aware of this. I also did not allow her to take my car. Police told me my car was not insured and that I had no valid licence. I did have my licence and insurance, they were reinstated Feb. 17, 2006. I do not drive the car yet however this girl <name of driver> took off when I was not around my house and main keys are with the car. My kids shoes are in the car, my car is my life. I am trying to get my life in order. My past has not been pleasant due to life trama and abuse and stress. I am on disability because of this with that I have suffer major financial hardship, lost 2 homes and 1 car already. My car is also currently under investigation with police because of this so called sticker that was put on the plate. I did not do this. Please let me have my car back. I need it to try and get back to living a normal life and find work. I am trying to get off disability. (*sic*)

"CONFIDENTIAL"

March 29, 2006

To whom it may concern:

Please accept this package as proof and evidence regarding my Order to Impound.

I the owner of this vehicle am licenced and have insurance. I do not yet have my sticker because of financial problems.

I am on disability and not in a good financial position. I did not authorize anyone to drive my car and was not aware that it was taken until I came out of the bath.

I desperately need that car. I have 2 daughters in Brampton that come back and forth with me in Orangeville. They rely on me to pick them up. Further to that I want to get back to work soon if Im well enough. I need the car to see my doctor (see attached. Doc). He is in Oakville and its been hard to get to my appointments and keep them. Im new to Orangeville. My daughter 17 years of age was in need of my car to work herself and go to school.

I just recently had my car insured and my licence reinstated, but waiting for money to get my sticker and I would have been totally legal and good to go. But this happened to me and strongly feel I do not deserve it. It was unfair and the person who did this is totally responsible. I am waiting to hear from Police Officer Holms in Orangeville.

With this impoundment it has already cost me over 200.00 dollars never mind the towing charges which are probably around 400.00 and then to get it out @ 1,500.00. Thats impossible. I need help and am asking you to please release my car.

> I am trying to get <name of driver> to admit her wrong doing and she also advised me that she was fully licenced. The police said she wasn't.
> I don't know what more to say other than this has had quite the effect on my life. Please be fair.
>
> Respectfully
>
> <Applicant's Name>
>
> (*sic*)

The following is a summary of the Applicant's affirmed testimony.

The Applicant is currently on a disability pension and does not work. She has two daughters whose ages are 17 and 21. They reside in Brampton, Ontario. They visit the Applicant on a periodic basis.

The Applicant moved to her residence just over a year ago. Her complex is low income housing in which her rent is subsidized. She does not leave her townhouse very often. Earlier this year, she had her driver's licence reinstated and her vehicle is roadworthy pending the renewal of her licence plate stickers. The vehicle's insurance was financially assisted by her mother.

Prior to the vehicle being impounded, the Applicant's male friend and his girlfriend would sporadically stay with the Applicant. The Applicant had only known her male friend's girlfriend, the suspended driver at the time the vehicle was impounded, for a few weeks.

The Applicant was unable to remember whether she was asleep or in the shower when her friends took her car keys from the coffee table and left her home. In her testimony, the Applicant did not lend her vehicle to her friends. The Applicant was advised by another friend who came to her door to advise that he had seen her vehicle being towed by a tow truck. To date, she is unaware of why her friends took her vehicle. The police advised the Applicant that the vehicle had been stopped because of an invalid sticker on the plate. The driver had been arrested and the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

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 November 2, 2006.

LAW:

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

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

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

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

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

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

> "Owner" means each person whose name appears on the certificate of registration for the vehicle but

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

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

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

The Applicant here appeals on the basis of subsections 50.2(3)(b) and (d).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, subsection 55.1(2) of the Act states:

> Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,
>
> (a) notify the Registrar of the fact or cause the Registrar to be notified; and
>
> (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identifies the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

> 41.(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,
>
> (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*
>
> (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*

(c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act;*

(d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or

(e) referred to in a predecessor to this sub-section,
is thereupon suspended ....

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

(a) upon the first conviction, one year; and

(b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

(4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,

(a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or

(b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

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

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

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

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

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

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

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal

in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

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

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

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

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

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

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

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

(a) no alternative to the impounded motor vehicle is available;
(b) the loss will be immediate, significant and lasting;
(c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
(d) the impact of the loss,

(i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
(ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

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

APPLICATION OF LAW TO FACTS:

The Applicant filed an appeal on the ground of "exceptional hardship" under subsection 50.2(3)(d). Section 22 of Regulation 632/98 is very specific. It provides the Tribunal with the criteria that the Applicant must meet to determine if "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in exceptional hardship as described by section 22(2).

Subsection 22(1) requires that the Tribunal consider whether no alternative to the impounded motor vehicle is available to determine whether exceptional hardship will result from an order to impound.

As mentioned above, the suspended driver was the girlfriend of the Applicant's friend. The Applicant did not want to press charges against her in the event it would ruin her friendship. After a number of conversations with the suspended driver, the Applicant changed her mind and asked the police to press charges. The police advised her that "*it was too late"* and no charges were laid.

The Applicant advised the Tribunal of her medical issues. She has not seen her doctor since November 2005, but has been able to speak with him by phone. Her doctor's practice is a significant distance from her new residence. Her prescriptions are being filled and are delivered to her by the pharmacy. She has not had or missed any medical appointments. Because of her condition, the Applicant was very hesitant in driving and attests to the fact that prior to the vehicle being impounded, "*I hardly ever take the vehicle"* and "*don't use it very much".* The hospital is nearby and she resides in an area which is 911 accessible.

By her own admission and written documentation, the Applicant has taken taxis to town on occasion. She has recently obtained a "*ride from a resident"* to the food bank. The Applicant has access to public transit as the bus stop is "*not far"* from her townhouse, but has never taken it. The Applicant also acknowledges that it has taken her 30 minutes to walk to town which would put her in the downtown core of her area. Although the Applicant's daughters do not have vehicles, her oldest daughter's boyfriend drives her and her sister to see their mother. The Tribunal finds that the Applicant has alternatives to the impounded vehicle.

The Representative for the Registrar of Motor Vehicles suggested that the Applicant advise her brother, who resides in her area, of her situation in the event of an emergency. He cannot help her if he is not aware of what has happened. The Applicant's mother, who is currently in Florida, has in the past provided financial support and also is unaware of the impoundment. The impounded vehicle is scheduled to be released on May 7, 2006.

Therefore should she require assistance, it would only be for the next 15 days from today's hearing date.

Although the Applicant is not sure whether the suspended driver will keep her word in assisting with the financial burden, the Applicant has a right to obtain financial support to recover costs from the suspended driver and may pursue compensation from her, as is stated in subsection 55.1(21) of the *Highway Traffic Act*:

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

The Tribunal has carefully considered all of the evidence in arriving at this decision. It sympathizes with the Applicant, but unfortunately her financial difficulties were pre-existing and were not a result of the impoundment. Since the conditions in subsection 22(3) have not been met, the Tribunal is not permitted to consider this factor in arriving at its decision.

The Tribunal finds that the Applicant does not meet the requirements under subsection 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98. These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under subsection 50.2(3)(d). On the evidence, none of the criteria have been met. The Applicant has had alternatives to the impounded vehicle and has managed in the interim.

The Applicant also filed an appeal on the basis that the driver's licence was not under suspension. The Tribunal will not be addressing this issue as the Applicant was of the understanding that it related to the validity of her own driver's licence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under subsection 50.2(5) of the HTA, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

_____

Nives Montano, Presiding Member

RELEASED: April 27, 2006

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3472 - MVIA– DUDI – EXHP- Due Diligence and Exceptional hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: GREG CROMPTON
Presiding member

APPEARANCES: ERROL M. MASSIAH
Representative for the Registrar of Motor Vehicles

THE APPLICANT
Unrepresented

DATE OF HEARING: April 11, 2006 *By teleconference*

REASONS FOR DECISION

A hearing was held on April 11, 2006, at the Licence Appeal Tribunal, 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:	Ford Tempo (the "vehicle")
Date of Appeal:	March 20, 2006

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 11, 2006 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:

> POSITION:
> -I was not aware that my son's (name deleted) driving license was suspended when he asked to borrow my car. I had often lent him my car over the previous five years (since jan 1/2001) when he moved into my home. I was shown by him a valid drivers license with his picture I.D. prior to lending him my car from the first time in 2001. I firmly believed he was in possession of a legal drivers license when I agreed to him borrowing my car on the 17th of Feb and returning it on Feb 20th/2006. I was never told of or never made knowledgeable of any revoking of a license on his behalf. If so he never would of been permitted to drive my car!
> I am 89 years of age (90 on Sept 30/06) and never have been in trouble with the police. I have driven since before a license in Ont. was needed (at age 13) and if challenged, you will find a clean record on all areas including parking ticket, criminal, and highway offences.
> My son (name deleted) was convicted on Nov 15/2005 of impaired driving and sentenced to 90 days intermetts jail on weekends. His ride from Kingston to Napan where his incarceration at Quento Dentention Center was attended failed and he asked to borrow my car for transportation to and from Quinto that weekend of Feb.
> It was my understanding that [name deleted]'s license is to be suspended on February 22/06 the day of his completed sentence of jail time. On Friday Feb 12/06 [name deleted] showed me a valid license with Photo I.D. prior to me lending him my car.
> It was to my surprise and disappointment when on Feb 20/06 at 10^{00} am I learned of the truth and betrayal by [name deleted].
> I am asking for the return of my car so as to continue a life of independence I was accustomed to.
> I have no one to drive me to my appointments places of duty. The bus schedule is too complicated from where I reside and a used car is out of question on my pension.
> You have my word on the BIBLE when I say that never will I lend my car to anyone again & if my car is to be returned to me, I will be forever grateful.
>
> Thank you
> (Sic.)

The Tribunal heard testimony by the Applicant's son who acted as representative for the Applicant. The Applicant's son testified he was the driver of the vehicle at the time of impoundment. The Applicant's son further testified that he was serving weekends in jail for being convicted of impaired driving. The Applicant's son had arranged for a drive to the institution, and when the vehicle of the prearranged ride broke down, the Applicant's son asked his mother to borrow her car to drive to his weekend sentence term.

The Applicant knew the son had been convicted of impaired driving and wanted to know how he could drive under such circumstances. The Applicant's son told the Applicant that he still had his licence and that it wasn't officially suspended until after he had completed

the weekend sentencing. The Applicant's son testified that he showed his mother his driver's licence even though he knew he shouldn't still be in possession of the document and purposely misled his mother as to the status of his licence.

The Applicant's son testified that his mother used the car quite often and was very unhappy with not having the independence her vehicle provided. The Applicant uses the car for grocery shopping, daily trips to mass, all other functions requiring travel.

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 driving with more than 80 mgs of alcohol in the blood under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 15, 2008.

The Registrar testified the impoundment of the vehicle had ended on April 6, 2006, and asked the Applicant's son where the car was at the present time. The Applicant's son advised the Tribunal the car was still in the impoundment facility in Ottawa. When asked by the Registrar's representative why it had not been picked up yet the Applicant's son replied that he called the holding facility and when he advised them the matter was being appealed, he was advised that the impoundment facility could provide no further information on the vehicle until after the Tribunal had decided on the matter. The Registrar's representative advised the Applicant's son that the Applicant would be responsible for all additional holding fees and that the Applicant should remove the car from the impound as soon as possible.

The Registrar had the Applicant's son confirm that his sister lived in the home with the Applicant and him and that the sister has a working car. The sister has a full time job so was unable to drive her mother to her daily functions, but was able to take her to mass on Sunday. The Applicant also testified there was public transit, but that due to the Applicant's age it was difficult for her to use.

The Registrar had the Applicant's son confirm that the Applicant had only asked to see his licence once and made no further attempt to verify the status of his licence.

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:

As to due diligence, the evidence established that although the Applicant asked how the driver could drive while serving a sentence for impaired driving, there was no reasonable attempt made by the Applicant to verify that what the driver had told her was truthful. The Applicant has lived with the driver for several years and, the Tribunal believes, must have been aware of her son's several convictions for impaired driving and driving while suspended. The driver's convictions began in the 1970's and continue to the present. The Tribunal finds the implication that the Applicant's age is in some way a reasonable explanation for not being more diligent is in fact unreasonable, especially in light of the driver's past history. The Tribunal finds that the Applicant did not meet the test of what a reasonable and prudent individual would do under similar circumstances, and therefore does not meet the standard of due diligence.

As to exceptional hardship, the evidence established that although inconvenienced, the Applicant did not suffer any exceptional deprivation or hardship due to the loss of the vehicle. There is another vehicle in the home, another adult living on the premises, public transit, taxi service, and emergency services are available. The Applicant's son testified that he would be responsible for any impoundment cost associated.

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

_____

Greg Crompton, Presiding Member

RELEASED: April 18, 2006

FILE NAME: 3472.mvia.dudi.exhp.doc

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 or other third parties (unless they took part in the hearing in a

professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3477-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: GREG CROMPTON
Presiding member

APPEARANCES: ERROL M. MASSIAH
Representative for the Registrar of Motor Vehicles

APPLICANT,
unrepresented

DATE OF HEARING: April 7, 2006

DECISION RELEASED: April 10, 2006 *Toronto*

REASONS FOR DECISION

A hearing was held on April 7, 2006, 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:	Applicant (the "Applicant")
Motor Vehicle:	2005 DODGE CARAVAN, (the "vehicle")
Date of Appeal:	March 22, 2006

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

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

This matter came before this Tribunal on April 7, 2006 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:

> Vehicle is needed for work. Vehicle is needed to transport children to school. Vehicle is used to go to doctor, groceries, errands etc. Vehicle is lease from Chrysler right now, has missed its 3 monthly inspection.
>
> I am kindly appealing to you to please give me permission to get back my vehicle which has been impounded since the 16 of March 2006. I am facing extreme hardship without my van to get around to do all my work. My husband works at the cemetery at Hwy 27/Albion at 6:30 a.m. I drive him to work from Bramalea, I reach back by 7:30 a.m. I get my children ready for school then drive 1 to <name of school deleted> the 2 to <name of school deleted>. I buy grocery at No Frill cause it's the cheapest, I go there sometimes or the bank on Eastborne.
>
> I am Diabetic. I have to visit my doctor at <address deleted> often. At 2:30 I go to pick up 1 child at <name of school deleted>, then go to <name of school deleted> for 2 more of our children. Then go to pick up my husband from work. I made application for Security Officer and a vehicle is an asset. I'll be called anytime to go to work night shift.
>
> Sir/Madam, without my vehicle I am without my hand & feet. I have only 1 vehicle, and so many persons and things depend on it. I did not know about all these rules. I am so sorry. I'll never let anyone drive my vehicle again. Right now the fees keep building up and I have no money, nor my husband. How will we pay this bill while it is impounded, only God knows. Please return my vehicle and cancel the fees. Please! Please!
>
> My 2 youngest kids have asthma. At this time it flares up, one ends up in the hospital every year. I keep my kids in my vehicle until the bell rings when it is cold. I don't let them walk too much being outside. Today I did not send them to school because of no vehicle and they had to walk.
>
> Thank you.

The Applicant testified that her spouse took the impounded vehicle because the ride, the spouse had prearranged, did not show up. The Applicant is aware of the spouse's suspended driver's licence and testified she would never allow the spouse take the vehicle and was very upset he did so on this occasion without permission or consideration of the consequences to the family.

The Applicant has three children between the ages of 9 and 11. Two of the children have asthma that is especially active during the spring months. This is a recurring problem and the Applicant's doctor has recommended the children stay indoors as much as possible to minimize the affects of weather on the children's asthma.

Each day the Applicant would drive her two youngest children the 0.30 miles to <name of school deleted>, then approximately another 1 mile to <name of school deleted> and then drop her spouse off in Etobicoke at his place of employment. Then the Applicant uses the vehicle to run various errands throughout the day.

The Applicant testified she had only once in her life been without a vehicle and finds not having one extremely restricting and feels lost without any form of transportation. The Applicant is also very concerned about the possible effects on her children's health by having to walk to school. The Applicant also has not applied for a position with a security company for fear the lack of a vehicle will jeopardize her successful hiring.

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 failed to provide breath or blood sample under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 4, 2007.

The Respondent had the Applicant confirm there was a great deal of public transit near the Applicant's home and that the Brampton City Transit hub is within visual distance of the Applicant's home. The Respondent had the Applicant confirm that they had not inquired into what public transit was available. The Applicant confirmed the existence of a grocery store beside the Applicant's building.

During the Respondent's questioning, the Applicant confirmed the Applicant's spouse's income to be $400 per week and the Applicant received government benefits.

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 Applicant:

The Applicant has appealed on the grounds of extreme hardship. Legislation is very clear that to meet the test for hardship the Applicant must be experiencing severe toil or suffering, or extreme privation. The Tribunal sympathises with the unfamiliarity of the situation the Applicant finds herself in but cannot justify, through the evidence presented, any form of hardship. The Applicant has been inconvenienced and has not attempted to find any alternative for herself to the impounded vehicle. The evidence presented to the Tribunal, and a cursory search of the Brampton Transit website, shows an abundance of viable, cost effective, and convenient public transit a short walk from the Applicant's home.

As to the Applicant's Children:

Of greater concern to the Tribunal is the well being of the Applicant's children and how it has been affected by the loss of the Applicant's vehicle for the impoundment period. The Tribunal member researched and walked the distances involved. The oldest child would have to walk 1.36 miles and the Applicant expressed concerns about the safety of such a walk considering this child has expressed some carelessness and poor judgment in the past. The Tribunal understands and sympathizes with the Applicant's concern, however there is public transit that will take the child almost directly to his school and the Applicant can accompany the child to and from school.

The Applicant's other two children and their seasonal asthma, confirmed by the Applicant and a note from the children's doctor advising they should be exposed to the outdoors as little as possible, has given the Tribunal greater pause for thought. Section 22 (1) (a) of Regulation 574 R.R.O. 1990 as amended by Ontario Regulation 632/98 provides the

Tribunal with the criteria it may apply in situations when determining if the test of extreme hardship has been met. The regulation states if there is no alternative to the impounded vehicle, and there is a threat to the health or safety of any person ordinarily transported by the motor vehicle the Tribunal may find the test of extreme hardship is met.

The Tribunal referred to the following information when researching this point:

From: http://www.everydaykidz.com/treating/seasons_spring.asp

During the spring, pollen from plants can become a factor in causing asthma symptoms. Pollen is made up of tiny, egg-shaped cells that come from certain flowering plants, such as trees, grasses, and weeds. In the spring—at least in most areas of the US—tree pollens are the most common asthma triggers. Some trees have small, light, and dry pollens that are easily spread to other areas by wind currents. Pollen from the following types of trees triggers allergy symptoms for some children:

Oak
Western red cedar
Elm
Birch
Ash
Hickory
Poplar
Sycamore
Maple
Cypress
Walnut

Pollen spreads most easily when the weather is warm, dry, and windy—so, you need to take the most care to protect your child on those kinds of days. What can you do to help keep your child breathing easy? Try taking these steps to help reduce your child's contact with allergic triggers.

Keep your child indoors as much as possible on dry, hot, windy days when the pollen counts tend to be highest, with the windows closed. Turn on the air conditioning if you need it to keep cool.

From Children's Hospital of Eastern Ontario Web Site

http://www.cheo.on.ca/english/2011e.html

Plants & Pollens

Outdoor plants and pollens often cause seasonal allergies, and asthma at particular times of the year. In Ontario, trees (such as elm, poplar, and spruce) generally cause problems between April and June. Grasses (such as timothy grass and bluegrass) generally cause problems between mid-May and mid-July. Ragweed causes problems between August and October.

Sites are being developed on the Net to let you know how pollen counts are doing in your area.

Pollens can effectively be kept out of your house by keeping your doors and windows closed during pollen season. An air conditioner is helpful to keep your house comfortable while you do this. If your child is grass-allergic, they shouldn't mow the lawn. You might wish to remember that your child probably isn't allergic to washing the dishes!

From EMedicine
Article: Asthma

Author: **Girish Sharma, MD**, Director of Pediatric Pulmonary Section and Rush Cystic Fibrosis Center, Rush University Medical Center; Associate Professor, Department of Pediatrics, Rush University

Girish Sharma, MD, is a member of the following medical societies: American Academy of Pediatrics, American College of Chest Physicians, and American Thoracic Society

- Weather changes: Asthma attacks can be related to changes in atmospheric temperature, barometric pressure, and the quality of air (e.g., humidity, allergen and irritant content).

The Tribunal finds that although the distance between the Applicant's home and the two younger children's school would not reasonably be considered too far for the Applicant to accompany the children, the possible exposure to the elevated pollen levels will pose a risk to the children's health. The Tribunal acknowledges the normal season for spring allergens is mid May to Mid June but believes the unusually warm winter could move this time frame to an earlier point posing a threat to the health and safety of the Applicant's children.

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

_____

Greg Crompton, Presiding Member

RELEASED: April 10, 2006

FILE NAME: .3477.mvia.Exhp

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3476-MVIA-STLN

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

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

APPEARANCES: ERROL M. MASSIAH
Representative for the Registrar of Motor Vehicles

GURJIT S. GREWAL
Representing the Applicant

DATE OF HEARING: April 3, 2006

DECISION RELEASED: April 10, 2006 Toronto

REASONS FOR DECISION

A hearing was held on April 3, 2006 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:	1996 Peterbuilt CON (the "vehicle")
Date of Appeal:	March 21, 2006

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 as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 3, 2006 and proceeded as an in person hearing.

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

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

The Applicant submitted documents concerning the dissolution of the partnership of the corporation known as 2073152 Ontario Inc.

There being no objections raised by the Respondent's Representative, the documents tendered by the Applicant, were entered into evidence as exhibits.

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 motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

> The Truck was in garage for repair and I have no knowledge why <name deleted> was driving my truck. I don't know <name deleted> at all.

At the hearing the Applicant reiterated comments stated in the Notice of Appeal, offering details of the conditions of partnership and the grounds for dissolution.

The Applicant attested that the vehicle in question was taken to the garage by the individual he now considers his former partner, without the Applicant's "…*knowledge, permission or consent*…"

The Applicant described that he discovered that the truck had been impounded after driving by the parking lot where the trucks were kept for the winter season, and noticing that the truck in question was not there. Upon enquiring he was informed of the impoundment.

In cross-examination that Applicant attested that he did not attend at the police station and never requested a charge to be laid. The Applicant is aware of the circumstances surrounding the impoundment and admitted that he was "…*shocked*…" when he learned about the incident.

The Respondent's Representative specifically asked the Applicant what made him appeal on the grounds that the vehicle was stolen. The Applicant replied: "…*vehicle can be classified as stolen …I had no knowledge where was my car*…"

The Respondent suggested to the Applicant that the investigating officer verified the suspended driver's place of employment and the possible reason he was driving the truck. The Applicant rebutted by stating that he had spoken to the owner of the garage, and was told that the suspended driver did not work at the garage and that he had no idea that the truck was being test driven at 11 o'clock at night.

Under continued questioning by Mr. Massiah, the Applicant stated that he had considered

going to the police station, but only to find out the whereabouts of the truck. Once the Applicant was told of the location of the truck, he appealed the impoundment order.

The Applicant affirmed that eventually his partner did admit to the Applicant that the truck had been in the garage.

The Applicant responded "…*it is possible*…" to the question posed by Mr. Massiah as to the plausibility "…*that the vehicle was in there for repairs …took the vehicle and was supposedly test driving it…"*

In his closing summary the Applicant reiterated his position that he "…*was not aware of what was happening …all done behind …back*…". The Applicant expressed his surprise that a mechanic in a garage was driving without a licence and emphasized that he "…*had no part in it*…"

In rebuttal the Applicant emphasized that he never went to the police station and was surprised to hear the statements made by Mr. Massiah.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by <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 suspended licence under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 22, 2007.

Prior to asking for the Respondent's Representative's evidence, the Tribunal took a short recess to photocopy the documents submitted by the Applicant.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided, but did introduce, at this time, a note containing an extract of the

conversation between himself and the investigating officer regarding the incident.

The Tribunal once again took a short break, in order to copy the new document in order for all the parties to have copies.

The Applicant having no objection, the note was entered as exhibit number 7.

In his closing remarks, Mr. Massiah explained that in order for a vehicle to be considered stolen within the context of the Act it must be demonstrated that "…*the driver intended to deprive the owner of in this case, the motor vehicle, on a permanent or temporary basis*…". It is quite clear that the vehicle was at a licensed repair shop for legitimate purposes. The vehicle was taken out to be test driven by a mechanic whose driver's licence was under suspension. Under the circumstances the investigating officer felt that no charge of theft was warranted.

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)(a).

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

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

> **Stolen:** 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance
>
> **Theft:** 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

The *Criminal Code (Canada)* R.S.C. 1985, Chap. C-46 provides guidance.

Section 1 of the Code states:

> "steal" means to commit theft…

Section 332(1) of the Code states:

> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or

> fraudulently and without colour of right converts to his use or the use of another person, anything, whether animate or inanimate, with intent,
> (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
> (b) to pledge or deposit it as security;
> (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
> (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.
> (4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.
> (5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

The Divisional Court held in *Marshall v. Registrar of Motor Vehicles* that the Tribunal should not limit the meaning of "stolen" only to an intention to take the vehicle permanently. The Court held that the term "stolen" could also apply to an intention to take the vehicle temporarily. The Court reviewed the circumstances of that case and stated:

> "In our opinion a vehicle is 'stolen' in this context when it is taken without the owner's consent and when the perpetrator intends to deprive the owner of it, whether permanently or temporarily."

APPLICATION OF LAW TO FACTS:

Although the total evidence was considered, the preceding reflects a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Applicant has appealed on the grounds that "…*the motor vehicle was stolen at the time it was being driven*…" in accordance with section 50.2(3)(a) of the Act.

The impounded vehicle is owned by an Ontario numbered corporation of which the Applicant is a principle. The Applicant admits to having entered into a partnership agreement, which is now in the process of being dissolved. At the time of impoundment the vehicle in question was parked in a lot for the winter season.

The Applicant argued that the vehicle could be deemed stolen as it was taken without his knowledge and consent, "…*behind …back*…".

Mr. Massiah maintains that there is no testimony whatsoever before the Tribunal that suggests intent by the suspended driver to deprive the Applicant of the use of the vehicle either "…*temporarily or permanently*…" as per the criteria established by cases heard in

Divisional Court. The Tribunal concurs.

In order to decide whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word "*stolen*". As the *Highway Traffic Act* offers no definition, the Tribunal looked to Black's Law Dictionary for reference as to what is commonly accepted by the judiciary as constituting theft.

According to Black's Law Dictionary, "*stolen*' is defined as follows:

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

The truck may have been taken without the Applicant's knowledge; nonetheless, there is no evidence that the suspended driver intended to steal the vehicle.

The Applicant did not dispute the explanation proffered by the Respondent's Representative, that the truck had been taken to the garage by his partner and subsequently driven by a mechanic with a suspended driver's licence. In fact, the Applicant admitted, in cross-examination, that his former partner had confirmed the truck had been at the garage.

The dilemma for the Tribunal is in understanding why the Applicant appealed on the grounds that the vehicle was stolen, yet never considered having charges laid. According to the Applicant he thought about going to the police station but only to enquire about the whereabouts of the truck. Any speculation on the Tribunal's part is inconsequential, as the fact remains that no charges were laid.

Based on the evidence, the Applicant's ground of appeal under section 50.2(3)(a) of Ontario Regulation 632/98 Amending Regulation 574 of R.R.O. 1990 is unsubstantiated and therefore 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

_____

Antoine A. Aouad, M.D.
Presiding Member

RELEASED: April 10, 2006

FILE NAME:3476.mvia.stln

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

3465 – 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: ANTOINE A. AOUAD, M.D.
Presiding member

APPEARANCES: ERROL M. MASSIAH
Representative for the Registrar of Motor Vehicles

THE APPLICANT
Unrepresented

DATE OF HEARING: April 3, 2006 *By teleconference*

REASONS FOR DECISION

An Electronic hearing was held on April 3, 2006, 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:	Dodge Caravan, (the "vehicle")
Date of Appeal:	March 14, 2006

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 3, 2006 and proceeded as an electronic hearing.

The Respondent arrived shortly after the customary half an hour had been granted. The hearing proceeded at 10:10 a.m.

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

Documents tendered were entered into evidence as exhibits with the consent of both parties.

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 own and operate a small business from my home, (address deleted) This is my only souce of income. Due to current circumstances, I am living and operating this business from the lakefield address.
>
> The van is required for pickup and delivery of product for my customers. It is also used by owner of farm where I am temporarily residing. (Drivers licence number can be supplied (if required) if appeal is heard. (Sic.)

At the hearing, the Applicant reiterated the comments in the Notice of Appeal. The impounded van is required by the owner of the farm and by the Applicant, to carry on his small business.

The Applicant explained that he was not driving recklessly, but that he was just trying to make a living.

In cross-examination, the Applicant admitted that he is aware of his driving record and noted that he will not be driving again.

A friend of the Applicant, who lives within the same residential confines as him, owns a car and, according to the Applicant, "…*is very cooperative…*" in assisting the Applicant get about. The Applicant's friend drives a school bus and "…*works around her schedule…*" to make sure that the Applicant gets around.

When questioned as to whether any medical appointments have been missed, the Applicant replied: "…*I don't even have a doctor*..."

The items that the Applicant picks up and delivers for his customers are too big to fit in a car and since the impoundment, no work has been done. Under further questioning by the Respondent's Representative, the Applicant admitted that "…*at this time of year business is pretty slow …this year not much happening yet*…"

The Applicant considered renting a vehicle, but feels that there is not much profit in doing

so, given the expenses associated with rentals.

The Applicant would like the van to be released in order to save impoundment fees, and in order to be able to buy and transport food for the animals. The Applicant is also afraid of loosing customers.

In closing, the Applicant explained that he needs the vehicle in order to run the farm and run the business. Not only is the Applicant loosing money due to the impoundment, at present, but also he is unable to procure new customers, as he has neither product nor way to transport it.

In rebuttal, the Applicant emphasized that he may go out of business unless he gets the van back before the release date of April 23, 2006.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the Applicant;

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

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until January 27, 2008.

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

In his closing remarks, Mr. Massiah suggested that the impoundment was nothing more than an "…*inconvenience*…" for the Applicant and respectfully requested that the Tribunal uphold the suspension, as the Applicant failed to prove the hardship grounds for appeal.

Mr. Massiah maintained that the Applicant did not demonstrate exceptional hardship, in

that although there may have been some personal losses, the Applicant's business being slow. As well, Mr. Massiah noted that the Applicant does have other vehicles available to him.

Also, there is no threat to personal or public health and safety.

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:

Although the total evidence presented was considered, the preceding notes reflect a summary of the proceedings. Evidence introduced not directly germane to the issue was not transcribed.

The Applicant appealed under subsection 50.2(3)(d) of the Act, the Tribunal will now proceed to review the decisive factors required to meet the onus for consideration of

"exceptional hardship".

In the determination of hardship, the Tribunal must ask several questions: are there health factors to be taken into consideration; is there an alternative mode of transportation; is there a financial loss arising out of the loss of the impounded vehicle.

Dealing first with the health and safety issue, the Tribunal looks to Section 22 (1) of the Ontario Regulation 632/98 Amending Regulation 574 of R.R.O. 1990 which prescribes that:

> 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 impoundment 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.

By his own admission, the Applicant confirmed that there were no health and safety issues, which, could be considered. The Tribunal so finds.

In assessing financial loss the Tribunal is restricted by Section 22(3) (a) of Regulation 574 as amended by O. Reg. 632/98, which provides.

> In determining whether exceptional hardship will result from an order to impound under Section 55.1 of the Act, the …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.

The constraint imposed on the Tribunal by Section 22(3) (a) of Regulation 574 as amended by O. Reg. 632/98, is lifted by under Section 22.3, which states that 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 impoundment motor vehicle is available…

At issue, is whether the Applicant has alternate mode of transportation. As the Respondent's Representative pointed out, the Applicant testified that he is able to get about as his friend "…*is cooperative*…" and attends to his mobility needs by *"…working around her scheduled*…" Thus, the Applicant does not meet the criteria for consideration

under Section 22.3.

The Tribunal further reviewed Section 22.3 (b) of Regulation 574 as amended by O. Reg. 632/98 which allows the Tribunal to consider losses that are:

> (b) immediate, significant and long lasting…

The Applicant was unable to establish that he has incurred losses other than the cost of the impoundment, and failed to document how said losses would be significant and lasting.

After assessing the evidence presented, the Tribunal finds that there is no doubt that the Applicant has been inconvenienced by the loss of the vehicle, nonetheless, the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) 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

_____

Antoine A. Aouad, M.D.,
Presiding Member

RELEASED: April 6, 2006

FILE NAME: 3465.mvia.exhp.doc

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3448 – MVIA – EXPH – Exceptional hardship

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: VICTOR H. BRANEY
Presiding member

APPEARANCES: ERROL M. MASSIAH
Representative for the Registrar of Motor Vehicles

APPLICANT
unrepresented

DATE OF HEARING: March 20, 2006 *By teleconference*

REASONS FOR DECISION

A hearing was held on March 20, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 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:	Volkswagen Jetta (the "vehicle")
Date of Appeal:	March 2nd, 2006

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 20, 2006, and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

> The loss of my vehicle for 45 days would result in exceptional hardship because I work out of town and if I miss any work I would be fired. Therefore I can not lose my vehicle for 45 days since it is my only way to and from work. (Sic.)

At this teleconference, the Applicant confirmed the basis for his appeal was for Exceptional Hardship.

The Applicant stated that he requires his vehicle for transportation to his work. He lives in Cambridge and his work is about 15 km to the town of Ayr. He has been working for the past five months for his present employer as an apprentice. His shifts start at 7:00 a.m. and end at 7:00 p.m. He has had to rely on a taxi to take him to work and the cost is around $20.00 a day.

The Applicant is an acquaintance of the involved driver. On the day of the impoundment, the involved driver asked if he could drive the vehicle. The owner asked if he had a licence and the driver stated he had his licence. They had driven onto the 401 where police were doing a seat belt check and when asked for his licence the driver informed the police he did not have a licence with him. He was charged with driving while under suspension. The vehicle was impounded.

The Applicant had no closing statements.

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 dangerous driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until December 9th, 2006.

Mr. Errol M. Massiah, Hearing Officer for the Registrar of Motor Vehicles, cross-examined the Applicant.

The Applicant confirmed that he had received the documents from the Hearing Officer and made reverence to the lengthy record of the involved driver. He stated he would attempt to have the involved driver pay for the impoundment costs.

His hardship is due to not having his vehicle and due to the consequences that he now has to live with until his vehicle is released. However, the Applicant has had the assistance of both his parents who each own a vehicle. He has relied on taxi service, but the cost is restrictive.

He has considered renting, but he can't afford a rental.

The Applicant is the owner of a second vehicle that is a 1990 customized pick-up truck. He states that this vehicle is a show vehicle and, at this time, is stored north of Barrie and it has no insurance currently on it.

The Applicant states that he has not suffered any health or safety issues by not having his vehicle. He has been late for work on two occasions. His employer is aware of his vehicle being in the pound. The Applicant did not feel he would suffer any employment difficulty.

In closing, the Hearing Officer stated it was the owner's responsibility to ensure all persons driving his vehicle have a valid driver's licence. The Applicant has alternatives for the impounded vehicle and there are no health and safety issues and he has not suffered any lasting financial loss. The Applicant can sue the involved driver for the impoundment costs if he so wishes. The Hearing Officer requests the impoundment of the vehicle be confirmed.

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 has alternatives for the impounded vehicle. He has the benefit of assistance from his family, friends, renting a vehicle and taking public transportation.

The Applicant has the burden of proving the basis for his appeal. The Applicant, to establish exceptional hardship, must first establish that there are no alternatives to the impounded vehicle under subsection 22 (3) of Regulation 574 R.R.O. 1990 as amended by

Ontario Regulation 632/98.

Since the Applicant has alternatives to the impounded vehicle, the Tribunal cannot consider inconvenience, financial or economic loss, loss of employment or loss of training under section 22 (2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

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LICENCE APPEAL TRIBUNAL

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Victor H. Braney, Presiding Member

RELEASED: April 3, 2006

FILE NAME: 3448.mvia.exph.doc

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 or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

3441 – 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: VICTOR BRANEY, Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

THE APPLICANT
Unrepresented

DATE OF HEARING: March 20, 2006 *By teleconference*

REASONS FOR DECISION

A hearing was held on March 20, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, 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:	the Applicant
Motor Vehicle:	Dodge Dakota (the "vehicle")
Date of Appeal:	March 3, 2006

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 20, 2006 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:

> ON Nov.17,04, [name deleted] attended court trial in Sarnia, ON for two charges. (1) Fleeing from police and (2) prowling. After speaking with his lawyer, J, he was informed of a plea bargain for two fines. $500.00 + $250.00 =$750. in total. At this time his lawyer informed him that by pleading guilty and receiving these fines he would avoid possible jail sentence, suspension of licence and probation. [name deleted] plead guilty based on this information. On Dec. 23/04, [name deleted] and I, [name deleted], were travelling home and were stopped by OPP officer, [name deleted], at this time [name deleted] was driving. The officer informed [name deleted] that he was driving with a suspended license and that the vehicle was going to be towed for a total of 45 days in impoundment. [name deleted] and I were both unaware of his suspension until the officer informed us. [name deleted] never received notice in the mail and based on the information we received on Nov. 17/04 at the trial, there was an understanding by [name deleted] and I that there would be no suspension. We contacted his lawyer, J, and explained the situation. [name deleted] then had to attend several court dates to deal with the "driving while suspended" charges. The final court dates was Oct. 17/05, when the charges were dropped. During the 45 day impoundment, I contacted the owners of the impoundment office and she told me when the charges were dropped and that I could appeal the impoundment. It took almost one full year to settle this issue with the courts. On Oct 17/05, the charged were withdrawn. I am forwarding a copy of the court dates for the charges. Please contact me, [name deleted] at [phone number deleted] or by mail at the address on the 1st page.
> I am not sure what type of hearing would be best. Please contact me and we can discuss this. Thank you. (Sic.)

At this teleconference the Applicant confirmed her appeal on the basis of due diligence.

The Applicant stated that the involved driver at the time the vehicle was impounded was not then under suspension. The Applicant's husband attended court on December 17, 2005 to answer for the charge of operating a motor vehicle while disqualified, contrary to Section 259 (4) of the Criminal Code of Canada. At this court date, the crown elected to have the charge withdrawn.

The Applicant decided not to appeal the impoundment of the vehicle that occurred on December 23, 2004 until the charge of driving while under suspension was withdrawn. The Tribunal received the Notice of Appeal on February 28, 2006.

The Applicant reviewed her submissions to support her appeal and also reviewed the understanding that she and her husband had when he plead guilty of the charges on November 17, 2004 for fleeing from police and prowling. It was the understanding of the Applicant and her husband that fines would be paid and he would not have his driver's licence suspended. On December 23, 2004, the Applicant's husband was stopped by

police and was charged with driving while under suspension and the Applicant's vehicle was impounded.

In closing, the Applicant stated that she was not aware her husband's driver's licence was under suspension.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

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

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the driver;

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

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failing to stop for a police officer under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until November 17, 2005.

Ms. Kim Beintema, Hearing Officer for the Registrar of Motor Vehicles cross-examined the Applicant.

The Applicant stated that her husband had not received the Notice of Suspension of driver's licence dated November 24, 2004. The Hearing Officer stated the Registrar considers the Notice delivered after five days of postage. The Applicant confirmed her present mailing address is the same address when the Notice was sent by regular mail.

The Applicant stated her husband had been fleeing from police on June 20, 2004 and, at that time, he was driving his own vehicle, a 2000 Escalade. However, the involved vehicle was a 2003 Dodge Dakota driven by her husband on December 23, 2004.

The Hearing Officer advised the Applicant that conviction of a criminal charge automatically requires the suspension of a licensed driver and section 41 of the HTA states the vehicle is to be impounded. Why was the driver's suspension withdrawn on October 17, 2005 is unknown and there was no explanation for the withdrawal. The crown may have withdrawn the charge for a number of reasons and not for the charge in itself.

In closing, the Hearing Officer stated it is the responsibility of the owner of the vehicle to ensure any driver at the time was driving with a valid driver's licence. The Applicant had not practiced due diligence and the charges being withdrawn for driving with a suspension should not be the basis of confirmation of due diligence.

LAW:

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

Subsection 55.1(3) of the Act states:

> (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
>
> 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
>
> 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

> **Due: A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling *to* by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).
>
> **Diligence:** 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

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

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

APPLICATION OF LAW TO FACTS:

DUE DILIGENCE

As to whether the Applicant exercised due diligence, the Tribunal finds as a fact the following:

The Applicant, being the registered owner of the involved vehicle, has the responsibility to ensure every person who drives the vehicle is not under suspension.

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 was not under suspension.

The Tribunal finds that the Applicant was not duly diligent. The involved driver did not have a valid licence at the time the vehicle was impounded on December 23, 2004. The suspension of the driver's licence was not rescinded until November 17, 2005. The withdrawal of the charges for driving with a suspended licence has no bearing on the issue of establishing due diligence.

The Tribunal notes the involved driver was driving on December 22, 2004 and was charged at the time for speeding. He was driving at 110 km/h in a 80 km/h zone.

DECISION:

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

LICENCE APPEAL TRIBUNAL

_____

Victor Braney
Presiding Member

RELEASED: April 6, 2006

FILE NAME: 3441.mvia.dudi.doc

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 or other third parties (unless they took part in the hearing in a

professional capacity or as a regulator).



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- 2004 - 2005
- 2005 - 2006

Decisions from the Superior Court of Justice

Decisions under Intercountry Adoption Act

Fiscal Year 2006 - 2007

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

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Decisions under Motor Vehicle Dealers Act

Fiscal Year 2006 - 2007

LAT Decisions, Rulings and Orders

April
May
June
July
August
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- 1531467 ONTARIO LTD. O/A NORTH SHORE AUTO SALES AND MARINE AND GREGORY STEVENS
- DAVID PATTERSON O/A PATTERSON AUTO SALES
- 985178 ONTARIO INC. O/A CLASSIC HONDA AND GLEN ALIZADEH AND SOHRAB ALIZADEH AND MAY ALLISON
- 2057055 ONTARIO LIMITED O/A DURHAM RV SERVICE AND JOHN PHILIP NEDHAM AND MARSHA KATHLEEN NEDHAM
- ALLRIGHT AUTOMOTIVE REPAIR INC. AND BRUCE ANDERSON
- SREEKUMARAN NAIR
- RALPH LINO LUCCHESE O/A PERFORMANCE CENTRE AUTO SALES
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MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

1531467 ONTARIO LTD. O/A NORTH SHORE AUTO SALES AND MARINE AND GREGORY STEVENS

IN THE MATTER OF
1531467 ONTARIO LTD. O/A NORTH SHORE AUTO SALES AND MARINE AND GREGORY STEVENS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: March 2, 2006

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

1531467 ONTARIO LTD. O/A NORTH SHORE AUTO SALES AND MARINE AND GREGORY STEVENS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on May 19, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m. on Tuesday, May 23, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: April 28, 2006

FILE NAME: 3473.mvda.North Shore Auto Sales and Marine et al.prehrg adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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

DAVID PATTERSON O/A PATTERSON AUTO SALES

IN THE MATTER OF
DAVID PATTERSON O/A PATTERSON AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: February 22, 2006

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

DAVID PATTERSON O/A PATTERSON AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on May 19, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *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, May 23, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: April 28, 2006

FILE NAME: 3453.mvda.David Patterson o/a Patterson Auto Sales.prehrg adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

985178 ONTARIO INC. O/A CLASSIC HONDA AND GLEN ALIZADEH AND SOHRAB ALIZADEH AND MAY ALLISON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: STEVEN ALIZADEH, Agent, representing 985178 Ontario Inc. o/a Classic Honda and Glen Alizadeh and Sohrab Alizadeh and May Allison

AVIVA R. HARARI, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF PRE-HEARING: April 18, 2006 Toronto

ORDER

Following attendances on April 18, 2006 at a prehearing before this Tribunal by Steven Alizadeh, Agent, appearing on behalf of 985178 Ontario Inc. o/a Classic Honda and Glen Alizadeh and Sohrab Alizadeh and May Allison (the "Applicants") and Aviva R. Harari, Counsel, who appeared on behalf of the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on June 8 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Ontario and to continue if necessary on June 9, 2006, at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicants and the Registrar.

2. The Agent for the Applicants informed the Tribunal that at this stage, the following persons will testify on the Applicants' behalf at the hearing:

   - Mr. Steven Alizadeh
   - Mr. Glen Alizadeh
   - Mr. Sohrab Alizadeh
   - Ms. May Allison
   - Mr. Robert Couto
   - Mr. Manny Cabral

3. Counsel for the Registrar informed the Tribunal that at this stage, the following persons will testify on the Registrar's behalf at the hearing:

   - Mr. Belahov
   - Ms. Sherryl Battle
   - Centenial Chrysler Plymouth Dodge's representative that handled the sale of the vehicle to Ms. Battle
   - The representatives of Barrie Auto Auction and Toronto Auto Auction who are familiar with the sale at auction of the 2003 Jeep Liberty and 2003 BMW
   - Ms. Sheena Naismith of OMVIC
   - Ms. Mary Jane South of OMVIC
   - Mr. George Khoury
   - Mr. Manny Cabral

4. The Parties shall fully and in a timely manner comply with Rule 6 of the Rules of Practice of the Tribunal in sofar as disclosure is concerned.

5. The Agent for the Applicants informed the Tribunal that it is the Applicants' intention to retain Counsel to represent them at the hearing of this matter. The Tribunal brought to the attention of the Applicants' Agent and the Registrar's Counsel that the dates for the hearing of this matter are peremptory against the Parties and that in sofar as the Applicants' are concerned, the Tribunal brought to their Agent's attention that when retaining Counsel for the hearing, attention should be brought to such Counsel regarding the Tribunal's Practice Direction on Adjournments more fully stated on pages 25 and 26 of the Tribunal's Rules of Practice and in particular, to the requirement that Counsel for the Applicants shall not accept the retainer offered to such Counsel if she/he is not available on both hearing dates or if she/he will not have sufficient time within which to adequately prepare for the hearing.

6. The Tribunal brought to the Parties representatives' attention that the granting or refusal of an adjournment request, despite the request being consented to by the Parties, shall not be binding on the Tribunal.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel
Vice-Chair

RELEASED: April 24, 2006

FILE NAME: 3358.mvda.classic Honda.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

2057055 ONTARIO LIMITED O/A DURHAM RV SERVICE AND JOHN PHILIP NEDHAM AND MARSHA KATHLEEN NEDHAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER *THE MOTOR VEHICLE DEALERS ACT* R.S.O. 1990

TO REFUSE REGISTRATION

TRIBUNAL: ANDREW DIAMOND, Vice-Chair

APPEARANCES: No one appeared on behalf of the Applicants

AVIVA R. HARARI, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: April 24, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This matter is an Appeal from a Notice of Proposal to Refuse the Registration of the Applicants.

This was the second date upon which this matter came before the Tribunal. The Appeal was originally scheduled to be heard on March 3, 2006. However, on the latter day, the assistant of counsel for the Applicants advised the Tribunal by telephone that there had been a scheduling error in their office and that counsel for the Applicants could not attend. As a result, the matter was adjourned to today's date **peremptory against the Applicants**.[1]

At 3:02 p.m., on Friday April 21, 2006, the Tribunal received a letter from counsel for the Applicants indicating that he had instructions to withdraw the Appeal "without prejudice in relation to any future applications that my clients may make".

[1] Order of the Tribunal dated March 6, 2006.

In response to counsel for the Applicants' letter, the Tribunal left both a voicemail and sent a fax advising counsel that:

> The Tribunal is not in a position to cancel the hearing scheduled for Monday, April 24, 2006 in the above-noted matter because the withdrawal of your client's appeal is on a without prejudice basis.
>
> Due to the above, this will serve to confirm that the hearing will proceed as scheduled on Monday, April 24, 2006 commencing at 9:30 am […].

The hearing of the Appeal did commence at 9:30 a.m., on Monday, April 24, 2006, however, no one appeared for the Applicants. The hearing was adjourned to 10:00 a.m. during which time counsel for the Registrar, *Motor Vehicle Dealers Act*, contacted the Applicants' counsel to confirm that no one was attending.

ORDER

On the recommencement of the hearing, the Tribunal permitted the withdrawal of the Appeal. As a result, the Tribunal orders the Registrar, *Motor Vehicle Dealers Act*, to carry out the Notice of Proposal to Refuse the Registration.

The Applicants had requested that their withdrawal be without prejudice. While the Applicants are free to make any further applications for licenses that the Act permits, both the Registrar, *Motor Vehicle Dealers Act* and any future Tribunal hearing a future appeal, may take notice of the Refusal to Register and give it what weight it thinks appropriate.

COSTS

Counsel for the Registrar, *Motor Vehicle Dealers Act* has sought costs of the Appeal. The Notice of Proposal provides notice that the Registrar, *Motor Vehicle Dealers Act* will seek costs in appropriate cases pursuant to rule 14 of the Tribunal's Rules of Practice.

Rule 14.1 and 14.2(a) state:

> 14.1 Where a party believes that another party in the proceeding before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.
>
> 14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:

> (a) Failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;

Counsel for the Registrar, *Motor Vehicle Dealers Act* has attended with her witnesses on two occasions. On the present occasion, while the letter sent to the Tribunal by counsel for the Applicants was apologetic for providing such late notice, the notice did come too late to avoid for the Registrar, *Motor Vehicle Dealers Act* the need to attend. As a result, the Tribunal orders that the Applicants shall pay the Registrar, *Motor Vehicle Dealers Act* its costs fixed at $400.00.

LICENCE APPEAL TRIBUNAL

_____
Andrew Diamond
Vice-Chair

RELEASED: April 27, 2006

FILE NAME: 3191.durham.pre-hrg.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

Ontario

ALLRIGHT AUTOMOTIVE REPAIR INC. AND BRUCE ANDERSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION OF ALLRIGHT AUTOMOTIVE REPAIR INC. AS A DEALER AND BRUCE ANDERSON AS A MOTOR VEHICLE SALESPERSON

TRIBUNAL: DANIEL LAURIN, Vice-Chair

APPEARANCES: GREG FARNAND, Counsel for the Applicants

A. MICHAEL ROTHE, Counsel for the Registrar, *Motor Vehicle Dealers Act*

DATES OF HEARING: January 24, 25 and 26, 2006 OTTAWA

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act", respectively). The Notice of Proposal dated September 15, 2005, proposed to revoke the registration of Allright Automotive Repair Inc. as a dealer and Bruce Anderson as a salesperson under the Act.

REASONS:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The 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 Allright Automotive Repair Inc. and Bruce Anderson under the *Motor Vehicle Dealers Act.*

The Registrar's Notice of Proposal includes the following allegations:

> 1. Allright Automotive Repair inc. has been registered as a motor vehicle dealer since on or about April 7, 1998.
>
> 2. Bruce Anderson is registered as a motor vehicle salesperson and is an officer and director of the corporate dealership.
>
> 3. The dealer retained the services of Peter Rockwell as an unregistered salesperson.
>
> 4. The dealer falsified documents. In particular, brand information on vehicle ownership documents was deleted.
>
> 5. The dealer sold motor vehicles without ensuring that full and complete disclosure was made to the purchaser.

Allright Automotive Repair Inc. ("Allright") and Bruce Anderson (the "Applicants") appealed the Proposal to revoke the registrations to the Licence Appeal Tribunal by Notice of Appeal dated September 21, 2005.

PREHEARING:

LAT Vice-Chair Douglas R. Wallace, conducted a pre-hearing by teleconference on December 19, 2005. Following that pre-hearing, he issued a pre-hearing interim Order on December 30, 2005 in which he orders the Registrar to communicate any evidence he might have on Peter Rockwell to the Applicants and that the Applicants provide a summary of all the steps taken by them to resolve customers' complaints.

EXHIBITS:

Twenty one (21) exhibits were filed with the Tribunal.

ADMISSION:

Following the issuance of the pre-hearing interim Order, the facts were reviewed by all the parties and an agreed statement of facts dated January 24, 2006 was filed with the Tribunal as Exhibit 5. In addition to this agreed statement of facts, the parties also agreed that Tabs 7 to 28 of Exhibit 4 of the Respondent's Book of Documents would also be admitted as evidence. These documents, as well as Exhibit 5, relate to the: sale of vehicles, bill of sales, ownership papers, inspections, extended warranty papers, the MTO vehicle inquiries, etc., for the following eight (8) vehicles:

James and Christina Allsop

1999 CHEVROLET S10 EXTENDED CAB PICK-UP - BLACK
- VIN NUMBER -1GCCS19W1X8186311

On or about July 13, 2004 the dealer purchased the above-mentioned vehicle from 1015482 Ontario Ltd. o/a Henleigh Auto Service ("Henleigh") **knowing that it was previously branded as salvage.** On or about the same day, Rockwell, on behalf of the dealer, sold the vehicle to James and Christina Allsop without disclosing **that the vehicle was previously branded as salvage.** Two copies of the bill of sale were produced: one with a disclosure "Previous Accident Repair Disclosed to Customers", and the other without the said declaration. On or about January 20, 2005, prior to the resolution of this matter, OMVIC received a complaint from Ms. Allsop and, as a result, attempted to assist in resolving the complaint by discussing the matter with both the dealer and Ms. Allsop. Ultimately, on or about March 10, 2005 the dealer reversed the sale and took back the vehicle as he had reached an agreement with the consumer and not due to any compulsion on the part of OMVIC (*unsure of meaning – to be clarified by Mr. Laurin*).

2. Yan Lambert

2002 GMC SONOMA SL - BLACK
VIN NUMBER – 1GTCS14W228165242

On or about October 19, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was previously branded as salvage**. On or about the same day, Rockwell on behalf of the dealer sold it to Yan Lambert without disclosing **that the vehicle was previously branded as salvage**. A copy of the ownership was altered by Rockwell to remove the MTO brand. Approximately one month later the vehicle was destroyed by fire.

3. Jonathon Herbert

1999 CHEVROLET TRACKER - GREEN
VIN NUMBER – 2CNBJ13C2X6938578

On or about October 4, 2004 the dealer purchased the above-mentioned vehicle **knowing that the vehicle was previously branded as rebuilt** and with the further disclosure of accident/repair. On or about the same day, Rockwell, on behalf of the dealer sold the vehicle to Jonathon Herbert, without disclosing that **the vehicle was previously branded as salvage or rebuilt.** A copy of the ownership was altered by Rockwell to remove the MTO brand.

4. Kenneth Peever

2003 FORD RANGER - BLACK
VIN NUMBER – 1FTYR10U83PA01331

On or about September 20, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was previously branded as salvage**. On or about the same day, Rockwell, on behalf of the dealer leased the vehicle to Kenneth Peever through Travelers Leasing Corporation without disclosing **that the vehicle was previously branded as salvage**. A copy of the ownership was altered by Rockwell to remove the MTO brand. The vehicle was subsequently reposed by the lender for failure to make payments.

5. Ronald McElroy

1999 DODGE GRAND CARAVAN - GREEN
VIN NUMBER – 2B4GP2432XR296677

On or about September 09, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was branded as salvage/rebuilt.** On or about the same day, Rockwell, on behalf of the dealer sold the vehicle to Ronald McElroy without disclosing **that the vehicle was previously branded as salvage.** A copy of the ownership was altered by Rockwell to remove the MTO brand and two copies of the bill of sale were produced: one with a disclosure "Previous Accident Repair" and the other without the said declaration. Mr. McElroy is satisfied with the vehicle.

6. Jonathan Mackay

2002 CHEVROLET S 10 - BLUE
VIN NUMBER – 1GCCS19W428174792

On or about August 26, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was branded as rebuilt**. On or about the same day, Rockwell, on behalf of the dealer sold the vehicle to Jonathan McKay with a declaration "previous accident repair" but without disclosing **that the vehicle was previously branded as rebuilt.** Mr. Mackay is satisfied with the vehicle.

7. Maureen Hall

2002 CHEVROLET TRACKER - BLUE
VIN NUMBER – 2CNBJ13C726905908

On or about October 15, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was branded as salvage**. On or about the same day, Rockwell, on behalf of the dealer sold the vehicle to Maureen Hall with a declaration "previous accident repair" but without disclosing **that the vehicle was previously branded as salvage.** The dealer has provided Ms. Hall with a new warranty for two years or 40,000km and she is satisfied with the vehicle.

8. Marc-Andre Louisseize

2002 FORD EXPLORER - RED
VIN NUMBER – 1FMZUT2E42ZC00449

On or about August 20, 2004 the dealer purchased the above-mentioned vehicle from Henleigh **knowing that the vehicle was branded as salvage**. On or about the same day, Rockwell on behalf of the dealer sold the vehicle to Marc-Andre Louisseize with a declaration that the vehicle was "previous accident repair Branded" explaining that the the declaration meant only that the vehicle was in a "fender bender" and was not v was previously branded as salvage. As a result of learning from Investigator the true condition of the vehicle, Mr. Louisseize became concerned about the vehicle's safety. Consequently, the dealer replaced the vehicle with a 2004 Pontiac Grand Prix.

All those vehicles were purchased by Allright Automotive Repair Inc. from 1015482 Ontario Ltd. o/a Henleigh Auto Service. It is Peter Rockwell who sold all those vehicles.

Furthermore, the following agreed statements formed part of Exhibit 5:

> 1. Allright Automotive Repairs Inc. ("the dealer") has been registered as a motor vehicle dealer since on or about April 7, 1998.
>
> 2. Bruce Anderson ("Anderson") is the sole officer and director and controlling mind of the Dealer. Anderson was first registered as a motor vehicle salesperson on or about April 7, 1998.
>
> 3. Peter Rockwell ("Rockwell") was first registered as a motor vehicle salesperson on or about June 26, 1991. Rockwell's registration lapsed on or about June 26, 1993.
>
> 4. On or about March 1, 2001 Rockwell was reinstated as a salesperson with Blossom Park Auto Sales.
>
> 5. Rockwell was terminated as a salesperson by Blossom Park Auto Sales on or about November 14, 2003. Rockwell retained possession of his pocket registration card from OMVIC, which showed an expiration date of March 2005.
>
> 6. In or about March 2004 the dealer retained Rockwell as a motor vehicle salesperson.
>
> 7. On or about November 24 and 25, 2004 the dealer was inspected by Tina Cabot, an inspector with the Registrar's office. It was discovered that Peter Rockwell was working as an unregistered salesperson for the dealer. The notes and findings as particularized in the inspection reports and inspection findings for both inspections correctly reflect what the inspector uncovered during said inspections.
>
> 8. On or about November 26, 2004 Rockwell submitted an application signed by Anderson for registration as a salesperson with the Dealer. Said registration was refused by the Registrar on or about January 17, 2005.
>
> 9. The dealer has retained the services of an unregistered salesperson.

The document contained the footnote noted below [1]

EXCLUSION OF WITNESSES

The Respondent's counsel requested the exclusions of all witnesses except Bruce Anderson (the "Applicant") and the Tribunal granted the request.

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1. Please note that whether or not the Applicants knew Rockwell was unregistered at the time remains a contentious element to be decided by the Licence Appeal Tribunal

OPENING STATEMENTS:

Counsel for the Respondent

Counsel explained what are the duties, responsibilities and obligation of a dealer: that the test included in section 5 of the *Motor Vehicle Dealers Act* is clear and must be applied in the present case; that Allright Automotive Repair Inc. is a small dealership; that there is an admission that Peter Rockwell was not a registered as a salesperson, and he had a previous criminal history.

The dealer knew before hiring him that there were serious problems with this individual: Peter Rockwell had worked for more than 9 months without any supervision; customers did not receive full disclosure before acquiring their vehicles, and there were 2 sets of documents in existence: one with disclosure, the other did not contain anything of that nature. In addition, information regarding "Brand Salvage" was deleted from the documents.

Finally, there was a duty and an obligation on the part of Mr. Anderson to supervise and this was not done. At the end, the burden lies on the shoulder of the Applicant.

Counsel for the Applicant

Several witnesses testified to the integrity of Mr. Anderson. His client took a former employer's warning about Peter Rockwell's problems with a grain of salt, given that he has known him for over 20 years and he did not think it was true. He trusted his employee, Mr. Rockwell and he considered that a person is innocent until proven guilty. His client spent a lot of money in order to compensate and satisfy the defrauded customers. He is also a victim of that fraud and he will implement changes in the way he is conducting his business.

ISSUES:

The issues in the present case are as follows:

1. What were the Applicants' duties in the circumstances, to ensure that Peter Rockwell had a valid salesperson licence in his possession?

2. What were the Applicants' responsibility and liability pursuant to the conditions contained in section 5 of the Act, to be applied in light of Peter Rockwell's misconduct, who was at the time an employee of Allright Automotive Repair?

3. What are the consequences, or what is the appropriate penalty under the Act, for the Applicants under the circumstances of this case?

THE LAW:

Section 3 of the Act states:

> 3.(1) No person shall,
>
> (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
>
> (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 4 of the Act, states:

> 4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

Section 5 of the Act, states:

> 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
>
> (c) the applicant is a corporation and,
>
> (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
>
> (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
>
> (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6 of the Act states:

> 6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
>
> (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 7 of the Act states:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, 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, and the applicant or registrant may so require a 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).

(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 out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

(6) The Registrar, the applicant or registrant who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

(7) Despite subsection (1), the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering the registrant's registration.

(8) Where, within the time prescribed therefore or, if no time is prescribed, before the expiry of the registration, a registrant has applied for renewal of a registration and paid the prescribed fee, the registration shall be deemed to continue;

(a) until the renewal is granted; or

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

(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.

Sections 9 of the Act, states:

9.(1) Where the Registrar receives a complaint in respect of a motor vehicle dealer and so requests in writing, the motor vehicle dealer shall furnish the Registrar with such information respecting the matter complained of as the Registrar requires.

(2) The request under subsection (1) shall indicate the nature of the inquiry involved.

(3) For the purposes of subsection (1) the Registrar or any person designated in writing by him or her may at any reasonable time enter upon the business premises of the motor vehicle dealer to make an inspection in relation to the complaint.

Section 10 of the Act, states:

10.(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 are being complied with.

Section 11of the Act, states:

11.(1) Upon an inspection under section 9 or 10, 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 therefore, 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.

(2) Any copy made as provided in subsection (1) and purporting to be certified by an inspector is admissible in evidence in any action, proceeding or prosecution as proof, in the absence of evidence to the contrary, of the original.

Section 13 of Regulation 801, Terms and Conditions of Registration, under the *Motor Vehicle Dealers Act* states:

(9) Where the registration of a salesperson is revoked, suspended or cancelled or, where he or she no longer intends to be employed as a salesperson, the salesperson shall immediately return his or her certificate of registration to the Registrar by registered mail.

(10) Where a sales person has not applied for a transfer of registration within sixty days of termination of his or her employment, and where he or she intends to continue as a salesperson, he or she shall apply for registration by filing an application in a form provided by the Minister, together with the appropriate fee prescribed in section 2.

(14) No motor vehicle salesperson shall be registered to more than one motor vehicle dealer at the same time unless the controlling interest in any other motor vehicle dealer by which the motor vehicle salesperson is employed is held by the motor vehicle dealer to whom the motor vehicle salesperson is registered.

Section 15 of Regulation 801, under the said Act states:

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,

(a) a complete record of any reconditioning or other work performed on the vehicle that includes the date and particulars of the work done, repair orders and the cost of the work done; and

(b) the details and cost of any inspection conducted under Regulation 611 of the Revised Regulations of Ontario, 1990 (safety Inspections).

EVIDENCE

WITNESSES FOR THE RESPONDENT

1. Lewis Tomlinson

Lewis Tomlinson has been involved in the automotive business for almost 30 years. He is currently semi-retired. He started to work at Myers Motors in Ottawa, and started his own automotive business in 1986. He has known Mr. Anderson for almost 20 years, and he worked, at one point, at his business. Peter Rockwell worked for Mr. Tomlinson at Blossom Park Auto Sales in Morrisburg, Ontario. Peter Rockwell apparently quit his sales job at Blossom Park around November 2003. The witness stated: "He quit before I discovered his fraudulent actions". Afterward, Mr. Tomlinson filed a police complaint and an investigation followed. The investigation revolved around theft and fraud at his business, and Peter Rockwell was later charged with those infractions. Mr. Tomlinson personally incurred a loss and he told the Tribunal that he had several conversations with the Applicant over the phone and in person, every couple of months, regarding an unpaid bill charged to him following Peter Rockwell's misbehaviour. Each time, he warned the Applicant of the serious problems encountered with Peter Rockwell when he acted as a salesperson for him. He told him repeatedly that Rockwell was a con artist. Mr. Tomlinson stated: "Bruce knew all along what was my opinion regarding Peter Rockwell". The witness wrote a letter to the Applicant dated February 09, 2005 (Tab 5 of Exhibit 4), in which he reiterated his position in writing towards Peter Rockwell.

In cross-examination, the witness stated that their relationship cooled off significantly after the incident involving the invoice. He had done business with the Applicant for a long time and never had problems before. Peter Rockwell worked for Mr. Tomlinson for approximately 2 1/2 years (from March 2001 until November 2003). The wallet card used by Peter Rockwell (salesperson registration from OMVIC) was for 2 years (from March 1, 2003 until February 28, 2005). OMVIC has never investigated him for lack of supervision towards Peter Rockwell. Mr. Tomlinson spoke with somebody at OMVIC a year after Rockwell had left, but has no recollection of what was said. The witness is still on speaking terms with the Applicant. Peter Rockwell forged Mr. Tomlinson's company cheques and the latter was defrauded of about $15,000.

2. Tina Cabot

Tina Cabot works for the Ontario Motor Vehicle Industry Council (OMVIC) as an inspector covering the Eastern Ontario region. She has been in this position for more

than 3 years. On November 24, 2004, she showed up for a scheduled routine inspection at Allright where she met Peter Rockwell and asked him if he had transferred his salesperson licence to Allright Automotive Repair Inc. He replied that he did but he was unable to find a confirmation that it had been sent and received by OMVIC. The witness told Peter Rockwell that he was not registered in the system. Rockwell told Ms. Cabot that he worked at Little Joes Auto, from December 2003 through to the end of January 2004. Ms. Cabot told Mr. Rockwell to get his act together and send the necessary papers for reinstatement that same day. During the inspection, Bruce Anderson was on the premises but did not stay in the office stating that he had other things to do. He came by from time to time during the inspection but told Ms. Cabot he was too busy to stay.

During her inspection, the witness found odometers discrepancies on 2 vehicles. She also discovered discrepancies in relation with ownership papers on 5 different vehicles: a 2002 GMC Sonoma; a 2002 Chevrolet Tracker; a 1999 Chevrolet Tracker; a 2003 Ford Ranger, and a 1999 Dodge Caravan. They uncovered altered documents. She discovered that there were 2 copies of some of the documents on file: copies of ownership brand with the brand clearly indicated on it and a second copy with no brand indicated.

This information, she told the Tribunal, was easily available: you just had to look in the file, just like she did. She stated: “It was obvious at the outset”.

She requested bank statements and was told by Patrice Anderson, the Applicant’s wife, that they were at home and that they would be made available the next day. At the end of that day, Ms. Cabot wrote her inspection findings on 2 pages and gave it to the owner Bruce Anderson. Both parties signed the 2 pages where she wrote the following:

Inspection findings (Exhibit 4 - Tab 9)

> 1. You are required to submit a municipal permit, lease on deed agreement and letter stating you want to change from wholesale to retail registration.
>
> 2. You are not permitted to retain the services of an unregistered salesperson. MVDA
>
> 3. You are required to disclose all material facts on all bills of sale, including but not limited to accident + repaired, insurance write off, MTO brand – rebuilt/salvage irreparable. SBP
>
> 4. Peter Rockwell is not currently registered as a salesperson with OMVIC and is not permitted to meet with customers to discuss vehicles, attend auctions.
>
> 5. A copy of the Standards of Business Practise was reviewed and left with you.

On November 25, 2004, the following day, the witness returned to Allright Automotive. Peter Rockwell showed her his salesperson registration card with an expiry date in 2005. He told her that he would send a copy of the cancelled cheque to her to prove that he did transfer his registration to Allright Automotive Repair Inc.

She wrote a second inspection report that was submitted as Exhibit 4 - Tab 11. She noted in that report that there was a "steady increase" in the balance of the account of Allright at the Royal Bank (from $40,000 in July 2004 to $102,000 in September).

She also noted in that same report that the odometer of a 2002 Chevrolet TY # 905908 (the Maureen Hall vehicle) indicated 16,563 km on a safety certificate dated October 14, 2004, while another document received on October 18, 2004, for the same vehicle, showed that Henleigh made a mistake. Because of an accident, there were 2 different vehicle parts were mixed together.

In cross-examination, the witness was asked if it was a routine inspection or one driven by complaints. Ms. Cabot stated that it was a routine inspection. The witness was asked several questions about what happened after her inspection reports were received by OMVIC. She replied that she was not handling prosecutions. Her job was to report what she saw. Same answer when she was asked why OMVIC did not prosecute Little Joes for lack of supervision. She was asked several questions in relation with a document titled *OMVIC Automotive Certification, revised: March, 2003* (Exhibit 8), and the witness provided the following clarifications in relation with the branding program: OMVIC does not brand vehicles. The dealer does the branding and the insurance companies volunteer to brand or not a motor vehicle.

3. Mary Jane South

Mary Jane South is the Deputy Registrar and Operations Director at OMVIC since 1997. She is overseeing the licensing and registration system. She stated that a salesperson could only work under the supervision of one dealership at a time. The individual is registered under that dealer's location and must transfer his or her registration when they move to another dealership. The salesperson must return the card to OMVIC if they are no longer employed by a dealership. Furthermore, if more than 60 days have elapsed since the last employment, a reinstatement request must be filed in order to be able to continue to act as a salesperson.

She stated that Allright was a small dealership and that Bruce Anderson could have put in place a number of simple controls that would have prevented the fiasco at his dealership. In her opinion, a minimum level of diligence would have sufficed to find out right away that there were major problems with his used cars business. There were several warnings provided to Mr. Anderson and obvious indications that something was wrong. A simple routine inspection by a member of OMVIC was enough to expose a relatively simple scheme in broad daylight.

She stated that she was very surprised to find out that Bruce Anderson, after discovering the fraud scheme, did not act immediately to terminate the employment of Peter Rockwell. In her opinion, Bruce Anderson delegated all responsibilities to Peter Rockwell. In addition, she finds it absolutely unacceptable that Bruce Anderson asked Peter Rockwell, 2 months after the inspections and in contravention of what was imposed on him, to follow-up with unsatisfied customers since he was the one who

created the fiasco in the first place. She said that there was a substantial mark-up, 3 to 4 times the normal average price, on the vehicle involved in the inspection. In her opinion, the Bruce Anderson benefited from these activities, and it would explain why he let time pass by, even though he had no confirmation that Peter Rockwell was indeed registered as a salesperson with his dealership.

In cross-examination, the witness was asked if she possesses any financial background that will allow her to testify on what constitutes a realistic profit on a rebuilt motor vehicle. Ms. South replied that she came to this conclusion after having seen these figures time and time again in more than 6 years at OMVIC. When asked if she had any complaints on file against Bruce Anderson, she replied that she had nothing previous to the incident of November 2004.

WITNESSES FOR THE APPLICANTS

1. Patrice Anderson

Patrice Anderson works with Bruce Anderson, her husband, at Allright Automotive Repair Inc. She started working with her husband in 1979 and has been the bookkeeper for the company since 1987. She is not registered to sell cars with OMVIC. Allright operates two different businesses under the same roof: they repair vehicles and they sell used cars, as a separate entity. They used to have a third arm to the company - selling gasoline - but it is now closed. They have 10 persons on site, both full and part-time workers. They contracted out the sale of used cars for a time but they are now doing it themselves.

She admitted that she knew there were problems with Peter Rockwell but she was never shown any documents and the police never contacted her. Peter Rockwell was 34 years old when she worked at Allright. He lived with their son for 4 months. He had the key to the business and to her son's home. She stated that she had loaned him money towards the payroll in excess of $10,000.00, because he was always short of cash during that period of 8 months or so. He was arrested for domestic violence in July 2004 and she bailed him out. She had to put $500.00 as bond and $1,000.00 for lawyer fees.

She stated that she lost $60,000.00 between payroll advances, legal fees, parking tickets, telephone bills, and the fraud at the garage. Everything was discovered when OMVIC came to do the audit at the garage.

In cross-examination, she admitted that she had access to all documents, and that she could do any search or check she wanted. She was receiving every bill of sale, verifying them and paying the commission. The instructions were that all bill of sales were filed with her.

2. Witness No. 2

Witness No. 2 met Peter Rockwell when she was managing a restaurant (Conroy) not far from Blossom Park Auto Sales. At the time, Peter Rockwell was working for Mr. Tomlinson and they were good friends. She possesses a licence to sell vehicles with OMVIC and is sponsored by Bruce Anderson. She described the relationship between Mr. Rockwell and Mr. Tomlinson as rocky as they were arguing all the time, over everything and nothing.

3. Witness No. 3

Witness No. 3 is a retired police officer. He was a member of the Ottawa Police Force for 33 years. He knows the Andersons because he is their neighbour. In his opinion, the Andersons were too good with Peter Rockwell.

4. Ian Legendre

He has been working as a salesperson at Allright for the last 4 months. He has been involved in the car business since 1994 and he worked at Little Joes and Blossom Park. He knows Peter Rockwell and expressed the opinion that Peter Rockwell was there to take people out, but cannot substantiate other than having witness that a customer gave a deposit and was never reimbursed by Peter Rockwell.

5. Detective Jorge Mendonca

Detective Mendonca has been an active member of the Ottawa Police Force for the last 17 years. He is presently a member of the organized fraud section.

He stated that there was an outstanding arrest warrant against Peter Rockwell for fraud emanating from the Ontario Provincial Police detachment of Stormont - Dundas. Also, Peter Rockwell is facing charges of assault, breach of recognizance, failing to appear, and other charges from the Ottawa Police force.

6. Raymond Parisien

Mr. Parisien has been working for the Ministry of Transportation of Ontario for 18 years and for the last five years as an Enforcement Officer in the Commercial Vehicle Inspection. He did not testify in his capacity of Enforcement Officer. He stated that he inspected the vehicle bought by his girlfriend and did not see any defects. The vehicle was involved in a rollover but the frame was intact. He brought the vehicle to a Ford dealer as it was still under warranty. Ford looked at it and everything seemed to be fine.

7. Bruce Anderson

Bruce Anderson has been involved in the automotive industry for more than 35 years. He stated that he is a very hands-on person and runs a very busy place. His is involved

in every aspect of the daily operations. A snap shot of a regular day shows that he: starts at 7:30 a.m.; organizes the work order system for the day; directs his staff to start different jobs; discusses with salespersons to find out if there are any problems, and then looks at licensing and inspections. The salespersons start arriving at 9.30 a.m. and work until 6:00 or 7:00 p.m. There is another meeting with them at around 5.00 p.m. to see if there are any problems. Mr. Anderson stated: "I feel I am capable of doing any kind of administrative work."

Thirteen (13) persons are currently working at the business, on a full or part time basis. Mr. Anderson said that he has the reputation of a hard working person, honest and customer oriented. Many customers over 27 years of operations and now the kids and grand kids are coming to the business. Administratively, there had never been any problems with OMVIC before Peter Rockwell entered the picture. Rockwell was the reconditioning guy with Tomlinson. Anderson spoke with him over the years on the phone. From experience, he chooses an employee based on how the employee treats a customer when a problem occurs. Peter Rockwell was very good with customer relations. The Applicant stated that both Tomlinson and Rockwell were high rollers. He considered both of them as honest persons and he was not surprised when Peter Rockwell left Tomlinson's business.

When Peter Rockwell moved to work with Little Joes, he called Bruce Anderson to see if there would be an opening at his business for selling cars. An opening was coming up and they came to an agreement. Mr. Anderson stated that he looked at Mr. Rockwell's licence and no problems were found, in his opinion. He did a follow-up 6 weeks after his hiring. Over the 8 months or so that Peter Rockwell worked for him, he did follow up on the transfer of registration, but stated that he was always getting a different answer from Peter Rockwell. For example, Mr. Rockwell told Mr. Anderson that he was unable to get a copy of the returned cheque that he wrote to OMVIC as there is a Prohibition Order in place against him and he was unable to get a copy of the said cheque since he can not contact his girlfriend following the domestic assault charges, etc.

The witness was convinced that Peter Rockwell was properly registered since he was attending the auctions. You need an identification card to enter the auctions and without that sweeping card, you cannot enter the premises. When Rockwell attended at MTO for the transfer of papers, he did not have a letter from Allright authorizing him to do so, but he did so any way. The Applicant finally issued him a letter of authorization.

In his opinion, the witness was performing a supervisory role. He was a hands-on person. He was going over the paperwork, the 30-day warranty; the first oil change, etc. He stated that he never leaves the premises during the day, but that Peter Rockwell was alone in the evening.

In the summer of 2004, domestic assault charges were laid against Mr. Rockwell and the Applicant noticed a change in him. "I noticed a dramatic change in him. He had been on the job for 7 months and I was very disappointed with the change in his attitude. He work was sloppy and he was drinking. He was still living with my son since

the domestic incident." When asked if he had any concerns about the transfer of registration still being up in the air after 7 months, Anderson replied: "No".

When Tina Cabot came for her inspection in November 2004, she was a week late as the inspection had been delayed by one week. At that time, Mr. Anderson said that he was trying to wear too many hats and he was unable to make better judgment decisions because Peter Rockwell was present. A lot of things were not explained to him and he did not understand everything that was said. When the Applicant was asked if he understood the 5 conditions contained in the inspection report (EXHIBIT 4 – TAB 9), he replied that he did understand them.

The witness stated: "At that point, I started to realize that there were serious issues going on". At that moment, the witness asked Ms. Cabot how they could speed up the process with Peter's licence.

The witness stated:

> "At that point in my mind he was already gone" (Peter Rockwell)
> "I gave him the benefit of the doubt"
> "I gave him 2 weeks to put order in the papers"

When asked why he retained Mr. Rockwell's services at that point the witness replied: "I was afraid of a civil suit. I went through that route before". Nothing is proven just yet, we must not take this likely. At that time only 2 vehicles were involved in relation with the whiteout incident.

Then, the witness described what steps he took in order to satisfy the customers that were defrauded or misinformed. He stated that he had lost approximately $60,000.00 due to Peter Rockwell's involvement in his used cars sale business.

In cross-examination, the witness stated that he possesses 7 years of experience in the used cars sale business. He is familiar with OMVIC's procedures but more with the certification course. He is familiar with the rules that govern the administration of salespersons' registration, since he owns one himself. He was asked to read for the Tribunal what is written on the back of the registration card that is sent by OMVIC to all registrants (Exhibit 9):

> **Terms and Conditions**
>
> This certificate is only valid until its expiry date or until any information printed on the reverse changes (e.g. name, sponsoring dealer), whichever comes first. Please note: you must give OMVIC 5 days' written notice of any changes to the information in the form required by the Registrar, with appropriate fees, to obtain a revised certificate.
>
> If a salesperson leaves or is terminated from a dealership, the salesperson will be required to submit a reinstatement application if he/she does not submit a transfer within 60 days of leaving the previous dealership, even if their registration is not expired. Salespersons or dealers who have been terminated, for any reason, for more than 2 years will be required to retake the OMVIC certification course.

> This certificate is not valid unless signed by the registrant. By signing the certificate, the registrant acknowledges that they have read these terms and conditions.

Furthermore the witness was asked to look at Exhibit 6 – Notice of Registration Change under the *Motor Vehicle Dealers Act* (Salesperson Notice).

This is the form that was filed by Peter Rockwell presumably sometimes before February 23, 2004. In section C of the form, it is indicated that the previous dealer's legal name was Little Joes Auto Sales but Mr. Anderson said that the name Blossom Park was indicated on the card that Peter Rockwell showed to him some times at the beginning of March 2004. The witness stated that the start date of February 23, 2004, indicated in section C, is incorrect since there was an overlap due to the fact that Peter Rockwell started working at Allright around the first week of March 2004.

The form was incomplete and not dated. Furthermore, the method of payment was not indicated. However, the witness had already signed the bottom of the second page but had not dated the document. The Applicant agreed.

Mr. Anderson was then referred to Exhibit 7 – Application for Registration under the *Motor Vehicle Dealers Act* (Individual Application)

This document is incomplete and contains false information. For example, in Section E question 1, the question is:

> Have you previously applied for or been granted any registration, exemption or certificate of any kind by the Registrar, Motor Vehicle Dealers Act? If yes, of what kind?

Peter Rockwell answered no. In section A the previous registration number for a reinstatement is not indicated, nevertheless Bruce Anderson signed it.

CLOSING ARGUMENTS

Counsel for the Respondent

The primary goal behind the *Motor Vehicle Dealers Act* is to protect the public as the purchase of a vehicle is the second most important purchase for most individuals. The Applicants are stating that they are the victims, that they have been punished enough and are unable to substantiate $60,000.00 in losses. They learned their lesson and they paid a price for their mistakes.

The Applicants had access to all documents but they decided to ignore the warnings from the witness Tomlinson even though they had been business associates for 20 years. Mr. Anderson hired Peter Rockwell on a gut feeling, even if he knew that he was a high roller, that there were problems at his previous employments, that he was not properly registered and that he had never received any paper confirming that fact.

The management of the files was done on a minimal basis. Eight transactions were recorded in a period of approximately 4 months, thus realizing a profit of around $30,000.00. This is strong enough a motive to turn a blind eye.

It was never the Applicants' fault: it was either, Tomlinson, Rockwell or Hanley's problem, or OMVIC's, which is a very sloppy organization, very badly administered.

The Applicants repeated throughout the hearing that their "motto" at Allright was customers first. The evidence shows exactly the opposite. The settlements arose from customers' complaints, not because of the Applicants' were pro-active in settling complaints.

Applicants' Counsel

The Applicants' counsel proceeded to examine the 7 grounds that form the Registrar's position to revoke registration. In his opinion, to whit;

1. Duty of Care to supervise an employee

    - Anderson was monitoring the activities on a professional basis
    - Rockwell was a very good con-man
    - Rockwell was dishonest with the Anderson's family
    - Anderson was on site all the time
    - Anderson maintained a close contact with Rockwell

2. The Andersons had the same access to the documentation contained in the file as the OMVIC inspectors: if it was easy for OMVIC, it should have been easy for Mr. Anderson.

    - Rockwell was bringing the documents to him
    - Anderson was processing them, paying him and filing the documents away and did not reopen them afterward
    - Anderson trusted his wife who was handling the files

3. Anderson did not insure due diligence

    - Same answer as point number 1

4. Anderson hired Rockwell dismissing all the warnings he received regarding his previous conduct

    - Anderson didn't know who was telling the truth
    - Anderson considered the warnings as bickering evidence
    - The first real warning he received was in February 2005

5. Anderson was sloppy in hiring an unlicensed salesperson

    - There was a friendly relationship in place
    - He saw Rockwell working at other dealers before the hiring
    - He saw Rockwell's driver's licence
    - Rockwell was attending auctions, he must have had the proper card to get in (swiping card)
    - Rockwell was attending MTO as well

6. It was improper to retain Rockwell's employment status two more months after the investigations of November 24 and 25, 2004

    - There was no evidence that Rockwell was not truthful
    - Anderson received the advice of a lawyer (his brother) who misled him: it was a lack of knowledge on the part of his lawyer

7. Very substantial mark-ups on the vehicles, 3 to 4 times the usual price

    - It is not in the competence of the Registrar to make such affirmation
    - The Registrar possesses no qualification in this field

Finally, the Applicants' counsel stated that his client had an old style approach towards his business. His clients never dealt with "branded" vehicles before and it was a totally new area of the business for them. Counsel for the Applicants concluded by admitting that his clients used bad judgment with regard to the hiring of Peter Rockwell, that there were bad hiring practices in place as well as bad monitoring practices.

The Tribunal was presented with several conditions that might be implemented respecting the hiring and monitoring policies at Allright, if the Tribunal rules in favour of the his clients to retain their registrations.

AUTHORITIES SUBMITTED BY THE PARTIES

APPLICANT

(1) *Target Autozone and Richard Crooke v. Registrar, Motor Vehicle Dealers Act April 26, 2005*, (Vice-Chair Derek Israel)

In this case, the Registrar intended to revoke the registrations of the dealer and the salesperson, which was the same individual. Richard Crooke retained the services of an unregistered salesperson, and failed to comply with the OMVIC Code of Ethic, i.e. he did not obtain safety standards certificates. Numerous complaints were received about the dealer and the dealer misrepresented the actual purchase price of vehicles on bills of sale.

The Applicants' counsel pointed out two passages in the decision, both on page 21:

> 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 of a high quality of sales and services practices.

Furthermore, Vice-Chair Israel added:

> 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.

(2) *Shine Car Sales and Omar Hassan Rahim v. Registrar, Motor Vehicle Dealers Act* Court File 507/01 Date 20030211 (Divisional Court)

Counsel pointed out the following excerpt on page 3 of the above decision:

> 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.

RESPONDENT

(1) *919810 Ontario Inc. o/a All service Auto Centre and Zolthan Hegedus v. Registrar, Motor Vehicles Dealers Act* (May 01, 2002)

In this particular case, the Registrar intended to revoke the licence of both the dealer and the salesperson, held by the same individual. There were nine (9) allegations against them, i.e. misrepresentation of the true distance traveled (odometer alteration), failure to disclose that the vehicle was branded as salvage, etc.

Counsel for the Respondent pointed out the following excerpts:

Page 14 and 15

> The Tribunal finds that this case essentially revolves around two basic allegations:
>
> 1) The Applicants provided false documentation to the Registrar during an inspection; and,
> 2) The Applicants failed to make disclosure of material facts to purchasers.

> The first allegation concerns the Applicants and their relationship with OMVIC. The second relates to the business practices of applicants with consumers.
>
> With the respect to the first allegation, the Registrar is entitled to carry out routine inspections of registrants pursuant to Section 10 of the *Motor Vehicle Dealers Act (the "Act").* That section stands alone from section 9 inspections, which are triggered by complaints received by the Registrar. Ms. Gingras stated that no complaints were received with respect to the Applicants. The inspection was carried out to ensure compliance with the Act and its regulations relating to registration. During the course of that inspection, the Applicants provided Ms. Gingras with two documents – the Applicant's copies of the Story Bill of Sale and the Lis Bill of Sale – which were altered from the original Bills of Sale provided to the consumers.
>
> Section 11 of the Act provides, in part, that upon an inspection under section 10, "…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." Furnishing altered and inaccurate documentation on such an inspection is a clear breach of the requirements of this section. Moreover, it is an indication that the Applicants do not act with honesty or in accordance with the law.
>
> The second allegation concerns the business practices of the Applicants with respect to the public. Laura Gordon, OMVIC's Director of Compliance, testified that the Registrar has a zero-tolerance level for non-disclosure or altering of odometer readings. Disclosure of material facts revealing the true distance a vehicle has traveled is clearly important to the consumer's purchase decision. As Ms. Gordon indicated, accurate information allows the consumer to assess the future maintenance and repair costs to be expected for the vehicle and the present market value of the vehicle.
>
> According to Ms. Gordon, The *Business Practices Act* and OMVIC's standards of conduct require full disclosure and not misrepresent all material facts.

Furthermore on page 16:

> The transaction involving Maria Story is also troubling. The Applicants acquired the vehicle on February 6, 2001 from Impact Auto Auctions Ltd. The Bill of Sale to the Applicants indicates the vehicle is branded as "salvage" and that the true distance traveled is unknown and may be in excess of what is recorded to date. The consumer was told the vehicle was rebuilt but did not understand what "rebuilt" meant in the parlance of the industry. She testified that Mr. Hegedus mentioned it to her in a very inconsequential manner. The Tribunal finds this to be further evidence of the Applicant's misleading of the purchaser.
>
> On the evidence presented, the Tribunal concludes that the past conduct of the Applicant afforded the Registrar reasonable grounds for his belief that the Applicant would not carry on business in accordance with the law and with integrity and honesty.

(2) *1490464 Ontario Limited o/a A1 Autoline and Ade Taitlbaum and Nitai Taitlbaum v. Registrar, Motor Vehicle Dealers Act* (January 16, 2006)

In this case, the Registrar's proposal alleges the following particulars:

Nitai Taitlbaum was the sole officer or director of A1 Autoline ("Autoline"), registered as a dealer since October 19, 2001. Autoline was registered subject to terms and

conditions i.e. not to retain the services of an unregistered salesperson, restrictions concerning the activities of a salesperson and attendances at auctions on behalf of the dealer. Nitai was also registered a salesperson since August 17, 2001.

Ade Taitlbaum was also a salesperson registered periodically since August 25, 2002. Two corporations 1190167 Ontario Ltd and 1296945 Ontario Inc. were registered as dealers and Ade was the controlling mind of both Corporations. In November 7, 2002, an Order by the Licence Appeal Tribunal revoked both registrations and terms and conditions were attached to Ade's registration.

Ade Taitlbaum is a controlling mind in charge of the day-to day operations of Autoline.

Both individuals provided false and misleading information to OMVIC concerning their respective roles. They also failed to respond to a written request for information from OMVIC.

The Respondent's counsel referred to excerpts on Page 9 of the LAT decision:

> 1. As concerns the registration of Nitai Taitlbaum as a salesperson:
>
> The facts are reasonably simple. Nitai Taitlbaum admitted he had knowingly allowed Dave to act as an unregistered salesperson for the dealership even after OMVIC had questioned him on the Consumer #1 complaint. He admitted he knew he had signed specific terms and conditions clearly prohibiting such action. He attempted to explain the violation as indicative of his sympathy towards an individual who had worked for his father and was in difficult economic circumstances. The Tribunal is not convinced that the decision to violate the Act and his own specific terms and conditions of registration were entirely motivated by sympathy or "youthful misjudgement" as urged by Counsel. Nitai is university educated and has been a registered dealer since 2001. He knew of his dealership's terms and conditions of registration. He also knew his father's dealership had been revoked two years earlier for employing an unregistered salesman. He testified that he knew his father was of the opinion that the Registrar did not want him registered. And, further, after July 29th, he acknowledged his father advised him to let Dave go. Moreover, there are certainly other ways of employing Dave in the dealership than by having him interact and negotiate with potential consumers of vehicles and there was no evidence this had been attempted. Given all these facts the Tribunal finds that Nitai authorized Dave to act as a salesperson in contravention of the law and the terms and conditions of his registration, and continued to do so, with complete understanding of what he was doing and the potential ramifications because he believed he could do so without getting caught.
>
> The Tribunal is not convinced by Mr. Nitai Taitlbaum's testimony in which he insisted he "supervised" all sales by Dave in an effort to ensure such sales were his as much as the unregistered Dave. It is clearly self-serving and is not corroborated. In fact, it is directly contradicted by both Consumer #1, a consumer with no apparent self-interest in the outcome, as well as Mr. Edgar, also found by the Tribunal to be an entirely credible witness. Consumer #1 testified to a number of private phone conversations between herself and Dave in relation to her purchase; she also testified to Nitai refusing to become involved when she requested his interference with the writing up of the contract price. Nor was there any indication that Nitai held a supervisory position over Dave during the latter's discussions and pricing of fleet vehicles with Mr. Edgar.

(3) *Registrar, Motor Vehicle Dealers Act and TAGHI Vahid Shahidi o/a GTA AUTO* (March 04,2003)

The last precedent used by the Respondent's counsel is a decision of the Superior Court of Justice (Divisional Court), respecting an appeal of the Registrar following a Decision of the Licence Appeal Tribunal to grant a registration with conditions to Taghi Vahid Shahidi o/a GTA Auto.

The application of the Brenner test has been applied frequently since 1983. In this case law, however, the facts found differ from those that relate to this matter.

APPLICATION OF LAW TO FACTS FOUND PROVEN:

There is no need to repeat the admissions filed by the parties and that are reproduced at the beginning of that Decision and that are very thorough. However, based upon the oral and documentary evidence presented at the hearing, the following are the facts found by the Tribunal to have been proven:

- Bruce Anderson was not in full control of the situation with regard to the used cars sale portion of his business;
- He had archaic methods of control in place;
- He had no hiring procedure in place for his personnel, nor any kind of screening procedure;
- He was not monitoring the administrative side of his business;
- During the period where the events took place, he was overwhelmed with work at his business; he showed very bad judgment during this period of time.

In the present case, there is no doubt that the perennial reason why the *Motor Vehicle Dealers Act* is in place is to ensure that the public is be protected when they decide to buy a used vehicle in the province of Ontario. It is a fact that for the majority of Ontarians, buying a motor vehicle is the second most expensive item they will buy after real estate property, and if they do not own real estate, it will be their most expensive item. This is why section 5 of the Act requires dealers and salespersons to conduct business activity with honesty, integrity, financial responsibility and in accordance with the law. In the opinion of the Tribunal, there is no doubt that the standards of conduct in relation with that section must be maintained beyond just a minimum threshold of compliance.

As stated previously the issues in the present case are as follows:

1. What were the Applicants' duties in the circumstances to ensure that Peter Rockwell had a valid salesperson licence in his possession?

2. What are the Applicants' responsibility and liability in light of the conditions contained in section 5 of the Act, to be applied in light of Peter Rockwell's misconduct who was at the time an employee of the corporate Applicant, Allright Automotive Repair Inc?

When we look at all the evidence presented at this hearing, it is obvious that the Applicants have tried to depict an individual, Peter Rockwell, as a con artist, a very good one many witnesses testified. What is also striking, is that the Applicants maintain the position that Peter Rockwell is responsible for the fiasco that took place at Allright and also in the Andersons' life. The Applicants have lost a lot of monies, they have compensated some of the victims, they have learned their lesson and they should be left alone, since they have suffered enough. At the outset, it looks like they are victims along with the eight (8) individuals who trusted their dealership and bought used vehicles from Allright Automotive Repair Inc.

However, when we look deeper into the evidence, something else is showing up.

On one side of Bruce Anderson's story, we can see a very responsible owner and manager, a very hands-on person, a person in charge of the whole operation and a person monitoring everything on a daily basis. "The buck stop with me", as Anderson stated several times during his testimony. However, when we look at the evidence as a whole, we discover another side of the story.

<u>Peter Rockwell's Registration with OMVIC</u>

The Tribunal found Mr. Anderson extremely evasive when he testified in relation with Peter Rockwell's registration. He stated that he had seen his driver's licence before hiring him and that he also saw his registration card from OMVIC somewhere at the end of February 2004.

The Applicant, Mr. Anderson, knows that Rockwell does not have a registration card for Allright Automotive Repair Inc. since he is on the verge of hiring him. He read the back of his own registration card to the Tribunal and he stated that he knew what were the conditions attached to it at that time in 2004.

There was an admission that the OMVIC card that Rockwell had in his possession was bearing the expiry date of March 2005. It does not change the opinion of the Tribunal since the card was not bearing the name of the Dealer he was close to be working for or just started to work for, in this case, Allright Automotive Repair Inc.; otherwise, Bruce Anderson would not have asked Rockwell from time to time if he had received confirmation of his change of registration with his dealership.

Furthermore, Anderson stated that he saw Rockwell's OMVIC card in February 2004 and it was valid. Given that he saw it, Anderson must have noticed that the card was registered in the name of Blossom Park, not in the name of Little Joes. Following the

explanation the Applicant gave to the Tribunal and the fact that he knew of the conditions attached to such registration card, he then knew or ought to have known that more than 60 days had elapsed since Rockwell's employment with Blossom Park was terminated. Accordingly, Rockwell's registration card was no longer valid and that he had to reapply for registration, with a form indicating, Application for registration under the *Motor Vehicle Dealers Act* – INDIVIDUAL APPLICATION.

At that point, **there is no doubt that Mr. Anderson knew that Rockwell was not properly registered** to sell used cars at his dealership and that he had to apply for at least a notice of Registration Change, since he stated that, in his opinion, Rockwell's card was still valid when he hired him and because he testified that he knew the conditions attached to such card.

In any event, at the beginning of March 2004, Anderson knew that Rockwell's registration with OMVIC was in limbo somewhere, that is was incomplete and that the situation had to be straightened out immediately.

To repeat the testimony of the Applicant:

> My style of management is that when there is a priority I put everything else on the side and I make sure personally that it is done, before stepping to the next task in line.

But it was obviously not done.

At the beginning of March 2004, Rockwell started working at Allright. The Applicant stated that he asked Rockwell, on different occasions, if he had received confirmation of the change of registration with OMVIC. Anderson received different answers during that (nine) 9-month period: he had faxed his application but could not find the receipt; he was unable to show him the returned cheque from his bank since, after his arrest, he was unable to communicate with his girlfriend, etc.

An application form dated November 24, 2004was submitted as evidence (Exhibit 7), bearing the signature of Bruce Anderson. This form was filed as the result of the inspection performed by Mrs. Cabot. It does not help the Applicant to establish what step he took between the beginning of March and the end of November 2004 (a period of (nine) 9 months).

Furthermore, the Notice of Registration Change (Exhibit 6) that was produced as evidence is signed by Anderson but is not dated. Why did he leave the space for the date blank? At first, a reasonable person may ask herself, was it because it was filed after the fact to corroborate evidence? It would make no sense since the date can be added later by anyone before submitting it as evidence. Where is this document emanating from? Logically, it is coming from Peter Rockwell. Nonetheless, it had never been completed and sent to OMVIC.

What are the conclusions that can be reached from the production of that document?

1. That Anderson did not follow up on the registration issue like he should have. It was a priority for him and he always resolves priorities first.

2. If it is not the case, it shows that Anderson was very sloppy: he signed a document without dating it.

CONCLUSION

The Tribunal does not retain the explanation provided by Bruce Anderson. His story does not constitute a credible description of what took place at his business. He firmly stated in his testimony in chief that when there is a priority, he takes care of it personally and makes sure it is resolved before he does anything else. The Tribunal must reach the conclusion that it was not a priority for Bruce Anderson to insure proper registration. It is neither acceptable nor reasonable that somebody allows a (nine) 9-month period to pass by without taking any measures to ensure that his employee has proper proof of registration on file, especially if one takes into consideration that he was warned repeatedly and knew that this employee in particular had encountered problems with a previous employer in the same field of business.

APPLICANTS' RESPONSIBILITY AND LIABILITY IN LIGHT OF PETER ROCKWELL'S MISCONDUCT

The Tribunal has established that Bruce Anderson employed an unregistered salesperson at his dealership for a period exceeding 9 months and that this employee was retained afterwards for at least 2 more months, but, apparently, not as a salesperson.

This finding must be analyzed into the greater context of what took place in 2004 for Bruce Anderson and Allright Automotive Repair Inc. to determine what responsibility and liability both entities must bear respectively.

The Tribunal is of the opinion that, in this case, what took place over a period of approximately one year is adamant to self-inflicted wounds from the part of the Applicants. Bruce Anderson has admitted in cross-examination that he had access to all the files in relation with his used cars sale business. Even though, he testified that he was managing that part of his business closely and in a reasonable manner, the Tribunal does not retain his testimony as credible. The evidence submitted has demonstrated that there was no monitoring or supervision at all on his part. The fact that there is a meeting at the end of a business day does not constitute monitoring and supervising a business or the individuals who are working in it. Even though the sales business is located in the same building, it was running independently from the repair business. In addition, the fact that the Applicant is on the premises on a daily basis, does not establish that there are supervision, monitoring, inspections and/or controls in place. To the contrary, nothing in the evidence submitted established that.

Proof of lack of controls can be found in the results of the inspection conducted by Mrs. Cabot of OMVIC on November 24 and 25, 2004. In her testimony, she was very candid when she indicated that without having to dig into the files she immediately found, on an ordinary inspection, that there were duplicates and triplicates of certain documents. Some of them were altered with whiteout and, judging by what the Tribunal has seen in Exhibit 4, it was a very poor job, as it was visible that some of them were not entirely covered with whiteout.

This is another issue that the Tribunal does not find credible evidence. The Applicant tried to portrait Peter Rockwell as one of the best con artists that he has ever seen. If he was the con artist that the witnesses have described, why was the paper trail so easily uncovered as a result of Ms. Cabot's inspection?

In addition, if control, supervision and monitoring measures had been in place as they should have been, none of this would have happened. The fact that it was not discovered before OMVIC's inspection shows that there were no control measures in place. In addition, Anderson stated that after Rockwell's marital problems in the summer of 2004, Rockwell was a changed man who he started drinking and be sloppy.

Even if the Tribunal accepts that there were no control in place between March and June 2004 (nothing wrong was discovered by OMVIC for that period), a reasonable person would have immediately changed her method of assessing an employee after what took place at the beginning of July 2004.

Anderson in his own words stated:

> Peter Rockwell started to change after his arrest. He was a changed man.

Anderson had, at that point, the opportunity to put controls in place and to start an inspection process at least as a minimal precaution, on a monthly basis. The frauds took place during the critical period of July 13 through to October 19, 2004. If the Applicants had put in place **MINIMAL** controls, supervision and monitoring processes, the fraud could have been entirely avoided or at least discovered very rapidly thus minimizing the losses to 1 or 2 vehicles. However, nothing was done.

Furthermore, when asked about the kind of business Rockwell was involved in, the Applicant stated:

> I was not familiar at all with branded vehicle. I have never been involved in this trade. I do not go to auctions. I buy my used vehicles directly from dealers.

The Tribunal considers that this was another missed opportunity to put controls, supervision and monitoring in place. The Applicant was not familiar with the process and knew nothing about it. However, again, nothing was done.

Does the past conduct of the Applicant afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty?

Bruce Anderson knew what the requirement of the law was. The Applicant has been in business for a long time. Nonetheless, by his actions or lack of actions, he does not even meet the minimum standard of what is expected of a normal individual. The Tribunal is not even considering to put the threshold at the Standards of Business Practice that OMVIC expects from his members and the Code of Ethics.

The Tribunal does not consider the testimony of Bruce Anderson as credible. He was evasive, to say the least, and tried to put the blame on everybody else around him except on himself. He even pushed the limit further to what is acceptable and understandable by an ordinary person. When it was discovered, at the time of the inspection, that Peter Rockwell had altered documents and falsified others, Bruce Anderson testified in chief that:

> I was afraid that Rockwell will sue me in civil courts, I have spoken with my brother and he told me to be very careful.

Once again he did nothing. Once more, it was not his fault but his brother's as he gave him wrong legal advice.

There is no need to address any further the authorities submitted by both counsel since the Tribunal is of the opinion that the current case stands on its own. However, the Tribunal would like to point out that the Shahidi Decision was released on March 4, 2003, approximately 3 weeks after the Shine Decision, which was released on February 11, 2003. The Tribunal is of the view that the proper test to be applied is the following:

> The question that the Tribunal must ask itself is not whether the Registrar was wrong, instead, the Tribunal is required to make an independent decision as to whether the criteria for depriving the Applicant of his license have been proven, showing no deference to the initial decision of the Registrar.

This quotation substantiates the wording of section 7(4) of the Act.

In light of all the evidence heard in this case and the above analysis, the Tribunal is of the opinion that Bruce Anderson, who is the sole officer, director and controlling mind of Allright Automotive Repair Inc., has showed a total lack of judgment throughout the events that took place in 2004. He was careless in the manner in which he has conducted business with regards to the used car segment i.e. "Allright Automotive" of his business. He had no policies and procedures in place, neither for hiring, monitoring nor for administrative purposes, i.e. monthly internal controls on bills of sales etc. In fact, it was a total "laisser faire" (non-interference) attitude. The money was coming in and everything was fine.

He chose to ignore every warning, all the red lights. His explanation was:

> Everybody is innocent until proven guilty

Most of the events that took place could have been prevented, but then again, nothing was done. Accordingly, the Applicants have nobody else to blame but themselves for the losses that they have encountered and the Tribunal cannot see how the Applicants can continue to do business having regard to the event that took place during the year 2004.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal to revoke the registrations of Allright Automotive Repair Inc. and Bruce Anderson as motor Dealer and salesperson respectively.

LICENCE APPEAL TRIBUNAL

_____

DANIEL LAURIN
Vice-Chair

Released: April 27, 2006

Filename: 3186.Allright.mvda.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.

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

SREEKUMARAN NAIR

IN THE MATTER OF
SREEKUMARAN NAIR

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 3, 2006

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

SREEKUMARAN NAIR

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sreekumaran Nair, 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 13, 2006

FILE NAME: 3356.mvda.Nair.consent order.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 approximately two weeks time. The decision will also be available on Quicklaw at a later date.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

RALPH LINO LUCCHESE O/A PERFORMANCE CENTRE AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: RALPH LINO LUCCHESE, representing himself

A. MICHAEL ROTHE, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF PRE-HEARING: April 11, 2006 Toronto

ORDER

Following attendances on April 11, 2006 at a pre-hearing before this Tribunal by Ralph Lino Lucchese, appearing on his own behalf (the "Applicant) and A. Michael Rothe, Counsel, appearing on behalf of the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on Monday, May 29, 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. There was no resolution of the issues in this matter.

3. The Parties shall fully and in a timely manner comply with the disclosure requirements under Rule 6 of the Rules of Practice of this Tribunal.

4. The Parties were not able to determine the number of witnesses that will testify at the hearing.

5. The attention of the Applicant was directed to pages 25 and 26 of the Tribunal's Rules of Practice by virtue of the fact that Dean D. Paquette is no longer acting for the Applicant in this matter. The Applicant was accordingly informed that if he does intend to have Counsel represent him at the hearing he must bring to his proposed Counsel's attention, prior to that Counsel accepting his retainer, that Counsel shall ensure that he is in fact available to appear before the Tribunal on May 29, 2006 and that he will have sufficient time within which to prepare to adequately represent the Applicant.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: April 12, 2006

FILE NAME: 3326.mvda.Ralph Lino Lucchese o/a Performance Centre Auto Sales.prehrg order.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.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

PAUL BUDAY O/A BUDAY AUTO SALES AND GLEN BUDAY

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GLEN BUDAY, representing himself and as Agent for Paul Buday

AVIVA R. HARARI, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF PRE-HEARING: April 11, 2006 *By teleconference*

ORDER

Following attendances on April 11, 2006 at a prehearing before this Tribunal by teleconference of Glen Buday who appeared on his own behalf and as Agent on behalf of Paul Buday (the "Applicants") and Aviva R. Harari, Counsel, who appeared on behalf of the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on June 20, 2006, at the Valhalla Inn, 1 Valhalla Inn Road, Board Room 2, Thunder Bay, Ontario and to continue if necessary on June 21, 2006, at the above-mentioned address;

1. The Parties to the hearing are the Applicants and the Registrar.

2. There was no resolution of any of the issues in this matter.

3. In sofar as the allegation in paragraph 8 of the Registrar's Proposal is concerned, Counsel for the Registrar shall by no later than April 28, 2006, furnish the Applicants with full written particulars of the alleged indebtness of Paul Buday to the Motor Vehicle Dealers Compensation Fund which particulars shall include copies of documents the Registrar intends to rely on at the hearing of this matter. By no later than May 19, 2006, the Applicants shall furnish written full particulars

of their defence to the Registrar's claim as stated in paragraph 8 of his Proposal and shall include copies of all documents the Applicant's intend to rely on at the hearing of this matter.

4. Without derogating from what is stated in paragraph 3 above and in addition to such disclosure as is contemplated in paragraph 3 above, the Parties shall make full and timely disclosure as required by in Rule 6 of the Rules of Practice of the Tribunal.

5. Glen Buday advised the Tribunal that the dates of the proposed hearing, namely June 20 and 21, 2006 are suitable to the Applicants as well as the venue in Thunder Bay. The Tribunal accordingly advised Glen Buday that the hearing on those dates will take place on a peremptory basis against both the Registrar and the Applicants. The Tribunal explained further to Glen Buday the Tribunal's Practice Direction on Adjournments more fully stated on pages 25 and 26 of the Tribunal's Rules of Practice. In particular, and in view of Glen Buday advising the Tribunal at the prehearing that the Applicants have as yet not retained Counsel but do intend to do so in the immediate future, the Tribunal drew to his attention that it is the Applicants' responsibility to ensure that whoever is retained by them as Counsel to represent them at the hearing is available on the scheduled hearing dates of June 20 and 21, 2006 and that the Applicants should further ensure that if the proposed Counsel is not available on the above dates and has insufficient time within which to prepare, they should not retain such Counsel.

6. The Tribunal further informed the Parties that the granting or refusal of an adjournment request, even if such request has been consented to by the Parties, is not binding on the Tribunal.

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: April 12, 2006

FILE NAME: 3323.mvda.buday.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ANTONI KIEZIK O/A HYPERSTORM AUTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MARK MAGER, Agent, representing Antoni Kiezik o/a Hyperstorm Auto

AVIVA R. HARARI, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act*

DATE OF HEARING: March 27, 2006 London

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal (the "Proposal") dated October 31, 2005 issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of Antoni Kiezik o/a Hyperstorm Auto (the "Applicant") as a motor vehicle dealer under the provisions of the Act.

THE ISSUES:

The Registrar bases his Proposal under section 5. (1) (b) and (c) of the Act as read with section 6. (2) of the Act which read as follows:

> 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; 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, …

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

In support of the Proposal to revoke the Registrar furnished the following particulars:

1. On or about July 14, 1999 Antoni Kiezik o/a Hyperstorm Auto (the "Dealer), was registered as a motor vehicle dealer.

2. On or about September 28, 1999 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was no longer operating from his registered premises.

3. On or about May 16, 2000 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was not making proper disclosure on his bills of sale regarding insurance write-off's and the distance traveled.

4. On or about February 28, 2001 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was no longer operating from his registered premises.

5. On or about May 5, 2001 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was no longer operating from his registered premises.

6. On or about September 3, 2003 a representative of the Registrar attended at the Dealer's registered premises and found that the Dealer was no longer operating from his registered premises.

7. On or about October 3, 2003 a representative of the Registrar attended at the Dealer's registered premises. The Dealer's books and records were not available for inspection. The importance of keeping books and records at the registered premises was explained to the Dealer at that time.

8. On or about October 16, 2003 a representative of the Registrar attended at the Dealer's registered premises. The importance of disclosure was explained to the Dealer at that time.

9. On or about September 13, 2004 a representative of the Registrar attended at the Dealer's registered premises. The following discrepancies were discovered:

    a. On or about March 17, 2004 the Dealer purchased a 1992 Ford Aerostar (VIN IFMDA31X0NZA89773). At the time of purchase, the vehicle was an insurance write-off. On or about April 23, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the vehicle was an insurance write-off.

b. On or about April 14, 2004 the Dealer purchased a 1997 Ford Aerostar (VIN 1FMDA31X6VZC06336). At the time of purchase, the vehicle was an insurance write-off. On or about May 19, 2004 the Dealer sold the vehicle to a consumer without disclosing that the vehicle was an insurance write-off.

c. On or about April 28, 2004 the Dealer purchased a 1995 Mercury Villager (VIN 4M2DV11W7SDJ19164). At the time of purchase, the vehicle was an insurance write-off. On or about May 19, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the vehicle was an insurance write-off.

d. On or about May 26, 2004 the Dealer purchased a 1995 Plymouth Voyager (VIN 2P4GH2536SR400770). At the time of purchase, the vehicle was an insurance write-off. On or about June 18, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the vehicle was an insurance write-off.

e. On or about May 26, 2004 the Dealer purchased a 1994 Ford Ranger (VIN 1FTCR10A6RPA16094). At the time of purchase, the vehicle was branded as salvage. On or about July 11, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the vehicle was branded as salvage.

f. On or about June 10, 2004 the Dealer purchased a 1994 Ford Ranger (VIN 1FTCR10U3RPA63349). At the time of purchase, the distance traveled was unknown and the vehicle was an insurance write-off. On or about July 19, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the true distance travelled was unknown and that the vehicle was an insurance write-off.

g. On or about June 24, 2004 the Dealer purchased a 1996 Volkswagen Golf (VIN 3VWHD1HXTM126830). At the time of purchase, the distance traveled was unknown and the vehicle was an insurance write-off. On or about July 2, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the distance travelled was unknown and that the vehicle was an insurance write-off.

h. On or about July 21, 2004 the Dealer purchased a 2001 Mercedes (VIN WDBRF61J91F022673). At the time of purchase, the distance traveled was unknown and the vehicle was branded as salvage. On or about July 21, 2004 the Dealer sold the vehicle to a consumer without disclosing on the bill of sale that the distance travelled was unknown.

i. On or about July 21, 2004 the Dealer purchased a 2000 Chevrolet (VIN 1G1 ND52JSYG159627). At the time of purchase the distance traveled was unknown and the vehicle was an insurance write-off. On or about July 21, 2004 the Dealer sold the vehicle to a (*sic)*

By Notice of Further and Other Particulars dated November 18, 2005 the Registrar added the following further particulars as follows:

1. Paragraph 9 subparagraph "i" of the Notice of Proposal dated October 31, 2005 is amended by adding the following:

   i. On or about July 21, 2004 the Dealer purchased a 2000 Chevrolet (VIN 1G1ND52JSYG159627). At the time of purchase the distance traveled was unknown and the vehicle was an insurance write-off. On or about July 21, 2004 the Dealer sold the vehicle to a ***consumer without disclosing on the bill of sale that the distance travelled was unknown and that the vehicle was an insurance write-off.***

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of Ms. Tracy Recoskie, Consumer #1, Consumer #2, Consumer #3, Ms. Galynne Ethier and Ms. Mary Jane South. The evidence introduced by the Applicant consisted solely of the Applicant. In addition the Registrar introduced evidence by way of a Book of Documents (Exhibit #4).

Testimony of Tracy Recoskie

Recoskie testified that she is employed by Impact Auto Auctions ("Impact") as a team leader. She explained that Impact deals with auctions of automobiles that are considered salvage vehicles that have been written off by the insurer of the vehicle. The purchasers of the vehicles sold at Impact auctions are solely motor vehicle dealers and the sellers are only insurance companies. Recoskie recalls having seen the Applicant at Impact auctions.

Recoskie went on to state that a 1992 Ford Aerostar vehicle went through auction at Impact (Item 9.(a) of the particulars to the Proposal). This vehicle was sold on auction on behalf of its insurer Royal and Sun Alliance Insurance Co. On the vehicle being delivered to Impact it was inspected and the visible damage noted which was to the vehicle's front and left front fender. At auction on March 17, 2004 the vehicle was sold to the Applicant for $225.00. The vehicle's insurer had furnished Impact with its completed "automobile proof of loss" form in which the damage is listed at $3,480.00. The vehicle was considered beyond economical repair and the insurer therefore considered it to be a total loss (Exhibit #4, tab 18).

Recoskie went on to testify in regard to a second vehicle sold at an Impact auction and this related to a further 1997 Ford Aerostar vehicle which was sold on behalf of its insurer, State Farm Insurance Company (Item 9.(b) of the particulars to the Proposal). On delivery of the vehicle to Impact it was noted by Impact that the damage to the vehicle was to its rear end, both rear fenders as well as the front and left front fender. On auction by Impact on April 14, 2004 this vehicle was purchased by the Applicant for $400.00 (Exhibit #4, tab 21).

A further vehicle dealt with by Recoskie dealt with a 1995 Mercury Villager which went through an Impact auction on April 28, 2004 and was sold at that auction to the Applicant, the seller being State Farm Insurance Company. The selling price on auction was $950.00 and the purchaser was the Applicant (Item 9.(c) of the particulars to the Proposal) (Exhibit #4, tab 24).

The next vehicle referred to by Recoskie was a 1995 Plymouth Voyager which was sold at an Impact auction on May 26, 2004 on behalf of State Farm Insurance Company as seller. The purchase price of the vehicle was $650.00 and the purchaser was the Applicant (Item 9.(d) of the particulars to the Proposal) (Exhibit #4, tab 28).

A further vehicle dealt with by Recoskie was a 1994 Ford Ranger which also went through an Impact auction on May 26, 2004 the seller of the vehicle being State Farm Insurance Company. The vehicle realized on auction the sum of $700.00 the purchaser being the Applicant (Item 9.(e) of the particulars to the Proposal) (Exhibit #4, tab 31).

A further 1994 Ford Ranger, according to Recoskie, went through an Impact auction on June 10, 2004 when it was sold to the Applicant for $1,500.00 by TD Home and Auto Insurance Company. The insurer's report sent to Impact prior to auction and which report dealt with the damages sustained by the vehicle, indicated the vehicle to be a total loss in the insurer's opinion with repair costs totalling $4,444.31. Recoskie stated that the fact that the vehicle's insurer had sent the vehicle for sale through an Impact auction in itself indicates the total loss nature of the vehicle and that it was uneconomic to repair (Item 9.(f) of the particulars to the Proposal) (Exhibit #4, tab 34).

Recoskie testified further that a 1996 Volkswagen Golf GTI went through an Impact auction on June 24, 2004 at the instance of Complete Auto Salvage Management. The latter concern manages sales of vehicles on behalf of insurers who seek the best possible deal when disposing of vehicles. Again Recoskie emphasized that the fact this vehicle went through Impact indicated it was considered a total loss by its insurer Co-operators General Insurance Company. She also referred the Tribunal to the Ministry of Transportation's record of ownership of this vehicle which indicates this vehicle was owned by one Billings until December 18, 2003 when title passed to Co-operators General Insurance Company who in turn passed title to the Applicant on June 30, 2004 (Item 9.(g) of the particulars to the Proposal).

Recoskie went on to state that when this vehicle was delivered to Impact prior to auction and upon its inspection by Impact it was noted that the odometer was digital and its true kilometres were unknown as there was no reading due probably to there being no operating battery in the vehicle (Exhibit #4, tabs 37 and 38).

Recoskie then dealt with a 2000 Chev Malibu vehicle which also was sold through an Impact auction on behalf of Royal and Sun Alliance Insurance Co. Upon the vehicle's auction on July 21, 2004 it was purchased by the Applicant for $3,200.00. The Tribunal was also referred to the insurer's proof of loss form given to Impact prior to auction indicating that the total loss or damage to the vehicle was $11,471.25 which was in excess of its value (Exhibit #4, tab 43).

Testimony of Consumer #1

Consumer #1 testified that she purchased a 1995 Plymouth Voyager vehicle from the Applicant on June 18, 2004 when she dealt with the Applicant personally. Nothing was told to Consumer #1 by the Applicant concerning the vehicle, which "appeared to be in good shape". She noticed no damage to the vehicle and she was not told the vehicle had been in an accident or that it was an insurance write-off. If she had been told she would not have purchased the vehicle.

In cross-examination Consumer #1 stated she drove the vehicle prior to concluding the purchase. After the purchase she found that a door of the vehicle had been replaced. Furthermore, on the day after taking possession of the vehicle she noticed oil leaking from the engine of the vehicle which fact she brought to the Applicant's notice. The Applicant immediately replaced a gasket, which cured the leak (Item 9.(d) of the particulars to the Proposal) (Exhibit #4, tabs 26 to 29).

Testimony of Consumer #2

Consumer #2 testified that he purchased a 1997 Ford Aerostar from the Applicant on May 19, 2004. He was not able to say who he dealt with when purchasing the vehicle but was not told anything regarding the history of the vehicle. If he had known that the vehicle was an insurance write-off he would not have purchased it. He did say, under cross-examination, that he was "happy" with the purchase and went on to say he did not enquire at the time of purchase regarding the vehicle's condition but did say in regard to the vehicle that "it didn't cost too much" (Item 9.(b) of the particulars to the Proposal) (Exhibit #4, tabs 19 to 22).

Testimony of Consumer #3

Consumer #3 stated in her testimony that she purchased a 1996 Volkswagen Golf GTI from the Applicant on July 2, 2004 under a bill of sale. She stated that she was not interested in the history of the vehicle. She liked the vehicle and therefore bought it.

She noted the odometer reading when she purchased the vehicle. No other information was given to her regarding the odometer (Item 9.(g) of the particulars to the Proposal) (Exhibit #4, tabs 36 to 39).

Testimony of Galynne Ethier

Ethier testified that she is employed by the Ontario Motor Vehicle Industry Council ("OMVIC") as an inspector. In the course of her employment with OMVIC, she attempted to interview the Applicant on March 3, 2001 but was not able to speak with him as the door to the premises were locked.

After further unsuccessful attempts to speak with the Applicant Ethier eventually managed to interview him. During the interview she was satisfied that the Applicant knew and understood what was being discussed at the interview and she had no problems in communicating with him.

This interview took place on October 16, 2003. She inspected the Applicant's premises and found them to be in order. She inspected the Applicant's documentation and found it to be in order and she noted the Applicant was in compliance with the Act. She did however note from her inspection of documents that there were about some 5 bills of sale where the Applicant had sold vehicles with the note "as is" entered on those bills of sale. Ethier pointed out to the Applicant that the words "as is" are not proper and that he should not continue to use those words on his bills of sale.

On September 23, 2004 Ethier once again attended at the Applicant's premises and again conducted a routine inspection and viewed documents of the Applicant's relative to sales of vehicles. She verbally communicated her observations to the Applicant and reduced her observations to writing during the interview (Exhibit #4, tab 15). She noticed the words "as is" without the full-required disclosure and declaration of the vehicles' conditions as required by OMVIC's Standards of Business Practice (section 2.5.2). She removed, for copying purposes, some 10 offending bills of sale where the words "as is" were used. She also noted that the Applicant was not in compliance with declarations required on bills of sale insofar as disclosure regarding the distance travelled by vehicles were concerned as well as whether the vehicles were salvage, insurance write-offs and accident repairs. She stated that she discussed all the concerns in detail with the Applicant and before her departure from the Applicant's premises she completed and left a copy with the Applicant of her inspection findings, which written findings stated as follows:

> dealer must disclose all material fact in writing on the bill of sale including but not limited to salvage, insurance write off and accident and repair.
>
> dealer must use the proper "as is" declaration as per OMVIC's Standards of Business Practice section 2.5.2 dealer has declaration on bill of sale.
>
> dealer must use the proper true mileage unknown disclosure as per OMVIC's Standards of Business Practice section 2.2. dealer has disclosure on bill of sale.
>
> (Exhibit #4, tab 15)

The Applicant acknowledged by his signature that he received a copy of the above findings.

Ethier then testified as follows regarding the documents she removed from the Applicant and which documents were disclosed by the Registrar and became exhibits at the hearing.

1. <u>Exhibit #4, tab 39 – 2001 Mercedes vehicle (paragraph 9.(h) on Proposal)</u>

Ethier stated that the Impact bill of sale, given to the Applicant upon purchase indicated this vehicle was sold with the notation alongside the "Odometer" was "T.M.U." being the true mileage was unknown.

On sale by the Applicant to his purchaser the vehicle's "distance travelled" stated to be "72,030".

2. Exhibit #4, tab 42 – 2000 Chev Malibu vehicle

Ethier stated that the Impact bill of sale given to the Applicant stated that this vehicle was sold with a notation that the vehicle's true mileage was unknown, "TMU", while the vehicle was subsequently sold by the Applicant with the bill of sale noting that the vehicle had a distance travelled of 107,747 kms.

3. Exhibit #4, tab 36 – 1996 Volkswagen vehicle

Ethier stated that the Impact bill of sale to the Applicant had the following endorsement stamped on it – "The true distance travelled is unknown but may be in excess of which is recorded travelled". Alongside this statement were printed the words "Odometer: 124,000 km".

On the bill of sale from the Applicant to his purchaser the words "as is" were written and which is in contravention of the Standards of Business Practice of OMVIC.

4. Exhibit #4, tab 33 – 1994 Ford Ranger vehicle

Again Ethier pointed out that the Impact bill of sale given to the Applicant was stamped with the same endorsement as to distance travelled as in the previous noted vehicle.

On sale by the Applicant the latter's bill of sale did not disclose that the vehicle was accident damaged nor did it contain the disclaimer regarding the true distance travelled by the vehicle.

5. Exhibit #4, tab 26 – 1995 Plymouth Voyager vehicle

Ethier stated that there was no disclosure on the Applicant's bill of sale when the Applicant sold this vehicle despite the vehicle having been purchased at Impact which dealt with only insurance write-offs or damaged vehicles.

6. Exhibit #4, tab 30 – 1994 Ford Ranger vehicle

Ethier stated that on the Impact bill of sale of this vehicle to the Applicant there was the printed notation that the vehicle had been branded as "salvage". This fact was not stated on the Applicant's bill of sale to his purchaser.

7. Exhibit #4, tab 19 – 1997 Ford Aerostar vehicle

This vehicle, as with all other vehicles in this matter, was purchased by the Applicant under a bill of sale from Impact. Impact only sells insurance write-offs or accident damaged vehicles. There was no statement on the Applicant's subsequent bill of sale to his purchaser as to the vehicle's condition as required by section 2.5.1 of the Standards of Business Practice.

8. Exhibit #4, tab 23 – 1995 Mercury Villager vehicle

This vehicle, according to Ethier, was purchased by the Applicant from Impact at auction. Once again on the subsequent sale of this vehicle by the Applicant he used the words "as is" on the bill of sale. This was contrary to the disclosure requirements under section 2.5 of OMVIC's Standards of Business Practice.

9. Exhibit #4, tab 16 – 1992 Ford Aerostar vehicle

Ethier stated that this vehicle was sold at an Impact auction to the Applicant and was subsequently sold by the Applicant without any disclosure as to the vehicle's condition. This was, according to Ethier, a contravention of section 2.5 of the Standards of Business Practice as the Applicant, as with all motor vehicle dealers, knows that vehicles sold on auction by Impact are insurance write-offs or accident damaged vehicles and he should have disclosed this to all his purchasers.

Testimony of Mary Jane South

South testified that she is currently the Deputy Registrar under the Act and has held this position since 1997. She is employed by OMVIC, a non-profit organization, empowered to administer the Act which is consumer legislation. She stated that she is familiar with the Proposal and noted that the Applicant was registered as a dealer under the Act at all relevant times. He is exempt from registration as a salesperson as he is a dealer.

South reviewed the Proposal and stated that what is at issue in this matter is the question of non-disclosure. All vehicles in this matter were insurance write-offs and this fact was required to be disclosed by a dealer when selling such vehicle to a consumer. If a vehicle had been involved in an accident or written off and then repaired it must be so disclosed by a dealer when he sells that vehicle. All material damage to a vehicle must be disclosed by the dealer.

South went on to state that in terms of section 16.(2) (o) of Regulation 801 to the Act, a bill of sale of a used vehicle "shall show the distance travelled by the vehicle at the time of sale".

South pointed out to the Tribunal, as an example of the Applicant's failure to make disclosure, that in the sale of the Chev Malibu vehicle (Exhibit #4, tab 42) that vehicle was purchased by the Applicant through Impact at auction with the words "TMU" clearly noted on the auction bill of sale. On resale by the Applicant not only was this fact not disclosed to the purchaser but the fact that the seller of the vehicle on auction was an insurance company.

Testimony of Antoni Kiezik (the "Applicant")

In his testimony the Applicant stated that purchasers of vehicles have information regarding "rebuilt" vehicles as such information is in the Ministry of Transportation's records which are accessible to the public.

He stated that his failure to provide disclosure to his purchasers where the vehicle he sold to them were insurance write-offs were mistakes on his part. He further stated that he told all purchasers that if they experienced problems with the vehicle which he sold to them they should come back to him and he would help them with their problems. He also stated that he understood what he was required to disclose on bills of sale he entered into with purchasers of vehicles.

In cross-examination he stated that he is the only person at the dealership and he is the only person who buys and sells vehicles for the dealership.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal.

1. The Applicant was registered as a motor vehicle dealer in or about July 1999 and carries on business under the name of Hyperstorm Auto.

2. On September 13, 2004, inspector Galynne Ethier, there and then employed by OMVIC, attended at the Applicant's business premises.

3. Ethier, pursuant to her inspection, removed from the Applicant's records, for the purposes of copying, 10 files relating to transactions handled by the Applicant in the course of his business. These files contained the bills of sale of vehicles purchased by the Applicant from Impact and bills of sale of such vehicles which Applicant subsequently sold to his purchaser.

4. Each and every one of the 10 transactions more fully referred to in the 10 files removed by Ethier were personally handled by the Applicant in that the purchase of the vehicles from Impact and the subsequent sale of the vehicles by the Applicant were personally effected by the Applicant representing the dealership.

5. The 10 vehicles purchased by the Applicant were all purchased at an auction conducted by Impact whose business, to the knowledge of the Applicant, was to auction salvage vehicles on behalf of insurance companies.

6. The vehicles sold by insurers at auction(s) conducted by Impact are salvage vehicles as contemplated and defined in the OMVIC's Standards of Business Practice.

7. The aforesaid Standards of Business Practice have been issued by OMVIC to all dealers under the Act including the Applicant.

8. Upon the sale of the vehicles set forth in paragraphs 9 and 10 hereunder the Applicant failed to disclose on the bills of sale that the vehicles were either salvage vehicles within the meaning of the definition of "salvage" as contained in OMVIC's Standards of Business Practice and/or failed to disclose the true mileage or distance travelled by certain vehicles.

9. The following vehicles were sold to the Applicant at an Impact auction and to the knowledge of the Applicant were salvage vehicles as defined in the Standards of Business Practice issued by OMVIC to all motor vehicle dealers including the Applicant.

Vehicle	VIN # (four last digits)
1992 Ford Aerostar	9773
1997 Ford Aerostar	6336
1995 Mercury Villager	9164
1995 Plymouth Voyager	0770
1994 Ford Ranger	6094
1994 Ford Ranger	3349
1996 Volkswagen Golf GTI	6830
2000 Chev Malibu	9627

10. The following vehicles were sold to the Applicant at Impact auctions with the notation on the Impact bill of sale that the vehicles' true mileage was unknown.

Vehicle	VIN # (four last digits)
2000 Chev Malibu	9627
1996 Volkswagen Golf GTI	6830
1994 Ford Ranger	3349

The Applicant failed to disclose in the subsequent bills of sale relating to the above vehicles that the true mileage of such vehicles was unknown.

THE LAW:

The *Motor Vehicle Dealers Act* states as follows:

> 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;
>
> 6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Regulation 801 to the *Motor Vehicle Dealers Act* states:

> 16.(2) Where a used motor vehicle is sold, the sales or purchase order shall show,
>
> (o) the distance travelled by the vehicle at the time of sale;

OMVIC's Standards of Business Practice issued December 2000 states:

> Salvage means a vehicle, which is damaged by collision, fire, flood, accident, trespass or other to the extent that the cost of repairing the vehicle for legal operation on a highway exceeds its fair market value immediately prior to the damage being incurred.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of the Applicant ought to be revoked based upon activities of the Applicant having been carried on in contravention of the Act, its Regulations and OMVIC's Standards of Business Practice and which past conduct affords reasonable grounds for the belief that the Applicant will not carry on business in compliance with section 5 of the Act.

In the decision of *Brenner* [1983] O.J. No. 1017 a Divisional Court decision of Southey J. it states:

> 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 matter of *Shine Car Sales and Omar Hassan Rahim* a decision of the Divisional Court released on February 19, 2003 Lane J. stated, in referring to the *Brenner* decision, that while the latter decision remains the proper test it must be read carefully and went on to state that:

> 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.

There are two main issues for determination in this matter and they are analysed hereunder.

<u>First Issue: Failure by the Applicant to disclose that vehicles being sold by him were insurance write-offs/previously damaged vehicles</u>

The testimony of Tracy Recoskie of Impact was clear and unambiguous and was not contested by the Applicant. Recoskie stated that Impact carries on business as auctioneers where vehicles are sold on behalf of insurance companies, such sales being only to registered motor vehicle dealers. Insurers use Impact to dispose of salvage vehicles by way of auction.

The vehicles sold at an Impact auction are insurance write-offs or “salvage”, to use the term used in the trade, and the only buyers permitted at an Impact auction are registered motor vehicle dealers. A “salvage” vehicle means a damaged vehicle to the extent that the cost of repairing the vehicle for legal operation exceeds its fair market value immediately prior to the damage being incurred. This is clearly enunciated in the Standards of Business Practice.

All the vehicles sold at an Impact auction to the Applicant were salvage vehicles and it was not denied by the Applicant that he knew this as a fact as he had attended personally at the auctions when he purchased the vehicles and had had the opportunity of viewing the vehicles and of observing their damaged condition. He received detailed bills of sale upon having purchased the vehicles and in each bill of sale, it was clearly stated the seller was an insurance company. In addition, the testimony of Recoskie made it clear that when the vehicles were received from the various insurance companies for auction purposes, the damage was noted in detail by Impact and a copy of the document identifying the damages was handed to the Applicant at the time of the auction.

It was clear to the Tribunal that the Applicant was fully informed of the damaged condition of the vehicles at the time of purchase and that the damages were in each case severe and material and not of some minor nature. Additionally, the Applicant was a registered dealer and he knew or ought to have known that only severely damaged or “salvage” vehicles were processed for sale at Impact auctions.

The testimony of OMVIC inspector Ethier and the notes of her 2004 inspection clearly indicate that the Applicant had been warned of his failure to make full and proper disclosure on bills of sale and that this failure should be corrected. Despite this warning, the Applicant continued to fail to make full disclosure on all bills of sale as to the condition of the vehicles he was selling. Consumer #1 and Consumer #2 both testified that it was not brought to their notice by the Applicant when they purchased their vehicles that such vehicles had been damaged in an accident or were insurance write-offs, and they further stated that if they had been told of the true position, they would not have purchased the vehicles.

The Tribunal finds that the Applicant, well knowing that he was selling accident damaged vehicles, did not bring this material and highly relevant fact to the purchasers’ notice. He clearly misrepresented material facts by failing, as was his undoubted duty, to disclose the true facts. His conduct, which was repeated time and again despite OMVIC’s clear warning to him, was dishonest and lacking in integrity. This course of past misconduct, by the very nature of its repetitious character, affords reasonable grounds for belief that the Applicant will not in the future carry on business with integrity and honesty and in accordance with law.

<u>Second Issue: Failure to disclose true distance travelled</u>

The evidence, not disputed by the Applicant, shows that in the sale of three vehicles by the Applicant to members of the public, he did not disclose the fact that the true mileage of those vehicles was unknown.

The Impact bills of sale in respect of these three vehicles makes it obvious that the mileage of the vehicle was not known at the time of sale by Impact to the Applicant, yet the Applicant chose not to disclose this fact to the vehicles' purchasers. This is a material and highly relevant non-disclosure, which withheld important information from purchasers. The non-disclosure deprived the purchasers of making an informed decision whether or not to purchase and if to purchase at what price.

Here again, the Tribunal finds the conduct of the Applicant to be without integrity and dishonest and in contravention of section 16. (o) of Regulation 801 to the Act. The Tribunal also finds that in the three proven failures by the Applicant to disclose the true position as to the vehicles' distance travelled such failure constitutes misconduct and by the repetitious and recent nature shows the likelihood of the Applicant repeating such misconduct in the future.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7. (4) of the *Motor Vehicle Dealers Act* orders and directs the Registrar to carry out the Proposal to revoke the dealer's registration of Antoni Kiezik o/a Hyperstorm Auto.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel, Vice-Chair

RELEASED: April 13, 2006

FILE NAME: 3258.mvda.Antoni Kiezik o/a Hyperstorm Auto.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

Ontario

BRIJ LAL BADHAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Presiding Member

APPEARANCES: BRIJ LAL BADHAN, Applicant

A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF HEARING: February 24, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act" or the "MVDA"). The Proposal dated July 21, 2005, (Exhibit 1) sets out the Registrar's reasons for refusing to register Brij Lal Badhan as follows:

> The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Brij Lal Badhan under the *Motor Vehicle Dealers Act.*

The Particulars upon which the Registrar relies are stated in the Proposal dated July 21, 2005, as follows:

1. Brij Lal Badhan (the "Applicant") was first registered as a salesperson on or about May 4, 1982 and was a registered salesperson for Provincial Used Car Sales Ltd. until March 5, 2001.

2. Provincial Used Car Sales Ltd. was first registered as a motor vehicle dealer on or about March 4, 1997. Provincial Used Car Sales Ltd.'s registration lapsed on March 5, 2001. The Dealer subsequently submitted an application for reinstatement.

3. Profit Auto Sales Ltd. applied for registration as a motor vehicle dealer on or about October 30, 2000.

4. The Applicant was the sole Officer/Director of Profit Auto Sales Ltd.

5. On or about May 15, 2001 the Registrar proposed to refuse the registrations of Profit Auto Sales Ltd. and Provincial Used Car Sales Ltd. as motor vehicle dealers and to further propose to refuse the registration of the Applicant as a motor vehicle salesperson. A copy of said proposal attached hereto as schedule "A".

6. On or about July 21, 2001 the Registrar issued Further and Other Particulars attaching further information to the Proposal to Refuse mentioned above. A copy of said Further and Other Particulars attached hereto as schedule "B".

7. On or about November 14, 2001 the Applicant entered into Terms and Conditions (the "Order") issued by the Licence appeal (sic) Tribunal. Provincial Used Car Sales Ltd. and Profit Auto Sales Ltd. were refused by said Order. A copy of said "Order" attached hereto as schedule "C".

8. The Applicant submitted an application for registration on or about May 24, 2005.

9. On the application to become a registered salesperson question 6 asks:

   "Are you engaged now or have you been involved in personal bankruptcy proceedings? If yes, attach a copy of the Assignment in Bankruptcy or proof of discharge, and provide explanation of circumstances leading to bankruptcy.

   The Applicant answered, "No".

10. The Applicant declared bankruptcy on or about March 31, 1994. The Applicant was subsequently discharged on or about December 31, 1994.

11. On the application to become a registered salesperson question 9 asks:

    "Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary)."

    The Applicant answered "No".

12. On or about November 23, 2000 the Applicant was convicted under the Act of odometer tampering and selling off premise (sic).

The Registrar also relies on the particulars, set out in The Notice of Further and Other Particulars dated December 21, 2005, as follows:

1. The Applicant has been involved in the process of buying and/or selling motor vehicles without the benefit of registration.

EXHIBITS:

Exhibit 1 – Notice of Proposal to Refuse Registration, dated July 21, 2005;

Exhibit 2 – Notice of Appeal received by the Tribunal on September 1, 2005;

Exhibit 3 – Respondent's Book of Documents;

Exhibit 4 – Notice of Further and Other Particulars dated December 21st, 2005.

PRELIMINARY MATTERS

The Applicant was accompanied to the hearing by a friend and consultant who, at the outset of the hearing, requested an adjournment of the matter on behalf of the Applicant. The reason for the request was that the Applicant had not yet retained counsel.

The Notice of Appeal in this matter was received September 1, 2005. This matter was originally scheduled for January 9, 2006. The Applicant, through legal counsel, requested an adjournment in late December on the basis that there had been a death in the family and the Applicant had to travel to India. That adjournment was granted. The Applicant and his legal representative were each sent a copy of the Order issued by this Tribunal January 5, 2006, confirming that the hearing had been adjourned peremptory against all parties to February 24th, 2006.

When asked why he had not arranged representation the Applicant's friend stated that he (the Applicant) had approached a lawyer but he did not do this kind of work. He went on to say that the Applicant had been ill when he got back from India. The Applicant further added that he did not have money to pay a lawyer. There was no explanation as to what happened to previous counsel.

The Registrar made no submissions on this matter.

The Applicant had 6 months to arrange representation. Applicants are advised in the Tribunal's information brochure, (which is attached to the Application for Appeal and which this Applicant acknowledged he had read, in writing, in his application), that adjournments are rarely granted and only on very specific and exceptional grounds. This Applicant has already been granted one adjournment and it was made clear to the Applicant and his legal representative in writing that it would be peremptory against all parties.

There is an obligation on applicants to take reasonable steps to be prepared to proceed. After hearing the Applicant's submissions the Tribunal formed the opinion that the Applicant simply had not been diligent in arranging representation and that he had been given more than fair opportunity and warning to do so. A further adjournment was denied and the matter was ordered to proceed.

EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Louise Cohn.

The evidence presented by the Applicant consisted of the oral testimony of the Applicant and his friend/consultant, Witness #1.

Louise Cohn

The witness testified that she currently holds the position of Manager of Inspections with OMVIC and has been in this position since 1997.

Ms. Cohn reviewed the current Proposal to Refuse Registration (Exhibit 1) and the attached schedules A, B, and C. Schedule 'A' is a Notice of Proposal to Refuse Registration of the Applicant as a salesperson, (and the two corporate entities he operated at that time as dealers), dated May 14th, 2001. The Applicant had been registered as a salesperson but that registration had lapsed and the Proposal dated May 2001 related to his application for reinstatement. The basis for the refusal was that the Applicant had been charged with odometer tampering. A further basis for the refusal (set out in Schedule "B", a Notice of Further Particulars), was the Applicant's failure to disclose his bankruptcy in March of 1994 as required by the application for registration

The Applicant appealed this Proposal to this Tribunal and pursuant to an Order dated November 14, 2001, the Applicant was allowed to keep his licence as a salesperson on the conditions set out in Schedule 'C' which included, among other things that:

> 4 b) the Registrant will only purchase and sell motor vehicles on behalf of the motor vehicle dealer to whom he is registered to work for,

and

> 4 e) the Registrant shall not invite the public to buy or sell a vehicle at any other place other than the registered premises of the motor vehicle dealer to whom he is registered to work for.

These terms and conditions were agreed to by the Applicant.

Ms. Cohn reviewed the corporate inquires for Provincial Used Car Sales Ltd. and Profit Auto Sales Ltd., both dated December 22, 2005, found at tabs 5 and 6 of Ex. 3. The inquiries indicate the current status of these corporations is 'cancelled'. The sole director of record for Provincial Used Car Sales Ltd. had been Mansi Badman (sic) since November 6, 1996. The sole director of record for Profit Auto Sales Ltd., since April 11, 2000, had been Brij Badhan, Address #1, Markham.

The witness reviewed the Applicant's October 2000 application for registration as a salesperson at his new company, Profit Auto Sales Ltd. The Applicant failed to disclose his personal bankruptcy in that application, which he signed on his own behalf and as

director of the sponsoring employer, Profit Auto Sales Ltd. The personal address provided by the Applicant in that application was Address #1, Markham.

In March 2001, Provincial Used Car Sales Ltd. applied for renewal. This renewal form was signed by Mansi Badhan as director.

The Applicant also renewed his registration as a salesperson on March 14th, 2001. The witness pointed out that this application was made after his registration had lapsed. This application was signed by the Applicant both as the salesperson applying for renewal and as the authorized signing official for the Registered Dealer, Provincial Used Car Sales Ltd. This application required the Applicant to indicate whether he had ever declared bankruptcy, to which he again answered 'no'.

Ms. Cohn reviewed the letter dated September 26, 2000, provided to OMVIC from Georgian College confirming the Applicant's completion of the OMVIC/CAI Automotive Certification course with a grade of 71 percent. (Tab 10, Ex. 3).

The Applicant made another application for registration as a salesperson, which was dated May 14, 2001 and received by OMVIC on May 22, 2001. The personal address of the Applicant provided was again Address #1, Markham. The proposed employer was to be Gill Auto Collision & Used Car Sales. Ms. Cohn pointed out that the Applicant answered 'no' to question 6, relating to whether he had ever been involved in personal bankruptcy proceedings. The witness referred to the bankruptcy search found at tab 14, confirming the Applicant had been discharged from bankruptcy in 1994.

In this same application for registration the Applicant also answered 'no' to question 9 relating to whether the Applicant had ever been found guilty or convicted of an offence or whether charges were pending. Ms. Cohn made reference to the Information of Don MacAndrew, OMVIC provincial offences officer, wherein Provincial Used Car Sales Ltd. and Brig Lai Badham (sic) were charged with odometer tampering contrary to s. 22 of the MVDA. Provincial Used Car Sales Ltd. was also charged with selling off premises at Address #1 in Markham, contrary to s. 22 of the MVDA. By agreement dated May 11, 2001, the Applicant, on behalf of Provincial Used Car Sales, agreed to plead guilty to the charge of odometer tampering on the following conditions:

1. The guilty plea will be entered after the OMVIC Hearing to be held at a future date.
2. The charge of deal at a place other than authorized under Section 3(3) of the Motor Vehicle Dealers Act will be withdrawn.
3. (Consumer named) to be reimbursed her $500.00 deposit on a 1998 Ford Windstar.
4. A fine of $1,000.00 to be paid.

Ms. Cohn testified that according to OMVIC records the date of disposition of this matter with respect to the Applicant was December 7, 2001, the inference being that the charges were still pending against the Applicant at the time of this application, yet he did not disclose this.

In his most recent application for registration, received by OMVIC May 24, 2005, the Applicant proposed to work for 'Quality Import Truck'. Pursuant to the LAT Order issued in November 2001, the Applicant could only work for an approved dealer and therefore this was an application to re-register. The address provided by the Applicant as his residence was Address #2, Brampton, and the telephone numbers provided were Telephone No. #1 and Telephone No. #2 (cellular). Ms. Cohn reviewed this application and pointed out that the Applicant answered 'no' to both questions 6 and 9, relating to previous bankruptcy and convictions. The Applicant also indicated in this application that his last employer was Provincial Used Car Sales Ltd. and that he had not been working since March of 2001.

The witness reviewed copies of records from the Toronto Star newspaper relating to 10 advertisements for cars for sale placed by Mr. B. Badhan, of Address #1 Markham under the phone number Telephone No. #3. The dates of these ads ranged between December 15, 2000, and July 18, 2001. These advertisements related to 8 different cars. (The Tribunal notes that this was during the period that the charge of odometer tampering was pending against Mr. Badhan and the charges of odometer tampering and selling off premises were pending against his dealership, and in part after the time he said he had stopped working).

Ms. Cohn then reviewed copies of records from the Toronto Star newspaper relating to ads placed by Mr. Brig Badhan of Address #2 as a private party selling a car. Each ad gave one of the two telephone numbers provided by the Applicant on his May 2005 application for registration. Under telephone number Telephone No. #1 there were 6 ads between February 2005, and September 2005, for 4 different cars. Under his cellular phone number Telephone No. #2 there were 15 ads during this period for 11 different cars. There were also records relating to the account of Mr. B. Badhan providing a third telephone number namely 416-566-8394. Two ads for two different cars appeared in September '05 and November '05 with this third telephone number. A total of 15 different cars were advertised for sale by the Applicant between February and September 2005.

The witness then reviewed the Registrant Identification Number ('R.I.N.') record for the Applicant. This is the record of all the vehicles that are or have been registered in the Applicant's name. This record was from February 1988, to December 21, 2005. Ms. Cohn pointed out that there were 3 active vehicles, meaning that they were still registered in the Applicant's name, and 39 inactive vehicles – vehicles that had been transferred by the Applicant. The witness went through the vehicle records for 9 of the vehicles owned and then transferred by the Applicant, between May 2002, and February 2005, pointing out the length of time the vehicles were registered in the name of the Applicant. This ranged between 1 day and 9 months. Three of the vehicles were owned for less than 2 weeks. Ms. Cohn also went through the details of the transfers between the Applicant and the subsequent owners pointing out that the records indicated that the Applicant sold these vehicles as a private individual as evidenced by the issuance of a Used Vehicle Information Package ('UVIP'), which is not required for a dealer.

Ms. Cohn also reviewed the R.I.N record for the Applicant's wife, with the registered address of Address #2, and noted that there were 6 active vehicles currently registered in her name and 23 inactive vehicles. This record was for the period June '99 to December 12, 2005. The length of ownership of the inactive vehicles varied – the shortest being 12 days.

Ms. Cohn testified that it is the Registrar's position, based on the MTO documentation and the Toronto Star documents, that the Applicant has been conducting business as a motor vehicle dealer without the benefit of registration: he is placing ads to sell cars registered to himself or his wife. She also testified that the evidence indicates that there were more cars being sold through the Toronto Star than appeared on the Applicant's R.I.N. record and that this is common when someone is 'curbsiding': operating in order to avoid detection by selling the car to the consumer without registering with the Ministry first. This, Ms. Cohn stated, speaks to the Applicant's honesty and integrity.

In cross-examination Ms. Cohn was asked how many vehicles is an individual allowed to buy and sell. Her response was "Zero, if buying a vehicle with the intent to sell it." She also stated that an individual can own an unlimited number for personal use.

Witness # 1

This witness testified that he has known the Applicant for more than 30 years and that he is honest and hardworking. It was his evidence that the Applicant asked him for his help in filling out the application for renewal. In particular, he asked for advice about question 6 on page 3 of the form. It was his evidence that he advised the Applicant to answer 'no' to question 6 because he had been discharged from bankruptcy. The witness testified that he had not read the form himself.

The witness also indicated that he filled out the Notice of Appeal in this matter for the Applicant.

The witness also testified that he did not think that the Applicant was selling cars except for his own family. The various cars referred to by the previous witness were cars owned by the Applicant's children and wife and the Applicant had dealt with these vehicles simply to help family out.

In cross-examination the witness confirmed that he is an Income Tax Consultant and knows the Applicant as a friend. He has been a tax consultant for 30 years. He has no official accreditations but took some accounting courses. He confirmed that he was aware that the Applicant went through bankruptcy proceedings in 1994. After being asked to read question 6 of the application for registration, (whether the Applicant had been bankrupt), the witness testified that he had helped the Applicant over the phone and that the Applicant hadn't read him the whole question. It was his evidence that had

he known the entire question he would have advised the Applicant differently. He made the same comments regarding question 9 relating to convictions under any law.

Brij Lal Badhan

The Applicant testified that he has been in the car sales business for approximately 18/19 years without any problems. In 2001 he applied to other dealers – he had never worked with anyone in the past and did not have success getting employment. In 2002 he had to sell his house. He stated that he did not have anything; he was financially in a bad situation.

In 2005 he applied for registration. It was his evidence that he thought, as he was discharged in 1994, he “didn’t have bankruptcy”. With respect to the odometer tampering incident the Applicant testified that it was “only one time”. The Applicant asked the Tribunal that he be given "one chance" so he can apply for a job with the "truck" people as he is 59 and he cannot do anything else.

With respect to some of the cars appearing on his R.I.N. record it was the Applicant’s evidence that he sold some of the vehicles for scrap. According to his evidence he only has 2 cars. He went on to state “maybe I sold some, put in my wife’s name – I didn’t have enough money that is maybe what I did”. The Applicant reiterated that without his licence he has a big problem, as it is all he can do.

In cross-examination the Applicant confirmed that he had managed Provincial Used Car Sales Ltd. and that Profit Auto Sales Ltd. was his company. He acknowledged he was previously refused registration for non-disclosure. In response to questions about the OMVIC course he took, the Applicant confirmed that it dealt with issues of being registered and advertisements – what should be included in them. He also indicated he was familiar with the MVDA and knew that his registration had to be renewed every 2 years.

In response to why he did not disclose his bankruptcy in his May 2001 application the Applicant testified it was “by mistake – I didn’t disclose bankruptcy because discharged”.

When asked about the non-disclosure of his bankruptcy on his May 2005 application he again stated that “I made a mistake, I think I just read one line”. When asked why he did not disclose the conviction for odometer tampering the Applicant stated he “didn’t know conviction for odometer was criminal”.

When the Applicant was asked about the advertisements in the Toronto Star he pointed out that a number of advertisements were for the same car. He confirmed that all of the telephone numbers indicated in the ads were his daughter's as he lives with her. In response to a question by the Tribunal as to whether his daughter is in the car business the Applicant answered “no”.

When questioned about the vehicle records for 9 of the 'inactive' vehicles on his R.I.N Record, (Tabs 19A through 19I), the Applicant acknowledged that all but one indicated a vehicle status of 'Fit' as opposed to 'Wrecked' at the time of transfer. He was then asked if the vehicles sold through the ads in the Toronto Star were to people, not as scrap, and he answered "yes".

Lastly, in response to questions regarding Provincial Used Cars Sales and the charge of odometer tampering against it, the Applicant confirmed that he was the director although his daughter's name appears as director on the corporate records included at Tab 5.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant filed for personal bankruptcy in November 1994 and was discharged in December 1994.

2. The Applicant failed to make full disclosure in his applications for registration, in May 2001, and in May 2005.

3. The Applicant, acting as salesperson for and the directing mind of Provincial Used Car Sales Ltd., committed odometer tampering in October 2000. The Applicant and Provincial Used Car Sales were charged with this offence under the MVDA. A guilty plea was entered on behalf of Provincial Used Car Sales by the Applicant as director in May 2001.

4. Provincial Used Car Sales alone was charged with the offence of selling off premises, which charge was withdrawn.

5. The Applicant has engaged in buying and selling vehicles without the benefit of registration, contrary to the MVDA.

THE LAW:

The *Motor Vehicle Dealers Act* states as follows:

> 5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

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

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

APPLICATION OF THE LAW TO THE FACTS:

The sole issue to be determined in this matter is whether the Applicant's past conduct provides sufficient grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The onus of proof rests upon the Registrar.

The key facts that the Registrar relies upon to support its conclusion are as follows:

1. The Applicant failed to provide full disclosure of his bankruptcy on his application for registration. Question 6 of the application is very clear that details of a previous bankruptcy are to be disclosed and specifically mentions attaching proof of discharge. This application is not only relied upon by OMVIC but by the sponsoring dealer. The Applicant's explanation for this omission is simply that he 'made a mistake'. Given the evidence it is difficult to accept that the non-disclosure was a result of carelessness. The Applicant had to be acutely aware of the importance of answering this question accurately as he had previously had an application for registration refused, in part, because he did not answer it correctly. Further, if Witness 1 is to be believed, the Applicant even sought advice about answering this question - although he apparently failed to read his advisor the whole question. The Tribunal concludes that it was not an issue of carelessness but that the Applicant was not being honest in filling out the application form, thus failing the first test of honesty required by the Registrar.

2. The Applicant was convicted for odometer tampering and selling off premises and failed to disclose this on his application.

   With respect to the charges against the Applicant for odometer tampering it is clear from the evidence that he and the corporate dealership for which he was the directing mind were charged on November 23, 2000. The documentation provided by the Registrar indicates that the corporate dealership plead guilty in May of 2001. The only documentation provided regarding the Applicant's charges were OMVIC records indicating that the 'disposition' date of this matter was December 7, 2001. It is not clear from the documentation that a conviction was entered. However, the Applicant clearly acknowledges responsibility for the odometer tampering both in his Notice of Appeal and in his evidence during this proceeding. The Applicant stated in paragraph 3 of Schedule 'A' of his appeal "On November 23rd, 2000, I made a mistake due to some poor guidance from another party for which I have learned my lesson over the past 4-5 years". The

Applicant then stated in his oral evidence that this 'mistake', (the odometer tampering), was just 'one mistake' and that he should be given another chance. Calling this conduct a 'mistake' suggests that it was a result of misunderstanding or inadvertence. Odometer tampering is a serious, intentional, dishonest act and certainly brings the honesty and integrity of the Applicant into question. It is appropriate and reasonable for the Registrar to consider this previous dishonest conduct in making his decision.

Although it is indisputable that the Applicant was the directing mind of Provincial Used Car Sales Ltd. there was no evidence that the Applicant was ever personally charged with or convicted of selling off premises. Provincial Used Car Sale Ltd. alone was charged with this offence and the documentation before the Tribunal includes an agreement signed by the Applicant on behalf of Provincial Used Cars Sales Ltd. wherein the company pleads guilty to the odometer tampering on conditions - including that the charge of off premises selling be withdrawn. The Tribunal finds that neither the Applicant nor his dealership was convicted of off premises selling in 2001.

3. The Applicant has been dealing in cars without the benefit of registration. The Registrar produced evidence that the Applicant placed 23 advertisements as a private individual for 15 different vehicles between February 2005, and October 2005, a nine-month period. The R.I.N. Records produced for the Applicant also indicates activity which is consist with the buying and selling of vehicles, other than for personal use. The Applicant testified that he owns 2 vehicles. His R.I.N record indicates there are 3 active vehicles and his unemployed wife's RIN record indicates there are 6 currently in her name. Some of these may be legitimately owned for the personal use of the Applicant. He may no longer be in possession of some of these. However, he should be able to explain the status of these cars but he either could not or would not do so. In addition to the large number of 'active' cars there were numerous 'inactive' vehicles that were owned for less than 2 weeks. There were 9 vehicles sold by the Applicant between 2002 and 2005 - 3 were in his name for less than 14 days. The Applicant tried to suggest that these were in fact sold for scrap but the vehicle records did not support this. Finally, and most importantly, the Applicant admitted in his evidence that he has put some cars in his wife's name and sold them because he needed the money. Based on the above evidence the Tribunal finds that the Applicant has been selling cars without the benefit of registration, contrary to the MVDA.

It was the Registrar's further argument that the Applicant is disentitled to registration because he is in breach of the terms and conditions set out in the Order of this Tribunal dated November 14, 2001. These terms and conditions included that he will only purchase and sell vehicles on behalf of a motor vehicle dealer that he is registered to work for and that he will not invite the public to buy or sell a vehicle other than at the premises of a registered dealer. The Registrar acknowledged the Applicant's registration had lapsed, and he therefore was not technically registered, but argued that

the terms and conditions contained in the Order should still apply and their breach should result in disentitlement.

In support of this position counsel for the Registrar cited the decision of this Tribunal *Jalil Ghaleh Bagheri v. Registrar, Motor Vehicle Dealers Act, LAT August 4, 2005.* In that case the Applicant had made an earlier appeal of a proposal to revoke his registration. The Tribunal granted the appeal but imposed terms and conditions which the Applicant then failed to comply with. This subsequent failure to comply with the order was found to be sufficient grounds to refuse the registration application. Simon Dann, Presiding Member writes, p. 6:

> It is a finding of this Tribunal that as of the date of this hearing the Applicant had failed to (a) comply with the noted conditions ordered by the Tribunal, and (b) that he had not paid the outstanding fines nor did he provide any explanation as to why he had not done so.
>
> The Tribunal is in agreement with the court's decision in the appeal by Tri-Star that the breach of the order alone is sufficient to refuse the registration application. The fact that the Applicant failed to comply with the conditions and also disregarded the requirement for payment of the conviction fines leaves the Tribunal to conclude that the Applicant's conduct provides reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

In both the *Bagheri* case above and in the case referred to, *10202265 Ontario Inc. cob Tri-Star Sales and Leasing, SCJ, No. 366/2002,* there had been consent orders, issued by the Tribunal, which included a term which stated that if any of the terms of the order were breached the registration in question would be automatically revoked. It appears from the reasons of the court in *Tri-Star Sales and Leasing* that this inclusion of an automatic revoke term was a significant factor in its decision. However, the more recent decision of the Divisional Court in *North York Auto Actions Inc., Sept. 2004,* has brought into question the validity of such a term altogether. It is not clear to the Tribunal therefore that the *Bagheri or Tri-Star* case should be interpreted or relied upon to mean that the breach of any condition in a consent order is, on its own, sufficient basis to refuse registration. Any breach certainly goes to the issue whether the Applicant will act in accordance with the law, and an Applicant cannot avoid this consequence simply by allowing his or her registration to lapse. Whether the breach is sufficient to lead to revocation remains a matter to be decided.

Having carefully considered all the evidence the Tribunal finds that the Registrar's conclusion that the Applicant will not carry on business in accordance with law and with honestly and integrity was reasonable. He was not honest in making his application, he has previously committed odometer tampering and there is cogent evidence that he has engaged in selling cars to the public without being registered as a salesperson to a dealer, contrary to the terms and conditions of an Order of this Tribunal and the MVDA.

The Applicant has had many years experience in the car industry. He has taken the OMVIC certification course. He has been down this path of being refused registration on almost identical grounds. He pleads for 'one chance,' but he was given a chance in November 2001, when the Registrar agreed to allow the Applicant to continue to be

registered on terms and conditions. However, he has continued to act without regard for these terms and conditions and the rules and regulations of the MVDA. The industry the Applicant wishes to be a part of is a highly regulated industry and yet he has not demonstrated that he is accepting of regulation.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7.(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs and orders the Registrar to carry out his Proposal of July 21, 2005, to refuse the registration of Brij Lal Badhan as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

_____
Elizabeth L. Sproule, Member

RELEASED: April 12, 2006

FILE NAME: 3146.mvda.Badhan

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.

Decisions under Ontario New Home Warranties Plan Act

Fiscal Year 2006 - 2007

LAT Decisions, Rulings and Orders

April
May
June
July
August
September
October
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December
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LAT Decisions are exempt from translation under Ontario regulation 411/97 of the French Language Services Act

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- MICHAEL AND NADIA DUFOUR - ADJ-Adjournment
- LIMO HOMES LTD. AND GLENFOREST HOMES LTD.
- RAKESH KUMAR DHIR AND MEENAKSHI DHIR
- PRABJOT KAUR ARORA
- GRAZYNE HLUCH
- GERALD AND THELMA STREET
- ELLEN GARBER
- IN THE MATTER OF a PROPOSAL by STELPSTRA HOMES CORPORATION
- STELPSTRA HOMES CORPORATION
- MILTIADIS and EVANGELIA CHRISTIDIS
- CRAIG AND SUSAN ALLISON
- YAJNAVALKYA BHATTACHARYA
- DANNY DeCICCO
- JEFF AND HEATHER GILLARD
- VIJAY SHARMA

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Ontario

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

MICHAEL AND NADIA DUFOUR - ADJ-Adjournment

IN THE MATTER OF a CLAIM by
MICHAEL AND NADIA DUFOUR

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)

MICHAEL AND NADIA DUFOUR

Applicants

-and-

TARION WARRANTY CORPORATION

Respondent

-and-

FRACARSAN CORPORATION

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 8 and 9, 2006;

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 June 8, 2006, and to continue on June 27, 2006, if necessary.

LICENCE APPEAL TRIBUNAL

_____

Carl F. Dombek
Chair

Released: April 26, 2006

FILENAME: 3415.Dufour.onhwpa.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

LIMO HOMES LTD. AND GLENFOREST HOMES LTD.

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

TO REFUSE TO RENEW REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BRIAN M. CAMPBELL, Counsel, appearing on behalf of Limo Homes Ltd. and Glenforest Homes Ltd.

CAROL STREET, Counsel, appearing on behalf of the Registrar, *Ontario New Home Warranties Plan Act*

DATE OF PRE-HEARING: April 20, 2006 Toronto

ORDER

Following upon attendances on April 20, 2006 at a pre-hearing before this Tribunal by Brian M. Campbell, Counsel, appearing on behalf of Limo Homes Ltd. and Glenforest Homes Ltd. (the "Applicants") and Carol Street, Counsel, appearing on behalf of the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on the dates set forth in this Order:

1. The Parties to the hearing shall be the Applicants and the Registrar.

2. The hearing scheduled to be heard before the Tribunal on June 5, 6, 7, 8 and 9, 2006 is by consent of the Parties Counsel hereby adjourned to commence at 9:30 a.m. on Tuesday, July 18, 2006 at the Tribunal's Chambers as noted above and shall continue, if necessary, at 9:30 a.m. on July 19, 20 and 21, 2006 at the Tribunal's said chambers.

3. There was no resolution of any of the issues in these matters and Counsel for the Applicants confirmed that the Applicants will contest the chargeable conciliations as referred to in the Proposals.

4. The Parties Counsel recorded the Parties consent for the proceedings in the Registrar's Proposals against Limo Homes Ltd. and Glenforest Homes Ltd. be joined and heard together.

5. Both Parties shall fully and in a timely manner comply with the Tribunal's Rules of Practice and more particularly Rules 6.3 and 6.4 (the latter if applicable).

LICENCE APPEAL TRIBUNAL

_____
Derek Israel, Vice-Chair

RELEASED: April 27, 2006

FILE NAME: 3385.3397.onhwpa.Limo Homes.Glenforest Homes.prehrg order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

RAKESH KUMAR DHIR AND MEENAKSHI DHIR

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: RAKESH KUMAR DHIR, representing himself and representing MEENAKSHI DHIR as her Agent

ANDREW PINTO, Counsel, representing Tarion Warranty Corporation

DATE OF PRE-HEARING: April 20, 2006 Toronto

ORDER

Following attendances on April 20, 2006 at a pre-hearing in person before this Tribunal of Rakesh Kumar Dhir, representing himself and as Agent for Meenakshi Dhir (the "Applicants") and Andrew Pinto, Counsel, representing Tarion Warranty Corporation ("Tarion");

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

1. The Parties to the hearing are the Applicants and Tarion.

2. There was no resolution of the issues in this matter.

3. The Parties shall comply fully and in a timely manner with the disclosure requirements more fully set forth in Rule 6.3 of the Rules of Practice of the Tribunal and such disclosure shall be at least 10 days before the hearing.

4. The Tribunal, having been advised by Rakesh Kumar Dhir that it is his probable intention to retain an expert to testify on his behalf at the hearing, advised Dhir that if he intends to have an expert testify on the Applicants' behalf at the hearing he shall ensure compliance with the requirements of Rule 6.4 (1)(a), (b), (c) and (d). The Tribunal orders that disclosure under Rule 6.4 (1) shall be made by the Applicants by no later than May 10, 2006 and by Tarion by no later than May 20, 2006 in the event of Tarion retaining an expert to testify at the hearing. Disclosure under Rule 6.3 and 6.4 as above shall be effected by the Applicants by service being made on Counsel for Tarion.

5. Immediately upon Rakesh Kumar Dhir being advised by Tarion or its Counsel that Tarion wishes its expert to inspect the Applicants' home relative to the issues in this matter the Applicants shall give reasonable and unimpeded access to the Applicants' premises to Tarion's expert(s) so as to enable Tarion's expert(s) to expeditiously inspect and report upon their findings.

6. Dhir informed the Tribunal that at this stage the Applicants will represent themselves at the hearing. In the event however of the Applicants deciding to be represented at the hearing by either counsel or an agent their attention is drawn to the Tribunal's Practice Direction on Adjournments as stated on pages 25 and 26 of the Rules of Practice of the Tribunal and that it is the Applicants' responsibility to ensure that whoever is retained to represent the Applicants at the hearing is available on the date of hearing namely June 1, 2006 and that the Applicants shall further ensure that if their counsel or agent is not available on June 1, 2006 or has insufficient time within which to prepare, such counsel or agent should not be retained by the Applicants. Similarly, the Applicants before retaining the services of an expert to testify on their behalf at the hearing, shall ensure that the expert is in fact available to appear and testify at the hearing on June 1, 2006 and if not then such expert should not be retained by the Applicants.

7. The Applicants were advised by Counsel for Tarion that Tarion would not consent to an adjournment of the June 1, 2006 hearing date. Should any adjournment request be agreed to by the Parties such agreement shall not be binding upon the Tribunal.

LICENCE APPEAL TRIBUNAL

_____
Derek Israel, Vice-Chair

RELEASED: April 27, 2006

FILE NAME: 3378.onhwpa.Dhir.prehrg order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRABJOT KAUR ARORA

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

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: PRABJOT KAUR ARORA, Applicant, appeared on her own behalf

KERRI POPE, Counsel, appeared on behalf of Tarion Warranty Corporation

FRED GUTH, appeared on behalf of Somerset Lorne Park Inc., the Added Party

DATE OF HEARING: April 6, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

On April 25, 2000 the Applicant took possession of a residence in Toronto, Ontario. On April 20, 2005, Ms. Arora wrote to Tarion Warranty Corporation ("Tarion") complaining of two cracks in her basement wall. In her Request for Claim Inspection, she also raised the issue of a rippling in her kitchen and dining room ceiling, which she believed was related to the foundation wall cracking. By Decision Letter dated November 25, 2005, Tarion denied her claim on the grounds that the foundation cracks did not constitute a major structural defect under the *Ontario New Home Warranties Plan Act* (the "Act") and that the undulations in the ceiling were unrelated to the cracks and were within normal construction practices. The Applicant appealed this decision to the Licence Appeal Tribunal (the "Tribunal") by Notice of Appeal filed on December 15, 2005.

THE EVIDENCE

This is a summary of the evidence given at the hearing.

Prabjot Kaur Arora

Ms. Arora introduced photographs showing two cracks in her basement wall. In her testimony, Ms. Arora stated that the cracks extended from the ground to the brick work. She first noticed hairline cracks in December, 2004 and these have since widened. By Ms. Arora's measurements, one crack is now wider than 2 millimetres and the other is slightly less than 2 millimetres in width.

There are also ripples in her kitchen and dining room ceilings which Ms. Arora feels are related to the cracks. Finally, she noted some cracking has occurred in the brick work above one of the foundation cracks.

There is no water leaking into the house as far as Ms. Arora can determine given that the basement is finished. Her use of the house is not affected at this time.

Richard Johnston

Mr. Johnston is a Senior Field Representative with Tarion. He has been with Tarion for 18 years and inspects about 200 homes a year.

Mr. Johnston inspected the property on November 10, 2005. He speculates that the cracks extend to the footings and that the footings themselves may be cracked. The width of the cracks, by his measurements, is 1.5 millimetres for one and 1.75 millimetres for the second. The width of the cracks is not major, according to Mr. Johnston. Further, the foundation wall is stable. There is no evidence of vertical movement, or shearing, around the cracks and no evidence of horizontal movement on either axis.

It is Mr. Johnston's opinion that these are cracks caused by the normal shrinkage of cement that was slightly too moist in composition. He concedes that 85% of shrinkage cracks appear in the first 12 to 18 months, but he feels these cracks existed for some time before Ms. Arora noticed them. He also saw no evidence that the cracks are widening; the degree of dirt and the slight erosion at the edge of the cracks both signified a stable situation that had existed for some time.

Concerning the undulations in Ms. Arora's ceiling, Mr. Johnston testified that these are at the seams of the ceiling drywall and are the product of an extra thickness at the tape. He considers this a normal building practice. In his opinion, these undulations are unrelated to the cracks in the foundation wall.

FACTS FOUND PROVEN

The Tribunal accepts Mr. Johnston's evidence that the foundation walls are stable and that the cracks are not major. The Tribunal further accepts as fact that the undulations in Ms. Arora's ceiling are caused by the thickness of the taping of the seams in the drywall and are unrelated to the foundation wall cracks.

REASONS FOR DECISION

The onus of proof rests on the Applicant to establish, on the balance of probabilities, that she has a valid claim for relief under the Act.

Because of the passage of time, all but one of the warranties under the Act have expired. This leaves Ms. Arora in the unenviable position of having to prove that her claim involves a major structural defect to her home. If she can do so, then her claim is timely under Section 16 of Regulation 892 of the Act.

Regulation 892 of the Act defines a major structural defect as follows:

> "major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,
>
> (a) that results in failure of a load-bearing portion of any building or materially and adversely affects its load-bearing function, or
>
> (b) that materially and adversely affects the use of such building for the purpose for which it was intended,
>
> including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage:"

Under this definition, an Applicant must show:

1. that there has been an defect in the builder's work or materials;

2. that this defect gives rise to one or more of the specific results set out in the definition, and

3. that the exclusions specified in the definition do not apply.

The Applicant must then satisfy the Tribunal that the claim is otherwise valid under the Act.

Ms. Arora has not demonstrated that there is a defect in material or workmanship in the matters of which she complains. The foundation wall cracks are normal shrinkage

cracks and the undulations in her ceilings are also a function of normal construction practices. Therefore, her appeal must fail.

The Tribunal wishes to note the following. Ms. Arora was a credible witness. In her testimony, she stated that she was told by a representative of the general contractor that if she signed up with Tarion, any basement cracks would be covered. No one has the authority to make such an assertion in view of the wording of the Act. If intelligent homeowners like Ms. Arora are being led to believe that the Tarion coverage is significantly broader than the Act allows, then this should be of significant concern to the contractor, in this case the Added Party. The Added Party has an obligation to properly train its representatives as to the representations they may make about the scope of Tarion's coverage.

DECISION:

Accordingly, based on the evidence and pursuant to the authority vested in it by section 16 (3) of the Act, the Tribunal directs Tarion Warranty Corporation to disallow the claim made by the Applicant under section 15(2) of Regulation 892 to the Act.

LICENCE APPEAL TRIBUNAL

_____

Laurie Sanford
Vice-Chair

Released: April 19, 2006

Filename: 3291.arora.onhwpa.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

Ontario

PRE-HEARING

GRAZYNE HLUCH

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

TRIBUNAL: WILLIAM M. MCINTOSH, Vice-Chair

APPEARANCES: PATRICIA CONWAY, Counsel for the Applicant

TED S. WEREDYNSKI, Agent for Tarion Warranty Corporation

JOHN A. HOWLETT, Counsel for FRAM Builders (Durham) Corp.

DATE OF PRE-HEARING: March 24, 2006 Toronto

ORDER

Following attendances at a pre-hearing held March 24, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, from the Applicant's Appeal from Tarion's Decision Letter of January 10, 2006, denying the Applicant's claim for repairs to defects in the hardwood floors. A settlement on terms was reached.

It is ordered that the Added Party will replace up to six sections of the engineered hardwood flooring in the Applicant's condominium as determined in the Pre-Delivery Inspection Report and offered in Tarion's January 10, 2006, Decision Letter.

It is further Ordered that a date for the completion of the work, subject to availability of materials, within 30 days of the Order will be agreed upon between the Added Party and the Applicant, in writing.

LICENCE APPEAL TRIBUNAL

_____
William M. McIntosh
Vice-Chair

Released: April 4, 2006

File name: 3370.onhwpa.hluch.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

GERALD AND THELMA STREET

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

TO DISALLOW A CLAIM

TRIBUNAL: JIM KENNELLY, Member

APPEARANCES: GERALD STREET, Applicant, representing himself and as Agent for THELMA STREET (the "Applicants")

MATTHEW GERVAN, Counsel, and DOUG LAPPAN, Agent, both representing Tarion Warranty Corporation ("Tarion")

NIA DeCARIA AND MAURICE DeCARIA, Agents, representing 2014435 Ontario Inc. (the "Added Party")

DATE OF PRE-HEARING: March 31, 2006 Ottawa

ORDER

The above mentioned Parties appeared at a pre-hearing in Ottawa, Ontario on March 31, 2006.

One day of hearing remains scheduled, for Wednesday, May 24, 2006 at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, commencing at 9:30 a.m.

The Parties to this claim are Gerald and Thelma Street (the "Applicants"), Tarion Warranty Corporation ("Tarion") and 2014435 Ontario Inc. (the "Added Party").

Nia DeCaria, Agent for the Added Party provided a letter from Lanark Hardwood Flooring dated March 30, 2006.

The pre-hearing matters were all items related to the hardwood flooring in the Applicants' home. One item regarding the "insufficient fastening of the floor to the under lying substrate" has been deemed as covered under warranty in the Decision Letter dated January 5, 2006.

The outstanding issue is the 'cupping' and floor noise of the hardwood. The Applicant Gerald Street maintains that this is a result of inferior wood or poor quality workmanship when the floor was installed on site.

Tarion points out that there was no mention of hardwood floor problems by the original owner on the PDI. Tarion maintains that the floor was damaged due to the humidity levels and lack of ventilation in the home after the Pre-Delivery Inspection.

The home was purchased by the original owner in 2003. The Applicants are the second owners and they took possession in August 2004. The home was not occupied by the original owner.

The Applicant Gerald Street does not agree with the argument from Tarion that the cause is related to humidity and ventilation.

Tarion has clarified that there is no issue with the fact that the Applicants are the second owners of the home as the Applicants purchased the home within a year of the original owner's purchase.

It was suggested by Tarion that this Order include the Applicants providing access to their home so an expert could assess the floor. It is possible that the Applicants may bring expert witness testimony on the cause of the 'cupping' of the hardwood.

The Tribunal is not inclined to make such an Order. Tarion has had two experienced employees visit the home on separate visits. It will be left to the Chair of the May 24, 2006 hearing to weigh the evidence based on those reports, the letter submitted by the Added Party and the possibility that the Applicants will provide an expert witness.

It is possible that the Applicants and Tarion may come to an agreement on an objective expert witness. The Parties may explore this avenue before the hearing.

All Parties were reminded of the deadlines under the Rules of Disclosure of documents set forth in the Tribunal's Rules of Practice. Parties were also reminded of the requirements as they relate to 'Expert Witnesses' under the Rules of Practice.

The number of witnesses could not be established at this time. In any case, all Parties agreed that this matter would require one day of hearing.

LICENCE APPEAL TRIBUNAL

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Jim Kennelly, Member

RELEASED: April 13, 2006

FILE NAME: 3369.onhwpa.Street.prehrg order.doc

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

ELLEN GARBER

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: ELLEN GARBER, appearing on her own behalf

JOEL OLIPHANT, Counsel, representing Tarion Warranty Corporation (the “Respondent” or “Tarion”)

DAVID GREENSPAN, representing Anix Developments (1465491 Ontario Inc.), the “Added Party”

DATE OF PRE-HEARING: March 22, 2006 Toronto

ORDER

Following attendances on March 22, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Ellen Garber, appearing on her own behalf (the “Applicant”), Joel Oliphant, Counsel for Tarion Warranty Corporation ("Tarion") and David Greenspan, for Anix Developments (1465491 Ontario Inc.), (the “Added Party”);

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on May 18, 2006 at the Tribunal’s Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are the Applicant, Tarion and the Added Party.

2. A review of the Tarion Decision Letter of January 4, 2006, stated the Applicant had a

complaint regarding a pre-existing problem with a hallway leading into the basement. The Applicant's home had originally been completed for possession on January 31, 2002. The Applicant had submitted notice of claim letters in 2003, dated January 9, February 11, February 28 and then November 28, 2005. Tarion inspected the home on April 16, 2003, March 19, 2004 and May 6, 2004. The observations from these inspections were stated as follows:

> **Observations**: At the inspection on April 16, 2003 no water was observed on the west foundation wall at the foot of the stairway leading into the basement space. You were asked to monitor this problem and report any water penetration prior to January 30, 2004, the date of the expiration of your two year warranty.
>
> [...] [Tarion representative] returned on May 6, 2004 and conducted a water test. No water penetration was observed after a 15 minute test on both the foundation wall and brick veneer. The foundation wall at this location is finished with framing, vapour barrier, drywall and baseboard. The drywall felt damp after the test but was not wet. The intersection of the wall and floor was observed to be dry. This area would be wet if water penetration was occurring. Your claim was denied at that time and your two year warranty had expired.
>
> No further correspondence was received by Tarion until November 2005 in the 4th year of warranty coverage.
>
> **Reason**: Water penetration through a foundation wall is covered for the first two years after the date of possession of your home. While you did report a problem with moisture during the warranty period Tarion did conduct a water test after the expiration of your two year warranty and found no water penetration.
>
> […]
>
> The recent water penetration complaint is considered new and reported beyond the expiration of the 2 year warranty period. Your claim must be denied.

Tarion's Decision Letter noted that while "a problem with moisture" was reported during the warranty period, a water test conducted after the expiration of the two year warranty period showed no water penetration. The claim was denied in May 2004.

Tarion's receipt of the Applicant's letter of November 28, 2005, again reporting water penetration in the same area, was acknowledged but considered as beyond the warranty period.

3. The Applicant confirmed the dates regarding possession and complaints as well as that the water test had been conducted and while nothing was observed, she claimed there was water penetration every time it rained.

4. While there was no settlement of the issue, the Applicant and the Tarion representative agreed to arrange another water test and that it would be conducted

in accordance with the guidelines detailed in the Construction Performance Guidelines.

The Applicant agreed to remove the drywall from the concerned area, in advance, to enable inspection of the foundation wall behind the drywall as this interior inspection had not previously occurred.

The Tarion representative pointed out that if the water test showed water penetration and that if such observation were confirmed to be linked to the initially reported problem, then warranty coverage would apply. If any water penetration were observed and confirmed as not being linked to the original complaint, warranty coverage would not apply. The Applicant confirmed her understanding of Tarion's position.

Subject to weather conditions, it was agreed that the water test would be conducted by or before April 21, 2006.

5. The Parties were reminded of the Tribunal's disclosure rules and timing and that they shall fully comply with the requirements of disclosure as set forth under Rule 6 of the Rules of Practice of the Tribunal.

6. The Parties are advised that in the event the matter is settled prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to all other Parties, that the matter has been settled and the hearing will not be required.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

Released: April 5, 2006

File name: 3355.onhwpa.garber.doc

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

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

IN THE MATTER OF a PROPOSAL by
STELPSTRA HOMES CORPORATION

AND IN THE MATTER OF the PROPOSAL of
Tarion Warranty Corporation
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act)
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: January 5, 2006

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

STELPSTRA HOMES CORPORATION

Applicant

-and-

TARION WARRANTY CORPORATION

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on March 30, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the 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, April 12, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek
Chair

Released: April 4, 2006

file name: 3340.nhw.Stelpstra Homes Corporation.adj

PRE-HEARING

STELPSTRA HOMES CORPORATION

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

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: BRIAN CAMPBELL, Counsel, for the Applicant

KRISTINE DI BACCO, Counsel, for the Respondent

DATE OF PRE-HEARING: April 12, 2006 Toronto

ORDER

Following the attendances on April 12, 2006 at a prehearing before the Tribunal of Brian Campbell, Counsel for Stelpstra Homes Corporation (the "Applicant") and Kristine Di Bacco, Counsel, for (the “Respondent”), the Tribunal makes the following order:

1) The Parties to the hearing are the Applicant, Stelpstra Homes Corporation and Tarion Warranty Corporation.

2) The hearing is scheduled for 9:30 a.m. on May 8, 2006 at the Tribunal Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

3) The Respondent indicated that one witness would be called.

4) The Applicant indicated one witness would be called.

5) The Parties agree there is no resolution of the issue concerning the Respondent’s proposed registration condition of requiring Security deposits per home enrolled in the Plan by the Applicant.

6) The Parties shall fully comply with all applicable disclosure requirements as set out in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

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Jane Weary, Vice-Chair

Released: April 13, 2006.

File: 3340.nhw.Stelpstra Homes Corporation.prehrg.doc

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PREHEARING

MILTIADIS and EVANGELIA CHRISTIDIS

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: PETER CARLISI, Counsel, representing the Applicants

HEATHER GRAY, Counsel, representing Tarion Warranty Corporation

DATE OF PRE-HEARING: March 22, 2006 Toronto

ORDER

Following attendances on March 22, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Peter Carlisi, Counsel for the Applicants, and Heather Gray Counsel for Tarion Warranty Corporation ("Tarion");

The Tribunal orders that:

1. The parties to the hearing are the Applicants and Tarion.

2. No settlement of the issue was arrived at by the parties.

3. The issue, as set out in the Tarion Decision Letter of November 25, 2005, is in accordance with section 14(3) of the Act and section 17 of Regulation 892, which sets out the requirements for new homeowners to submit a Delayed Closing claim and that the Applicant's claim cannot be considered under the warranty as it was not submitted within the proper claim period;

4. In this instance, the Applicants' submission period was between April 17, 2003 and midnight April 16, 2003, while the date on which the Applicants did submit a delayed closing costs claim to Tarion was October 13, 2004.

5. Mr. Carlisi, counsel for the Applicants acknowledged the date of the delayed closing costs claim as October 13, 2004 and submitted that the issues to be addressed were (1) limitation and (2) claim amount.

6. The Parties were advised of the Tribunal's disclosure rules and timing and that they shall fully comply with the requirements of disclosure as set forth under Rule 6 of the Tribunal's Rules of Practice.

7. The Parties are advised that in the event the matter is settled or the Appeal is withdrawn prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to all other Parties, that the matter has been settled and the hearing, scheduled for April 28, 2006 will not be required.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Member

RELEASED: April 4, 2006

FILENAME: 3303.nhw.Miltiadis & Evangelia Christidis

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

CRAIG AND SUSAN ALLISON

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

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: LESLIE MILLER, Agent, representing the Applicants

ANDREW PINTO, Counsel, representing Tarion Warranty Corporation

DATE OF PRE-HEARING: April 10, 2006 Toronto

ORDER

Following attendances on April 10, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Leslie Miller, Agent for the Applicants (the "Applicants") and Andrew Pinto, Counsel for Tarion Warranty Corporation ("Tarion");

The Tribunal orders that:

1. The Parties to the hearing are the Applicants and Tarion;

2. The issues have to do with complaints regarding a claim for a major structural defect under section 14(4) of the Act, as set out in the Tarion Decision Letter of November 28, 2005;

3. The Applicants agreed the claims could be narrowed to items 1 and 2, as listed in the Tarion Decision Letter, and that claim items 3 and 4 would not be pursued at the hearing;

4. The Applicants acknowledged that repair work to their home was necessary and that the work had already been completed; it was stated that their claim was to obtain reimbursement, under the Act, for the cost of the repair work;

5. Tarion's position, as outlined by Mr. Pinto, is that for a structural claim to succeed, a homeowner must show the failure of a load-bearing element and that there is or was a structural defect;

6. The Applicants agreed to provide access to Tarion in the event Tarion retained an expert to carry out an on-site inspection and prepare an expert opinion regarding the claim items;

7. The Parties reviewed the disclosure dates for any and all expert reports and the benefits of having the authors as witnesses in the event the Parties did not arrive at a settlement and the matter did proceed to the hearing;

8. The Parties were reminded of the Tribunal's disclosure rules and timing, and that they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal;

9. The Parties were advised that in the event the matter is settled prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to all other Parties that the matter has been settled and the hearing will not be required;

10. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, June 12, 2006 and to continue, if necessary, at 9:30 a.m. on June 13 and 14, 2006.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: April 13, 2006

FILE NAME: 3295.onhwpa.Allison.prehrg order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

YAJNAVALKYA BHATTACHARYA

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

TO DISALLOW A CLAIM

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

APPEARANCES: YAJANVALKYA BHATTACHARYA, Applicant, representing himself and Jagruji Patrhak

TED WEREDYNSKI, Agent, representing Tarion Warranty Corporation

PAUL H. STARKMAN, Counsel for Remington Homes (Dufferin Hills) Inc., Added Party

HEIDI SCHEIBMAYR, Customer Relations Manager, for the Added Party

DATE OF PRE-HEARING: March 24, 2006 Toronto

ORDER

Following attendances at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") on March 24, 2006 of Yajnavalkya Bhattacharya, Applicant, appearing on his own behalf and on behalf of Jagruji Patrhak, co-owner (the “Applicants”); Ted Weredynski, Agent, for Tarion Warranty Corporation; Paul H. Starkman, Counsel for Remington Homes (Dufferin Hills) Inc., Added Party; and Heidi Scheibmayr, Customer Relations Manager for the Added Party;

The Tribunal makes the following Order:

1) The hearing will commence at 9:30 a.m. on Friday, the 21st day of April 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

2) The Applicants have been made aware of their right to counsel.

3) The Parties shall comply fully and in a timely manner with the disclosure requirements as set forth in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

_____
Irvin H. Sherman Q.C.
Vice Chair

RELEASED: April 4, 2006

FILE NAME: 3280.nhw.Bhattacharya.pre

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

DANNY DeCICCO

APPEAL FROM A DECISION OF TARION WARRANTY CORPORATION, THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT* R.S.O. 1990, CHAPTER O.31, AS AMENDED

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: MAURICE VATURI, Counsel, appearing on behalf of the Applicant

HEATHER GRAY, Counsel, appearing on behalf of Tarion Warranty Corporation

ROBERT SALITURO, Agent, appearing on behalf of Rangebury Estates Inc., the Added Party

DATE OF HEARING: March 28, 2006 Toronto

ORDER

The Corporation (“Tarion”) designated for the purposes of the *Ontario New Home Warranties Plan Act* (the “Act”) issued a Decision Letter dated November 9, 2005 to deny the claim of Danny DeCicco (the "Applicant") pursuant to Section 16 of the Act;

The Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal this Decision;

The Tribunal scheduled a hearing of this matter to be held on March 28, 2006;

At the commencement of the hearing, the Parties, through their representatives in attendance, as noted above, advised the Tribunal that the matter had been settled and that the Applicant wished to withdraw his request for a hearing before the Tribunal;

Accordingly, this Tribunal specifies that the application is withdrawn and that these proceedings are concluded before the Licence Appeal Tribunal.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice Chair

RELEASED: April 3, 2006

FILE NAME: 3275.onhwpa.DeCicco.withdrawal order.doc

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

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

JEFF AND HEATHER GILLARD

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

TO DISALLOW A CLAIM

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: NO-ONE APPEARED ON BEHALF OF THE APPLICANTS

JOEL OLIPHANT, Counsel, representing Tarion Warranty Corporation

NO-ONE APPEARED ON BEHALF OF THE ADDED PARTY

DATE OF HEARING: March 30, 2006 Toronto

ORDER

WHEREAS the Tribunal appointed a time and place for the hearing in the above matter on March 30, 2006;

AND WHEREAS the Applicants advised the Tribunal on March 29, 2006 of the recent hospitalization of a family member for whom the Applicant's wife is the primary caregiver and requested an adjournment of the hearing to the third or fourth week of April 2006;

AND WHEREAS Counsel for Tarion Warranty Corporation ("Tarion") advised the Tribunal that he had consented to the request late in the day of March 29, 2006 and further represented that he had directly communicated with the Added Party who had also provided its consent to the adjournment request;

AND WHEREAS the Tribunal deems it to be just, fair and equitable that an adjournment be granted so as to enable the Applicant to adequately present their evidence;

THE TRIBUNAL ORDERS that the hearing of the Applicants' appeal be adjourned, peremptory against the Applicants to commence at 9:30 a.m. on the 9th day of May, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____

Jane Weary, Vice-Chair

RELEASED: April 5, 2006

FILENAME: 3271.Gillard.onhwpa.adj.doc

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice 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

Ontario

VIJAY SHARMA

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*, R.S.O.1990, CHAPTER O.31

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: VIJAY SHARMA, Applicant (the "Applicant")

BENJAMIN LA BORIE, Counsel, representing Tarion Warranty Corporation (the "Respondent")

DOMENIC BINETTI, Agent, representing Fernbrook Homes (McLevin Woods) Limited (the "Added Party")

DATE OF HEARING: April 6, 2006 Toronto

ORDER

WHEREAS the hearing of this matter commenced at the appointed time;

AND WHEREAS the Parties agreed to adjourn the matter pending further investigation of the Applicant's residence;

IT IS THEREFORE Ordered that this matter be adjourned until 9:30 a.m., Monday, June 26, 2006, to continue June 27, 2006, if necessary.

LICENCE APPEAL TRIBUNAL

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William McIntosh, Vice-Chair

RELEASED: April 10, 2006

FILE NAME: 3053.onhwpa.Sharma.order.doc

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

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

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Decisions under the Private Career Colleges Act

Fiscal Year 2006 - 2007

LAT Decisions, Rulings and Orders

Archives

- 2003 - 2004
- 2004 - 2005
- 2005 - 2006

Decisions from the Superior Court of Justice

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- CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.
- CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.
- CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.
- CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC. - SECOND PRE-HEARING ORDER
- CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

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Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: RAJ PANNU, Vice-Chair

APPEARANCES: SHELVAN KANNUTHARAI, Agent, representing Canadian College of Business and Computers Inc.

SONAL GANDHI, Counsel, representing the Superintendent under the *Private Career Colleges Act*

DATE OF MOTION: March 13, 2007 Toronto

ORDER

BACKGROUND

On March 13, 2007, at a hearing before this Tribunal, Shelvan Kannutharai, Agent, appearing on behalf of Canadian College of Business and Computers Inc. (the "Applicant"), and, Sonal Gandhi, Counsel, representing the Superintendent under the *Private Career Colleges Act*, made representations to the Tribunal.

The Tribunal was asked by the Applicant to order that he be allowed to lead his evidence and call his witnesses as he sees fit. The Applicant wishes to examine his witnesses prior to his own Examination-in-Chief.

Sonal Gandhi, Counsel for the Respondent, opposed the Applicant's request. In support of her arguments, she presented the Tribunal with the following documents:

1. *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22;*

   Powers re control of proceedings

   Abuse of processes

   > **23. (1)** A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its

processes.

2. *Prassad v. Canada (Minister of Employment and Immigration), 1989 S.C.J. No. 25, pp. 1-19.* Counsel highlighted the Powers of the Adjudicator in paragraph 16 on page 7. In her oral presentation, Counsel emphasized, in particular, "*As a general rule, these tribunals are considered to be masters in their own [page 569] house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the provison that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice…* "

3. *Courts of Justice Act, R.R.O. 1990, REGULATION 194, Amended to O. Reg. 77/06*

   RULES OF CIVIL PROCEDUR*E*

   EXCLUSION OF WITNESSES

   Order for Exclusion

   52.06 (1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2). *R.R.O. 1990, Reg. 194, r. 52.06 (1).*

4. a) *1423391 Ontario Inc. (c.o.b. Supreme Car Sales) Decision by I. H. Sherman (Vice-Chair), Ontario Licence Appeal Tribunal, July 15, 2005.* Counsel referred to the fact that *Rule 26* of the *Rules of Civil Procedure* provided that the court shall grant leave to amend a pleading at any stage of an action.

   b) *Kim (Re) [1995] O.C.R.A.T.D. No. 112 Decision by B. J. Reade (Vice-Chair) of Ontario Commercial Registration Appeal Tribunal, November 3, 1995.* Counsel highlighted the position of Garth Little for the applicants, when he argued that an analogy should be made with the *Rules of Civil Procedure* and the *Rules of Small Claims Court*, "*...wherein parties are precluded from introducing expert testimony unless copies of reports are provided to other parties well in advance of the scheduled hearing date…* "

5. Excerpts from *The Trial of An Action (Second Edition), John Sopinka, Butterworths, Toronto and Vancouver, pp. 146, 147.*

   Counsel highlighted the various Rules of Practice that give the trial judge the power to exclude witnesses.

The Tribunal derives its authority from the *Statutory Powers Procedures Act, R.S.O. 1990, c. S.22.* There is nothing in the Rules of Practice dealing with the order of witnesses. Each party is entitled to lead their evidence and call their witnesses as they deem fit, as long as they do not (if they are the party that goes first) divide their case

between the main case and the reply case. The issue here deals with the Applicant Licensee, and since this party has only one opportunity in the case to call witnesses and lead the evidence, then the Reply issue does not arise and the general rule that a party is entitled to call his or her witnesses in the order in which they wish to applies. In case a lawyer was representing the Applicant, the lawyer would probably call the Licensee first. This is a general practice, and it is frequently ignored, especially if there are witnesses present who have been summoned. The issues that affect a Counsel's judgment as to whom to call first include, but are not limited to, who can give the best overview of the case for the party (often an expert), and who presents best and most credibility. Although there are no rules regarding the order of witnesses, there is, however, a requirement to provide the parties with an opportunity to present evidence. The Tribunal cannot dictate the order in which the parties present their evidence.

ORDER:

Accordingly, the Tribunal orders that the Applicant is allowed to call his witnesses and to present evidence in any order he deems appropriate.

LICENCE APPEAL TRIBUNAL

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Raj Pannu
Vice-Chair

RELEASED: March 14, 2007

File name: 3403.pcca.ccbc.motion.doc

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Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

MOTION

CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: RAJ PANNU, Vice-Chair

APPEARANCES: SHELVAN KANNUTHARAI, Agent, representing Canadian College of Business and Computers Inc.

SONAL GANDHI, Counsel, representing the Superintendent under the *Private Career Colleges Act*

DATE OF MOTION: November 27, 2006 Toronto

ORDER

BACKGROUND

On November 27, 2006, at a hearing before this Tribunal, Shelvan Kannutharai, agent, appearing on behalf of Canadian College of Business and Computers Inc. (the "Applicant") made a motion to the Tribunal to order the Ministry of Training, Colleges, and Universities to disclose the following documents obtained by the Applicant under the *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 (the "Act")**:**

NO.	RECORD	EXEMPTION (S)
1	September 20, 2005 – January 19, 2006. Emails from/to Susan Hoyle-Howieson from/to Jerson Joaquin, Nancy Shepherd, Dawn Greenwood regarding CCBC, Canadian College of Business and Computers, and/or Shelvan Kannuthurai – Documents are numbered from 1 – 56.	**s.19 of The Act–Solicitor-Client Privilege**
2	September 21, 2005 – January 19, 2006. Emails from/to Susan Hoyle-Howieson from/to Jerson Joaquin, Nancy Shepherd, Dawn Greenwood regarding CCBC, Canadian College of Business and Computers, and/or Shelvan Kannuthurai –	**s.13 of The Act-Advice to Government**

	Documents are numbered from 1 – 9.	
3	October 18, 2005 – December 22, 2006. Emails from/to Susan Hoyle-Howieson from/to Jerson Joaquin, Nancy Shepherd, Dawn Greenwood regarding CCBC, Canadian College of Business and Computers, and/or Shelvan Kannuthurai – Documents are numbered from 1 – 13.	**s.17 of The Act-Third Party Information** **s.21 of The Act-Personal privacy**
4	December 23, 2005 – January 6, 2006. Emails from/to Susan Hoyle-Howieson from/to Jerson Joaquin, Nancy Shepherd, Dawn Greenwood regarding CCBC, Canadian College of Business and Computers, and/or Shelvan Kannuthurai – Documents are numbered from 1 – 2.	
5	September 21, 2005 – January 19, 2006. Emails from/to Susan Hoyle-Howieson from/to Jerson Joaquin, Nancy Shepherd, Dawn Greenwood regarding CCBC, Canadian College of Business and Computers, and/or Shelvan Kannuthurai – Documents are numbered from 1 – 12.	
6	September 20, 2005 – November 4, 2005. Handwritten notes by Jerson Joaquin regarding CCBC.	**s.19 of The Act-Solicitor-Client Privilege (partial)**

The Tribunal heard arguments based on law relating specifically to Litigation Privilege from Ms. Sonal Gandhi, counsel, appearing on behalf of the Superintendent under the *Private Career Colleges Act* (the "Superintendent"). The Tribunal was provided with the Respondent's affidavit and factum for this motion. The factum provides the citations of the following two cases upon which the counsel relied in her arguments**:** *Blank v. Canada (Minister of Justice), 2006 SCC 39* and *Garratt v. CGU Insurance Co. of Canada [2002] O.J. No. 1499.*

The Respondent refused production of material relating to the private investigation company which was retained by the Ministry on grounds of Litigation Privilege. Counsel stated on the record that the vast majority of material had already been disclosed to the Applicant. Four (4) documents, which were relevant, but inadvertently not produced, were sent to the Applicant on November 24, 2006, via facsimile. The Applicant acknowledged receipt of handwritten notes by Jerson Joaquin regarding CCBC from September 20, 2005, to November 4, 2005, as per point #6 of the Motion record.

The Tribunal derives its authority from the *Statutory Power Procedures Act,* R.S.O. 1990, c. S.22. The statutory interpretation of provisions under the *Freedom of*

Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 is not applicable to this Motion. In case the Applicant wishes to appeal any decision under this same Act, he should do so in the proper forum provided under Section 50 of the said Act.

The Applicant's Motion was confusing and non-specific. He acknowledged that he had already received some of the documents mentioned in his Motion Record. The Tribunal finds that Section 19 – Solicitor-Client Privilege - of the Act applies and provides exemption of the disclosure of documents. Sections 13, 17, and 21 also provide the relevant exemptions from disclosure of documents.

The Respondent's refusal to produce any material relevant to the private investigation company retained by the Ministry falls under Litigation Privilege which was clearly defined by the recent decision of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice), 2006 SCC 39.* In the case before this Tribunal, the private investigator was retained by the Ministry for the purpose of preparing for litigation after litigation had begun**;** thus**,** the requirements for Litigation Privilege are met and all material pertaining to the private investigation is excluded from disclosure. There is no compelling public interest override which clearly outweighs the purpose of an exemption.

ORDER:

Accordingly, the Tribunal denies the Motion.

LICENCE APPEAL TRIBUNAL

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Raj Pannu
Vice-Chair

RELEASED: December 5, 2006

FILENAME: 3403.ccbc.pcca.pre-hrg.doc.

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

MOTION

CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: SHELVAN KANNUTHARAI, Agent, representing Canadian College of Business and Computers Inc.

SONAL GANDHI, Counsel, representing the Superintendent under the *Private Career Colleges Act*

DATE OF HEARING: August 28, 2006 Toronto

DECISION AND ORDER

BACKGROUND

The Applicant faxed the Tribunal on August 11, 2006 with motion material for an adjournment in this matter. Hearing dates of September 5, 6, 7 and 8, 2006 had been scheduled for hearing the appeal in an interim pre-hearing Order of May 1, 2006. In that Order, the Tribunal had required disclosure by the Superintendent by May 12, 2006 and disclosure by the Applicant by May 19, 2006.

In its final pre-hearing Order of June 2, 2006, the Tribunal noted the Applicant's failure to comply with its earlier Order and re-ordered the Applicant to make disclosure by no later than Friday, June 30, 2006. It was noted that the Superintendent had made full disclosure. The Tribunal further advised the Parties that the hearing would take place on the dates originally scheduled of September 5, 6, 7 and 8, 2006 on a peremptory basis against both Parties.

SUBMISSIONS

Mr. Kannuthurai submitted that the Superintendent's immediate Suspension Order of the Applicant has hurt students whose enrollment in the private college was founded on the humanitarian not-for-profit initiative of the Federal Government's program "Professeurs pour la liberté" (PPL). Mr. Kannuthurai submitted the Applicant had done

everything possible to obtain what he considered to be vital evidence from Federal government departments and employees. He advised such documents would demonstrate the Superintendent had manipulated Federal Agencies and thereby acted with malice for personal gain in issuing her Proposal and immediate Suspension of the College in January 2006.

Documents in the motion material filed, establish the Applicant first sought such disclosure by letter to the pertinent Federal Agency on April 24, 2006. The most recent letter from the Federal Agency filed in the motion material is dated June 2, 2006 and notes the government requires an additional 120 days over the original 30 days to complete the Applicant's request.

The balance of the motion material filed with the Tribunal demonstrates that Mr. Kannuthurai has filed complaints against relevant Federal departments for the length of time the process is taking. In his submission to the Tribunal, Mr. Kannuthurai advised he has spoken with Federal individuals responsible last week and was informed the information would be available within 30-60 days. He therefore seeks a 90-day adjournment of the hearing.

Counsel for the Superintendent noted there was no evidence supporting the Applicant's allegation of malice or improper interference with Federally administered programming. Counsel submitted further that the issue before the Tribunal on the Appeal is whether the Applicant has met minimum standards of licensing in its operation as a private college under the legislation. If, as the Superintendent alleges in her Proposal, it has not, then the appropriateness of her action will be confirmed by the Tribunal. Consequently, the material the Applicant seeks from the government, which he hopes will demonstrate a nefarious motive by the Superintendent, is immaterial.

Counsel further submitted that the Applicant has had months to gather his evidence, if indeed he considers it necessary. The fact is that he chose not to make the request until close to four months after the Superintendent's issuance of her Proposal.

Ms. Ghandi noted an adjournment would cause much prejudice to her client who has made disclosure, subpoenaed 3 witnesses as well as 2 expert witnesses and prepared various Ministry employees for the hearing, set to last 4 days commencing next week.

Finally, Counsel for the Respondent argued that the public interest would not be served in granting the adjournment. She noted that approximately 20 students were affected by the closure of the Applicant's business and that, despite her offices seeking releases this winter from the Applicant to place these students, such has never been received. Further, funds established under the legislation to assist the affected students, some $110, 000.00 in this case, cannot be distributed until this Tribunal has issued a final order in the matter. Consequently, the students have no ability to benefit from the very economic recourse that the legislation seeks to provide until this matter is heard and an Order released.

DECISION

The Parties were advised at the closing of their submissions that the motion was denied. The reasons for the denial are as follows:

1. Adjournments are not granted as of right but are discretionary. The main consideration is whether the Parties require the adjournment to ensure a fair and full hearing.

In the circumstances of this case, the Tribunal is not convinced the adjournment to gather information from Canadian federal government agencies is necessary for the Applicant to receive a full hearing. The allegations against it as contained in the Proposal are limited to its past and present financial conduct in failing to refund student money as well as its honesty and integrity in the manner by which it has conducted its business as a regulated career college under the Provincial legislation. It is evidence on the Applicant's past and present conduct and not on the Superintendent's that the Tribunal must consider in deciding whether the Proposal should be upheld or not.

The Act is one of consumer protection such that it is the interests of the public that are of prime importance. If the Applicant has evidence of some improper action by a public employee, it has other avenues of legal action available to pursue any claim which may arise. The Tribunal's mandate is to ascertain whether the public protection of the pertinent legislation is jeopardized by the acts or omissions of the businesses licensed under it, and if so uphold the refusal or revocation of that licence.

2. The Tribunal agrees with Counsel for the Respondent that an adjournment this late in the preparation would be prejudicial to her client who has clearly expanded much time and effort into compiling documentary and witness evidence. It is noted further that these witnesses, including 2 experts have no doubt already rearranged their schedules in order to be available for next week's scheduled hearing.

3. The Tribunal also concludes it is not in the public interest to grant the adjournment. It acknowledges the students affected need some resolution of the matter, which has been unsettled for close to nine months and involves significant funds of which they, being in this country on humanitarian visas, do not have easy access to (accepting for the moment, Mr. Kannuthurai's submission that the had himself ensured placement of the students at alternative colleges).

Further, an extended delay for 90 days would bring the hearing into dates of January 2007, one full year after issuance of the Proposal. There is an often quoted legal maxim that "justice delayed is justice denied" and to this affect, the Tribunal is cognizant of the Report of the Special Review Committee on Review of Regulatory and Adjudicative Agencies Seat Performance Measures (1999) that:

> Timelines is critical in the administration of justice [and] hearing be completed within one year of the date of filing.

Finally, the cost to the public price in adjourning would be significant given the Ministry offices and witnesses as well as the Tribunal rooms and staff who would need to be re-scheduled. The costs which could be imported on the Applicant under the *Licence Appeal Tribunal Act* do not reflect anywhere near the actual amount such an adjournment would entail.

ORDER

Therefore, for all these reasons: lack of proof of relevance; prejudice to the other party; and, the public interest being negatively affected, the motion for an adjournment is denied and the hearing remains peremptory on all Parties to proceed September 5, 6, 7 and 8, 2006.

LICENCE APPEAL TRIBUNAL

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Jane Weary
Vice-Chair

RELEASED: September 5, 2006

FILENAME: 3403.ccbc.pcca.pre-hrg.doc.

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Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SHELVAN KANNUTHARAI, Agent, representing Canadian College of Business and Computers Inc.

SONAL GANDHI, Counsel, representing the Superintendent under the *Private Career Colleges Act*

DATE OF PRE-HEARING: June 1, 2006 Toronto

SECOND PRE-HEARING ORDER

Following attendances on June 1, 2006, at a second pre-hearing before this Tribunal by Shelvan Kannutharai, agent, appearing on behalf of Canadian College of Business and Computers Inc. (the "Applicant") and Sonal Gandhi, counsel, appearing on behalf of the Superintendent under the *Private Career Colleges Act* (the "Superintendent");

The Tribunal makes the following further Order respecting the hearing scheduled to commence at 9:30 a.m., on September 5, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on September 6, 7 and 8, 2006, at the above Chambers:

1. SHELVAN KANNUTHARAI appears as agent for the Applicant as the latter's counsel, Julian N, Falconer no longer represents the Applicant in this matter.

2. The Applicant's agent conceded that the Applicant had not complied with paragraph 3 of the Tribunal's Order released on May 1, 2006.

3. The Tribunal Orders that the Applicant shall make full disclosure as contemplated by Rule 6.3 of the Tribunal's Rules of Practice by no later than Friday, June 30, 2006.

4. The Tribunal advised the Parties that the hearing will take place on a peremptory

basis against both Parties on the dates set forth in the pre-hearing Order released on May 1, 2006, and restated in the preamble to this Order.

5. The Tribunal brought to the attention of the Applicants' agent the Tribunal's Practice Direction on Adjournments more fully stated on pages 25 and 26 of the Tribunal's Rules of Practice. In particular, and in view of the fact that the Applicant's agent informed the Tribunal that the Applicant intends to retain counsel to represent it at the hearing, the Tribunal drew to the Applicant's agent's attention that it is the Applicant's responsibility to ensure that whosoever is retained to represent the Applicant at the hearing is available on the dates referred to in paragraph 4 above namely September 5, 6, 7 and 8, 2006, and that the Applicant shall further ensure that if it proposed counsel is not available on all the above dates and/or has insufficient time within which to prepare, such counsel should not be retained by the Applicant.

6. The Tribunal hereby records that the undermentioned address is the Applicant's address for the purpose of the service of all documents and things upon the Applicant and the Tribunal Orders that any change of the address shall be notified in writing to the Superintendent and his counsel within 48 hours of such change:

   32 Park Road, Toronto, Ontario, M4W 2N4

7. It is recorded that the Superintendent has made full disclosure in terms of Rule 6.3 above and will continue to make disclosure to the Applicant regarding any further documents that come to the Superintendent's notice. It is further recorded that at this pre-hearing, the Superintendent's counsel served upon the Applicant's agent certain three bound volumes of supplementary productions.

8. No other matters or issues were resolved and accordingly, the pre-hearing was concluded.

LICENCE APPEAL TRIBUNAL

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Derek Israel
Vice-Chair

RELEASED: June 2, 2006

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Licence Appeal Tribunal
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Ontario

PRE-HEARING

CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE SUPERINTENDENT UNDER THE *PRIVATE CAREER COLLEGES ACT*

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ELIZABETH WIDNER, Counsel, representing Canadian College of Business and Computers Inc.

PRABHU RAJAN, Counsel, representing the Superintendent under the *Private Career Colleges Act*

DATE OF PRE-HEARING: April 27, 2006 Toronto

ORDER

Following attendances on April 27, 2006, at a pre-hearing before this Tribunal by Elizabeth Widner, Counsel, appearing on behalf of Canadian College of Business and Computers Inc. (the "Applicant") and Prabhu Rajan, Counsel, appearing on behalf of the Superintendent under the *Private Career Colleges Act* (the "Superintendent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on September 5, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on September 6, 7 and 8, 2006, at the above Chambers:

1. The parties to the hearing are the Applicant and the Superintendent.

2. There was no resolution of any of the issues in this matter.

3. The pre-hearing, which commenced on April 27, 2006, was not concluded and was adjourned until 9:30 a.m. on June 1, 2006, at the Tribunal's Chambers as set out above.

4. Disclosure, as contemplated by Rule 6.3 of the Rules of Practice of the Tribunal, shall be made by the Superintendent by May 12, 2006 and disclosure, as contemplated by the above Rule, shall be made by the Applicant by May 19, 2006. The aforesaid disclosures shall relate to all documents or things in the custody, control or possession of the Parties.

LICENCE APPEAL TRIBUNAL

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Derek Israel
Vice-Chair

RELEASED: May 1, 2006

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- RAHAMAN SUBADAR
- GEORGE SZANTO
- RAHAMAN SUBADAR
- MICHELE DETERING
- IN THE MATTER OF SEPIDEH MOAZZANI
- A. AMEER BAKSH
- JUTHIKA KHETANI
- DESMOND ROY ALLEN
- PAUL LONERGAN
- IN THE MATTER OF A. AMEER BAKSH
- IN THE MATTER OF DWIGHT BRANSTON WATSON
- IN THE MATTER OF DESMOND R. ALLEN
- JEROME S. NICHOLSON
- JUTHIKA KHETANI
- JASON ABELA AND MANJIT SINGH AND SONIA SIDDIQUI
- COURTNEY WALLIS SIMPSON
- PAUL LONERGAN
- JOSEPH D. SINGH
- SIMON DAHAN
- RAHAMAN SUBADAR

- COURTNEY WALLIS SIMPSON
- COURTNEY WALLIS SIMPSON
- DWAYNE W. GREENE
- IN THE MATTER OF DWIGHT BRANSTON WATSON
- DWIGHT BRANSTON WATSON
- IN THE MATTER OF SONIA SIDDIQUI AND MANJIT SINGH AND JASON ABELA
- ALEXANDER AMEER BAKSH
- GERALD JOSEPH McCARTHY

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REAL ESTATE AND BUSINESS BROKERS ACT, 2002
Revised Statutes of Ontario 1990, Chapter R.4

IN THE MATTER OF
VINCE CARERE AND HOMELIFE PINE-WEST REALTY INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: January 12, 2007

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

VINCE CARERE AND HOMELIFE PINE-WEST REALTY INC.
Applicants

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on April 13, 2007;

TAKE NOTICE that upon consent of the Parties, the Tribunal adjourns the pre-hearing, to commence at 10:00 a.m., on May 3, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____
Lynda Tanaka
Acting Chair

RELEASED: March 28, 2007

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RAHAMAN SUBADAR

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: RAHAMAN SUBADAR, representing himself

TIM SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF HEARING: February 26, 2007 Toronto

ORDER

WHEREAS Allen Welman, Counsel for Subadar, by letter dated February 19, 2007, addressed to the Registrar's Counsel and copied to the Tribunal, stated that he was no longer representing Subadar in this matter;

AND WHEREAS Subadar represented himself before the Tribunal at the hearing of this matter on February 26, 2007, to which date this matter had been adjourned on a peremptory basis;

AND WHEREAS, when Subadar appeared before the Tribunal on February 26, 2007, he informed the Tribunal that his counsel, Allen Welman, would no longer represent him in this matter, as a result of which Subadar wished to retain new counsel;

AND WHEREAS, Counsel for the Registrar opposed the granting of an adjournment based upon the fact that some five months had passed since the Registrar had closed its case and that Subadar had during the past five months neglected to prepare his case;

AND WHEREAS, Counsel for the Registrar stated that the ongoing conduct of Subadar is to delay the hearing for as long as possible;

NOW THEREFORE, the Tribunal, having considered the submissions of Subadar and Counsel for the Registrar orders:

1. The hearing of this matter is adjourned, on a peremptory basis against Subadar, to 9:30 a.m. to Wednesday, April 18, 2007, at the Tribunal's Chambers 1 St. Clair Avenue West, 12th Floor, Toronto, and thereafter to continue, if necessary, on Friday, May 4, 2007, Monday, May 14 and Tuesday, May 15, 2007, at the Tribunal's aforementioned address.

2. Subadar shall inform such new counsel as he retains that the Tribunal will not consider the convenience of such counsel to be sufficient reason for the granting of a further adjournment and such new counsel shall not accept the retainer if such counsel is not fully available to appear on the dates and at the times and place set forth in paragraph 1 above.

3. Subadar shall ensure that each and every witness that he intends to call to give evidence on his behalf shall be summonsed, at his sole cost and expense, to attend and remain in attendance at the times, dates and place referred to in paragraph 1 above.

4. As he has undertaken today, Subadar shall forthwith order a copy of the transcript of the proceedings before the Tribunal and pay the cost and expense of such transcript when called upon to do so. Subadar was advised by the Tribunal that the transcript may be obtained from the undermentioned court reporter:

   Alfred C. Devenport
   Official Examiner
   65 Queen Street West, 3rd Floor
   Toronto ON M5H 2M5

   Telephone: (416) 366-8965

5. In the event of Subadar intending to call to testify on his behalf witnesses in addition to those whose names have already been advised to the Registrar's Counsel, he shall ensure that his counsel communicates such additional witnesses' names to the Registrar's Counsel together with a synopsis of their intended testimony;

6. Subadar shall advise the Tribunal and the Registrar, in writing, regarding the full name of any counsel retained by him as well as the mailing address, telephone and fax numbers of said counsel.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: March 2, 2007

FILE NAME: 3139.rebba.Subadar.March.07.Order

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

GEORGE SZANTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002, Chap c. 30, Schedule "C"

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair, Presiding

APPEARANCES: No-one appearing on behalf of the Applicant

GEORGE DRAMETU, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF PRE-HEARING: February 12, 2007 Toronto

ORDER

Following attendances on February 12, 2007 at a pre-hearing at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, no-one appearing on behalf of George Szanto (the "Applicant") and George Drametu, Counsel, appearing on behalf of the Registrar, *Real Estate And Business Brokers Act, 2002.*

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on April 3rd, 2007 at the Tribunal's Chambers, 1 St Clair Avenue West, Toronto, Ontario and to continue if necessary on April 4th, 2007 at the aforementioned address;

1. The Parties to the hearing are the Applicant and the Registrar.

2. The Applicant 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 of experts' reports, if any are to be relied on at the hearing, shall be made at

least 30 days before the hearing. The parties shall, not less than 10 days prior to the hearing, serve on the other and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

3. Not less than 10 days before the hearing the Applicant shall serve on the Registrar a list of witnesses that he intends to rely on at the hearing.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude, Vice-Chair

Released: February 16, 2007

File name: 3923.rebba.Szanto.Prehrg.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RAHAMAN SUBADAR

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ALLEN PHILIP WELMAN, Counsel, representing Rahaman Subadar

TIM SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: January 30 and 31, 2007 Toronto

ORDER

WHEREAS, the above-stated matter was set down for continued hearing before this Tribunal on January 30 and 31, 2007;

AND WHEREAS when the hearing commenced on January 30, 2007, counsel for Subadar informed the Tribunal that he had been instructed to move for an adjournment of the hearing until January 31, 2007;

AND WHEREAS Subadar's counsel advised the Tribunal that the adjournment was being sought due to Subadar having advised his counsel that he was indisposed and unable to attend the hearing on January 30, 2007;

AND WHEREAS Subadar's counsel was advised by the Tribunal to immediately have his client furnish the Tribunal with a medical certificate as to his client's indisposition;

AND WHEREAS counsel for Subadar furnished a doctor's note to the Tribunal indicating that the doctor had seen Subadar on January 29, 2007, for an undisclosed illness;

AND WHEREAS, the Tribunal granted an adjournment of the hearing to January 31, 2007, subject to the question of the day's aborted costs being reserved for later decision by the Tribunal;

AND WHEREAS, when this matter came before the Tribunal on January 31, 2007, for the continuation of the hearing, counsel for Subadar advised the Tribunal that his client was not able to be present for the continuation of the hearing on January, 31, 2007, as according to Subadar, "his half-brother had died and he had gone to his funeral". Subadar's counsel further advised the Tribunal that he had no further information to offer to the Tribunal and counsel moved for the matter to be adjourned to February 26 and 27, 2007, which latter dates had already been reserved for the continued hearing of this matter;

AND WHEREAS, counsel for the Registrar opposed the granting of an adjournment but in the event of the granting of such adjournment reserved his client's right to move for costs;

AND WHEREAS, upon consideration of counsels' submissions, the Tribunal granted an adjournment subject to the following terms and conditions which are hereby made an Order:

1. The hearing will continue, on a peremptory basis against Subadar, at the Tribunal's Chambers at, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on February 26, 2007, and will continue at 9:30 a.m., on February 27, 2007;

2. The hearing shall thereafter continue at the Tribunal's above-stated Chambers on February 28, 2007, and March 2, 2007;

3. Counsel for Subadar shall ensure that the four summonses issued by the Tribunal at his request and handed to him on January 30, 2007, are expediously served upon the witnesses together with the necessary conduct money and fees due to such witnesses. Counsel shall also ensure that the summonses reflect that the witnesses are to appear on February 28, 2007, and March 2, 2007, in addition to February 26 and February 27, 2007;

4. By no later than February 19, 2007, Subadar's counsel shall serve upon the Registrar's counsel and file with the Tribunal, a synopsis of the proposed evidence that each of the four witnesses propose to adduce at the hearing;

5. By no later than February 19, 2007, Subadar's counsel shall serve upon the Registrar's counsel and file with the Tribunal of the following documents:

    a) a legible medical certificate under the signature of Dr. R. Beharry stating precisely from what illness Subadar was suffering when he was seen by Dr. Beharry, on January 29, 2007;

b) the full names and date of death of Subadar's half brother and the date and place of the latter's funeral as well as the death certificate of Subadar's half brother;

The information ordered in terms of paragraphs 5 (a) and (b) above are required to enable the Registrar's counsel to assess his client's position relative to the question of aborted costs.

LICENCE APPEAL TRIBUNAL

_____

Derek Israel
Vice-Chair

Released: February 2, 2007

FILE NAME: 3139.rebba.Subadar.adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

MICHELE DETERING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE REGISTRATION

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

APPEARANCES: MICHELE DETERING, the Applicant

TIM SNELL, counsel, representing the Registrar under the *Real Estate and Business Brokers Act, 2002*

DATE OF PRE-HEARING: November 3, 2006 Toronto

ORDER

Following attendances on November 3, 2006 at a pre-hearing before this Tribunal of Michele Detering (the "Applicant") and Tim Snell, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m., on January 2, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on January 4 and 5, 2007, at the Tribunal's above Chambers;

1. The Parties to the hearing are the Applicant and the Registrar;

2. The hearing has been adjourned to commence on January 22, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on January 23 and 24, 2007, at the Tribunal's above Chambers;

3. There was no resolution of any of the issues in this matter; and

4. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

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

Released: November 14, 2006

File name: 3774.deterring.rebba.pre-hrg.doc

The 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
SEPIDEH MOAZZANI

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: July 27th, 2005

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

SEPIDEH MOAZZANI

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 November 7 and 8, 2006;

TAKE NOTICE that upon consent of the Parties, the Tribunal adjourns the hearing, *peremptory against all parties*, to commence at 9:30 a.m., on February 5, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue if necessary on February 6 and 7, 2007.

LICENCE APPEAL TRIBUNAL

_____
Carl Dombek
Chair

RELEASED: November 7 2006

FILE NAME: 3110.rebba.moazzani.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

A. AMEER BAKSH

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

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

APPEARANCES: PAOLA KONGE, counsel, representing the Applicant

TIM SNELL, counsel, representing the Registrar under the *Real Estate and Business Brokers Act, 2002*

DATE OF PRE-HEARING: October 12, 2006 Toronto

ORDER

Following attendances on October 12, 2006 at a pre-hearing before this Tribunal of Paola Konge, counsel, appearing on behalf of A. Ameer Baksh (the "Applicant") and Tim Snell, counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Registrar");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on December 4, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue, if necessary, on December 5 and 7, 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

3. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

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

Released: October 17, 2006

File name: 3687.rebba.baksh.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

Ontario

JUTHIKA KHETANI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT,* 1990

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: ANDREW B. TULK, Counsel, appearing on behalf of Juthika Khetani

TIM SNELL, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: October 4, 5 and 6, 2006 Toronto

REASONS FOR DECISION AND ORDER

Upon the application of Juthika Khetani, this hearing was conducted under Section 9. (2) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R.4 (the "Act"), to review a Proposal by the Registrar under the Act to revoke Ms. Khetani's registration as a real estate salesperson.

THE EVIDENCE

The Respondent introduced documentary evidence and called witnesses: two clients of Ms. Khetani; Ms. JoAnn Swain, an investigator with the Real Estate Council of Ontario ("RECO"); Margaret Marshall, a Registration Officer with RECO, and Brian Schlotzhauer, the Deputy Registrar under the Act. The following is a summary of the Respondent's evidence.

A man who shall be known as AQK came to Canada from Pakistani Kashmir and, through connections in the Canadian Pakistani Kashmiri community, contacted two of the witnesses in the summer of 2004. One of these witnesses is a student and shall be referred to as SJ. The second is a travel agent and shall be known as ZK. To both of these people, AQK made a very similar pitch. He claimed to work for Re/Max, in one case saying that he worked with Ms. Khetani.

He said they were interested in buying property before the American Presidential election, holding it briefly and then re-selling it after the election when property values could be expected to soar. In one case, he suggested profits in the range of $80,000. AQK said that the properties were rented and the rents would pay the mortgage. The transactions were legal, AQK assured SJ and ZK, but he needed someone to nominally buy the property and take out the mortgage pending the re-sale. For this service he was prepared to split the profits 50/50. As well, he offered a payment on signing of $12,000 in the case of the student, SJ. In the case of the travel agent, ZK, there was a payment of $6,000 but ZK understood this was to make some of the mortgage payments.

In each case, the properties were acquired in the early fall of 2004. SJ and ZK did not inspect the properties and, in the case of ZK, he did not know the addresses of the properties he was buying until he attended at the lawyer's office to sign some documents. Neither SJ nor ZK asked questions about the documents they were given to sign. Neither party met Ms. Khetani prior to closing the transaction although they both understood that she was the real estate broker on the transactions.

In each case, AQK made the first mortgage payment and, with some prodding, the second. Then he disappeared. SJ and ZK were told he had returned to Pakistani Kashmir. Only then, with the mortgagees looking to them for repayment did SJ and ZK contact Ms. Khetani. SJ and ZK inspected the properties that had been bought in their names and found them to be derelict and vacant. Ms. Khetani was prepared to attempt to re-sell the properties but she did not accept any responsibility for the predicament that SJ and ZK found themselves in.

At that point, SJ and ZK obtained the sale and mortgage papers. ZK stated that it was not his signature on several of the documents. No expert witness was called but the signatures on the various documents in ZK's name are obviously different. The properties were ultimately resold for substantially less than the mortgage amount. SJ is now considering bankruptcy. ZK is financially unable to repay the shortfall he owes on the mortgages he gave.

Both SJ and ZK filed complaints against Ms. Khetani with RECO. As a result of these complaints, RECO investigated and interviewed Ms. Khetani, who is registered as a salesperson with Re/Max Goldenway. Ms. Khetani volunteered that, in addition to the transactions involving SJ and ZK, there were two other properties where AQK was involved and she provided files for these properties as well.

The investigation showed that Ms. Khetani had not met her clients prior to the sale, had not shown them the properties and had purported to witness their signatures on Agreements of Purchase and Sale and other legal documents without actually seeing them sign. During the investigation, RECO also learned that the listings on some of the properties had been cancelled by Ms. Khetani after the properties had been sold, a highly irregular procedure.

Ms. Khetani gave evidence on her own behalf, which may be summarized as follows.

Ms. Khetani is 50 years old. She was born in India and came to Canada in 1976. She obtained a real estate registration as a salesperson in 1987 and currently works part time as a realtor and part time as a dental assistant. She makes about $20,000 a year, principally from real estate. She does about ten real estate deals each year.

She met AQK in the summer of 2004, through his wife. AQK and his wife befriended her and told her they had contacts in Toronto who were interested in buying and selling properties. They asked if she would like the business and she was excited by the prospect.

Later in the summer, AQK brought the first transaction to Ms. Khetani. He offered her the opportunity to act for both the buyer and seller, but because he was bringing the parties together, arranging the mortgage, doing the house inspection and most of the rest of the "running around", he offered Ms. Khetani a commission of 2% and she agreed.

She listed the property but was concerned that the listed price was "a little high", about $45,000 above comparable property in the area. AQK reassured her that the buyer was happy. AQK came to her home, picked up the offer and brought it back signed and asked Ms. Khetani to fax it to a mortgage broker. She met the buyer on the day of closing and was relieved when he told her he was happy with the transaction and would like to do more.

In September 2004, AQK brought in four more potential transactions. Again, he would do all the legwork; again she would represent both buyer and seller and, in this case, she would collect a 1% commission. Even 1% on these four properties represented over half of Ms. Khetani's usual annual income. She listed the properties, this time without questioning the listing price. AQK either prepared the documents or gave her the information with which to prepare them. She purported to witness documents, including Agreements of Purchase and Sale, without seeing them signed. Ms. Khetani cancelled the listing for several of these properties after closing. AQK gave her various reasons why the seller did not want the transaction to be known.

She believed that she had met SJ and ZK and had shown them their respective properties. However, when she subsequently met ZK in the winter of 2005, after the problems with the transactions had surfaced, she realized that she had been duped; the person she had shown the properties to was not ZK. She said nothing to ZK or to RECO about the impostors.

She did ask the mortgage broker how people like ZK could afford such large mortgages but was told that his income had been confirmed. Everything happened so quickly that she did not have time to realize that this was fraud. At the outset, it did not occur to her that the transactions might be fraudulent as she had never been exposed to anything like this.

She became uncomfortable with the transactions and decided to stop accepting deals from AQK. Only in the winter of 2005 did she discover the extent of the fraud and she regards herself as a victim of it. She believes that over 60 properties were involved in the total scheme, although she acted as realtor in only five of these. She expressed her regrets that her ignorance and incompetence had caused so much trouble.

On cross-examination, Ms. Khetani conceded that the listing agreements for the properties showed a commission of around 4%. She said she had put that figure into the listing agreements in the hopes that she would receive that amount. She acknowledged that she had already agreed to accept 1% commission on the September listings.

FACTS

In closing arguments, Mr. Snell suggested that Ms. Khetani had "rented her registration" to AQK. That is an evocative and apt summary of what occurred. AQK did all the legwork and Ms. Khetani filled out the paperwork at his direction or simply accepted paperwork that he had completed. He set the listing price and, when he produced signed documents, she witnessed them without demur.

The Tribunal finds that her evidence of having shown some properties to impostors is not credible. She mentioned nothing of these impostors at the time. Even when she met ZK for the first time after the transactions were revealed to be questionable, she expressed no surprise that he was not the person she claims to have met earlier. During her interview with RECO, she stated that she had not met ZK or SJ prior to closing. Nor is her explanation for the misleading commission rates on the listing agreements credible. The effect of putting artificially high commission amounts in the listing agreements is to avoid questions about the transaction by anyone having access to the listing agreements. Listing agreements are frequently forwarded to mortgage companies and may form a basis of their decision to finance the transaction.

Ms. Khetani made little or no effort to represent the interests of her clients, whether buyers or sellers, especially on the four properties brought to her in September. She met neither buyers nor sellers, did not inspect or show the property, explained nothing about the obligations of a mortgage to the buyers and gave no opinion as to whether the listing price was reasonable to either seller or buyer. She witnessed signatures without seeing her clients sign. At AQK's direction she cancelled listings on some of the properties after the transactions closed without questioning this irregular procedure. The effect of doing this was to attempt to hide the transaction from other agents having access to the Multiple Listing Service.

To Ms. Khetani's credit, she did have some reservations about these transactions. In the first, she did tell AQK that the listing price was high. She did question the mortgage broker about how at least one of her clients was able to afford the mortgage payments. Regrettably, she did not act on her reservations until it was too late.

The result is that she played an important, if passive, role in a massive real estate fraud. Derelict properties were sold at inflated prices and mortgages were obtained on false information. AQK, the force behind this fraud, has apparently left the country and the buyers of the properties have been left without the means to pay their mortgages.

REASONS FOR DECISION

Section 6. (1) of the Act states:

> 6. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where, ...
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; …

The test in the Act is not what Ms. Khetani's behaviour is likely to be in the future but what her past conduct has been and what expectations it gives rise to concerning her future behaviour. Ms. Khetani was seduced by the prospect of easy money into performing a series of highly irregular and ultimately dishonest acts. The Tribunal is particularly struck by how Ms. Khetani tried to hide some aspects of the transaction, especially the startlingly low commission she was earning. This is strong evidence that she knew that she was involving herself in a series of questionable transactions, even if she might not have understood the full extent of the fraud. As important as what Ms. Khetani did is what she did not do. She accepted a commission without performing the essential services that a realtor provides. Had she provided these services, the fraud would have been revealed; had she even attempted to provide them, AQK would have been forced to go elsewhere to find his accomplice.

The fact that she bore false witness to the signatures of her clients is telling evidence about her honesty. That not all her evidence is credible is also an unfortunate reflection on her integrity.

The Tribunal is sympathetic to the situation that Ms. Khetani finds herself in and accepts her remorse as genuine. However, she must lose her registration as a result of her role in these fraudulent transactions.

ORDER

The Tribunal, pursuant to subsection 9. (4) of the Act, directs the Registrar to carry out his Proposal of December 13, 2005 to revoke the registration of Juthika Khetani.

LICENCE APPEAL TRIBUNAL

_____

Laurie Sanford, Vice-Chair

RELEASED: October 31, 2006

FILE NAME: 3307.rebba.Khetani.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

DESMOND ROY ALLEN

IN THE MATTER OF A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002, CHAPTER 30, AS AMENDED, TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, VICE-CHAIR

APPEARANCES: DONALD F. McLEOD, Counsel, representing the Applicant

TIM SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF MOTION: August 23, 2006 Toronto

ORDER

Mr. Desmond Allen has brought a Motion for an Order granting an extension of time to file an appeal from the Notice of Proposal dated May 8, 2006 in which the Registrar (the "Registrar") of the *Real Estate and Business Brokers Act*, 2002 (the "Act") proposes to revoke the Mr. Allen's registration as a salesperson under the Act.

THE LAW:

The relevant sections of the Act are as follows:

> **14. (1)** The registrar shall notify an applicant or registrant in writing if he or she proposes to, ...
>
> (b) suspend or revoke a registration: . . . .
>
> **14. (2)** The notice of proposal . . . . . shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within 15 days after service of the notice, a written request for a hearing to the registrar and to the Tribunal.

> **14. (3)** The notice of proposal shall be served on the applicant or registrant in accordance with section 45.
>
> **14. (4)** If an applicant or registrant does not request a hearing in accordance with subsection (2), the registrar may carry out the proposal.
>
> **45. (1)** Any notice, order or request is sufficiently given or served if it is:
>
> (a) delivered personally;
>
> (b) sent by registered mail; or
>
> (c) sent by another manner if the sender can prove receipt of the notice, order or request.
>
> **45. (2)** If service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made established that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice or order until a later date.

The relevant section of the Licence Appeal Tribunal Act, 1999 is as follows:

> **7.** Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
>
> (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
>
> (b) give the directions that it considers proper as a result of extending the time.

Concerning the issue of what constitutes "reasonable grounds" for extending the time in which to file an appeal, the case of *Miller Manufacturing and Development Co. v. Alden*, [1979] O.J. No. 3109, a decision of the Ontario Court of Appeal, canvases the law and concludes:

> [The decisions] reveal that a number of considerations are viewed as important, the emphasis given to them in each case varying with the circumstances. They include the existence of a bona fide intention to appeal, the length of the delay, prejudice to the other party, whether it can be compensated by costs and the merits of the appeal.

In considering these factors, Mr. Justice Blair noted that the question of whether the appeal had merit could be established with a lesser standard of proof than is required on an application for leave to appeal.

In the subsequent Ontario Court of Appeal decision *Frey v. MacDonald*, [1989] O.J. No. 236, Mr. Justice Blair added the following:

> Usually, time for 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 . . . .

FACTS:

No oral evidence was given and the following is a summary of the relevant affidavit evidence given, the Notice of Motion filed and the arguments made.

Mr. Allen has been registered as a salesperson under the Act for approximately 20 years. By Notice of Proposal dated May 8, 2006, the Registrar proposed to revoke Mr. Allen's registration. The Notice of Proposal alleges that Mr. Allen's conduct falls short of the standards required for registration in a number of respects. Four of these charges may be characterized as serious; each might, if proven, put Mr. Allen's registration at risk. First, it is alleged that Mr. Allen arranged, on two occasions, to be paid commission directly from the client in violation of the Act. Secondly, the Registrar alleges that Mr. Allen failed to report a real estate transaction to his broker. Thirdly, it is alleged that Mr. Allen failed to ensure that the terms of a trust fund agreement were adhered to in a situation where his broker was trustee. Fourthly, it is asserted that Mr. Allen was involved in making false documents in respect of a real estate transaction, specifically, that Mr. Allen misrepresented the identity of a party to an agreement of purchase and sale.

On May 9, 2006 the Registrar's office served the Notice of Proposal on Mr. Allen in three ways. The Notice of Proposal was sent by regular mail, by registered mail and by overnight courier. The copy sent by registered mail was returned because it had been unclaimed by May 29, 2006.

Mr. Allen did not file a Notice of Appeal within the required 15 days and so on June 5, 2006, the Registrar's Final Notice was served on Mr. Allen, again via regular mail, registered mail and overnight courier. Again the copy served by registered mail was returned because it was unclaimed by June 23, 2006.

For his part, Mr. Allen asserts that he did not receive the Notice of Proposal until May 29th, 2006 when he discovered a courier's package in his backyard addressed to him. He "immediately" contacted his lawyer. On June 6, 2006, 6 business days after Mr. Allen discovered the package, his lawyer left a phone message with the Registrar advising that Mr. Allen did wish to appeal. There was further correspondence on the matter and on July 13, 2006, a Notice of Appeal was completed on Mr. Allen's behalf.

In an affidavit supporting this motion, Mr. Allen does not explain why he did not collect either of the registered mailings to him. Nor does he assert that he did not receive the notices sent by regular mail.

Concerning the merits of the case, Mr. Allen in his affidavit asserts that he was a friend of the purchasers in two related transactions and loaned them money to close the purchase. The implication is, and his lawyer's argument was, that Mr. Allen was not receiving commissions from a client but rather was receiving a partial repayment of a loan. However, Mr. Allen does not specifically make this claim in his affidavit. In the affidavit he also states his belief that any suggestion in the trust ledgers of his broker that trust monies were improperly accounted for was an error on the part of the brokerage. Mr. Allen does not answer the charge that he failed to ensure that the provisions of a trust agreement were complied with. Nor does he dispute the claim that he failed to report a real estate transaction to his broker or that he was involved in falsifying real estate documents.

APPLICATION OF THE LAW:

Mr. Justice Blair in the above-noted cases sets out a multi-pronged test to determine whether the time to file an appeal ought to be extended. The failure to observe the time limits must be reasonably explained. There must be a firm intention from the beginning to appeal. There must be no prejudice to the other party or, if prejudice is found, there must exist a way to compensate the prejudiced party. The appeal must be shown to have merit, that is, the appeal must raise a substantive and reasonably arguable case. Finally, all these tests are subject to a broader rule that permits an extension when the justice of the case requires it.

Concerning the first test, in this case there are two elements to it. First, is there a reasonable explanation as to why Mr. Allen did not receive the notice on time? Mr. Allen has not offered any explanation as to why he did not collect the registered mail. Nor does he assert in his affidavit that he did not receive the regular mail. His affidavit contains a bald assertion that he did not see the couriered package until May 29th. His lawyer argued that the regular mail may have been sent to the wrong address and that Mr. Allen may have assumed that the registered mail contained "junk mail", but the Tribunal is not persuaded by either of these arguments. It was open to Mr. Allen to explain why he did not receive the notice and he has failed to do so. It should be noted here that Mr. Allen has, by not offering an explanation, failed to take himself out of the deemed delivery provisions of Section 45. Therefore, he is deemed to have received notice on May 12th. This means he was more than six weeks late in filing a Notice of Appeal.

Mr. Snell, counsel for the Registrar, notes that even if we accept Mr. Allen's account that he did not receive any notice until May 29th, he was still late in filing the appeal. His lawyer did not file until July 13th, almost a month late by even the most generous interpretation of time. Nor did his lawyer make any contact with the Registrar until 6 business days after Mr. Allen picked up the courier package in his backyard. The best legal practice is, in the case of a late filing, to file a Notice of Appeal on the day the client retains counsel, or if it is too late on that day, then on the next business day. Mr. McLeod, counsel for Mr. Allen, explained that he had delayed in filing the Notice of

Appeal because he was suffering from a rare disease, which while not incapacitating, caused a back-up in his practice. The Tribunal is sympathetic to the havoc that an illness can cause a one-man practice. The Tribunal is concerned as well that clients not be made to suffer for the problems of their counsel. However, in this case the Notice of Appeal was a generic one which could and should have been filed as soon as Mr. McLeod was retained. If his health did not permit him to adequately represent Mr. Allen, he should have declined the file.

Concerning the second test, after the unexplained delay of 6 business days, Mr. Allen did demonstrate an intention to appeal the revocation of his registration, as evidenced by the phone message from his lawyer and the subsequent correspondence between the counsel for the Registrar and Mr. McLeod.

The Tribunal finds that under the third test, the Registrar has not been prejudiced in making his case because of the delay. Mr. Snell did adduce affidavit evidence that Mr. Allen had continued to practice as a real estate salesperson after his registration was revoked. To the extent that the public interest is prejudiced by this conduct, it is open to the Registrar under Section 15 of the Act to suspend Mr. Allen's registration pending a hearing. Therefore, any prejudice to the public interest has a remedy at law.

The fourth test has to do with the merits of the case. Mr. Allen has alleged that he made loans to the purchasers. It is unfortunate that he did not state in his affidavit that what the Registrar thought were commissions were in fact repayments of the loan. However, the Tribunal will extend to Mr. Allen the benefit of the doubt and assume that this would be his defence. It raises an arguable case against this allegation.

Another allegation is that Mr. Allen participated in a transaction where his broker was the trustee and where the terms of a Trust Agreement were not complied with. Here, his statement that he believes errors were made in the trust ledger is not a substantive defence to this allegation. The date of the alleged errors is a full month after the trust funds were to have been received. Even if one assumes the possibility of these errors, there remain other issues concerning the trust agreement that Mr. Allen has not addressed.

Mr. Allen does not attempt an answer to the Registrar's allegations that he failed to report a real estate transaction to his broker or that he was involved in misrepresenting the identity of a party to a transaction.

So Mr. Allen has answered only one of four serious allegations against him in any way that shows his case might have merit. Therefore the Tribunal finds that Mr. Allen has not, even under the much lower standards of proof required in this motion, demonstrated that he has an arguable case.

Having an intention to appeal is not sufficient grounds for granting an extension of time. Nor is the fact that the Registrar is not prejudiced in making his case. In the absence of any reason offered for the delay in receiving notice, there is little to compel the Tribunal to grant an extension. As well, the merits of this appeal have not been demonstrated: 3 of the 4 serious allegations of the Registrar are unanswered or are insufficiently addressed. What remains is to determine whether there is any overarching interest of justice that requires the motion be granted. It is always of concern to the Tribunal that a registrant be granted the opportunity to answer a Notice of Proposal. But once the time to file an appeal has passed, it is up to the Applicant to demonstrate why the rules should be altered for him. Mr. Allen has failed to do this and the Tribunal cannot find an overriding interest of justice that requires this motion to be granted.

Accordingly, this Tribunal orders that this motion be dismissed.

LICENCE APPEAL TRIBUNAL

_____

Laurie Sanford, Vice-Chair

Released: *September 25, 2006*

File name: 3678.rebba.Desmond Allen.order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

MOTION FOR STAY

PAUL LONERGAN

HEARING OF A MOTION TO STAY A DECISION OF THE LICENCE APPEAL TRIBUNAL

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

APPEARANCES: CHRISTOPHER JAMES SPARLING, Counsel, representing Paul Lonergan, (the "Applicant")

CHRISTOPHER D. BREDT, Counsel, representing the Registrar, *Real Estate and Business Brokers Act,* (the "Respondent")

DATE OF HEARING: August 25, 2006 Toronto

REASONS FOR DECISION AND ORDER

This is the hearing of a motion brought by the Applicant:

(a) for an order granting a stay of the Order of Laurie Sanford, Vice Chair, Licence Appeal Tribunal dated June 26, 2006 directing the Registrar, *Real Estate and Business Brokers Act* to carry out his proposal of July 4, 2005, and a stay of the subsequent revocation by the Registrar of his revocation of the registration of Paul Lonergan pending the hearing of an appeal of the said Order of the Licence [Appeal] Tribunal.

BACKGROUND:

The Applicant, aged 48 years, is an experienced real estate salesperson. He declared bankruptcy in 1991, and was discharged in 1992. He made a second assignment in bankruptcy in 2003, and at the date of the Tribunal hearing remained an undischarged bankrupt. In February 2002, the Applicant and realty company with which he was closely associated pled guilty to a charge of misappropriating trust funds in the Ontario Court of Justice. This real estate firm was subject to two investigations performed by the

Real Estate Council of Ontario (RECO), which disclosed several deficiencies in the firm's books, accounts and billing practices. The Tribunal found that, with one exception, that the Applicant was not responsible for these accounting irregularities. In 2002, the Applicant left this firm and worked as a salesperson for another real estate broker from which he was dismissed in 2005. The Applicant was working as a salesperson for West Group Realty Inc. at the time his salesperson's registration was revoked.

An elderly creditor, who was not a sophisticated investor but who was experienced in dealing with second mortgages, made advances to the Applicant with respect to his future commission income. The Applicant owed this creditor money at the time of his last bankruptcy. In its written reasons for decision, the Tribunal found that the Applicant had engaged in "predatory practices" with respect to this creditor which conduct fell short of the standards expected of real estate salespersons.

The Tribunal found that the evidence given by the Applicant at his hearing was improbable, internally inconsistent and inconsistent with the evidence given by other witnesses. It found that the Applicant appeared to have taken advantage of the limitations of the creditor's knowledge and experience.

The Applicant's carelessness in handling a deposit cheque directly enabled a serious mistake to be made by his broker when this cheque not deposited into the trust account. The Tribunal stated that that this conduct represented a clear breach of the Act.

The Tribunal found that the Applicant failed to learn from his past financial mistakes and that it was reasonable to assume that these mistakes will recur in one form or another if he is permitted to remain in the real estate business.

The Tribunal dealt at length with the Applicant's involvement in the sale of a property on North Drive in Toronto. The Applicant's evidence with respect to this sale was also found to be inconsistent and not credible. The Tribunal preferred the evidence of the other witnesses that of the Applicant.

The Tribunal found that the Applicant's conduct with respect to the North Drive transaction afforded reasonable grounds for belief that the Applicant will not carry on business in the manner outlined in section 6 of the Act. Specifically the Applicant (a) failed to disclose an offer to his broker and failed to deposit the cheque; (b) signed extension agreements improperly and without authority; (c) failed to disclose the extension agreements to his broker and to the vendor; (d) signed the North Drive commission agreement with the effect of displacing his broker as a co-operating broker; (e) paid commission to someone not registered as a broker; and, (f) failed to disclose both the agreement of purchase and sale and the commission agreement to the vendor.

The Applicant has exhibited in his dealings a wide range of behaviour that fell short of the standards of honesty and integrity statutorily incumbent upon real estate salespersons.

The Tribunal found that the Applicant has failed to learn from his lessons in the past and that he has avoided taking responsibility for his conduct. The Tribunal stated that the imposition of terms and conditions upon the Applicant's registration was an inappropriate remedy that would be insufficient to protect the public.

A further complaint has been made against the Applicant to the Registrar since the Tribunal's Decision has taken effect. In this new complaint, a real estate salesperson, alleges that:

(a) The Applicant requested that the complainant report himself as salesperson in trade record sheets with respect to two real estate transactions in which the Applicant was actually involved. This was allegedly designed to show that the commissions earned were paid to the complainant who would advance those earnings to the Applicant unreported.

(b) The Applicant allegedly signed the complainant's name to a document or documents with respect to the sale of the North Drive property. This allegation was previously unknown to the Registrar.

(c) The complainant was named on documents with respect to trades in real estate in which the Applicant was the actual salesperson. Expense statements generated by the Applicant's broker showed that advances on commission were paid to the complainant when they were in fact paid to the Applicant.

The Applicant stated that the new complaint related to the North Drive matter that was previously before the Registrar who should have investigated this matter more carefully at that time. The Applicant's conduct did not harm either the public or the complainant.

ANALYSIS:

In its consideration of this motion for stay, the Tribunal is mindful that its role is not to re-hear the appeal nor is it to usurp the function of the Divisional Court on the appeal. The Tribunal must decide if the Applicant has met each branch of the tri-partite test for granting a stay as stated by the Supreme Court of Canada in the case *of RJR – MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 312. The Tribunal will stay execution of its earlier Order pending the Applicant's appeal to the Divisional Court if the Applicant a) demonstrates that there is a serious question to be tried; (b) demonstrates that irreparable harm will result if the stay is not granted; and, (c) show that the balance of inconvenience to the parties lies in the making of the stay order.

Subsequent to the revocation of the Applicant's registration, the Applicant was dilatory in removing his name from "for sale" signs and in discontinuing one of the 3 websites in which his name appeared as a salesperson. The delay in the removal of the Applicant's name from the "for sale" signs was not great nor was his delay in discontinuing his involvement with the third website.

The Applicant wishes to keep his registration as a salesperson so that he may continue to earn a living. He remains an undischarged bankrupt. His wife is working. The Applicant stated that if he is not permitted to sell real estate then he will act as a consultant to the real estate salespersons working with his last broker. He would be paid a fee for his advice only if the transaction upon which he was consulted closes.

SERIOUS ISSUES:

The Applicant must show that he has raised a serious issue in his appeal. This is a low threshold. Once satisfied that the Applicant's appeal is neither frivolous nor vexatious, the Tribunal should proceed to the second and next branches of the test. A prolonged examination of the merits of his appeal is generally neither necessary nor desirable, *RJR MacDonald,* supra, at 1337.

The Applicant submitted that his appeal was neither frivolous nor vexatious. While the Applicant may have misappropriated trust funds, these funds were replaced without harm to any person. This misconduct occurred at a time when the Applicant was under financial distress.

The Applicant challenges the Tribunal's interpretation and application of s.10 of the Act, which reads

> **10.** (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> (a) the applicant is not a corporation and,
>
> (i) having regard to the applicant's financial position or the financial position of an interested person in respect of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business,
>
> (ii) the past conduct of the applicant or of an interested person in respect 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 Applicant submits that the requirements that a salesperson carry on business in accordance with honesty and integrity may be superfluous and refers to conduct not prescribed by law. The Applicant states that while his conduct may not have been moral or ethical it was not illegal.

The Applicant submits that the Tribunal's Decision is too harsh and that terms and conditions ought to have been imposed upon his registration. He avers that the Tribunal erred in its finding that the Applicant had a duty to explain to the creditor the risks inherent in advancing funds to the Applicant, with respect to his future commission income.

The Applicant also submits that the Tribunal's findings with respect to credibility are wrong and are not supported by the evidence and the Tribunal drew improper inferences with respect to its finding that the Applicant engaged in predatory practices.

The Applicant submits that in many cases his conduct caused no one harm. He is trying to settle his claim with the creditor and that he has had to resort to litigation in an attempt to do so.

The Respondent submitted that much of the Applicant's appeal relates to the Tribunal's assessment of credibility, the weight it attached to the evidence and its analysis of the facts. These are matters, which are subject to a highly deferential standard of review. The standard of review for findings of fact is such that they cannot be reversed unless the Tribunal has made a "palpable and overwhelming error", *Housen v. Nikolausen* [2002] 2 S.C.R. 235. The Tribunal must proceed on the assumption that the judgment is correct and that the Tribunal's order directing the Registrar to revoke the Applicant's registration was properly granted. *Ogden Entertainment Services v. United Steel Workers of America, Local 440* (1998), 38 O.R. (3d) 448

While the Tribunal agrees in the submissions made by the Respondent with respect to the highly deferential standard of review applicable issues of fact, weight and credibility, (which constitutes a significant portion of the Applicant's grounds for Appeal) the Tribunal notes that the Applicant has the right to appeal to the Divisional Court (*Licence Appeal Tribunal Act*, S.O. 1995, c. 12. s. 11). The Tribunal's decision is not protected by a privative clause. The Tribunal finds that the Applicant's appeal is neither frivolous nor vexatious. The threshold for establishing a serious issue is low, *Li v. College of Physicians and Surgeons of Ontario,* [2004] O.J. 1828 at par.15. The Tribunal finds that the Applicant has raised a serious issue.

IRREPARABLE HARM:

The Applicant submits that he will suffer irreparable harm if his motion for stay is dismissed. His has lost his ability to earn a living as a real estate salesperson. His wife is working. The Applicant proposes to work as a real estate consultant and be paid his consulting fee only if the transactions upon which he advised are successfully concluded. His chances of claiming damages from RECO are remote. In this regard, the Applicant relies on the following statement taken from the *RJR – MacDonald* decision, supra, at p. 342:

> In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will be in most cases impossible for a judge on an interlocutory application to

> determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief even though capable of quantification, constitutes irreparable harm.

The Applicant submitted that his plight is similar to that of the Appellant corporations in the *RJR – MacDonald* case, because, in that in the (non-Charter) circumstances of his case, it is unclear in law if any losses he suffers as a result of the revocation of his salesman's registration can be recovered from RECO.

The Respondent submits that the Applicant will not suffer irreparable harm if his registration is revoked. It is incumbent upon him to show something more than financial hardship. The Applicant has a job. His wife is working. Compliance with the Tribunal's Decision would not cause the Applicant irreparable harm. It could cause him financial difficulty.

The Applicant must convince the Tribunal that he will suffer irreparable harm were the stay be denied. "Irreparable" refers to the nature of the harm and not the magnitude*,* *RJR – MacDonald*, supra, at p. 348. The harm must be incapable of repair. The Applicant submits that he has no other skills other than those acquired as a real estate salesperson and that he has assets of no significant value. He and his wife live in rental accommodation. There is no evidence before the Tribunal showing what the Applicant's income was as a registered salesperson or what his current financial obligations are especially having regard to the fact that the Applicant is an unregistered bankrupt. The Applicant proposes to work as a consultant. He also has the ability to seek employment in other areas.

The Tribunal finds that the Applicant has not established irreparable harm.

BALANCE OF INCONVENIENCE:

The Act is consumer protection legislation enacted in the public interest so as to provide the public with some degree of protection and confidence in its dealings with realtors and salespersons. Such persons must be financially responsible. They must obey the law and act with honesty and integrity. The Tribunal has found several instances where the Applicant's conduct has fallen below that standard expected of real estate salespersons. The Applicant has been convicted of misappropriating trust funds and of being careless in his handling of trust funds. He has gone bankrupt twice and remains an undischarged bankrupt. He has admittedly engaged in wrongful practices, which he declares that he will not repeat (Affidavit of Applicant). He tends to blame others for his errors. The fact that some persons in some circumstances may not have been harmed by the Applicant does not denigrate from the fact that his conduct was wrong.

A complaint has been made against the Applicant since the Tribunal rendered its Decision. The complaint remains just that, a statement of perceived wrong-doing that must be investigated and acted upon if found appropriate to do so. The Applicant has

deposed in a supplementary affidavit filed in support of this motion his comments with respect to the complaint. It is not the function of the Tribunal hearing this motion to adjudicate upon the merits of the complaint. That is for others at a future date.

Having regard to all the circumstances of this case, the Tribunal finds that the public interest is paramount. The balance of inconvenience rests with denying the motion for stay.

DECISION:

Accordingly, the Tribunal dismisses that application brought by the Applicant for an Order granting a stay of the Decision of the Tribunal revoking his registration as a real estate salesperson pending the hearing of the Applicant's appeal to the Divisional Court.

LICENCE APPEAL TRIBUNAL

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Irvin H. Sherman Q.C.
Vice Chair

Released: September 18, 2006

Filename: 3069.Lonergan.rebba.motionforstay.doc

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

REAL ESTATE AND BUSINESS BROKERS ACT, 2002
Revised Statutes of Ontario 1990, Chapter R.4

IN THE MATTER OF
A. AMEER BAKSH

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: July 6th, 2006

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

A. AMEER BAKSH

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing and a hearing in the above matter on September 18, 2006 and on November 21, 22 and 23, 2006, respectively;

TAKE NOTICE that upon consent of the Parties, the Tribunal adjourns the pre-hearing, *peremptory against all parties*, to commence at 9:30 a.m., on October 12, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

AND TAKE NOTICE that upon consent of the Parties, the Tribunal adjourns the hearing, *peremptory against all parties* to commence at 9:30 a.m., on December 4, 2006 and to continue if necessary on December 5 and 7, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

_____
Carl Dombek
Chair

RELEASED: August 30 2006

FILE NAME: 3687.rebba.Baksh.adj.doc

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R.4

IN THE MATTER OF
DWIGHT BRANSTON WATSON

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: January 17, 2006

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

DWIGHT BRANSTON WATSON

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 August 21 and 22, 2006;

TAKE NOTICE that after hearing submissions from the Parties at the commencement of the hearing, the Tribunal adjourned the hearing, *peremptory against the Applicant*, to continue at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Tuesday, December 12, 2006.

LICENCE APPEAL TRIBUNAL

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

RELEASED: August 23, 2006

FILE NAME: 3390.rebba.Watson.Aug.adj.doc

REAL ESTATE AND BUSINESS BROKERS ACT, 2002
Statutes of Ontario 2002, Chapter 30, Schedule C

IN THE MATTER OF
DESMOND R. ALLEN

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: May 8, 2006

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

DESMOND R. ALLEN

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a motion hearing in the above matter on August 14, 2006;

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 1:30 p.m. on Wednesday, August 23, 2006.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek
Chair

RELEASED: August 4, 2006

FILE NAME: 3678.rebba.allen. motion.adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JEROME S. NICHOLSON

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: LAURIE SANFORD, VICE-CHAIR

APPEARANCES: MANLEY NICHOLSON and LORNA PHILLIPS, Agents, representing the Applicant

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: May 11 and 12, 2006; June 26, 2006 Toronto

REASONS FOR DECISION AND ORDER

Upon the application of Jerome S. Nicholson, this hearing was conducted under Section 9(2) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R4, (the "Act") to review a Proposal by the Registrar under the Act to revoke Mr Nicholson's registration as a real estate broker.

BACKGROUND

Jerome Nicholson has been registered as a salesperson under the Act since 1973 and has been registered as a broker since 1989, with a few short interruptions. He is currently the principal broker of Re/Star Realty Inc ("Re/Star").

In August 2000, during a routine inspection of the books of Re/Star, Maureen McDaniels, an inspector with the Real Estate Council of Ontario ("RECO"), discovered a number of trade record files that contained conflicting information about the purchase price paid on real estate transactions.

Three of these transactions form the basis of the Registrar's proposal to revoke Mr. J. Nicholson's registration. The transactions involve properties on Castlehill Road ("Castlehill"), Tumbleweed Trail ("Tumbleweed") and Starfield Crescent ("Starfield").

In each case, the trade record file contained an agreement of purchase and sale. However, the Re/Star files also included separate documents that required the vendor to credit money back to the purchaser on closing. The inspector's concern was that these documents had the effect of concealing the true purchase price paid. As a result of her findings, a Director's Investigation Order was issued and this in turn resulted in a Proposal, dated December 15, 2005, to revoke Mr. J. Nicholson's registration as a broker under the Act

Mr. J. Nicholson has applied to the Licence Appeal Tribunal (the "Tribunal") for a hearing on the Proposal.

THE ISSUES

Under Section 8(2) of the Act, the Registrar may revoke a registration if the registrant would be disentitled to apply for registration under Section 6(1)(b) of the Act, which reads:

> 6. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where, . . .
>
> > (b) the past conduct of the applicant affords reasonable grounds for the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;

The first issue before the Tribunal is whether Jerome Nicholson participated in, and permitted his clients to become involved in, real estate transactions that he knew or ought to have known were structured to conceal the true consideration.

If Mr. Nicholson did participate in these transactions and if he knew or ought to have known they were potentially duplicitous, the second issue facing the Tribunal is whether this past conduct is sufficient grounds for the Registrar to revoke Mr. Jerome Nicholson's registration as a broker under the Act.

THE EVIDENCE

This is a summary of the relevant testimony heard and documentary evidence submitted.

Maureen McDaniels

Ms McDaniels is an inspector with the Real Estate Council of Ontario ("RECO") and inspects pending and closed trades. During a routine inspection of the books and trading records of Re/Star, Ms McDaniels found conflicting information in the trade records of Re/Star. In the Tumbleweed transaction, there was an Agreement of Purchase and Sale and an amendment to it, dated the same day, which gave a credit to the purchaser on closing for home repairs. In each of the Castlehill and Starfield trade records, there were directions to the solicitor for the vendor, dated within a day of the Agreement of Purchase and Sale, directing that money be paid to the purchasers on closing. In the Tumbleweed and Starfield trade records, there was evidence that the commission had been calculated on the lower price.

In each of these three transactions, Mr J. Nicholson was the listing broker, which meant he acted for the vendor, and in the Castlehill transaction he acted for both parties. There was nothing in any of the files connecting Mr J. Nicholson to the mortgage companies. Ms McDaniels testified that, on inspecting these records, she became concerned that the effect of the transactions was to conceal the true purchase price. In her experience, it is not common to have adjustments for repairs made on closing. It is very unusual to have money going back to the purchaser on closing for no apparent reason; she has seen this in about 5 offices out of the 500 she has inspected. Concerning the documentation for Castlehill and Starfield, she testified had never seen a Direction to Solicitor in a realtor's office.

Based on her findings, she prepared an affidavit (Exhibit 3, Tab 3) to obtain a Director's Investigation Order under the Act.

David Andrew

Mr Andrew is an Investigator and Provincial Offences Officer with RECO. He has been with RECO since its inception in 1997 and before that was with its predecessor. Prior to that, he was a police officer, investigating criminal matters.

During his investigation of the three transactions noted above, Mr Andrew or his inspectors found the following documents. For Tumbleweed, the documents from the offices of Re/Star are in Exhibit 3, Tab 9 and consist of:

- A multiple listing agreement (a "MLS" listing) for Tumbleweed by Re/Star dated April 11, 2000 for an offering price of $205,500. A commission of 5% was specified.

- An Agreement of Purchase and Sale for Tumbleweed dated June 7,2000 for an amount of $226,000. The sale was scheduled to close on July 20, 2000.
- An amendment to the Agreement of Purchase and Sale, also dated June 7, 2000 which provided that the vendor would credit the purchaser $22,600 on closing for specified improvements to the home.
- A price change agreement also dated June 7, 2000 showing an increase in the MLS listed price to $227,900.
- A notice of commission due from the purchaser's agent dated June 14, specifying commission of $5,085, calculated as "(203,400 @2.5%)".
- A Reminder Notice to Solicitor submitted by Re/Star Realty to the vendor's solicitor indicating that the total commission payable of 5% on this transaction was $10,170, which is 5% of $203,400.
- A further listing price change dated June 26 lowering the MLS listed price to $207,500.
- A Trade Record Sheet showing Jerome Nicholson as the listing broker.

As well as the documents found at the offices of Re/Star, there is also a Land Registry entry for Tumbleweed, showing the sale of Tumbleweed for a purchase price of $226,000 (Exhibit 3, Tab 9I). The Land Registry entry shows a charge registered on the property on July 23, 2000 by CIBC Mortgages Inc., trading as Firstline Mortgages, in the amount of $222,751. Investigation at CIBC Firstline Mortgages disclosed that it had the Agreement of Purchase and Sale in its files but did not have the amendment dated June 7, 2000 crediting the purchaser $22,600 on closing.

For Castlehill, the documents from the offices of Re/Star are in Exhibit 3, Tab 8 and consist of:

- An MLS listing agreement with Re/Star dated May 16, 2000 showing a listing by Re/Star for a price of $269,900 and a commission of 4½%.
- An Agreement of Purchase and Sale executed on June 8, 2000 for a purchase price of $279,500. The sale was scheduled to close July 31, 2000.
- A Direction to Solicitor from the vendors dated June 8, 2000 instructing their solicitor to pay the purchasers $28,000 on closing.
- A reminder notice to the solicitor from Re/Star reciting the purchase price of $279,500. A gross commission is specified as $11,317.50, a fixed amount which, mathematically, is 4½% of $251,500, the purchase price net of the credit to the purchasers.
- A trade record sheet showing Jerome Nicholson as the listing broker.

Mr. Andrew testified that the Land Registry records (Exhibit 3, Tab 8, F, G, H &I) showed a transfer price of $279,500 and a charge of $257,838.75 registered by the Royal Bank of Canada on the property. Investigation at the Royal Bank of Canada disclosed that it had the Agreement of Purchase and Sale in its files but did not have the Direction to Solicitor from the vendors dated June 8, 2000 instructing their solicitor to pay the purchasers $28,000 on closing.

For Starfield, the documents from the offices of Re/Star are in Exhibit 3, Tab 10 and consist of:

- A multiple listing agreement dated May 2, 2000 showing a listing by Re/Star for a purchase price of $224,900 and specifying a commission of 5%.
- An Agreement of Purchase and Sale dated May 17, 2000 specifying a purchase price of $219,700.
- A Direction to Solicitor also dated May 17, 2000 instructing the vendor's solicitor to credit to the purchasers the amount of $9,700 on closing of the May 17 Offer.
- An amendment to the May 17 Offer dated May 17, 2000 whereby the vendor agreed to credit the purchaser the amount of $9,700 on closing to repaint and carpet parts of the house.
- A second Agreement of Purchase and Sale, with different purchasers, dated June 20, 2000 for a purchase price of $219,500.
- A Direction to Solicitor for the second Agreement of Purchase and Sale, also dated June 20, 2000 instructing the vendor's solicitor to credit to the purchasers the amount of $11,500 on closing.
- A third Agreement of Purchase and Sale, again with different purchasers, dated July 10, 2000 for the price of $214,000. A closing date of July 18, 2000 is specified.
- A Direction to Solicitor for the third Agreement of Purchase and Sale, also dated July 10, 2000, instructing the vendor's solicitor to pay the purchasers the sum of $5,000 on closing.
- A handwritten note from Mr J. Nicholson to the vendor indicating that net purchase price to the vendor would be $209,000.
- A reminder to Re/Star from the purchaser's agent indicating a commission of 2.5% on a sale price of $214,000. The price of $214,000 is crossed off and $209,000 has been inserted and initialled by Jerome Nicholson.
- A Reminder Notice to Solicitor specifying a purchase price of $214,000 and a total commission at a fixed amount of $10,500, signed by Jerome Nicholson. The commission, mathematically, is 5% of the net purchase price of $209,000.

- A trade record sheet showing Jerome Nicholson as the listing broker.

Mr. Andrew testified that the Land Registry records (Exhibit 3, Tab 10 O, P, & Q) showed a transfer price of $217,000 and a charge of $210,923 by MCAP Service Corporation on the transaction. Investigation at MCAP Service Corporation disclosed that it had the third Agreement of Purchase and Sale in its files but did not have the Direction to Solicitor from the vendors dated July 10, 2000 instructing their solicitor to pay the purchasers $5,000 on closing.

In Mr. Andrew's experience it is not common to have a credit towards the purchase price established at the time of the agreement of purchase and sale. Such an adjustment is characteristic of a type of real estate fraud that is colloquially known as an "Oklahoma deal". In this form of fraud, the purchase price is artificially inflated. There is then a side agreement adjusting the purchase price on closing back to the fair market value. Only the documents showing the higher price are submitted to the proposed mortgagee of the property. The financial institution accepting the mortgage is unaware of the true purchase price and advances more money than it would have had it been in possession of all the facts.

To make an Oklahoma deal work, everyone has to be involved, in Mr. Andrew's experience. The purchaser, the vendor, their agents and solicitors would see the net price because of the flow of the documents and because of the commission calculations. At a minimum, the listing agent would know that an Oklahoma deal was being proposed, because he would be involved in setting the listing price and in negotiating the selling price. It is the broker's responsibility to steer his client away from fraudulent transactions. This responsibility is spelled out in the RECO Code of Ethics and is re-enforced by on-going training.

Mr. Andrew spoke with Jerome Nicholson once, about a year ago. When asked for an explanation for some of the documents found, Mr. Nicholson acknowledged that he was involved in each of the three transactions.

<u>Ms Georgiou</u>

Ms Georgiou is Director of Mortgage Policies & Fraudulent Practices at CIBC and has worked at the CIBC for 29 years. CIBC Mortgages Inc., trading as Firstline Mortgages, registered a charge on Tumbleweed on July 23, 2000 in the amount of $222,751. This was a "high ratio" mortgage, meaning that it was designed to be a charge for 95% of the purchase price. This is as opposed to a conventional mortgage for 75% of the purchase price, requiring a 25% deposit.

Firstline Mortgages accepts these high ratio mortgages because they are insured by a third party insurer. Because of this insurance, Firstline Mortgages does not do an independent valuation of the property.

Ms Georgiou confirmed that Firstline Mortgages had in its files the MLS Agreement dated June 7th showing a listing price of $207,900 and an Agreement of Purchase and Sale showing a sale price of $226,000. Firstline Mortgages did not have in its files the June 7, 2000 amendment crediting the purchaser $22,600 on closing. Ms Georgiou testified that had Firstline Mortgages known of the June 7th amendment, it would not have advanced as large a loan as it did.

In Ms Georgiou's experience, it is unusual to have credits given for repairs, especially one as large as this. When credits are given, the lender should be able to confirm that the credit represents a reasonable estimate of the cost of the repairs and that the repairs were done. Firstline Mortgages was not able to do this since it did not know of the credit.

The property was sold by Firstline Mortgages under a power of sale in 2001 for $188,000, which represents a loss to the company on the transaction.

On cross-examination, Ms Georgiou conceded that she could not say that Jerome Nicholson was involved in concealing the true purchase price from the bank but she persisted in her opinion that he would have known of the concealment. Both brokers, in her experience, are interested in helping the purchaser obtain mortgage financing.

Sheila Wilson

Ms Wilson works in the Corporate Investigation Services department of Royal Bank of Canada. She is an investigator, primarily for mortgage fraud involving residential properties.

The Royal Bank advanced $257,838.75 on the Castlehill property based on an Agreement of Purchase and Sale showing a purchase price of $279,500. This was a high ratio mortgage and on these mortgages the Royal Bank relies on the insurers to do a detailed appraisal of the property.

The Royal Bank did not have in its files the Direction to Solicitor dated June 8, 2000 directing the vendors' solicitor to credit the purchaser's $28,000 on closing. Had the Royal Bank been aware of this Direction it would have reviewed the transaction to determine why the credit was granted. It would not have advanced a loan in the amount that it did had it been in possession of the facts. Ms Wilson noted that the amount advanced was in excess of the net purchase price.

About a year after this transaction, Royal Bank sold Castlehill under power of sale for an amount of $250,000. Royal Bank incurred a loss on the transaction and Ms Wilson noted that the proceeds of the power of sale confirm that the fair market value was closer to the actual purchase price of $251,500 than the amount shown to the bank. She also noted that Royal Bank advanced an amount in excess of the actual purchase price.

On cross-examination, she conceded that she could not say for certain that Mr. Jerome Nicholson was involved in the fraud; simply that he was involved in the transaction.

Ms Ana Ialeggio

Ms Ialeggio is in charge of mortgage investigations for MCAP, a mortgage service company. She has been with MCAP for 11 years and is currently in charge of mortgage investigations.

She confirmed that MCAP had advanced $210,923 on the Starfield property on July 20, 2000. Her records show an MLS listing for $214,500 and a transfer price of $214,000. This is a high ratio mortgage and MCAP has no record of the Direction to Solicitor crediting the purchasers $5,000. MCAP advanced more that 100% of the purchase price because it did not know of the adjustment.

On cross-examination, Ms Ialeggio conceded that she could not say for certain that Jerome Nicholson was involved in the fraud; simply that he was involved in the transactions.

Brian Schlotzhauer

Mr. Schlotzhauer has been with RECO since 1999 and is currently Deputy Director.

The incidence of mortgage fraud has increased dramatically in Canada and around the world. 70% of RECO investigations now involve this type of scheme. Most are done as these three were, with an agreement of purchase and sale listing one price and a side agreement specifying a reduction in the price on closing. All of these so-called Oklahoma deals are done on high ratio mortgages where the appraisal of the property is less rigorous.

In response to this development, RECO has included training on these types of schemes in its on-going training. Brokers are taught how to identify this form of fraud and what to do about it. It is the responsibility of the broker to steer his client away from the transaction.

In Mr. Schlotzhauer's opinion, the Tumbleweed, Castlehill and Starfield transactions are classic examples of how the scheme works and of the disastrous results. In addition to the adjustments in the purchase price, one characteristic of these deals is the commission, which is based on the adjusted price. Mr. Schlotzhauer has never seen a legitimate transaction where commission is calculated on less than the full selling price.

Everyone is hurt by these transactions, Mr. Schlotzhauer testified. The mortgage lender is cheated and the insurer is exposed to losses. The largest insurer is CMHC, a crown corporation, the losses of which are paid by taxpayers. The market value of properties in the area is distorted by false MLS listings, affecting all sellers and buyers

in the area. Even the parties involved in perpetrating the fraud are hurt by it; the seller's risk of the transaction not closing is increased and the buyer is hurt because he or she is overextended on the loan.

On August 9, 2005 Mr. Schlotzhauer and Yvonne Nandalal, an officer of RECO, attended a meeting at their offices with Mr. Jerome Nicholson. Ms Nandalal took notes of the meeting (Exhibit 3, Tab 11), but these were not intended as a transcript of events. Jerome Nicholson began by characterizing these transactions as "creative financing". It is in the mind of the buyer and seller to do the deal, he said, and he puts it together. These transactions happen every day; it is the only way these deals can be done. The buyer and seller want to do the deal but the seller does not have the down payment. In explaining the commission calculations, which all appear to be on the net selling price, he said things change over time so commissions change. He conceded that these deals were not done in the way that RECO likes to see them done. After some discussion, he said he knew the sales were done in the wrong way. If he had to the deals to do over again, he would do them differently, Mr. Nicholson said.

Jerome S. Nicholson

Mr. Nicholson is the owner of Re/Star. He is 57 years old, married with 6 children ranging in ages from 38 to 10. His two youngest children and one grandchild are dependents. He is active in his church and has served on different committees of his local real estate board. He was bankrupt in the 1970s but has not been in financial difficulty since. He has neither a criminal record nor any record of previous disciplinary actions taken by RECO.

Mr. Nicholson initially testified that he was not familiar with Oklahoma deals but subsequently said that he had heard of them since he started in the industry. He testified that he had completed a RECO course on mortgage fraud in 2006 but he was not able to describe how an Oklahoma deal would be structured.

In each of the three transactions, Castlehill, Tumbleweed and Starfield, Mr. Nicholson testified that there was no fraud. There was a purchase price, there was a legitimate credit to the purchase price and there was a balance. The balance was not a net purchase price. There was only one purchase price and that was the one listed on the APS. He used the Direction to Solicitor form for convenience, since it did not have to be signed by the purchaser. But in each case there was a reason for granting a credit – rent for the property, appliances being taken by the vendor, or repairs required. The fact that the Starfield transaction had several attempted sales, each structured the same way, was simply a result of the wishes of the vendor and purchaser. The fact that commissions were based on the "balance" was a result of negotiation.

Mr. Nicholson felt that the testimony of the bank officials sounded "scripted" to him, although he did not allege that there was a conspiracy among the banks. Rather, it seemed to him that they could not show that they did not have all the documents. Concerning the losses that the banks suffered on powers of sale, Mr. Nicholson noted

that this was common and did not show that the fair value of the property was lower than shown on the agreements of purchase and sale.

Mr. Nicholson conceded that he had used the term “creative financing” to describe these transactions. When asked what he had meant by the term, Mr. Nicholson referred to ads in newspapers referring to 100% mortgage financing and no down payments. It is a meeting of the minds between the vendor and purchaser and he structured the transactions this way because the vendors wanted it done.

Mr. Nicholson saw nothing wrong with the way he had structured these deals. In no case was there a “cash back” arrangement, which Mr. Nicholson implied would be improper. At no time prior to June 2000 did RECO tell him it was wrong to set out purchase price credits in a separate document. Subsequently, however, there seemed to be only one way that RECO wanted the deals done, with all references to purchase price in the agreement of purchase and sale. Anything else would be an Oklahoma deal, Mr. Nicholson testified. Since Ms McDaniels sent him some guidelines as to how to structure transactions, he has followed these guidelines.

Mr. Nicholson testified that he withheld no documents from anyone. In the case of Castlehill, where he also acted for the purchaser, he sent the entire package of documents to the mortgage broker.

FINDINGS OF FACT

The documentary evidence, together with the evidence of the representatives of the three lending institutions, makes it clear that fraud was committed in each of the Tumbleweed, Castlehill and Starfield sales. The fraud consisted of artificially inflating the stated purchase price in order to defraud the lending institution into lending more money on the property than it otherwise would have. The Tribunal agrees with Mr. Nicholson that the testimony of the three bank employees sounded rehearsed but there is nothing inherently wrong with this and their evidence was clear, credible and uncontested.

Jerome Nicholson was involved in structuring each of these transactions and, in the case of Castlehill, he was the sole broker involved. However, his understanding of an Oklahoma deal is limited. Despite having taken a 2006 course in mortgage fraud, he was unable to describe such a transaction. His understanding would have been weaker in 2000, the time of the transactions. He believed that if he could plausibly state that there was only one purchase price, he would not be involved in fraud.

While his understanding of what constitutes a fraud is limited, the Tribunal has carefully reviewed the evidence and concludes that Mr. Nicholson did understand enough about the three transactions to know that they were wrong. He knew that the purchasers could not complete the deals without 100%, or greater, financing. He knew that

structuring the transactions in the way he did would enable the necessary financing to be obtained and that no other structure would work.

Whether he wilfully blinded himself to the details of how this would be achieved or not, he did know that the effect of each of these transactions would be to permit the purchaser to obtain financing which would not have been available if the agreement of purchase and sale had fully disclosed the purchase price. That is fraud, whether or not Mr. Nicholson was prepared to admit it, even to himself.

DECISION

Concerning the first issue before the Tribunal, the Tribunal finds that Jerome S. Nicholson participated in, and permitted his clients to become involved in, real estate transactions that he knew were structured to conceal the true consideration.

The remaining question is whether this past conduct is sufficient grounds for the Registrar to revoke Mr. Jerome Nicholson's registration as a broker under the Act. Here, the answer is more complex. Mr. Nicholson cannot continue to own and operate a brokerage. He has been involved in fraud and continues to have difficulty distinguishing a fraudulent transaction from a proper one. He is avoiding further offences by following the RECO guidelines but his limited understanding of what constitutes fraud leaves him prey to the next fraudulent scheme to come along, and the one after that.

However, Ms Phillips has submitted that taking away the right of Mr. Nicholson to earn a living dealing in real estate is too harsh, and the Tribunal wholeheartedly agrees. These transactions occurred 6 years ago. RECO waited over 5 years to issue its proposal and there is no evidence that Mr. Nicholson has been involved in any wrongdoing during this interval. The Tribunal accepts his evidence that he has followed RECO guidelines on how to structure transactions. Further, the Tribunal notes that Mr. Nicholson appears to be a sincere man who genuinely wishes to avoid any further transgressions.

The optimum solution, and one which the Tribunal would endorse, would be for Mr. Nicholson to work as a registered salesperson with his registration subject to terms and conditions. Both Mr. Nicholson and the broker for whom he worked would have to agree that any unconventional transactions would be reviewed by the broker or some other qualified person, such as the firm's accountant. Mr. Nicholson would have to commit to ongoing education in fraud identification and prevention.

This arrangement would need to continue for some reasonable period of time – three years would seem appropriate. After this, Mr. Nicholson should be entitled to apply for registration as a broker. He would have to demonstrate that he can correctly identify and prevent common forms of real estate and mortgage fraud. During the time his registration as a broker is revoked, he must also conduct his business within the law and with integrity, honesty and financial responsibility as required by the Act. If he is

able to do these things, then, in view of Mr. Nicholson's history and character, the Tribunal is of the opinion that he should be considered to have met the criteria of Section 6 of the Act.

The problem facing the Tribunal is that Mr. Nicholson submitted no evidence that such an arrangement is feasible. We do not know if Mr. Nicholson can locate a broker who is prepared to agree to such terms and conditions. Nor has RECO had the opportunity to review or comment on any conditions. In view of the variables and unknowns, it would be imprudent and inappropriate for the Tribunal to impose such a complex arrangement on the parties.

It is appropriate to give Mr. Nicholson and RECO some reasonable period of time to arrange for and to negotiate a salesperson's registration for Mr. Nicholson on terms and conditions similar to the ones outlined above. The Tribunal believes 8 months should be sufficient time to permit this. Given the lengthy delay between the discovery of the irregularities and the Registrar's Proposal, the Registrar obviously feels there is no urgent need to revoke Mr. Nicholson's registration, and the Tribunal concurs.

ORDER

The Tribunal, pursuant to subsection 9 (4) of the Act, directs the Registrar to carry out his Proposal of December 15, 2005 to revoke the registration of Jerome S. Nicholson, effective April 2, 2007.

LICENCE APPEAL TRIBUNAL

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Laurie Sanford, Vice-Chair

Released: *July 31, 2006*

File name: 3324.rebba.Nicholson.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.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JUTHIKA KHETANI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ANDREW B. TULK, Counsel, appearing on behalf of Juthika Khetani

TIM SNELL, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act*

DATE OF HEARING: July 26, 2006 Toronto

ORDER

BACKGROUND:

This hearing arises out of a written Notice of Proposal (the "Proposal") dated December 13, 2005 issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar" and "Act" respectively) against Juthika Khetani (the "Applicant") to revoke the latter's registration as a salesperson under the Act.

At the commencement of the hearing on July 26, 2006 Counsel for the Applicant requested that the hearing scheduled for July 26, 2006, and to continue on July 28, 2006, be adjourned. Submissions on the Applicant's Counsel's request were made and following such submissions the Tribunal found the following facts relative to the Applicant's Counsel's request for an adjournment.

1. The Registrar's Proposal to revoke is dated December 13, 2005.

2. On December 30, 2005 the Registrar requested a pre-hearing in this matter.

3. Ace Conveyancing and Paralegal Services Inc. on behalf of the Applicant wrote to the Tribunal on January 11, 2006 advising that the Applicant consented to a pre-hearing and that the Applicant would retain Counsel.

4. On January 21, 2006 the Applicant advised the Tribunal that she had retained one Harry Kopyto, an agent to represent her.

5. By separate notices of hearing and pre-hearing dated January 25, 2006 Agent Kopyto was advised of the dates of hearing being April 20 and 21, 2006 and of the date of pre-hearing being February 28, 2006. Together with the notices of hearing and pre-hearing Kopyto was sent a copy of the Tribunal's Rules of Practice.

6. A pre-hearing was held at the Tribunal's Chambers on February 28, 2006 when, at the request of Kopyto on behalf of the Applicant, he requested an adjournment of the above hearing dates from April 20 and April 21, 2006 to July 26 and July 28, 2006.

7. Counsel for the Registrar consented to the aforementioned adjournment and an Order was issued pursuant to the pre-hearing granting such adjournment on a peremptory basis against the Applicant.

8. On June 9, 2006 the Applicant's Agent Kopyto advised the Tribunal that he no longer represented the Applicant.

9. On July 12, 2006 Counsel for the Registrar wrote to the Applicant enquiring whether she had retained counsel and if so to be advised of such counsel's name and address.

10. On July 20, 2006 the Applicant advised the Tribunal that she had retained her present Counsel, Andrew B. Tulk.

11. By letter dated July 24, 2006 the Applicant's Counsel advised the Tribunal that he had been retained by the Applicant on July 20, 2006 and notified the Tribunal that he required an adjournment of the hearing and suggested new dates for the hearing of October 4 through October 6, 2006.

12. The reasons and basis of the Applicant's Counsel's request for an adjournment are set out in his letter to the Tribunal of July 24, 2006 and are set out hereunder:

> 1. I have just been retained. I met my client personally on Saturday, July 22, 2006 and reviewed this matter with her, in order to represent her properly I am of the view that more time is required to assess the witnesses my client should call to establish her lack of involvement in this matter, in particular, as the complaint against her as it relates to one, <Complainant #1> is as much a conclusion based on statements made which my client disputes the truthfulness of and for which witnesses may be called to rebut same. With respect to the complaint by <Complainant #2> and the facts set forth the same comments made above with respect to <Complainant #1> applies and is further compounded by the fact that this person in my opinion was an active participant himself in the scheme;

2. The apparent author of this scheme one, <name of author removed> is apparently in Pakistan and not available and apparently the mortgage broker one, <name of mortgage broker removed> is not a witness;

3. My client chose to have me act on her behalf based in large part on the fact that her decision is to have an experienced residential real estate lawyer in such capacity I have at least 10 residential and commercial transactions closing this week and potentially another one wherein my signature was forged by a real estate agent to an agreement of purchase and sale which will no doubt result in a complaint to RECO but which I must deal with.

13. Counsel for the Registrar consented to the adjournment of the hearing to the dates suggested by the Applicant's Counsel subject to the payment by the Applicant to the Registrar of the sum of $800.00 being costs for today's abortive hearing.

Having given consideration to the submissions of the Parties respective counsels and based upon the facts found by the Tribunal, the Tribunal makes the following Order based upon the reasons hereunder:

The hearing of this matter is hereby adjourned on a peremptory basis against the Applicant until 9:30 a.m. on October 4, 2006 and to continue, if necessary, on October 5 and October 6, 2006, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

The granting of the above adjournment was based upon the Applicant being entitled to a full and fair hearing and the rules of natural justice. Only with a full and fair hearing can an adequate enquiry be made into the justification or otherwise of the sanction sought under the Proposal. However, the conduct of the Applicant in requesting an adjournment at this late stage gives the Tribunal cause for concern in that this becomes the second adjournment requested by the Applicant, the last adjournment being granted on a peremptory basis. The Applicant had more than ample opportunity to find and retain counsel. The delay in doing so shows at the very least unreasonableness on the Applicant's part and a cavalier approach to this entire matter. She has ignored a procedural order of this Tribunal when the last adjournment was granted peremptorily against her. This has caused undue delay in these proceedings and potential prejudice to the public interest.

Having regard to the above the Tribunal orders that by no later than 30 days after the date of release of this Order the Applicant makes payment in the sum of $800.00 to the Registrar. This amount and the determination thereof is considered appropriate in all the circumstances and is made pursuant to Rule 14.1 of the Tribunal's Rules of Practice as read with Rule 14.2 (b) and (c) and Rule 14.4 (1) and (2) (b).

LICENCE APPEAL TRIBUNAL

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Derek Israel, Vice-Chair

RELEASED: July 31, 2006

FILE NAME: 3307.rebba.Khetani.order.doc

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

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

JASON ABELA AND MANJIT SINGH AND SONIA SIDDIQUI

APPEALS FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: No one appearing for Jason Abela, Manjit Singh and Sonia Siddiqui, Applicants

GEORGE DRAMETU, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF HEARING: July 10, 2006 Toronto

ORDER

Upon the application to the Tribunal by Counsel for the Registrar under the *Real Estate and Business Brokers Act* that there had been a settlement of the issues referred to in the Registrar's Proposal dated November 30, 2005 to revoke the Applicants' registrations such that the Registrar was withdrawing the said Proposal; and,

Having reviewed the letter from Jack F. Fitch, Counsel, representing the Applicants Manjit Singh and Sonia Siddiqui, dated July 7, 2006 advising his clients were withdrawing their appeals to this Tribunal; and,

Having received the letter from Joseph A. Longo, Counsel, representing the Applicant Jason Abela, dated July 10, 2006, advising his client was withdrawing his appeal before this Tribunal;

NOW THEREFORE, upon consent of the Parties, this Tribunal orders that the proceedings in this matter are concluded and the issues disposed of without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act,* R.S.O. 1990, Chapter S.22.

LICENCE APPEAL TRIBUNAL

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Jane Weary, Vice-Chair

RELEASED: July 18, 2006

FILE NAME: 3285.rebba.Abela et al.order.doc

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

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

COURTNEY WALLIS SIMPSON

AN APPEAL FROM A PROPOSAL AND A SUPPLEMENTARY PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*;

AND FROM A SUPPLEMENTARY PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*;

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: COURTNEY WALLIS SIMPSON, Applicant (the "Applicant")

ROBERT MAXWELL, Counsel for the Registrar, *Real Estate and Business Brokers Act* (the "Registrar")

DATES OF HEARING: February 20 & 21, 2006; May 1, 2006; May 3, 2006
May 15, 2006 and June 16, 2006 Toronto

ORDER

WHEREAS the Registrar issued a Notice of Proposal to Revoke the Registrations of Courtney Wallis Simpson and York Region Realty Inc. dated November 11, 2005:

AND WHEREAS Courtney Wallis Simpson appealed the Registrar's Proposal in a Notice of Appeal received at the Tribunal on December 7, 2005;

AND WHEREAS the Registrar issued a Supplementary Notice of Proposal to Revoke the Registration of the Applicant on January 23, 2006;

AND WHEREAS the Registrar issued a second Supplementary Notice of Proposal to Revoke the Registration of the Applicant, dated May 1, 2006;

AND WHEREAS at the commencement of the hearing on June 16, 2006 Courtney Wallis Simpson withdrew her appeal before the Tribunal:

NOW THEREFORE it is ordered that this matter in front of the Tribunal is concluded, and that the Registrar carry out the terms of the above-mentioned Notices of Proposal.

LICENCE APPEAL TRIBUNAL

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William McIntosh, Vice-Chair

Released: June 16, 2006

File: 3262.rebba.Wallis_Simpson.final.order.doc

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

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

PAUL LONERGAN

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: LAURIE SANFORD, VICE-CHAIR

APPEARANCES: MARY FLYNN-GUGLIETTI, Counsel, representing the Applicant

CHRISTOPHER SPARLING, Counsel, representing the Applicant

TIMOTHY E. SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: November 21 and 22, 2005
May 24, 25 and 31, 2006
June 1, 2006 Toronto

REASONS FOR DECISION AND ORDER

Upon the application of Paul Lonergan, this hearing was conducted under Section 9(2) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R4, (the "Act") to review a Proposal by the Registrar under the Act to revoke Paul Lonergan's registration as a real estate salesperson.

BACKGROUND

Paul Lonergan was first registered as a salesperson under the Act in 1982 and, with a few short interruptions, has been continuously registered since then.

In the late 1980's, Mr. Lonergan began investing in residential real estate. When the real estate market slumped in the early 1990's, Mr. Lonergan was unable to sell the properties he owned and was unable to pay the mortgages. He declared bankruptcy (the "first bankruptcy") in the spring of 1991. At that time, he had debts of slightly more than $300,000. He was discharged from bankruptcy in the spring of 1992.

In November, 1989, Mr. Lonergan registered as a salesperson with the realty company Islington Kingsway Realty Ltd. ("Islington Kingsway"). In October, 1995, all of the common shares of Islington Kingsway were sold to a registered broker, who will be referred to as the "Qualified Broker". Paul Lonergan was a party to the share purchase agreement. The parties apparently contemplated that Mr. Lonergan would one day complete his training and registration as a broker and would then buy the shares from the Qualified Broker. The agreement gives Mr. Lonergan a degree of involvement in the day-to-day management of the company that is unusual for a salesperson.

Several of the particulars of the Registrar's Proposal to revoke Mr. Lonergan's registration stem from his time with Islington Kingsway and from his status with the company. One particular of the Proposal not in dispute is that in February, 2002, Mr. Lonergan, on his own behalf and on behalf of Islington Kingsway, pled guilty in the Ontario Court of Justice to misappropriating trust funds. Certain trust funds were deposited in the general bank account of Islington Kingsway, an account on which Mr. Lonergan had signing authority. In this case, there was sufficient money available to permit the sale to close on time and the client was not harmed.

Also not in dispute is that the Real Estate Council of Ontario ("RECO") conducted inspections of the books of Islington Kingsway in August, 1998 and again in January, 2001. These inspections disclosed numerous deficiencies in the books, accounts and banking practices of Islington Kingsway.

Mr. Lonergan did not obtain his broker's registration and in August, 2002 he left Islington Kingsway and began working with Terrequity Realty Inc. ("Terrequity"). The Qualified Broker voluntarily terminated the registration of Islington Kingsway in November, 2002.

Mr. Lonergan had been funding the operations of Islington Kingsway and when the company ceased trading, he was unable to pay his creditors. In February, 2003, Mr. Lonergan filed an assignment in bankruptcy (the "second bankruptcy") and declared liabilities of $1,886,558.82. At the date of this hearing, Mr. Lonergan is an undischarged bankrupt but it appears that his debts are substantially less than he first declared as some of the obligations are owed by Islington Kingsway.

From the spring of 2004 to the spring of 2005, Mr. Lonergan was involved in the purchase and sale of a property which shall be referred to as "North Drive". The Registrar alleges that Mr. Lonergan committed several improprieties in his handling of the North Drive transaction.

Mr. Lonergan was dismissed from Terrequity in June, 2005. He is currently working with West Realty Group Ltd. ("West Realty").

On July 4, 2005, the Registrar under the Act issued a Proposal to revoke Paul Lonergan's registration as a salesperson. Mr. Lonergan has applied to the Licence Appeal Tribunal (the "Tribunal") for a hearing regarding the Proposal.

Applicable Law and Standard of Proof

Under Section 8(2) of the Act, the Registrar may revoke a registration if the registrant would be disentitled to apply for registration under Section 6(1)(a) and (b) of the Act, which reads:

> 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 the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty; . . . .

The Registrar has the burden of proof in these proceedings and standard of proof is "clear and convincing proof based upon cogent evidence…" (*Re Coates et al. and Registrar of Motor Vehicle Dealers and Salesmen,* (1988), 65 O.R. (2d) 526, a decision of the Ontario Divisional Court).

Organization of Decision

The Registrar called 8 witnesses: the vendor of North Drive, who has lodged a complaint with RECO about Mr. Lonergan's conduct; the eventual purchaser of North Drive; an individual creditor of Islington Kingsway and the author of a complaint about Mr. Lonergan's conduct; Judy Fitzpatrick, the Accounting Administrator at Terrequity; Andrew Zsolt, the principal broker of Terrequity; Jennifer Katsoulis, an Inspector with RECO; Mr. Brian Prendergast, Manager of Inspections & Investigations for RECO, and Mr. Brian Scholtzhauer, the Deputy Registrar of RECO.

The Applicant called 4 witnesses: Hans Rizarri, the Trustee in Bankruptcy in Mr. Lonergan's second bankruptcy; Michael Volpatti, the lawyer involved in one offer to purchase North Drive; Debbie Boccia, the Office Administrator and book keeper for Islington Kingsway, and James Sturino, the principal broker of West Realty, where Mr. Lonergan now works. Mr. Lonergan also gave evidence on his own behalf.

There are numerous issues in this matter and the testimony was wide ranging. For clarity, each issue will be set out separately and the testimony of the witnesses and the documentary evidence that is most relevant to that issue will be summarised with it. Findings of fact will also be grouped with the issue being considered as will arguments and the applicable law. Following the consideration of each issue, the cumulative effect of the findings will be assessed.

STRUCTURE OF ISLINGTON KINGSWAY

1st Issue – Was Paul Lonergan's interest in Islington Kingsway a breach of the Act?

Testimony

The Individual Creditor

A creditor of Islington Kingsway, who shall be referred to as the "Individual Creditor" testified that Paul Lonergan told her that he was the owner of Islington Kingsway. She alleges that he told her he would guarantee the loans she had made to Islington Kingsway, regardless of whether the company went into bankruptcy. He told her that he was the person behind Islington Kingsway.

Jennifer Katsoulis

Jennifer Katsoulis, the inspector for RECO, testified that Debbie Boccia, the Islington Kingsway Office Administrator told her during an inspection that Paul Lonergan was the "real owner" of Islington Kingsway and that the Qualified Broker was simply the broker on paper.

Debbie Boccia

Debbie Boccia was the Office Administrator and book keeper of Islington Kingsway from 1995 to 2000. Earlier, in 1987, she had been married to Paul Lonergan, but the couple had separated in 1991 and later divorced. She confirmed that she told Ms. Katsoulis that Paul Lonergan was the real owner of Islington Kingsway but in hindsight, she testified, she should not have used the word "owner".

Ms. Boccia understood that there was an agreement between the Qualified Broker and Paul Lonergan which provided that if Paul Lonergan ever qualified as a broker, he would take over the brokerage, but she did not know on what terms. Mr. Lonergan was the major producer of the firm. His commissions were paid into the firm to cover expenses and he borrowed money, both in the name of the firm and personally, to keep the firm going. He received a small draw, sometimes $500 a week, depending on the cash flow of the firm.

The Qualified Broker and Paul Lonergan operated as partners. In most cases they agreed on major decisions. Ms. Boccia could not say whose voice would prevail in case of a disagreement because, in her experience, they either agreed initially or worked things out.

Ms. Boccia testified that the Qualified Broker played a passive role in the day-to-day management of Islington Kingsway but he did "oversee" the firm. He was the signing officer on the trust account. On the general account of the business, two of three of the signatures of Debbie Boccia, Paul Lonergan and the Qualified Broker were required.

The Qualified Broker was responsible for the trade records. He collapsed the firm's line of credit when he felt the company was over-extended. It was also the Qualified Broker who terminated the firm's registration.

The Qualified Broker would occasionally advance money to Islington Kingsway but these loans would be short term. It was Paul Lonergan who provided the funding to keep the company going either by contributing his commissions, from borrowings on behalf of Islington Kingsway, or by borrowing personally.

Debbie Boccia testified that at the time Islington Kingsway went out of business she was owed about $6,000 in back wages, on an annual salary of $40,000. Paul Lonergan told her that he would pay her any outstanding money that Islington Kingsway owed her.

Paul Lonergan

Paul Lonergan in his testimony referred to the agreement in which the shares of Islington Kingsway were sold by the previous owner to the Qualified Broker. (Exhibit 5, pp 7 to 14). This agreement will be referred to as the "I.K. Ownership Agreement". Mr. Lonergan and his father were parties to this agreement. Paul Lonergan was never a shareholder in Islington Kingsway but he hoped to own the firm when he received his broker's registration.

The I.K. Ownership Agreement has several unusual provisions. Key among these is Section 2.3 which reads as follows:

> The parties hereto agree that the day to day management of the Corporation's business shall be performed by Paul Lonergan together with such other employee of the Corporation as appointed by him or [the Qualified Broker]. [The Qualified Broker] shall perform a supervisory role so as to ensure the Business operates in a business-like manner in keeping with first class standards for comparable businesses, and in compliance with the requirements of the Real Estate and Business Brokers Act, the Toronto or other jurisdictional Real Estate Board as appropriate, and the Policy Manual of Coldwell Banker Affiliates of Canada Inc. Each of the parties to this agreement hereby agree to provide all information as required by [the Qualified Broker] pertaining to the day to day management of the Corporation. All trust accounts maintained by the Corporation in the course of its business shall have signatories designated by the Corporation as required or permitted by applicable legislation.

Other provisions of the agreement include an obligation on the part of the Qualified Broker to make himself available on a reasonable and regular basis to sign cheques, trade sheets and other documents and to attend meetings with real estate governing bodies.

Mr. Lonergan testified that he had received legal advice that the I.K. Ownership Agreement did not violate the provisions of the Act. He denied that he was a partner in Islington Kingsway or that he represented himself as the owner. He said he was a member of a "team concept" together with the Qualified Broker and Debbie Boccia.

Mr. Lonergan did acknowledge that he was the principal contributor to Islington Kingsway in terms of sales. He said his role was to build the company by driving sales and hiring sales agents to further increase the commissions of the company.

Islington Kingsway had the right to terminate the I.K. Ownership Agreement. On cross-examination, Mr. Lonergan testified that he interpreted that to mean that he had the ultimate right to terminate the Qualified Broker's involvement with the firm.

Mr. Lonergan testified that he contributed his commissions to Islington Kingsway and he did borrow money to support the firm, both on behalf of the firm and personally. In his view, he went into bankruptcy for the second time because the business failed, leaving him with a personal debt load that was unsustainable.

Mr. Lonergan testified that he did not remember telling Debbie Boccia that he would pay her any outstanding wages at the time Islington Kingsway went out of business. Under the second bankruptcy, Ms. Boccia has not been paid.

Messrs. Zsolt, Sturino and Rizarri

Both Mr. Zsolt, the principal broker of Terrequity, where Paul Lonergan worked from August, 2002 to June, 2005, and Mr. Sturino, principal broker of West Realty, where Paul Lonergan currently works, referred to Islington Kingsway as "his" company, meaning Paul Lonergan's. The trustee in bankruptcy, Mr. Rizarri, also assumed, based on discussions with Paul Lonergan, that Mr. Lonergan was a principal in Islington Kingsway.

Submissions

Concerning the first issue, Mr. Lonergan's interest in Islington Kingsway and whether that interest was a violation of the Act, Mr. Snell conceded that Mr. Lonergan was not a shareholder. Under the Act, only registered brokers can have a majority shareholding in a real estate brokerage.

However, Mr. Snell argued that the Tribunal should look behind the corporate structure in view of what he submitted was overwhelming evidence that Mr. Lonergan was a "directing mind" of Islington Kingsway. Mr. Snell argued that it was open to the Tribunal to find that there was more than one directing mind of Islington Kingsway, acknowledging that the Qualified Broker did retain some measure of direction over the firm.

He also argued that Section 2.4 of the I.K. Ownership Agreement, citied above, was a violation of the Act. He referred to Section 4(2) of the Act which he submitted was the only section that deals with day to day management. It reads:

> Each branch office shall be under the supervision of a registered broker and each branch office having more than one registered salesperson shall be under the direct management

> by a registered broker or by a salesperson who has been registered for at least two years and who is under the supervision of a registered broker.

Mr. Snell argued that not to interpret Section 4(2) as including head offices would be to make an absurdity of the Act by having a potentially higher standard of supervision required in a branch office than in a head office.

The Act contemplates that a broker who is also a shareholder will be in control of the brokerage but it is silent on who should have the day-to-day operational control of the head office.

Ms. Flynn-Guglietti argued that the Tribunal ought to pierce the corporate veil only in limited circumstances that do not apply here. She also submitted that the I.K. Ownership Agreement clearly contemplated that the Qualified Broker would have a supervisory role.

She noted that the best evidence of the Qualified Broker's role in Islington Kingsway would have been to call the Qualified Broker himself. Although he was available to testify, the Registrar had elected not to call him. In his absence, Ms. Flynn-Guglietti argued, it was not open to the Tribunal to look behind the corporate structure.

Application of the Law

The Tribunal finds that there is not enough evidence to look behind the corporate structure. The Qualified Broker retained sufficient control to protect his interests by, for example, collapsing the line of credit when he felt the company was over-extended. He was the signing officer on the trust account and, under the terms of the I.K. Ownership Agreement, he did retain a supervisory role. While there is evidence of lax supervision, as will be noted below, there is no evidence that the Qualified Broker abrogated his obligations under the I.K. Ownership Agreement to Mr. Lonergan. The fact that the Qualified Broker did not give evidence is relevant but not determinative of the issue.

The Tribunal does not accept Mr. Snell's argument that it must read Section 4(2) as applying to the head office of a brokerage. While the Act does have several "vulnerabilities", in Mr. Snell's word, Section 4(2) does not create an absurdity. The Act clearly contemplates the broker shareholder being in control of the business and having a supervisory role in branch offices.

It is interesting to note that even accepting Mr. Snell's interpretation, Mr. Lonergan would not be in violation of Section 4(2). There was more than one registered salesperson at Islington Kingsway at all relevant times. Mr. Lonergan is a salesperson registered for at least two years and he was acting under the supervision, however passive, of the Qualified Broker.

Findings of Fact

Mr. Lonergan was clearly more than an employee and more than a "team player" as he suggests. He had the authority to bind the firm to debt and signing authority on the general account. He was actively involved in both operational and strategic decisions of the firm. He funded the company to the point of personal bankruptcy.

The Tribunal accepts Mr. Lonergan's evidence that I.K. Ownership Agreement was entered into in anticipation of his becoming a broker and acquiring the business. This would explain the unusually active role Mr. Lonergan played in the company and his willingness to bankrupt himself to keep the company afloat.

There is nothing in the Act that prohibits the I.K. Ownership Agreement and the Tribunal finds that Paul Lonergan was not in violation of the Act by entering into it. However, the unusual structure of Islington Kingsway and the way in which it was operated do create some significant concerns which will be discussed under the heading of the 4th Issue**,** below.

ACCOUNTING IRREGULARITIES AT ISLINGTON KINGSWAY

2nd Issue – What do the accounting irregularities at Islington Kingsway say about Paul Lonergan's ability to conduct his business with honesty, integrity and financial responsibility?

There is no dispute about the fact that Paul Lonergan has been convicted of a misappropriation of trust funds. As a result of this conviction, Mr. Lonergan's registration was, at all relevant times, subject to terms and conditions that he agreed to in June, 2002 (Exhibit 4A, Tab 2E).

There is also no dispute about the fact that two separate inspections of the books of Islington Kingsway revealed continuing and serious deficiencies in the books and accounting practices. These deficiencies were serious and comprehensive. Ms. Boccia accepted first level responsibility for some of these and, according to her testimony, the Qualified Broker had supervisory responsibility. With one exception, which will be discussed under the heading of the 3rd issue, below, there is no evidence that Mr. Lonergan is responsible for these accounting irregularities of Islington Kingsway.

Application of Section 6 of the Act

It is open to the Tribunal to consider all of the past conduct of Mr. Lonergan in making a determination under Section 6 of the Act. However, the accounting irregularities for which he was not responsible will not form part of this decision.

THE INDIVIDUAL CREDITOR'S COMPLAINT

3rd Issue – What does Mr. Lonergan's course of conduct with the Individual Creditor say about his ability to conduct business with honesty and integrity?

Testimony

The Individual Creditor

The Individual Creditor testified that she was the sole proprietor of a retail business, from which she is now retired. She has been in the practice of investing in second mortgages. Mr. Lonergan first approached her in 1997 concerning a power of sale in which she had an interest of about $70,000. There were several discussions about this power of sale and The Individual Creditor told Mr. Lonergan she would be consulting a lawyer about his proposal.

While these discussions were ongoing, The Individual Creditor was, in her words, "coming into money" and Paul Lonergan asked what she was planning to do with it. The Individual Creditor talked about investing in more second mortgages but she testified that Mr. Lonergan had another idea. He proposed that The Individual Creditor make advances against Mr. Lonergan's future commissions. She would be repaid when the transactions closed. The Individual Creditor asked if these commission advances could be registered and Paul Lonergan told her no, because they were just for a short term. However, Mr. Lonergan told her that she would have paper security in the form of the agreement of purchase and sale, or relevant parts of it.

The Individual Creditor testified that Paul Lonergan told her that, while the loan would be made to Islington Kingsway, he was the owner of the company and he would stand behind her loans. It was also her testimony that Paul Lonergan told her that the paper "security" of the agreement of purchase and sale was "like a mortgage". At no time, according to the Individual Creditor, did Paul Lonergan suggest she get independent legal advice about these proposed transactions.

In August, 1997 the Individual Creditor began loaning Islington Kingsway money on the strength of agreements of purchase and sale. Some of the loan agreements were signed by Debbie Boccia, the administrator and book keeper of Islington Kingsway; some agreements were signed by the Qualified Broker, and some were signed by Paul Lonergan. All of the agreements were stated to be with Islington Kingsway. The interest rate on these first loans was 18% per annum. The Individual Creditor was pleased with the results of the first transactions.

Around December, 1997 Paul Lonergan and Debbie Boccia suggested to the Individual Creditor that, instead of paying off each loan as it come due and then getting a new advance, it would be easier simply to roll the loans over to a new transaction. This could work as well if the particular agreement on which the loan was advanced failed to close. The outstanding loan could simply be rolled over to a new agreement of

purchase and sale. The Individual Creditor testified that she was unfamiliar with the term “rollover” but agreed to the proposal. It was as part of these negotiations that the Individual Creditor requested an administration fee to be paid on the loans, or some of them, in addition to the interest. In early 1998, the Individual Creditor was receiving regular interest payments and was pleased with the arrangement. She testified that Paul Lonergan told her that her “advances” would help him make a lot more money.

In the spring of 1998, the Individual Creditor began advancing money on the basis of exclusive listing agreements (Exhibit 4B, Tab 7K, p. 1) in addition to agreements of purchase and sale. At least some of these listing agreements were for projects that had yet to be built, such as a condominium known as Stephenson Drive Estates.

By July 1998 the Individual Creditor had advanced some $200,000 to Islington Kingsway. Things began to go awry during a transaction wherein the Individual Creditor advanced $58,000 against the commission on a set of townhouses known as Britain Gate that were allegedly under construction. The Individual Creditor requested further documentation on the transaction but was told that Paul Lonergan and Debbie Boccia were too busy to supply it. None of the transactions closed and the Individual Creditor now doubts whether the municipal address given for the Britain Gate townhouses ever existed.

In January, 1999, the Individual Creditor, as Purchaser, entered into a Reservation Agreement with the vendor of a condominium complex which will be referred to as the “Bloor Street Condo”. Islington Kingsway acted for both parties. The Individual Creditor paid a $20,000 deposit which was to be held by Islington Kingsway in an interest bearing trust account. The transaction was not completed and the Individual Creditor was repaid the deposit only after she demanded the money.

In 1999, the rate of new advances slowed as the Individual Creditor began to feel uneasy about her arrangement with Islington Kingsway. Despite growing misgivings about her loans, the Individual Creditor testified that she continued to make advances, feeling pressured to do so by Debbie Boccia and Paul Lonergan. The two of them began to skip meetings with the Individual Creditor and she began having problems being paid the interest. At first, these missed payments were explained as mistakes, but they persisted. Finally, the Individual Creditor was persuaded in November, 1999 to make a loan on a commission, despite the fact that she had to borrow the money for the loan.

The Individual Creditor began to ask for her principal back, and, in her words, complained “badly” about the lack of documentation. Paul Lonergan made promises of repayment but in 1998 one cheque came back marked NSF. The Individual Creditor turned that cheque over for collection to Bank of Nova Scotia. It was following this NSF cheque that the Individual Creditor began to insist on a higher interest rate and greater administrative fees.

An agreement between the Individual Creditor and Islington Kingsway, with Paul Lonergan as signatory (Exhibit 4B, Tab 7) was entered into in June, 2001 whereby Islington Kingsway acknowledged a total loan obligation to the Individual Creditor of

$411,012.95 with interest of 25% per annum, payable monthly. The agreement committed Islington Kingsway to pay Mr. Lonergan's commissions in reduction of the debt.

When Mr. Lonergan went into bankruptcy in February, 2003, he initially declared the Individual Creditor as a creditor (Exhibit 4A, Tab 6 B). In 2003, the Individual Creditor filed a complaint with RECO about Mr. Lonergan's conduct.

On cross-examination, the Individual Creditor testified that she had been plaintiff in more than 5 or 6 legal actions, apparently involving defaulting mortgagors to whom she had loaned money.

Debbie Boccia

In her testimony, Debbie Boccia confirmed that the Individual Creditor had loaned money to Islington Kingsway and that the security for her loans were usually Agreements of Purchase and Sale and Commission Advance Assignments. The Individual Creditor did not want to have her capital back; she wanted the commissions rolled over.

The Individual Creditor was not the only private person who advanced money based on commissions. Debbie Boccia "pulled together" the agreements covering these advances based on examples she had from professional firms which advance money based on commission. These companies are called commission advance agencies. She testified that the interest rates for this type of loan were in the range of 24% to 36% and might also involve an administrative fee. Only rarely would commission advance agencies loan on the basis of an exclusive listing agreement.

The Individual Creditor would sometimes call during the week to say that she had some money to invest. If Islington Kingsway needed the money to get through the following week, Paul Lonergan would go out on the weekend and pick it up. Debbie Boccia would then prepare an agreement and take it to the Individual Creditor to sign in the week following the advance.

It was because of this practice that a mistake was made in January 1999 in handling the deposit cheque that the Individual Creditor paid as part of her Reservation Agreement for the Bloor Street Condo. Mr. Lonergan left the $20,000 cheque in Ms. Boccia's in basket without explanation. Ms. Boccia assumed it was an advance and, as usual, deposited it into the general account. It was not until the deal was unwound that Ms. Boccia realised that the money should have gone into the trust account. The amount of the deposit was returned to the Individual Creditor.

Paul Lonergan

Paul Lonergan testified that when he met the Individual Creditor, she was investing in second mortgages and was interested in high rates of return. He directed her to mortgage brokers but also talked about commission advances.

When the Individual Creditor looked over the commission advance documents, she said she understood the transaction. Nevertheless, Paul Lonergan advised her to consult a lawyer or accountant. The Individual Creditor said she did not need to because she was smart enough. "At all times", Mr. Lonergan recommended that the Individual Creditor get independent legal advice.

Mr. Lonergan was asked to explain the provisions of some of the earlier commission advance documents and he answered that he relied on Debbie Boccia to prepare the documents.

It was the Individual Creditor who suggested the money stay in the business and was most receptive to the idea of rolling the loans over. Mr. Lonergan does not think he first used the term "rollover" and does not recall who did. Mr. Lonergan never said he owned Islington Kingsway or that he would guarantee payment to the Individual Creditor.

The course of dealing evolved to loans and advances on listing agreements and new developments. Concerning the Individual Creditor's testimony that she could not find the municipal address for Britain Gate, Mr. Lonergan produced photographs and a listing for the development. The reason no commissions were generated was that the builder terminated the listing agreement with Mr. Lonergan. This was explained to the Individual Creditor and it was made clear to her that some of the money being rolled over was going to new developments and listing agreements.

Mr. Lonergan characterised the Individual Creditor as an aggressive lender who "threatened all kinds of things" when she was not paid, including legal action and physical assault.

Concerning the acknowledgment of debt that Mr. Lonergan signed on behalf of Islington Kingsway in June, 2001, Mr. Lonergan testified that the Individual Creditor prepared the agreement and insisted that he sign it. He relied on Debbie Boccia for the figures in the agreement as he didn't get into the numbers. In November, 2001, Mr. Lonergan stopped making payments to the Individual Creditor because he did not have the funds.

Submissions

Mr. Snell submitted that Mr. Lonergan's responsibility to the Individual Creditor was not to misrepresent the situation, including the security for the loans and the way in which the loans were being used. Mr. Lonergan misrepresented both, in Mr. Snell's submission, by not making clear the distinction between a loan secured by an agreement of purchase and sale and a loan secured only by an exclusive listing

agreement. Mr. Lonergan did not clearly explain what the increased risks were when the Individual Creditor lent on commissions for property not yet developed.

Mr. Lonergan also misrepresented the use to which the funds were put, in two ways. First he represented to the Individual Creditor that the funds were being used to develop the business whereas they were often being used just to keep the company afloat. He also failed to disclose the true state of the company's finances.

Ms. Flynn-Guglietti argued that the Individual Creditor was an experienced and sophisticated investor who, in any event, had ample opportunities to get independent legal advice about her transactions with Islington Kingsway. She had experience with high yield, high risk second mortgages. Mr. Lonergan fulfilled whatever obligation he might have owed the Individual Creditor.

Findings of Fact

The testimony of the two primary participants in the discussions surrounding these loans, the Individual Creditor and Mr. Lonergan, is contradictory in key respects. The third witness to testify on this matter, Debbie Boccia, impressed the Tribunal with her straightforward account of events. Unfortunately, Ms. Boccia was not present at most of the meetings between the Individual Creditor and Mr. Lonergan.

During the cross-examination of the Individual Creditor, it emerged that this was the fourth time she had been examined by Mr. Sparling, counsel for Mr. Lonergan, in the matter of the loans. She displayed hostility towards Mr. Lonergan and positive animus towards his lawyer. Her answers were evasive and her memory was selective. Although much of the cross-examination concerned matters collateral to this hearing, her credibility is undermined by her performance.

Mr. Lonergan gave evidence that was in some respects internally inconsistent and was also inconsistent with the evidence of others. He alleged that the Individual Creditor was an aggressive, experienced investor who drove the relationship between them. He did not seek legal advice for himself, relying on Debbie Boccia, who has no legal training, to draft the assignment documents. Yet he claims "at all times" to have recommended that the Individual Creditor seek independent legal advice.

It is improbable that if he had assessed the Individual Creditor as an experienced investor, he would have advised her to seek independent legal advice. It is also unlikely, given his own casual conduct in having the Office Administrator draft the agreements, that he would have repeatedly encouraged the Individual Creditor to get independent legal advice, as he claims, even if he had realised that she was not a sophisticated investor.

His evidence that at no time did he lead the Individual Creditor to believe that he was the owner of Islington Kingsway is inconsistent with the impression that he created with others who saw him doing business, including Debbie Boccia, Andrew Zsolt and James Sturino, all of whom testified that they regarded Islington Kingsway as his company. His

adamant denial of ever telling the Individual Creditor that he would stand behind the loans is at odds with the agreement he signed on behalf of Islington Kingsway that acknowledged the debt and committed his commissions to repaying it. It is also at odds with his listing of the Individual Creditor as a personal creditor on his bankruptcy. The Tribunal does not accept Mr. Lonergan's explanation that, in the stress of the moment, he simply listed all the creditors he could imagine at the time of his bankruptcy filing. This was Mr. Lonergan's second bankruptcy and he would have understood the difference between a creditor of Islington Kingsway and a personal creditor.

His evidence about the Individual Creditor's degree of understanding of the transactions was also at odds with the understanding that she demonstrated during her testimony.

The Tribunal, based on a careful consideration of the evidence of both principal parties, and the observation of them during examination, finds the following as fact.

The Individual Creditor is not a sophisticated investor but she is one who is experienced with the risks and rewards of high yield second mortgages. At the outset of her conversations with Mr. Lonergan she said she would consult a lawyer about some advice he had given her and it was plainly open to her to obtain legal advice about the form of transactions he was proposing.

Having said this, there are obvious limitations to the Individual Creditor's knowledge and experience that Mr. Lonergan appears to have taken advantage of in a way that a person conducting business with honesty and integrity would not have.

The fact that she did not recognise the deficiencies in the early assignments (for example, Exhibit 4A, Tab 7D), which are confusing and misleading, demonstrates that she was not as sophisticated as a professional commission advance agency would have been. She also appears not to have understood that the usual interest rate charged for commission advances was between 24 and 36%, together with administrative fees. The rate of 18% that she charged was a rate more suited to a second mortgage. Mr. Lonergan would have known this.

The Individual Creditor did understand that her risk was greater when she advanced money on an agreement of purchase and sale than it would be on a second mortgage. But it was clear during her testimony that the Individual Creditor did not understand that when she began loaning money on basis of listing agreements, she had accepted a sharply higher level of risk. Mr. Lonergan made no effort to alert the Individual Creditor that the risk level of their transactions had sharply increased.

In addition, Mr. Lonergan did not at any time have a candid conversation with the Individual Creditor about the state of finances at Islington Kingsway. The company was losing money throughout the period of the Individual Creditor's loans. The Individual Creditor thought she was loaning the money to expand the business whereas in fact the money was often being used to cover week-to-week operating costs.

Finally, Mr. Lonergan's carelessness in handling the deposit cheque the Individual Creditor submitted with her Reservation Agreement directly enabled a serious mistake

to be made when the funds were not deposited into the trust account. This is the second example of misappropriation of trust money raised during this hearing for which Mr. Lonergan bears some responsibility. This misappropriation is a clear violation of the Act.

Application of Section 6 of the Act

Considering the whole course of dealing with the Individual Creditor, Mr. Lonergan engaged in predatory practices that fell short of the standards expected under Section 6 of the Act.

PAUL LONERGAN BANKRUPTCIES

4th Issue – What do Paul Lonergan's first and second bankruptcies indicate about his ability to be financially responsible in the conduct of business?

There is no dispute about the fact that Paul Lonergan became bankrupt for the first time in 1991 when he overextended himself in real estate investments and was unable to support the mortgages when the market slumped. He had debts of slightly more than $300,000. He was discharged from bankruptcy in the spring of 1992.

Likewise, there is no dispute about the fact that Paul Lonergan voluntarily filed an assignment in bankruptcy the second time in February, 2003. When Islington Kingsway failed, Mr. Lonergan was unable to support the loans he had assumed to keep the company going. At the time of the bankruptcy, he declared liabilities of $1,886,558.82. As at the date of this hearing, Mr. Lonergan is an undischarged bankrupt but it appears that his debts are substantially less than he first declared as some of the obligations are owed by Islington Kingsway.

Application of Section 6 of the Act

The fact of bankruptcy, even undischarged bankruptcy, is not enough to conclude that Mr. Lonergan, having regard to his financial position, cannot reasonably be expected to be financially responsible in the conduct of business. The circumstances of the bankruptcy must be considered.

Mrs. Flynn-Guglietti submitted that the two bankruptcies must be considered as unrelated incidents as the causes of them were different. However, the Tribunal does not accept this view. There are common threads between the two bankruptcies that raise reasonable expectations about Mr. Lonergan's financial responsibility in the future.

Mr. Lonergan began investing in real estate when, as he testified, he lacked the skills, training or experience to do so. His failure, therefore, was predictable. It was up to Mr. Lonergan to learn the painful lessons from this failure; lessons about his own limitations as a businessperson. He could then have set about remedying these shortcomings either by study, apprenticeship or by surrounding himself with people who had the skills he lacks. Instead, by his own admission, Mr. Lonergan did not take any financial training before launching into a much more complex financial undertaking by signing the I.K. Ownership Agreement.

The I.K. Ownership Agreement served to set up a business which was running in anticipation of Mr. Lonergan's registration as a broker. It also permitted Mr. Lonergan to anticipate his registration by operating in a capacity that was very close to that of a broker. Thus Mr. Lonergan had a significant influence over a business that he did not have the training, skill or experience to manage responsibly.

Mr. Lonergan chose not to complete his studies to become a broker during the seven years of the arrangement or to seek any other financial training. Given his role in the company, this is evidence of financial irresponsibility in itself. The statements of profit and loss of the company (Exhibit 5, p. 69) for the years 2000-2003 make it clear the that problem the company faced was that expenses, particularly expenses for staff and advertising, were excessive for the revenues being generated. In 2000, these two heads of expenses were in excess of 90% of revenues. Yet throughout this period Mr. Lonergan persisted, according to his testimony, in believing that the problem was that he was not growing revenue quickly enough. Therefore, he continued to maintain excessive expense levels. Revenue remained constant at about $400,000 per year throughout this time.

When asked what his plans were to make Islington Kingsway successful, Mr. Lonergan talked of his "vision" or his "dream" of running a successful brokerage. To have a dream is a wonderful thing but we must pursue our dreams before we can live them. In Mr. Lonergan's case, this meant the hard work of acquiring the skills he needed to succeed. Alternatively, it was open to Mr. Lonergan at any time to propose to the Qualified Broker that they hire someone with the business skills he lacked to run Islington Kingsway. But Mr. Lonergan chose instead to use his undeniable skills as a salesperson to persuade others to fund his dream. As Islington Kingsway fell further and further into debt, his persistence in this course of action became more and more financially irresponsible.

With regret, the Tribunal concludes Mr. Lonergan continues to avoid the opportunities to learn from his past mistakes. Several times Mr. Lonergan said that in hindsight he would have done things differently, but this is an acknowledgement of mistakes, not evidence of any lessons learned. When pressed for specifics of what he would do differently, Mr. Lonergan persisted in saying that the business might have succeeded if only he had been able to hire more people and pursue larger transactions.

The Tribunal also notes that Mr. Lonergan showed little remorse for the difficulty he has caused his creditors. There was an indication of chagrin that Debbie Boccia will not be repaid, but beyond that, his attitude towards his creditors is one of politely restrained

aggravation. He spoke feelingly of how his creditors "harassed" him making his life "insupportable" and giving him no choice but to seek bankruptcy protection. His counsel says that Mr. Lonergan feels remorse, but the Tribunal saw little evidence of it.

Given Mr. Lonergan's persistent failure to learn from his past financial mistakes, it is reasonable to assume that he will repeat some variation of them if he is permitted to continue in the real estate business.

NORTH DRIVE TRANSACTION

5th Issue – Did Paul Lonergan meet his obligations to the vendor of North Drive?
6th Issue - Did Paul Lonergan meet his obligations to his broker in the course of the North Drive transaction?
7th Issue – Was the commission agreement concerning North Drive dated March 12, 2005 a violation of the Act?
8th Issue – What does Paul Lonergan's conduct throughout the North Drive transaction say about his ability to conduct his business in accordance with Section 6 of the Act?

Testimony

The Vendor of North Drive

The vendor of North Drive, who shall be referred to as the "North Drive Vendor" testified that he is a partner in an executive search firm. Prior to moving to Arizona in August, 2001, the North Drive Vendor and his family lived on North Drive, a property which he owned with his wife.

In April, 2001, the North Drive Vendor listed North Drive with Paul Lonergan for over $2 million. However, 2 weeks after that listing, the owners changed their minds about selling the property and requested Mr. Lonergan to withdraw the listing.

Again determining to sell the property in April 2003, the owners gave the listing to Mr. Lonergan. At this time, Mr. Lonergan advised the North Drive Vendor that the property would sell quickly if it were priced at $1,950,000 and that was the listed price. By August, 2003 there had been 17 showings of the property but no offer. The North Drive Vendor extended the listing with Mr. Lonergan from August to December 31, 2003.

The North Drive Vendor became dissatisfied with Mr. Lonergan's performance and in October, 2003 asked him to resign the listing. Mr. Lonergan refused saying he would sell the property by Christmas. Sometime in November, the North Drive Vendor advised Mr. Lonergan that the listing would not be extended after December 31, 2003 and that the North Drive Vendor would be listing with another brokerage. It was also during this fall period that the North Drive Vendor began insisting that Paul Lonergan call him with regular Friday progress reports and that he advise the North Drive Vendor of the name of any viewer before showing the property. The North Drive Vendor wished

to satisfy himself that those viewing the property were legitimate prospective buyers and he also wanted feed back from the viewers.

On December 19, Mr. Lonergan presented a conditional offer for North Drive, which the North Drive Vendor accepted at the end of that year (the "Eno Offer"). The purchase price was $1,900,000 with a $200,000 deposit. The North Drive Vendor never saw the deposit cheque and he subsequently learned that it had not been deposited in a trust account. The conditions of the offer included approval of the transaction by the purchaser's solicitor by January 7, 2004, which the North Drive Vendor interpreted as giving the buyer the right not to close the deal for any reason, or excuse. In the result, the deal did not close. The reason given was the existence of an undisclosed easement granting the city access to a creek running over the edge of the property in a ravine.

On cross-examination, the North Drive Vendor stated that he had not disclosed the easement on the original Purchaser's disclosure agreement and he does not remember whether he included the plan which showed the easement with the disclosure agreement. However, he testified that he did tell Paul Lonergan that the city had the right to go down to the creek in back of the property to deal with water flow. The North Drive Vendor revealed that he had reservations about the *bona fides* of the Eno Offer but felt he had nothing to lose by accepting it.

The North Drive Vendor was advised by his new broker, a representative of Remax, not to re-list until February 15, 2004. During the interim from December 31 2003 and mid-February, the North Drive Vendor gave Mr. Lonergan the right to bring forward offers on the property. However the North Drive Vendor did not extend, or authorize Mr. Lonergan to extend, the listing which had expired on December 31.

By mid-December, the North Drive Vendor was insisting that Mr. Lonergan seek his clearance before showing the property to anyone. But on January 18, 2004 Mr. Lonergan showed the property without consent. The North Drive Vendor wrote to Paul Lonergan (Exhibit 5, p.71) relating the incident and stating he was "stunned" by this. He added that "As of Dec. 31 no one has the listing on our home." He demanded that Mr. Lonergan return the key and remove the selling sign, which Mr. Lonergan did. Still, the North Drive Vendor permitted Paul Lonergan to continue to attempt to sell the property, concluding he had nothing to lose by doing so pending the February new listing. At some time, probably in January 2005, a year later, the question of what commission Mr. Lonergan would be entitled to for bringing a purchaser to the North Drive Vendor was discussed. The North Drive Vendor's recollection was unclear but he feels that it was probably at this time that he mentioned the figure of $18,000.

In discussions with the new listing agency, Remax, in late January, the North Drive Vendor was advised that North Drive had been listed for 109 days in 2001, despite the owners' request that the listing be withdrawn after 14 days. He also learned that the 2003 listing had been extended three times: from December 31, 2003 to January 7**,** 2004; from January 9, 2004 to January 13, 2004, and from January 13, 2004 to January 20, 2004.

The North Drive Vendor was adamant that he had not discussed the possibility of an extension of the listing with Mr. Lonergan. The signatures on the documents purporting to be those of the North Drive Vendor and his wife were not their signatures. The North Drive Vendor stated that he had not given Mr. Lonergan authority to extend the listing agreement by phone or mail, nor had he given Mr. Lonergan a power of attorney. By the time that the North Drive Vendor was made aware of the purported extension of the listing, January 20 had come and gone.

On February 15, 2004 the North Drive Vendor signed the new listing with the Remax representative. The listed price was $1,950,000. After almost a year on the market, there was an offer dated January 30, 2005 for $1,825,000 (the "North Drive APS") and the sale was completed at the end of May, 2005.

The North Drive Vendor was aware that Mr. Lonergan was acting for the buyer. When one of the eventual purchasers, who shall be referred to as the "North Drive Purchaser" asked him to structure the transaction in a certain way to accommodate the North Drive Purchaser's arrangement with Mr. Lonergan, the North Drive Vendor refused. The North Drive Vendor was concerned, on legal advice, that the proposed structure of the transaction might give rise to the suspicion of illegality. The North Drive Vendor also had an issue with the amount of commission Paul Lonergan might receive, given his past experience with Mr. Lonergan.

The North Drive Purchaser

The North Drive Purchaser describes himself as a very successful financial consultant. On January 30, 2005, he entered into the North Drive APS with the owners of the property. Paul Lonergan was acting as his agent in the transaction and it had been agreed that Mr. Lonergan would share the commission with the listing broker.

The North Drive Purchaser had chosen Paul Lonergan on the basis of his perception of Mr. Lonergan as one of the two most successful real estate agents in the area, a perception based on advertisements he had seen featuring Mr. Lonergan.

Paul Lonergan suggested that the North Drive Purchaser might wish to loan him money on the strength of his pending commissions. The North Drive Purchaser did so once or twice. The North Drive Purchaser was at pains to point out that he would not ordinarily loan money to his real estate agent. But it had occurred to the North Drive Purchaser that Paul Lonergan might represent the sort of people he would like to have as clients and *vice versa*. He proposed to Mr. Lonergan that they should refer their clients to each other as appropriate.

It was agreed that the North Drive Purchaser would advance Paul Lonergan $48,818.75 on the strength of the proposed purchase of North Drive. The North Drive Purchaser did not regard this as part of the transaction but as part of what he hoped would be an

ongoing referral arrangement with Mr. Lonergan. On March 12, 2005 the North Drive Purchaser, acting through his service company, entered into a form of agreement for the loan, the "North Drive Commission Agreement" (Exhibit 4B, Tab10D, p. 3). The signatories to the agreement are Paul Lonergan, purporting to act on behalf of Terrequity, and the North Drive Purchaser, apparently acting on behalf of his service company. The North Drive Purchaser believes that his lawyer prepared the North Drive Commission Agreement and that his lawyer also proposed the handwritten changes that were made to the document.

Paragraph 2 of this agreement reads:

> Upon acceptance of this agreement, both parties acknowledge that the purchaser agency agreement clause is deleted from the Buyer Agency Agreement.

Added in handwriting and initialled by the parties are the words, "with the agent of record being [name deleted] and/or Paul Lonergan."

Paragraph 5 of the agreement reads:

> Coldwell Banker agrees to provide documentation in the form of a receipt or invoice documentation in the amount of $48,818.75 for the above commission payment to be used to verify and confirm that said funds have been received and therefore should be listed as a credit to the Purchasers on the Statement of Adjustments for the sale of [civic address deleted] North Drive.

The North Drive Purchaser testified that he did not understand the meaning and effect of the handwritten changes he made and initialled in paragraph 2 of the North Drive Commission Agreement but was acting solely on the advice of his lawyer. He testified that he never received the receipt mentioned in paragraph 5 of the North Drive Commission Agreement, which he understood to be some sort of document to be exchanged between the two lawyers acknowledging that the commission was to be deducted on the statement of adjustments.

The North Drive Purchaser approached the North Drive Vendor to participate in re-structuring the purchase agreement to accommodate his arrangement with Mr. Lonergan. The North Drive Vendor declined. Because of the North Drive Vendor's concerns, only $20,000 of the money advanced under the North Drive Commission Agreement was actually loaned to Paul Lonergan. Of this amount, the North Drive Purchaser has been repaid between $5,500 and $6,500.

Judy Fitzpatrick

Judy Fitzpatrick has been working with Terrequity for 6 ½ years, including the period from August, 2002 to June 2005 when Paul Lonergan was working with the company. She is the accounting administrator who, together with a small staff, is responsible for tracking and accounting for the real estate transactions of the business.

Ms. Fitzpatrick explained the various systems in place to ensure that transactions are properly identified and documented and that monies are paid into the appropriate funds, including the trust fund and the commission trust fund. She is not aware of any transaction file, or Trade Record, being lost while she has been at Terrequity.

When a Terrequity representative is acting for the seller, the salesman has 48 hours to submit the deposit, so that Terrequity can deposit it into the trust account within 2 business days as required by the Act. The salesman is also required to report transactions to Terrequity. The one exception would be when the sales representative knows that the transaction will be terminated within 48 hours. Even in this case, it is typical to file the agreement of purchase and sale, the deposit and then the mutual release.

Ms. Fitzpatrick testified that the Eno Offer for North Drive was not reported to Terrequity nor was the deposit cheque submitted. She instituted an extensive search for the file and the cheque. She also did not receive the extension agreements (Exhibit 4B, Tab 9F, p. 12), purporting to be signed by the owners.

Concerning the North Drive APS, the agreement was not reported within 48 hours. Ms. Fitzpatrick first learned of the offer on May 19, 2005, four and a half months after it was signed, when Remax, the seller's broker, contacted her. At her request, Remax forwarded the North Drive APS to her. She then contacted Andrew Zsolt, the managing broker of Terrequity. On May 20, 2005, Paul Lonergan submitted documentation on this transaction.

Judy Fitzpatrick explained that many sales representatives did receive advances on their commissions. Terrequity used a couple of third party companies to advance up to 70% of the commission on any given transaction. The advance was paid to the agent and Ms. Fitzpatrick would deduct the advance from the commission and repay the third party company. In this way, the commission would flow through Terrequity as required by the Act.

Andrew Zsolt

Andrew Zsolt is the Principal Broker of Terrequity. He has been in the real estate business since 1984 and has been in his present position since 1990. He manages the company, heading the administration, finance and training. He no longer sells.

If an offer is accepted he expects it to be reported. He communicates this expectation to employees through a memo and through on-going training. It is reinforced by the day-to-day procedures of the company.

Sometime in the spring of 2002, Paul Lonergan called Andrew Zsolt and asked if Mr. Zsolt was interested in buying "his company". Mr. Zsolt understood this to mean Islington Kingsway, in which Mr. Zsolt believed Mr. Lonergan had an interest.

Mr. Zsolt was interested but did not want to assume the debts of Islington Kingsway. So an agreement was reached whereby Terrequity operated Islington Kingsway, technically as a branch. There was an expense sharing arrangement with Mr. Lonergan paying the majority of the expenses. In exchange, he received a greater than usual share of commissions. Mr. Lonergan began working with Terrequity and Andrew Zsolt also took on the other surviving employees of Islington Kingsway.

On May 19, 2005, Mr. Zsolt became aware of the North Drive APS and the North Drive Commission Agreement. Ms. Fitzpatrick interrupted an important training session to tell him about the structure of the North Drive Commission Agreement and about her concern that it might violate the Act. Mr. Zsolt understood that the North Drive Purchaser had advanced the commission to Paul Lonergan and wanted an acknowledgement of this. Paul Lonergan had not told him about the North Drive APS, the North Drive Commission Agreement or about the advance.

Paul Lonergan usually received commission advances through Real Cash, a third party lending company. Terrequity had made a special arrangement to permit Mr. Lonergan to get his commission advances through Real Cash. Mr. Lonergan was denied advances from the companies Terrequity normally did business with because of non-repayment of an advance.

Andrew Zsolt was unaware that Paul Lonergan was receiving advances on his commission from any buyer. Mr. Zsolt has never seen a transaction like the North Drive Commission Agreement, with an advance against the commission and then an adjustment of the purchase price to subtract the commission. Mr. Zsolt expressed the opinion that one effect of the North Drive Commission Agreement was to attempt to substitute Paul Lonergan for Terrequity as the co-operating broker.

Andrew Zsolt contacted Paul Lonergan on May 19 and, without explanation, Mr. Lonergan supplied the documentation the next day. After delivering the papers, Mr. Lonergan had a brief conversation with Andrew Zsolt during which he said this was just a routine commission advance. Andrew Zsolt did not agree; he felt the North Drive Commission Agreement violated the Act by allowing a commission to be paid through someone other than a broker.

Andrew Zsolt became aware of the Eno Offer in February, 2004 as a result of the North Drive Vendor's complaint to RECO.

Mr. Zsolt testified that Mr. Lonergan did tend to be slow with his paperwork but had no pattern of not reporting deals. He also stated that no sales representative should extend a listing without proper authorization from the client.

Andrew Zsolt had three problems with Paul Lonergan's conduct on the sale of North Drive:

1. Mr. Lonergan's behaviour in extending the listing into January, 2005;

2. Mr. Lonergan's being paid the commission on the North Drive APS directly from the North Drive Purchaser; and

3. The non-reporting of the Eno Offer and the North Drive APS.

Mr. Zsolt dismissed Mr. Lonergan from Terrequity on June 1, 2005.

Michael Volpatti

Mr. Volpatti is the solicitor for Eno Investments and its principals. He was the lawyer who reviewed the Eno Offer on behalf of the buyer and he confirmed that it was a *bona fide* offer that collapsed because the easement on the back of the property prevented the buyer from developing the back lot.

Paul Lonergan

Mr. Lonergan handled the first listing of North Drive. He did not end the listing after fourteen days because he understood that the North Drive Vendor wanted to downplay the marketing by taking down the sign, but also wanted the opportunity to consider an offer if one were made.

On the second listing, in 2003, Paul Lonergan brought at least two offers to the owners but there was no sale because the North Drive Vendor did not want to reduce the price, in one case by $200,000 or $300,000.

On December 19, the Eno Offer was made with a price in the $1,800,000 range. The Eno Offer stated that the deposit was "submitted herewith" (Exhibit 4B, Tab 9F, p.7). The cheque was not submitted with the offer but was faxed. Mr. Lonergan did not insist on the cheque because he felt the buyer's covenant was good, although in hindsight Mr. Lonergan acknowledges that the offer should have read "the deposit will be submitted on acceptance".

Paul Lonergan did not receive the cheque until New Year's Eve, when the offer had been accepted by the owners. On January 2, Mr. Volpatti, the lawyer for the purchaser, advised that the deal would not proceed. Because Paul Lonergan was notified within 48 hours of receiving the cheque that the deal would be aborted, he did not report the Eno Offer to Terrequity nor did he deposit the cheque.

Mr. Lonergan testified that the North Drive Vendor had told him there was no easement on the property and that no easement showed on the 1953 survey.

At the beginning of 2003, the North Drive Vendor was travelling. In phone calls, the North Drive Vendor said if Eno were still interested, "we'll give them a week". The North Drive Vendor subsequently extended the deadline for negotiations two more times. Mr. Lonergan interpreted this as authority to extend the listing agreement. Mr. Lonergan extended the agreement at his office by signing both the North Drive Vendor's name and the name of his wife on the extension. However, he wrote the word "per" in front of their names, which he understood to mean "pursuant to the instructions of". He then

witnessed these signatures by signing his own name as witness. He dated the extensions and wrote that they had been executed in Arizona, because that was where the owners were. He did not send the extensions to the North Drive Vendor or tell him about them because the North Drive Vendor frequently had trouble with his fax machine.

He characterized the North Drive Vendor as "a little difficult" as a client.

A year following the Eno offer, the North Drive Purchaser inquired about buying North Drive. By this time, Mr. Lonergan was not acting for the North Drive Vendor but he arranged with Remax to be the co-operating broker on the transaction. The North Drive Purchaser was interested in doing commission advances. The North Drive Commission Agreement (Exhibit 4B, Tab 10D, p. 3) refers to a series of advances totalling $48,818.75, payable in three instalments. The North Drive Purchaser issued all three cheques but Mr. Lonergan only cashed the first, for about $20,000 because by that time the North Drive Vendor was "raising noise" about the commission payable to Paul Lonergan. About one half of the amount advanced by the North Drive Purchaser has now been repaid him.

When asked to explain the North Drive Commission Agreement, Mr. Lonergan replied that the North Drive Purchaser led him down the path to this agreement and that he relied on the lawyer to draft it. He says he will make a plan to repay the North Drive Purchaser when this proceeding is over.

Mr. Lonergan asserts that he did submit the North Drive APS to Terrequity. He testified that Terrequity was often very slow in returning Trade Record Acknowledgement sheets for Trade Records submitted so he did not follow up with them when he did not receive an acknowledgment. It was not until May 19, four and one half months after the North Drive APS was signed, that Terrequity advised him that they had no record of the transaction. During his investigation as to what had happened, he spoke with a Terrequity receptionist who said documents, including cheques, were frequently lost.

Findings of Fact

Credibility is obviously an issue in this matter with the testimony of Paul Lonergan at odds with that of the North Drive Vendor, Andrew Zsolt and Judy Fitzpatrick. Both counsel made submissions about credibility, although Ms. Flynn-Guglietti was hampered in her submissions because she had not been present when the North Drive Vendor, Mr. Zsolt and Ms. Fitzpatrick gave their evidence.

The North Drive Vendor impressed the Tribunal with his honesty and candour. While Ms. Flynn-Guglietti attempted to portray him as a difficult client who sent mixed messages, this is not the impression the Tribunal received. The North Drive Vendor did not seem particularly difficult or even especially demanding, given the value of the property he was selling and the fact that he was trying to sell it from Arizona. He was a businessman who was prepared to be opportunistic – if someone made an offer, he would consider it, regardless of whether the property was listed. This is not uncommon.

He wanted to be kept informed about what was happening and asked for regular Friday updates, again a reasonable request. He spoke very highly of Mr. Lonergan's successor as his agent, praising her professionalism despite the fact that it took her almost a year to sell the property.

Mr. Zsolt was also a credible witness. Ms. Flynn-Guglietti argued that his evidence contradicted that of the North Drive Vendor but the Tribunal does not accept this interpretation. It was clear that Mr. Zsolt was tired of hearing from the North Drive Vendor about the commission payable to Paul Lonergan and that Mr. Zsolt thought the North Drive Vendor was changing his position on the matter of this commission, but this does not contradict the North Drive Vendor's testimony.

Judy Fitzpatrick impressed the Tribunal as a knowledgeable and careful employee. The systems she has established are complete and professional. She says that she has never lost a Trade Record and the Tribunal believes her. Although she gave no evidence specifically on this point, it is not characteristic that she would be consistently months late in sending out Trade Record Acknowledgment sheets.

Mr. Lonergan's evidence was not as consistent or as credible. For example, concerning the extension agreements he signed extending the listing for North Drive, it simply does not make sense that a man of his experience would not know that he could not sign an agreement in someone else's name and then witness his own signature. He would have known that he could not place the agreement as having been signed in Arizona when it was not and he would have known that the word "per" means "by", not "on the authority of". Even if the North Drive Vendor was having difficulty with his fax machine, Mr. Lonergan could have told him about the extensions during their phone conversations or e-mailed him about them.

Therefore, where the evidence is in conflict, the Tribunal accepts the testimony of the North Drive Vendor, Andrew Zsolt and Judy Fitzpatrick as representing the facts.

Application of the Act

Mr. Lonergan's extension of the listing for North Drive was done without authority and the way in which he executed the extensions was improper. The failure to deposit the Eno cheque is also a serious matter. The cheque should have been submitted with the offer and should have been deposited.

The failure to disclose either the Eno Offer or the North Drive APS to Terrequity is a clear violation of Paul Lonergan's responsibility to Terrequity. Terrequity is responsible under Section 19 of the Act for maintaining trade records of every transaction done by the brokerage. To ensure compliance with this provision, Mr. Zsolt made clear to salespeople their obligation to disclose transactions to the brokerage.

Concerning the North Drive Commission Agreement, the Act does not expressly say that a salesperson cannot trade on his own behalf. However, the definition of a salesperson is "a person employed, appointed or authorized by a broker to trade in real

estate." Section 30 of the Act prohibits a salesperson from collecting a commission from anyone other than the broker for whom he works.

Regardless of the intent of the parties, the effect of the North Drive Commission Agreement, had it been completed, would have been to replace Terrequity as co-operating broker with Paul Lonergan and/or his third party colleague. A second effect would have been to have the commission payment flow through the North Drive Purchaser's company rather than through a registered broker, a violation of section 30 of the Act.

It was only because of the North Drive Vendor's refusal to re-structure his transaction with the North Drive Purchaser to accommodate the North Drive Commission Agreement, that the agreement was not completed. However, Mr. Lonergan, as an experienced salesperson, knew or ought to have known on signing the North Drive Commission Agreement that it would give rise to one or more violations of the Act.

Mr. Lonergan's conduct during the North Drive transaction clearly constitutes "past conduct of the applicant [that] affords reasonable grounds for the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty", in the words of the Act. Specially, Mr. Lonergan:

1. failed to disclose the Eno offer to Terrequity or to deposit the cheque;

2. signed the extension agreements improperly and without authority;

3. failed to disclose the extension agreements either to Terrequity or to the North Drive Vendor;

4. signed the North Drive Commission Agreement, with its effects of displacing Terrequity as co-operating broker and of paying commission thorough someone not registered as a broker; and

5. failed to disclose the North Drive APS or the North Drive Commission Agreement to Terrequity.

CUMULATIVE EFFECT OF MR. LONERGAN'S PAST CONDUCT

9th Issue – What is the cumulative effect of Mr. Lonergan's past conduct within the meaning of Section 6 of the Act?
10th Issue – Is there some remedy other than revocation of registration that is more appropriate?

Testimony

<u>Mr. Paul Lonergan</u>

Mr. Lonergan testified as to his extensive involvement with community activities including Junior Achievement and numerous presentations at local high schools. He also introduced an impressive array (Exhibit 9) of client testimonials. Some of the more recent of these specifically commend him for his honesty and integrity.

He noted that, with the exception of one minor advertising infraction which is not a subject of this hearing, he has not had a complaint made against him in the year that he has been working with West Realty.

He is currently working in a very structured environment where his commission advances are handled directly by West Realty and his expenses are deducted and paid directly from his commission advance cheques. He is therefore able to focus on generating business and on selling.

He is no longer interested in being a broker or in running a brokerage because his "dream turned into a nightmare". He would sign conditions on his registration that would prevent him, for a period of four years, from becoming a broker, running a brokerage, obtaining commission advances from anyone other than West Realty or leaving the employment of West Realty without the consent of the Registrar.

Mr. James Sturino

Mr. Sturino is the principal broker of West Realty, where Paul Lonergan currently works. He testified that Mr. Lonergan is a premier real estate salesperson in his area. In one year, Mr. Lonergan earned commissions of over $700,000. He has a loyal client base and has a lot of repeat business. He was trained by some of the best and is an excellent agent who has proved his worth again and again.

Mr. Sturino is willing to work with Paul Lonergan to get his financial house in order. For example, this spring, he sat down with Mr. Lonergan and persuaded him to let one of his assistants go, because Mr. Lonergan's expenses were too high for the commissions he was generating.

Mr. Sturino would be willing to monitor Mr. Lonergan's performance in accordance with the terms and conditions summarized by Mr. Lonergan above and enumerated in Exhibit 23.

Submissions

Ms. Flynn-Guglietti noted that the Mr. Lonergan's activities of the past year can be considered in determining his past conduct under section 6 of the Act.

She argued that Mr. Lonergan's misjudgements principally revolved around the operation of Islington Kingsway. No client had been hurt by Mr. Lonergan's activities and it was open to the Tribunal to impose the conditions proposed in Exhibit 23, which would effectively stop Mr. Lonergan from running a brokerage or from borrowing commission advances from anyone other than West Realty.

Alternatively, she submitted, the Tribunal could consider a suspension of Mr. Lonergan for a short period, followed by a period during which Mr. Lonergan could operate under terms and conditions.

She suggested that a revocation of Mr. Lonergan's registration would leave him unable to ever again qualify as a salesperson because the standards he would have to meet for registration would be impossibly high.

Reasons for Decision

Mr. Lonergan is blessed with an engaging personality, an infectious enthusiasm and a palpable charm. It is to his credit that he is able to inspire the loyalty of clients and of brokers like James Sturino. However, the Tribunal is mindful of the fact that Andrew Zsolt was also at some pains to accommodate Mr. Lonergan and was repaid for his efforts by being exposed to possible violations of the Act by Mr. Lonergan's conduct. Given the independence with which real estate agents must operate, Mr. Sturino cannot guarantee Mr. Lonergan's conduct. Paul Lonergan must be the ultimate guarantor of his own conduct.

Concerning Ms. Flynn-Guglietti's argument that no clients were hurt by Mr. Lonergan's actions, the Individual Creditor and the North Drive Vendor would argue strenuously that they were injured by Mr. Lonergan. Moreover, the Act does not set as a test that the Applicant must behave with honesty and integrity only towards clients. The Act is clear that an applicant must conduct his business with honesty, integrity and financial responsibility and the evidence for that is his past conduct and financial position.

Anyone running a business interacts with clients, competitors, creditors and the community. Other stakeholders include employees and shareholders. While it is open to the Tribunal to weigh these interests differently, the cumulative past conduct of an applicant can include examples of past conduct towards each of these different groups.

Mr. Lonergan's financial irresponsibility during his tenure with Islington Kingsway, particularly: his undertaking a role in the business that he did not have the skills to perform responsibly; his failure to take corrective action when the firm continued to lose money; and the intertwining of his personal and business finances, led directly to his second bankruptcy. It is the circumstances of this bankruptcy and the failure to learn the lessons of it that justify the Registrar taking action under Section 6 (1)(a) of the Act. His carelessness in handling trust funds is also strong evidence of ongoing financial irresponsibility.

Ms. Flynn-Guglietti submits that preventing Mr. Lonergan from running a brokerage business would avoid a repetition of the conduct he displayed while involved with Islington Kingsway.

However, it is important to note that Mr. Lonergan's conduct during the North Drive transaction occurred after he had ended his involvement with Islington Kingsway and

while he was operating under terms and conditions agreed with the Registrar as a result of his misappropriation of trust funds conviction. The Tribunal is of the view that Mr. Lonergan's conduct during the North Drive transaction would be sufficient, on its own, to justify the Registrar revoking Mr. Lonergan's registration.

The other conduct shown by Mr. Lonergan might have been addressed by terms and conditions on his registration if each incident were considered in isolation. The case of *Registrar v. Griese*, [1985] 14 C.R.A.T. 179, is helpful in noting that it is the cumulative effect of past conduct that is relevant in making a determination under Section 6 of the Act. The cumulative effect of Mr. Lonergan's conduct is to show a wide range of behaviour that falls short of the standards of honesty and integrity set in the Act.

Ms. Flynn-Guglietti's submission that the Tribunal could consider Mr. Lonergan's conduct over the past year is correct. It is also open to the Tribunal to consider Mr. Lonergan's conduct during the hearing.

It was noted above that the Tribunal is of the view that Mr. Lonergan is failing to learn the lessons of his past. It was also notable during the hearing that Mr. Lonergan repeatedly avoided taking responsibility for his actions. Debbie Boccia had prepared the Individual Creditor agreements; the Individual Creditor had driven the relationship; he relied on lawyers for the I.K. Ownership Agreement; the North Drive Purchaser led him into the North Drive Commission Agreement; his creditors drove him into bankruptcy; Terrequity lost the trade record, and so on.

This Tribunal cannot, therefore, have confidence that a suspension of Paul Lonergan's registration, even with terms and conditions attached, will be sufficient to protect the public. The Tribunal heard no evidence as to how Mr. Lonergan might spend any time in suspension and therefore cannot conclude that Mr. Lonergan's behaviour would change as a result of suspending his registration.

Nor is it possible to see how terms and conditions will constrain him when they have not in the past. Indeed, given the varied nature of his unacceptable conduct, any terms and conditions would have to amount to a personal code of ethical conduct. There currently exists such a code, in the Act and as detailed in RECO's Code of Ethics. Until Mr. Lonergan changes his standards of conduct, no terms and conditions will suffice to regulate his behaviour.

Ms. Flynn-Guglietti's view that a registration under the Act once lost, is lost forever, is unnecessarily dire. It is open to Mr. Lonergan to re-apply for registration, and the Tribunal hopes that he will do so. The onus will be on him to show that his past conduct demonstrates the standards of financial responsibility, honesty and integrity required by the Act.

Order

The Tribunal, pursuant to subsection 9 (4) of the Act, directs the Registrar to carry out his Proposal of July 4, 2005 to revoke the registration of Paul Lonergan.

LICENCE APPEAL TRIBUNAL

_____

Laurie Sanford,
Vice-Chair

Released: June 26, 2006

Name: 3069.Lonergan.rebba.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

Ontario

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: WILLIAM McINTOSH, Vice Chair.

APPEARANCES: ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF PRE-HEARING: March 6, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal is brought pursuant to Section 9 of the *Real Estate and Business Brokers Act* R.S.O. c R. 4 as amended ("the Act") from a decision of the Registrar under the Act. The decision is contained in a Notice of Proposal dated April 28, 2005 issued by the Real Estate Council of Ontario (RECO) the entity designated to administer the Act.

ISSUES:

The Tribunal convened at the appointed time and was faced with another request for an adjournment. On the previous return date the Tribunal granted an adjournment on medical grounds. Counsel for the Applicant was present and spoke to the matter. The bona fides of counsel were accepted at that time regarding the adjournment.

At this hearing no counsel or representative appeared on the Applicant's behalf and no adequate rationale was provided to the Tribunal for his absence. On hearing submissions on behalf of the Registrar the Tribunal ordered the hearing to proceed in the absence of the Applicant. During the proceeding the Applicant telephoned the offices of the Tribunal stating his desire to withdraw his appeal. The hearing went to conclusion.

It is the position of RECO that as set forth in the Notice of Proposal the Applicant should have his registration revoked as a Salesperson pursuant to the grounds allowed to the Registrar under Section 8 of the Act.

The basis for the Registrar's decision arises out of an investigation into the practices of the Registrant. That investigation convinced the Registrar that the Registrant had engaged in the practice known as "mortgage fraud". This practice can occur when there is a property for sale but insufficient equity in its valuation to permit lenders to advance mortgage funds. In order to allow lenders to advance funds the "value" of the property is artificially inflated to allow a lender to meet his risk formula for the loan.

This practice was accompanied in the opinion of the regulator by other practices unbecoming a registrant such as inappropriate handling of trust monies and dealing in real estate without registration.

EVIDENCE:

The past history of the Applicant as a Registrant under the Act was put in through Joann Swain a RECO investigator. She was involved in the investigation into a transaction involving a client by the name of De Gannes. De Gannes wished to sell his Mississauga house and retained Parkview as realtor. The property was listed at $147,900.00 although no listing agreement was passed to the client. De Gannes while away in Trinidad was approached by the Applicant and asked to execute a power of attorney in favour of the Applicant for the sale of real estate. As well a Direction was signed by De Gannes authorizing the proceeds of the sale to be kept in trust by the Applicant. De Gannes was not provided with a copy of the Direction. In due course De Gannes found a house to his liking for $211,000.00. The purchase was made conditional upon financing but not upon sale of the existing home. The Applicant suggested a marketing incentive whereby the list price would be "jacked up" to obtain larger mortgage financing with any excess being directed back to the Applicant. The existing home was sold for $140,000.00. a deposit of $5,000.00 was placed in trust at Parkview. This amount was not returned to De Gannes. Mr. De Gannes continues to complain about the accounting of the proceeds from the sale.

Mr. David Tredrae another RECO investigator was called to testify as to another dealing of the Applicant at 77, Darras Court Brampton. The listing agent was a Mr. Van Halen.

Mr. Van Halen initiated the investigation by RECO by writing a letter of complaint dated June 26, 2003. He also testified. The property was listed for $149,000.00. On June 11, the Applicant called saying that he had showed the listing and that he had an offer. The offer was however contingent upon the list price being increased to $170,000.00 with a side agreement that the vendors rebate through solicitors $25,000.00 to the purchasers on closing. The explanation proffered was that such an increase was necessary to acquire mortgage financing and cover brokerage fees and closing costs. When challenged by Mr. Van Halen that this would breach the requirement of full disclosure to all parties the Applicant replied that such disclosure would scupper the transaction. Mr.

Van Halen in fact contacted his solicitor regarding the transaction and was informed that it could easily lapse into criminal behaviour.

Mr. Brian Schlotzhauer, the Assistant Registrar was called to explain the regulator's perspective on the dealings put forth into evidence. The inflating of sale prices in a rising market is a significant problem to the proper functioning of the real estate market. Decisions are made quickly in relation to the amounts involved, with everyone understandably wishing to maximize their individual gain from each transaction. The lending institutions are in competition with each other to hold mortgages particularly on more expensive homes. A layman's glance at any repayment schedule will stand as sufficient evidence on this point. It follows that any distortion in the assessed value of the properties that come before them and upon which they rely for risk evaluation distorts the marketplace. Mr. Schlotzhauer stressed the importance of each player in the marketplace making decisions on properly arrived at value.

He continued with testimony regarding the information laid against the Applicant for trading in real estate without being a registrant under the Act and regarding his financial situation given the bankruptcy. As well he commented upon the Applicant's receipt of trust monies in the De Gannes matter as being unusual and unnecessary when a transaction is not back-to-back.

It was clear to the Tribunal on the evidence that the Applicant had breached several requirements of his registration and showed a disregard for those requirements.

THE LAW:

The *Real Estate and Business Brokers Act*:

Section 6

6. 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 carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 7

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).

Section 8

(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

APPLICATION OF FACT TO LAW:

The governing legislation was enacted to provide for inter alia a transparent and properly functioning real estate market within the province. Essential to such a marketplace are properly informed participants. Sellers, buyers and lending institutions must have available sufficient information regarding their individual transaction in order to assess the basis of their participation in the marketplace. It follows that they have available competent and trustworthy professionals upon whom they can rely for access to that information. If those persons who are held out as such professionals by registration under the Act do not comport themselves within the requirements of that registration the public is left unprotected and the consumer protection rationale behind the Act breaks down.

It is the responsibility of the Registrar to assess registrants under the Act, such as the Applicant, when complaints are lodged. To carry out that responsibility the Registrar has available investigators to look into instances brought to RECO's attention and recommend appropriate action. Should the Registrar decide, upon review of that investigation, that sanctions against the registrant are called for he chooses the most appropriate from a range available to him up to the instant case of revocation. As this results in a registrant being effectively barred from a right to pursue his chosen profession and as it is a decision based upon an investigation only the Act provides for a hearing before an oversight Tribunal.

In the present case the Tribunal had no difficulty finding that the Applicant fell foursquare within the intent of the Act and the Registrar's role. The marketplace is clearly skewed when values of properties are inflated in order to obtain enhanced

mortgage financing. It is thanks to the watchfulness of another registrant that the activities of the Applicant were brought to the attention of the Registrar.

ORDER:

The Tribunal by the powers vested in it under the Act orders that the Registrar carry out the terms of the Notice of Proposal which is the subject of this appeal.

LICENCE APPEAL TRIBUNAL

_____
William McIntosh, Vice Chair

Released: June 2, 2006

File name: 2971.rebba.singh

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.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

SIMON DAHAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REINSTATEMENT OF REGISTRATION

TRIBUNAL: ANDREW M. DIAMOND, Vice-Chair

APPEARANCES: SIMON DAHAN, the Applicant, self-represented

JENNIFER FRIEDMAN, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATE OF HEARING: March 27 and 28, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises from a written Notice of Proposal (the "Proposal") dated November 30, 2005, issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Registrar" and the "Act" respectively), to refuse to reinstate the registration of Simon Dahan ("Dahan") as a broker under the Act.

THE ISSUES

The Registrar bases his Proposal to refuse to reinstate the registration of Dahan under section 8. (1) of the Act which reads as follows:

> 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.

The Registrar further bases his Proposal in terms of section 6 of the Act. Section 6(1) (a) and (b) of the Act 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;

The basis for the Registrar's decision to refuse to reinstate Dahan is set out *inter alia* at paragraphs 1, 2, 4, and 9 of the Proposal, which read as follows:

> 1. Having regard to Dahan's financial position, Dahan cannot reasonably be expected to be financially responsible in the conduct of business; and/or
>
> 2. The past conduct of Dahan affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty…
>
> 4. Thereafter, Exit Agency provided the books and records to RECO. Upon review of the books and records of Exit Agency, it was discovered that there was a deficiency in the trust account of at least $208,588.19 (i.e. the amount may have been even more significant given that some real estate transactions were concealed by Exit Agency), which was caused by unsubstantiated disbursals and/or removal of funds…
>
> 9. On or about December 15, 2003, a probation order was issued against Dahan, which order extended for a period of two years and included the following conditions:
>
> i. The defendant shall not operate any account to be held as a trust account for a period of two (2) years;
>
> ii. The defendant shall not be involved directly with any real estate broker business for a period of two (2) years;
>
> iii. The defendant shall not work as a real estate agent unless under the strict supervision of a real estate broker.

THE EVIDENCE

The evidence introduced by the Registrar consisted of the testimony of Brian Prendergast, Manager of Inspections and Investigation; Jennifer Katsoulis, an Inspector employed by the Registrar; Mr. Andrew, an Investigator with the Registrar and Mr. Schlotzhauer, the Assistant Registrar and Manager of Registration.

The evidence on behalf of the Applicant was his testimony and documents tendered by him in Exhibit J.

The facts of this appeal are not really in dispute, what is, is the interpretation to be made of those facts. From the Tribunal's perspective there are two heads of complaint; the first is Dahan's failure to cooperate with the Registrar in November/December of 2001 when the Registrar was commencing its investigation. The second is the breach of trust perpetrated by Dahan. The Registrar raised a third issue with respect to an old, but significant debt of Dahan. It appears this debt resulted from the reassessment of a tax driven real estate investment years ago. While Mr. Dahan has not repaid the debt he acknowledges it and has taken steps to satisfy his creditor to some degree. Though raised by the Registrar, in the view of the Tribunal they are not determinative of the issue of whether or not Dahan should be registered.

Background

Dahan was first registered as a real estate salesperson in 1988 and by all accounts was a successful agent for approximately 10 years. The Registrar was not aware of any consumer complaints about Dahan as a salesperson.

Dahan had ambition, he was not satisfied being a mere salesperson, so in 1998 he and a partner decided to become brokers and start an new agency with a new franchise called “Exit”. Dahan and his partner incorporated Agency Realty Corporation, which carried on business as Exit Agency Realty (“Exit”). Dahan's partner was the President and Dahan was the “Treasurer”. However, Mr. Dahan’s evidence was that this was a mere title as far as he was concerned, and did not designate him as having any more or less responsibility for the finances of the company than did his partner.

It was Dahan's evidence that Exit grew incredibly quickly, including acquiring all of the agents of a Caldwell Agency, to the point where Exit had approximately 90 agents. However, as Dahan admits, while the agency grew, Dahan took no steps to put the necessary infrastructure in place to deal with the administration and operational issues of Exit. In Dahan’s words there was a “lack of structure for maintaining of records”.

What then happened is that Dahan and Exit started to use its deposit trust account to pay the operating expenses of the business without regard to whether or not transactions had closed and funds should be released from the trust. Two questions arise, as discussed in more detail below; the first is whether or not the breach of trust was as a result of malfeasance or mismanagement? The second question is whether or not when Exit was wound up and all assets liquidated, there were any shortfalls as a result of the breach of trust?

Dahan now submits that all of the mistakes made by him were in his capacity as a broker; that he now realizes that he does not have the skills necessary to be a broker, that he has paid his debt to society for his mistakes and that he now wishes simply to be a real estate salesperson, working under the supervision and direction of a broker. In that capacity he will have no responsibility for or access to trust accounts.

Failure to Cooperate

On or about November 12, 2001the Registrar gave notice of its intention to conduct an inspection on November 23, 2003 of the books and records of Exit (see exhibit I-A). Sometime between November 12 and November 23 Dahan contacted the Registrar and advised the Registrar that Exit’s books and records were “a mess”, but that he had engaged an accountant to sort them out; but as a result Exit needed an extension of time before the inspection could take place. As is set out in Exhibit I-B the Registrar confirmed that it was agreeable to rescheduling the inspection to December 19, 2001.

On December 10, 2001 the Registrar received a complaint from another agency (Re/Max All Stars) indicating that Exit had not paid it a commission that it owed and that phone calls to Exit were not being returned. This heightened the Registrar's desire to conduct its inspection of Exit.

On December 13, 2001 Lipton Wiseman Altbaum LLP, the chartered accountants retained by Exit, contacted the Registrar by telephone confirming their retainer.

On December 17, 2001 (two days before the scheduled inspection) Exit's accountants wrote to the Registrar and reported that:

> We have commenced assisting the Agency's bookkeeper in bringing all of the records up to. [sic] We currently anticipate having the books and records current before the end of February 2002.
>
> We therefore request, on behalf of the Agency, an extension of sixty days for your spot-checks of the Agency's records.

The Registrar was not prepared to grant the further extension.

Also on December 17 a former employee of Exit wrote to Exit and complained to the Registrar that commissions had not been paid (exhibit I-D). In short, the house of cards that was Exit was tumbling down.

The next contact between the Registrar and a representative of Exit was a telephone call from Schiff & Associates Inc, Trustee in Bankruptcy, indicating that they were in the process of being retained by Exit and that there would be a proposal filed under the *Bankruptcy and Insolvency Act*. The Trustee then suggested that the Registrar should delay their inspection so as to avoid the Trustee and the Registrar "tripping over each other". The Registrar asked for written confirmation of the filing of the assignment or proposal. No such confirmation was ever provided (and in fact Exit did not file). The Registrar was provided with a cell phone number for Dahan who advised the Registrar that all of the books and records for Exit were with the Trustee.

The Trustee later advised the Registrar that there was now a conflict and they would not be acting on behalf of Exit. Dahan confirmed in his testimony that he decided that he did not wish to have Exit file for bankruptcy, he said, in order to do the right thing and not run from his obligations.

At that time representative of the Registrar advised Dahan of his obligations as a broker, and asked him to provide an authorization that would allow the Registrar to inspect the books and records at the Trustee's or at the Accountant's offices. The Registrar never obtained the authorization and was not getting any satisfaction. This is confirmed in correspondence from the Registrar to Dahan dated December 21, 2001, which states:

> December 21, 2001
>
> Dear Mr. Dahan:
>
> Re: Agency Realty Corporation o/a Exit Agency Realty
>
> Further to our conversation in the late afternoon of Friday December 21, 2001, please find attached a copy of the letter that I faxed to your accountant Stephen Altbaum, earlier in the day.
>
> As the letter explains, and as we discussed today, it is imperative that we be granted access to the books and records of your company so that we can conduct our inspection. During our conversation you indicated that these records would be dropped off at Mr.

Altbaum's accounting office on Saturday December 22, 2001 and that we could have access to the records there.

To that end, you are to fax me a letter confirming that you have made arrangements for RECO to inspect the records at this location. In addition, you will provide me with the name of a contact at the accounting office, as it is my understanding that Mr. Altbaum will be on holidays next week. You are to fax this information to my office at (416) 2074820.

If you have any questions, you can contact me directly at (416) 207-4818.

Brian Prendergast

Manager of Inspections and Investigations

December 21, 2001

Mr. Stephen Altbaum
Lipton, Wiseman, Altbaum & Partners LLP Chartered Accountants 245 Fairview Mall Drive Toronto, Ontario
M2J 4T1

Dear Mr. Altbaum:

Re: Agency Realty Corporation o/a Exit Agency Realty

In our conversation late yesterday afternoon you advised that the principals of the abovementioned corporation asked you to contact me. You informed me that they had contemplated bankruptcy, but had now decided against this and would wind down the corporation on their own. To that end, they had asked that you contact me to determine what had to be done to comply with the requirements of the Real Estate Council of Ontario (RECO).

As I explained during our conversation, if a broker corporation is terminating its registration under the Real Estate and Business Brokers Act (the Act), there are specific documents and information required by the Registrar. The particulars are spelled out in the attached Registrar's Bulletin entitled "Documents Required by the Registrar When Terminating a Business under the Real Estate and Business Brokers Act."

In our conversation yesterday I also indicated that regardless of whether or not your client terminates their registration under the Act, we must have access to all of the books and records of the company so that we can conduct our inspection that was originally scheduled for November 23, 2001. To that end it is imperative that your client contact us to let us know where the records are located so that this inspection can be conducted.

Our office views these continuing requests for postponements of the inspection and the vague responses as to the availability of the books and records of the company very seriously and we will not tolerate any further delays. Please be advised that we have approached the Director under the Act to obtain an investigation order, pursuant to section 15(1) of the Act to investigate this matter.

> For your information the attached inspection confirmation letter originally sent out to your client by Jennifer Katsoulis on November 12, 2001, provides you with a listing of the records that we will need to conduct our inspection.
>
> Please have your client contact this office immediately advising us as to where the abovementioned records are located so that we can conduct this inspection now. My direct telephone number is (416) 207-4818.
>
> Yours truly,
>
> Brian Prendergast
> Manager of Inspections and Investigations

On December 28, 2001 a freeze order was placed on Exit, at which time it stopped operating. It was Dahan's evidence that he has not worked in the real estate business since that time, even though his license did not lapse until August 8, 2003. The Registrar's evidence was that while they did not revoke Dahan's license at the time; the issue was moot as he required a sponsoring broker to continue and he was registered to Exit, which was not nor could not carry on business under the freeze order.

After the freeze order the Registrar did receive the books and records of Exit, however, they were not complete, including missing bank statements. From the records provided the Registrar attempted to reconstruct and reconcile the trust account balance.

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. It is the Registrar's position that Dahan consistently stifled the reasonable requests for inspections and follow up. Dahan's evidence suggests that while he was clearly, on the one hand, attempting to delay the inspection, he was doing so in hope that he could correct what he recognized to be the problems with the trust account.

Dahan characterizes his request for a postponement of the inspection as being because the books and records were admittedly a mess and he was getting professional assistance with getting them organized to be forthright and responsible. The Registrar, as indicated in its contemporaneous correspondence, was frustrated with what it perceived to be a shell game as between Dahan, his accountant and the Trustee in Bankruptcy. The truth, as is often the case, lies somewhere in the middle. Dahan was clearly avoiding both the inspectors and the other brokers and agents seeking their commissions. He must have been aware that the jig was up. However, as is often the case he grasped at straws including the accountant and the potential of filing for bankruptcy in hopes that that he could salvage something before the Registrar stepped in.

Breach of Trust

As stated above the breach of trust is admitted, and as the Proposal sets out, Dahan pled guilty to seven counts of breach or trust under the Act.

The two questions that the Tribunal considers important in its determination is (a) was there malfeasance and (b) was there a shortfall when the business was wound up.

Malfeasance

With respect to malfeasance, none of the evidence tendered suggests that the breach of trust was part of a scheme to steal money; instead it resulted from mismanagement (or total lack of management).

Shortfall

The evidence as to whether or not there was a shortfall is unclear and at times contradictory.

The Registrar attempted to reconcile the records or the trust account and concluded that it was short $209,000 as of June 1, 2001. It was Mr. Andrew's testimony that he understood from "Ruth," the claims coordinator with the insurer, and others, that as a result of winding up of Exit "the Insurance Company" had claims for $413,000 in unpaid commissions. However, under cross-examination, he admitted that he "had no idea how claims were paid". He did "not know how it was worked out" and "does not know how dispersal was done". In contrast Mr. Schlotzhauer's evidence (also on behalf of the Registrar) was that the insurance file is still not closed. The Tribunal requested of Counsel for the Registrar evidence of the status of the insurance claims in order to determine if there was a shortfall. Counsel advised that they did not have that information. The Tribunal is left wondering why that evidence was not obtained by the Registrar.

In contrast Mr. Dahan's evidence is that he has been working with the insurance company and their counsel to assist them in the liquidation of Exit's assets and that as a result there is no, or there is expected to be no, shortfall. As confirmation for this Mr. Dahan submitted as evidence the transcripts of his plea and sentencing hearing in Provincial Court on December 15, 2003 (exhibit J-5) and in particular on pages 12, line 25–32, and page 13 lines 1 -12 in response to the Court's question "was any money lost at all by any clients?" Counsel for the Registrar responds to the Court starting at line 27:

> Mr. Drametu: Actually, in the end, no money was lost. It appeared **nobody** actually ended up suffering. Because although there was a few games played before, the whole thing was done when Mr. Moore [Dahan's counsel] came in into the picture, all the books were brought in when the accounts were frozen. I think the respondents to their credit transferred some money from whatever source back to the trust account so that nobody really suffered.
>
> The Court: No, this is what I just wanted to know, okay continue on.
>
> Mr. Drametu: Yes, they corporate [sic] quite well in the end and it would appear **nobody in the end actually suffered…**[emphasis added].

Sentence

As stated above Dahan plead guilty to breach of trust and his sentence included the payment of a fine of $17,500, being $2,500 for each count. Dahan has, on a regular basis, returned to Court to obtain extensions to pay the fines, as he has not been earning a significant amount since that time. The Tribunal was advised that there still remains $12,500 outstanding of the fines.

The Tribunal would also note that part of the sentence precluded Dahan from acting as a real estate broker for a period of two years, but the Court took great pains to ensure that Dahan could work as a salesperson. While that order is not binding on either the Registrar or the Tribunal, it is instructive. At page 36 of the transcript the Court commented starting at line 16:

> I'm also mindful of the fact, they may be a salesperson [sic] tomorrow and I have intention not to suspend their selling privileges.

To which counsel for the Registrar responds, "Yes".

FINDINGS OF FACT

Avoiding Inspection

While the behaviour of Dahan in November and December 2001 is understandable as part of human nature, it was not the forthright and direct approach that the Registrar would have liked or expected. Dahan should have signed the direction to have the Registrar inspect the documents (wherever they were) when asked. He should have been more responsive to getting the documents to the Registrar when asked. However, he did seek the appropriate professional advise in an attempt to rectify his mistakes. It was just too little too late.

Breach of Trust

Exit was obligated to maintain its trust account in accordance with the statutory and trust obligations. Dahan had control of Exit's trust account.

Contrary to his trust obligations of maintaining funds in trust until such times as disbursements were possible, and in breach of his statutory obligations pursuant to the *Act*, Dahan permitted or authorized withdrawals from the account to pay general obligations of Exit.

The Tribunal finds that there was no malfeasance in these withdrawals. They were not part of some scheme to defraud consumers or agents, but instead resulted from mismanagement.

Dahan took responsibility for and plead guilty to 7 counts of breach of trust.

Dahan has not been involved with the sale of real estate since the spring of 2002.

With respect to whether or not anyone lost any money as a result of the breach of trust, the evidence is inconclusive. The Registrar has the burden on this point and an

inference can be drawn from its failing to produce conclusive evidence on this point. The Registrar has not satisfied their burden on this point. As a result this Tribunal is unable to find that anyone suffered a loss (other than inconvenience and delay in being paid) from the breach of trust by Dahan.

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.

DECISION AND ORDER

The issue for decision is 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. Furthermore, having regard to the financial position of the Applicant, whether he can 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.

In coming to its decision the Tribunal recognizes that the Act 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. However,

it must balance this with one of the fundamental tenants of our justice system – that rehabilitation is possible, and is a worthy goal.

Mr. Dahan had a successful 10-year career as a real estate salesperson with apparently no issues. He had a disastrous year as a real estate broker. He has been out of the real estate industry for some four years. He now applies to be reinstated as a real estate salesperson.

The Tribunal is of the view that with the appropriate conditions attached to his licence, Dahan's past misdeeds are not indicative of his being likely to re-offend.

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 register Simon Dahan as a real estate salesperson on the following terms and conditions:

1. It is a condition precedent of his registration that he pay all of the outstanding fines arising from his conviction for breach of trust under the Act before he may be registered.
2. Dahan must take and pass all educational requirements for a new (never-before registered) real estate salesperson.
3. Dahan shall not be licensed as a broker nor have any supervisory role with any real estate broker for a period of 10 years.
4. Dahan shall not be permitted access to or have authority over any trust accounts of any real estate broker for a period of 10 years;
5. Any sponsoring broker must be provided with a copy of these reasons and a copy of Mr. Dahan’s conviction record for breach of trust, and acknowledge that they have read same.
6. Dahan must strictly comply with all reporting, registration, examination and inspection requirements of the Registrar exercising its power under the Act in good faith.

LICENCE APPEAL TRIBUNAL

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Andrew M. Diamond,
Vice-Chair

Released: May 19 , 2006

File name: 3293.rebba.dahan.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.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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; May 16, 2006 Toronto

ORDER

WHEREAS on February 13, 2006 the hearing of the above matter was adjourned by ORDER of the Tribunal to 9:30 a.m. on May 16, 2006 and to continue, if necessary, on May 17, 29 and 30, 2006;

AND WHEREAS upon the matter coming before the Tribunal on May 16, 2006, Counsel for Rahaman Subadar ("Subadar") was not in attendance but Subadar was in attendance and present;

AND WHEREAS, Subadar requested that the Tribunal grant him an adjournment of the hearing on May 16, 2006 and May 17, 2006 due to his Counsel not being present due to attendance in another matter in a criminal court on both such dates:

AND WHEREAS submissions having been made to the Tribunal by Subadar and the Registrar's Counsel in regard to the requested adjournment and the question of costs relative to the requested adjournment;

AND WHEREAS having heard submissions made by the aforesaid persons, the Tribunal makes the following Order:

1. The hearing of this matter is hereby adjourned, on a peremptory basis, to 9:30 a.m. on Monday May 29 and to continue on May 30, 2006 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

2. At the commencement of the hearing on Monday, May 29, 2006 witness Sheila Wilson who completed her testimony-in-chief shall return to the witness stand and shall, if required, be available for cross-examination by Subadar's Counsel. It was noted that Wilson will not be available to attend at the Tribunal beyond the morning of May 29, 2006.

3. Immediately after the conclusion of Wilson's testimony the Parties' Counsel shall address the Tribunal on the question of costs relative to the adjournment of the hearing at the request of Subadar on May 16, 2006.

LICENCE APPEAL TRIBUNAL

_____

Derek Israel
Vice-Chair

Released: May 16, 2006

File name: 3139.rebba.Subadar.order.2.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

Ontario

COURTNEY WALLIS SIMPSON

AN APPEAL FROM A PROPOSAL AND A SUPPLEMENTARY PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*;

AND FROM A SUPPLEMENTARY PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*;

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: COURTNEY WALLIS SIMPSON, Applicant (the "Applicant")

ROBERT MAXWELL, Counsel for the Registrar, *Real Estate and Business Brokers Act* (the "Registrar")

DATES OF HEARING: February 20 & 21, 2006; May 1, 2006; May 3, 2006 Toronto

ORDER

WHEREAS the Registrar issued a Supplementary Notice of Proposal to Revoke the Registration of the Applicant, dated May 1, 2006;

AND WHEREAS the Registrar issued an Immediate Suspension Order under section 15 of the *Real Estate and Business Brokers Act, 2002*:

IT IS ORDERED that the Applicant's registration is suspended up to and including May 16, 2006.

Applications for alteration or extension of the Suspension Order will proceed by Motion on the grounds stipulated in the *Real Estate and Business Brokers Act, 2002*.

LICENCE APPEAL TRIBUNAL

_____
William McIntosh, Vice-Chair

Released: May 9, 2006

File: 3262.rebba.Wallis_Simpson.order.doc

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

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

COURTNEY WALLIS SIMPSON

MOTION FOR AN EXTENSION OF THE IMMEDIATE SUSPENSION ORDER, ISSUED BY THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*;

TRIBUNAL: WILLIAM McINTOSH, Vice Chair

APPEARANCES: COURTNEY WALLIS SIMPSON, Applicant (the "Applicant")

ROBERT MAXWELL, Counsel for the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar")

DATE MOTION HEARD: May 15, 2006 Toronto

WHEREAS by Notice a motion returnable May 15, 2006 was brought by the Registrar seeking extension of an existing Order of Suspension imposed upon the Applicant;

UPON HEARING the submissions of both Parties the Tribunal issues the following Reasons and Order.

REASONS AND ORDER

The Registrar relies upon Section 15 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002 Chapter 30 Schedule C (the "Act") as legislative authority for the relief sought. Section 15(4) grants to the Tribunal the authority to extend the time for an Order of Suspension until the commencement of the hearing if it is satisfied that the Registrant ("Applicant") has delayed the hearing.

The difficulty in proceeding with the hearing of this matter has been the Applicant's search for legal counsel. Her representations have been to the effect that counsel is available, awaiting a retainer agreement.

The wording of Section 15(4) imports the sense of avoidable delay. If the delay of the hearing were unavoidable, as for example caused by a death in the Applicant's family,

the Tribunal would be obligated to take such a happenstance into consideration. No circumstance of that measure was presented.

The Registrar is granted plenary authority under Section 15 to suspend registration of persons licenced under the Act. A review of that power by the Tribunal is available as part of its oversight function, upon commencement of the hearing.

The Suspension Order before the Tribunal emanated from the Second Supplementary Notice of Proposal dated May 1, 2006. A review as to the merits underlying the Registrar's Order is available to the Applicant upon commencement of the hearing. As the Tribunal interprets Section 15(4) the issue of delay is the matter before it at this stage.

There was no evidence indicating the delay in proceeding until June 16, 2006 was due in any part to deleterious pursuit of the matter by the Registrar. The delay in proceeding lies at the door of the Applicant.

It is therefore Ordered that the Suspension Order the Applicant is under extend and remain in effect until June 16, 2006.

LICENCE APPEAL TRIBUNAL

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William McIntosh, Vice-Chair

Released: May 15, 2006

File: 3262.rebba.Wallis_Simpson.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.

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

DWAYNE W. GREENE

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: DWAYNE W. GREENE, the Applicant

ROBERT A. MAXWELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: April 3,4,5, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal from a Notice of Proposal to Revoke the Registration of the Applicant, Dwayne W. Greene, dated the 16th day of September 2005. The Notice of Proposal may be divided into three major categories. The first concerns a lack of financial responsibility in the conduct of business arising out of dealings between the Applicant and Agent's Equity, a factoring company that the Applicant dealt with to factor his commissions. The second arises out of 27 sales where the Applicant acted as a real estate agent despite the fact that his registration had lapsed. The final category addresses the involvement of the Applicant in three transactions whereby properties were flipped on closing for a substantially higher value, and mortgages were obtained at that higher value without disclosure of the earlier, same day, transfer for substantially less consideration.

THE LAW

The statutory scheme covering the entitlement of applicants to registration is set out in the *Real Estate and Business Brokers Act* (the "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
>
> (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.

The Act then sets out appeal rights to this Tribunal and grants this Tribunal the right to uphold, vary, or set aside the Registrar's Proposal.

THE ISSUES

The Act defines the issues. It directs the Registrar to look at the financial position of the Applicant to determine if the Applicant will be financially responsible and to look at the Applicant's past behaviour to determine if the Applicant will carry on business with honesty and integrity and in accordance with the law. On appeal to this Tribunal, the Tribunal must apply the same test to the evidence presented and make the same determination without deference to the Registrar's Proposal. With particular reference to this matter the issues are:

1. Did the Applicant act in the capacity of a real estate agent while unregistered?
2. Assuming the answer to point 1 is yes, are there any mitigating circumstances?
3. Did the Applicant deal with Agent's Equity in such a manner that it can be concluded that he did not act in accordance with law and with honesty and integrity?
4. Is the Applicant's financial position such that he cannot be expected to be financially responsible in the conduct of his business?
5. Was the Applicant knowingly involved in a scheme to flip properties and garner increased mortgage advances?
6. If the answer to one or more of the above questions is yes, are there reasonable grounds to conclude that the Applicant will not carry on business in accordance with law and with integrity and honesty or in a financially responsible manner?
7. Should this Tribunal uphold the Proposal of the Registrar or vary it or set it aside?

EVIDENCE

The Tribunal had before it five volumes of documentary evidence. It also heard from four witnesses on behalf of the Registrar. The Applicant did not call evidence nor did he testify on his own behalf.

Evidence of Catherine Marie Step

Catherine Marie Step is a credit manager with Agent's Equity. She has been employed by Agent's Equity since 1998 and her current area of responsibility is collections. She gave evidence regarding the business of Agent's Equity and its dealings with the Applicant that led it to initiate a complaint to the Real Estate Council of Ontario ("RECO") in the summer of 2004.

Agent's Equity is a factoring company. It restricts its factoring activities to commissions arising out of the purchase of single family owner occupied residential properties. These limitations are set out in a two page contract entered into by the agent and broker for each property transaction and in brochures. On qualified properties, Agent's Equity will advance up to 80% of the agent's share of the commission subject to the right of an agent's employing broker to set a lower limit. It is important to Agent's Equity that it deal only with single family owner occupied residential properties. This restriction accommodates more rapid payment and permits the highest volume of transactions. It does not consider commercial transactions or vacant land.

The Applicant dealt with Agent's Equity through his listing broker, Tristar Corporation. Prior to the events that are the subject of this appeal, the Applicant had factored about 85 transactions through Agent's Equity without apparent concern. In late 2003 and early 2004, the Applicant brought ten transactions to the company for factoring that did not close, resulting in Agent's Equity being out of pocket to the tune of approximately $70,000.00. One transaction finally did close, reducing the amount outstanding to approximately $65,000.00.

Agent's Equity has 75,000 agents in its database of which 10,000 are active at any one time. In her years with Agent's Equity, Ms. Step stated that very occasionally an agent would have a deal that did not close. She said that the procedure in such cases is for the company to deduct 25% of the amount outstanding over the next four factored commissions. In some cases, a transaction would not generate enough commission so the repayment would be extended over more than four deals. To paraphrase, the repayment system is predicated on the basis that transactions submitted by agents are *bona fide* and the submitting agent is acting with honesty and integrity. Ms. Step had never experienced 10 deals from one agent that did not close in a very short time period. As a result of the experience, Agent's Equity commenced a review of all 10 deals.

The review of the Applicant's 10 transactions highlighted a pattern that became obvious in hindsight. She described it as a crossover pattern. Three different names often surfaced as purchasers or sellers. The Applicant advised Ms. Step that it was one person using three names. In one case, the transaction involved an eight unit

apartment block in Hamilton. All of this was in direct contravention of Agent's Equity's contract providing for advances on single family owner occupied residential properties only. The investigation also highlighted that the MLS listings on these properties were suspended or terminated on the day of/or shortly after the commission advance. Had Agent's Equity been aware of the true state of affairs, it would not have advanced funds. In addition to the use of one person using three names as a vendor or purchaser on these transactions, a number of the transactions also involved M.A. and R.B.

One deal that particularly concerned Ms. Step involved Squirreltrail Way. The Applicant presented this transaction for consideration for a commission advance. On the surface, it appeared to be a sale from J.S. as sole owner to F.G. At the time, the facts that J.S. was the Applicant's girlfriend, or in the more modern but strictly incorrect usage, his common-law spouse, or that the property was the Applicant's home address, were not made known to Agent's Equity. On the basis of the submission, Agent's Equity funded the deal. Subsequent investigation determined that the property was not owned solely by J.S., but was owned in common with the Applicant's mother. The investigation also disclosed that the MLS listing was suspended on the day of the commission advance, October 1, 2003. Ms. Step deposed that Agent's Equity would not have advanced funds if it was aware of the Applicant's personal interest in this property.

Notwithstanding the fact that an inordinate number of transactions had failed to close, Ms. Step tried to work with the Applicant to set up a repayment schedule. As stated above, the normal course for this would be for the company to withhold some percentage of commissions on subsequent deals while advancing enough for the agent to live on. Assuming the *bona fides* of deals submitted by Greene, Agent's Equity ended up advancing substantial sums until the amount outstanding reached $69,073.30. Given the several month lapse between advance and closing, it is understandable that the Applicant was able to factor a number of deals before Agent's Equity became aware that there was a problem. The Applicant was then given to June 2004 to pay this amount off. One of his attempts involved a property on Corby Crescent, Brampton. The Applicant submitted an Agreement of Purchase and Sale where J.S., as vendor, was selling to R.B. as purchaser. According to the Applicant, he was going to clear $45,000.00 to $50,000.00 on this deal as he had some equity interest in the property. Agent's Equity had seen previous transactions that did not close involving R.B. as vendor or purchaser. Not surprisingly, they had no interest in this transaction. When Ms. Step advised the Applicant that there could be no consideration for a deal involving R.B., the Applicant offered to resubmit the transaction with another purchaser. Agent's Equity declined to consider it at all.

The Applicant failed to meet the repayment deadline of June 2004 and Ms. Step sent a letter of complaint to the Registrar. The letter set out the impugned transactions in detail and triggered an investigation by the Registrar. Litigation also followed the failure to pay. Agent's Equity sued both the Applicant and Tristar Corporation. The Applicant has not repaid anything to the company. As a result of the litigation, Tristar Corporation made a partial payment of the company's losses in settlement of the litigation and, in return, took an assignment of its judgment against the Applicant and related security.

A number of questions were asked on cross-examination by the Applicant. Firstly, Ms. Step was asked if she believed that the Applicant would try to defraud Agent's Equity. In defence of his position, the Applicant had the witness admit that he had kept her informed of the steps he had taken to attempt repayment and had made no attempts to run away. Ms. Step's answer was that she did believe the Applicant would try to defraud the company after the matter went to collection. Secondly, the Applicant asked Ms. Step if Agent's Equity had changed its internal procedures in any way as a result of their dealings with the Applicant. This question opened a floodgate. Ms. Step detailed how, as a result of the problems with the Applicant, the internal computer system had been redesigned to cross-reference the names of vendors and purchasers and to identify if Agent's Equity had advanced commissions on any particular property in the past. The system had then been back tested. Finally, the Applicant asked Ms. Step if she had ever specifically pointed out to the Applicant the fact that Agent's Equity factored only single family owner occupied residential properties. She advised him that it was on the terms and conditions of every commission contract he signed (approximately 85 in all) and outlined in brochures provided by the company.

Evidence of Jo-Ann Swain

Jo-Ann Swain is an investigator with RECO, a position she has held for eight years. She investigated the complaint put forward by Agent's Equity. Her investigation highlighted a number of additional areas of concern with respect to the Applicant. She noted that with respect to 27 trades during the period from February 9, 2003 to July 2004, the Applicant was acting as a real estate agent while he was unregistered. She also noted that there were three specific transactions where the Applicant acted as an agent on same day flips of properties, where mortgage financing was obtained on the second closing in excess of the purchase price of the closing of the transfer earlier on the same day. She executed a search warrant at the Royal Bank of Canada ("RBC") and obtained disclosure of its files relating to the three flip transactions.

The first area to which Ms. Swain directed the Tribunal was the unregistered trading. According to the Registrar's records, the Applicant had first been registered as a real estate agent on February 9, 2001. His registration had lapsed on February 9, 2003, for failure to complete the mandatory articling requirement that he completes three courses within two years of registration. He was then reinstated in July 2004. Ms. Swain provided the Tribunal with a chart of 27 transactions where the Applicant had acted as a real estate agent on the purchase or sale of properties in contravention of the *Real Estate and Business Brokers Act*. The Applicant was charged with six counts of trading while unregistered and on July 5, 2005, pleaded guilty to one count, the other five counts being withdrawn. The Applicant was fined $3,000.00.

Ms. Swain then investigated the 10 transactions that formed the basis of the complaint from Agent's Equity. She also addressed the property on Corby Crescent that the Applicant had offered to Agent's Equity as a means of discharging a substantial part of his indebtedness. Its history is interesting. The Applicant had owned a property on Corby Crescent with M.V.C., his former common-law spouse (using that term in its modern colloquial connotation). It was sold on October 23, 2003, to J.S. for

consideration of $205,000.00. By that time, the relationship between the Applicant and M.V.C. had ended and the relationship with J.S. had begun. Subsequent to the split between the Applicant and M.V.C., M.V.C. had become a registered real estate agent working out of the same brokerage as the Applicant, Tristar Corporation. The Corby property was subsequently listed showing M.V.C. as listing agent and purportedly sold to R.B. at $255,000.00. It was this transaction that was offered to Agent's Equity. Ms. Swain testified that, in her discussions with M.V.C., M.V.C. stated that she had no knowledge of the listing or the sale to R.B. She believes the Applicant must have accessed her MLS code and falsely entered her name as listing agent.

Ms. Swain identified three transactions where flips had taken place and substantial mortgage advances had been procured on the higher value. The properties were:

- Merton Road, Brampton
- Campbell Street, Brampton
- Horseshoe Court, Brampton

The property on Merton Street was sold by the initial owner, B. to H.P. for $209,500.00. The transaction closed on December 12, 2003 and the Applicant acted as agent for H.P. Prior to closing, the Applicant listed the property on MLS showing H.P. as Vendor and an Agreement of Purchase and Sale was entered into with G.K.D. which also closed on December 12, 2003, at a price of $262,900.00, an increase of $53,900.00 or over 25%. Details of the B. sale were in the Tristar file but there was no information concerning the subsequent transaction except for an MLS listing which was marked suspended. Details of the H.P. sale were in the RBC file but there was no information regarding the B. sale. This same pattern repeated for each of the three transactions. The G.K.D. mortgage ultimately went into default and the property was sold by RBC for a loss under power of sale proceedings on June 28, 2004.

The property on Campbell Street closed on December 23, 2003, shortly after the property on Merton. In that transaction, the original owner sold to R.B. for $226,500.00 and the Applicant acted as agent for the purchaser. R.B. then transferred to H.P. for $265,000.00 and RBC advanced mortgage funds in the amount of $259,932.00. The Applicant acted as agent for R.B. on the purchase from L. and listed it on MLS prior to closing. Again, details of the L. listing and transaction were in the broker's file but not details of the R.B. to H.P. transaction. RBC was provided with only copies of the R.B. to H.P. transaction.

The property on Horseshoe Court involved M.V.C. The Applicant acted for M.V.C. on the purchase and listed it on MLS prior to closing. This transaction closed on September 30, 2002, very shortly after M.V.C. and the Applicant ended their relationship. According to the documents, M.V.C. purchased the property from B.#2 for $166,500.00 and flipped it on the same day to L. for $193,800.00. RBC advanced mortgage funds of $191,014.00. The Tristar file evidences the B#2 transaction and M.V.C.'s September 4 MLS listings, but has no documentation concerning the sale to L. Conversely, the RBC file has details of the L. transaction but not of the B#2 transaction. Ms. Swain deposed that, in her discussions with M.V.C., M.V.C. denied all knowledge of this transaction and stated that she received no proceeds. M.V.C. did provide a

consent for the lawyer, D.S., to disclose his file and discuss the matter with Ms. Swain. D.S. advised Ms. Swain that M.V.C. had attended his office and had executed closing documents with respect to this sale.

To assist her in her investigation, Ms. Swain had obtained a search warrant requiring RBC to turn over its files regarding these transactions. She has powers under the Act to require disclosure of Tristar Corporation and she obtained files from Agent's Equity as a result of their complaint and cooperation. Many of these documents were duplicated from the various sources and resulted in a very extensive and detailed document brief that was most helpful to the Tribunal. One point worthy of note, is that Ms. Swain was able to show the involvement of the Applicant in all aspects of these transactions by showing his signature on the numerous Agreements of Purchase and Sale.

Evidence of Brian Scholzhauer

The Tribunal heard evidence of Brian Scholzhauer, the Deputy Registrar of RECO. Mr. Scholzhauer was appointed Deputy Registrar effective March 31, 2006, as a result of a requirement in the *Real Estate and Business Brokers Act, 2002*. Prior to that date, he had been Assistant Registrar, a position he had held since 1999. Pursuant to his duties, he received and reviewed the results of Ms. Swain's investigation of the Applicant.

The witness reviewed briefly the requirements for registration. It is a statutory requirement that all persons dealing in real estate in Ontario must be registered. This requirement is designed to protect the public. It enables the Registrar to ensure that all registrants are insured and knowledgeable, since all registrants must meet initial and ongoing educational requirements. For an initial registration, an applicant must successfully complete three courses. Thereafter, there is an articling requirement to complete three further courses within the first two years. It is the articling requirement that the Applicant failed to complete.

Mr. Scholzhauer reviewed the Applicant's registration record. He was first registered on February 9, 2001 and was active for approximately 11 months in 2001. He then ceased acting for a short time, but resumed his real estate career in 2002 and was active with Tristar Corporation until his registration lapsed on February 9, 2003. As was seen in Ms. Swain's evidence, the Applicant continued his activities as a real estate agent after his registration lapsed. According to the evidence of Mr. Scholzhauer, the Applicant was aware of his need to complete the articling requirements as it is taught in the initial course and set out on the transcript. Weight is added to this evidence by the fact that the Applicant completed one of the required courses in March 2002, but failed to complete the other two courses within the time required. The Applicant submitted an application for reinstatement on July 15, 2004 and was reinstated on July 16, 2004, indicating that he had completed the educational requirements.

Mr. Scholzhauer reviewed the July 15, 2004 application for reinstatement. Of note is that it sets out a false employment history. According to the form, the Applicant worked

with Tristar Corporation between January 2002 and February 9, 2003. The form then states that the Applicant was unemployed from February 9, 2003 to present (July 15, 2004). The evidence of Ms. Swain indicated that he was very much employed during this period being involved in 27 real estate transactions while unregistered.

Mr. Scholzhauer guided the Tribunal through the basis for the Registrar's Proposal to revoke the Applicant's registration. He reviewed the ten transactions that failed to close, resulting in the debt to Agent's Equity. In his view, given that the Applicant was frequently working with the same names as buyer and seller, he should be aware of the suitability of such deals for factoring. The consistent submission of these transactions for commission advances knowing their unsuitability, indicates, according to Mr. Scholzhauer, that the Applicants business model does not have a solid foundation and, at a minimum, fails the financial responsibility requirement. The extent of the problem and the pattern of breaching Agent's Equity's underwriting rules indicates that the Applicant is not acting with honesty and integrity and in accordance with the law. The behaviour regarding commission advances indicates recklessness. The Applicant has used his status as a real estate agent to obtain significant advances that are not based on a solid business plan.

With respect to the three flip transactions, Mr. Scholzhauer stated that to have deals closing on the same day was extremely unusual. The Registrar's concern was that there should be full disclosure to RBC. Had full disclosure been forthcoming, then nothing fraudulent would have occurred. As it was, Ms. Swain's investigation indicated that the broker, and where applicable Agent's Equity, saw details of the initial lower value transaction and RBC saw details of the higher value transaction.

Mr. Scholzhauer finally described the impact of such price inflation on the market in general. He stated that flip schemes have the effect of misleading other agents and the public at large by creating false expectations of value. It can have an impact over a very wide area. In his view, to inflate transactions violates the trust and integrity which consumers must repose in the whole real estate system.

On cross-examination, the Applicant questioned Mr. Scholzhauer concerning the scheme for notifying an agent that his or her registration has lapsed. The system is as follows:

- As stated above, a new applicant is advised of the articling requirements as part of the initial training. This requirement is then set out in the transcript of the results from the initial courses. Three months prior to the first renewal, a notice is automatically sent to the broker and the individual agent at the employing broker's address. If there is no renewal, then a lapsed notice is automatically sent in the same manner as the three month notice. Once registration has lapsed, there is no system in place to ensure that an unregistered person is not acting as an agent. Overall, notwithstanding the efforts of the Registrar to ensure that notice is sent, it is the responsibility of the individual to ensure they continue to meet the requirements for registration.

Evidence of Sheila Wilson

The final witness to give evidence before the Tribunal was Sheila Wilson. Ms. Wilson is an investigator with Royal Bank Corporate Investigation Services, the branch of RBC that investigates fraud. Her duties are to investigate mortgage fraud. In her review of each of the three impugned transactions, Ms. Wilson confirmed the findings of Ms. Swain that the RBC files did not have details of the earlier lower value transaction. It is not necessary to go into that evidence in any detail.

Ms. Wilson referred to the three impugned transactions as "flips" or "Oklahoma schemes". The three mortgages in question were all high ratio mortgages such that there was an insurance component, either GE or CMHC. She stated that had RBC been aware of the substantial increase in value, it would have notified its insurers; in this case, she believed it was GE Capital (now Genworth). While she could not speak for the actions of the insurers, she felt the likely action would have been for an independent appraisal on each property to confirm value. The bank would then advance 95% of the appraised value.

On cross-examination, Ms. Wilson stated that the usual source for documentation regarding mortgages is the real estate agent. She stated that this is true even where a mortgage broker may have been involved in placing the mortgage in the first place. She stated that the insurers have an in-house preliminary appraisal system based on the average value in a given postal code area. Where flips are being engineered, the usual practice is to use the cheapest property in a particular area such that the postal code check will not highlight the actual value. The RBC and its insurers will then rely on the MLS listing and the Agreement of Purchase and Sale.

Ms. Wilson stated that in its instructions to lawyers, solicitors are instructed to advise the bank of any substantial increase in value. It appears that in these cases, the solicitors in question failed to notify the bank of the flip, something that would be apparent to them as a result of their title searches.

FACTS FOUND PROVEN

The case against the Applicant is overwhelming and cried out for the Applicant to lead meaningful evidence to rebut it. In the absence of such evidence, this Tribunal must conclude that each count in the Notice of Proposal has been supported on the evidentiary record.

Starting with the most obvious allegation, and by virtue of the guilty plea, irrevocably admitted with respect to at least one count, the allegation of trading while being unregistered. The balance of these allegations were conceded by the Applicant both during the hearing and in closing argument. His position was that he was unaware that he was unregistered, although he failed to lead evidence in that regard. Given that he was advised in his initial training that he had an articling requirement, that there was a subsequent notification on his transcript and he completed one of the courses but failed to complete the other two, this Tribunal concludes that the Applicant was well aware of

the requirements to keep his registration active and took no steps to do so. The evidence supports the following:

1. The Applicant was initially registered as a real estate agent on February 9, 2001;

2. The Applicant was aware that he had to complete further educational courses in the first two years as a registrant to keep his registration active;

3. Between February 9, 2001 and February 9, 2003, the Applicant failed to complete the articling requirements for continued registration;

4. On February 9, 2003, the Applicant's registration lapsed;

5. The Applicant completed the requirements for re-instatement by July 14, 2004 and was re-instated on July 15, 2004; and

6. Between February 9, 2003 and July 15, 2004 the Applicant acted as a real estate agent in contravention of the Act on 27 occasions.

With respect to his dealings with Agent's Equity, the evidence discloses that the Applicant hit on a scheme to keep himself in funds at the expense of the factoring company. The scheme bore all of the hallmarks of a kiting scheme whereby the Applicant used the lag between the factoring transaction and the closing to obtain a respite from collection. It is a compelling conclusion from the use of the same names as purchaser or vendor that the Applicant was well aware that the transactions he was putting forward for factoring were not *bona fide* transactions. When one transaction failed to close, the Applicant produced a "replacement" transaction with apparent ease, only to have it fail to close. At each step, he was given a monetary benefit. In many cases, the transactions failed to meet the underwriting requirements of the factoring company.

The Applicant's position, such as it was, that he was unaware of the requirement that Agent's Equity factored only owner occupied single family residential does violence to his obligation to act with honesty and integrity in his business dealings. The Applicant executed upwards of 85 factoring agreements and must be held to understanding the terms of the contracts he benefited from so extensively. In making these findings, the Tribunal bears in mind that Agent's Equity may have been less than diligent internally, especially in failing to notice that the Agreement of Purchase and Sale with respect to the Hamilton multiplex clearly indicated that it was a multiplex. This lack of diligence merely indicates the level of trustworthiness with which it dealt with registrants generally, and does not diminish the Applicant's lack of integrity in his dealings. With respect to the dealings with Agent's Equity, the evidence established the following:

1. The Applicant habitually factored his real estate commissions through Agent's Equity;

2. The Applicant was aware of the terms under which Agent's Equity entered into factoring transactions;

3. In the period from February 2001 to late 2003, the Applicant factored approximately 85 transactions through Agent's Equity;

4. Commencing in late 2003 through 2004, the Applicant presented 10 transactions for factoring and received commission advances on theses transactions;

5. 9 of the 10 transactions failed to close leaving the Applicant indebted to Agent's Equity in the amount of approximately $65,000.00;

6. The 10 transactions failed to meet the factoring requirements of Agent's Equity;

7. Many of the 10 transactions were not *bona fide* and were part of a scheme to kite transactions to gain a benefit for the Applicant; and

8. The Applicant failed to repay Agent's Equity either before or subsequent to the commencement of litigation and remains indebted to Agent's Equity's assignee, Tristar Corporation, for substantial amounts.

The final major issue brought to the attention of the Tribunal was the existence of three Oklahoma schemes involving mortgages at RBC. A review of the evidence indicates that the Applicant was deeply involved in the process. In each case, the Applicant opened a trade record sheet at his employing broker, Tristar Corporation, which contained details of the original low price sale. In each case, the file had the subsequent MLS listing at the higher price, indicating that the listing had been suspended or terminated. It can only be concluded that by this device, the Applicant kept his employer's curiosity at bay. His employer would not be looking for any information, or more importantly, any commission, with respect to the higher price transaction. In each case, the Agent's Equity file contained only documentation relating to the lower price transaction. In each case, the RBC file contained information relating only to the higher priced transaction.

The Applicant's position is that he has no responsibility for making applications for mortgages. There was some support for this position in the fact that RBC specifically instructs its solicitors to report recent increases in value, instructions not followed in this case. Ms. Wilson, however, testified that the major source of information in mortgage transactions was the real estate agent, notwithstanding that a mortgage broker may be involved. When added to the fact that the Applicant deliberately kept his employer uninformed about his activities, it is clear that the Applicant was aware of exactly what was transpiring and was in on it.

The Tribunal has treated the transaction involving M.V.C. as part of the same course of action involving the Applicant. The Applicant's involvement is clear from his signature on the various documents and his representation of M.V.C. as purchaser and on the MLS listing. The Tribunal did not hear from M.V.C. as she failed to show despite having been served with a *subpoena*. The Tribunal was not asked to draw any adverse inference from M.V.C.'s absence, but, if such an inference were to be drawn, it would not go to the Applicant's lack of involvement, that is well supported on the documents.

It would go to the veracity of M.V.C.'s protestations of innocence and whether she was involved with the Applicant. On the state of the evidence, the Tribunal is not satisfied that M.V.C. had no willing involvement, bearing in mind always that M.V.C.'s actions are not the subject matter of this hearing.

The evidence discloses the following:

1 The Applicant acted as agent on or was involved in three transactions where properties were flipped on the day of closing for substantially higher prices;

2 The Applicant disclosed only the lower value transactions to his employer, Tristar Corporation, and to the factoring company, Agent's Equity;

3 The Applicant specifically failed to open a trade record sheet at his employing broker setting out details of the higher value transaction; and

4 The Applicant was involved in the disclosure of only the higher value transaction to RBC for the grant of higher mortgage funding than the property might otherwise bear.

THE LAW

As stated above, there is a statutory test to determine the right to licensing. An applicant is entitled to a licence unless the Registrar has grounds for believing that, based on an applicant's current financial position, he or she cannot be expected to be reasonably financially responsible. Further, the Registrar may deny or revoke a licence where, based on the applicant's past behaviour, it can be reasonably concluded that the applicant will not carry on business in accordance with law or with integrity and honesty.

The first part of the test addresses an applicant's current financial status. Thus, to fail this part of the test, the Applicant's current finances must indicate a reasonable future expectation that he will not be financially responsible. Very little evidence was advanced about the Applicant's current financial position. Rather, the focus was on his past financial irresponsibility. To the extent that there was evidence, it addressed the fact that he is still substantially indebted to Tristar Corporation arising out of his past financial irresponsibility. There was no testimony concerning overall financial position or the rate at which his indebtedness is being discharged, if at all. There was evidence that the Applicant is a judgment debtor, having first forced Agent's Equity to sue both the Applicant and his employer and then permitting default judgment to be entered against him, but, overall, there was no evidentiary basis for determining his current financial status. Accordingly, the Tribunal does not find that, on the facts as set out in this appeal, there are grounds to determine that, based on his current financial position, there is a reasonable expectation that he will not be financially responsible in the future.

Past financial behaviour is caught by the provisions of the statute that require the Registrar to look at past behaviour as an indicator of future behaviour. The Applicant's past financial dealings indicate a history of transactions that were neither in accordance

with law nor were they based on integrity and honesty. In his dealings with Agent's Equity, the Applicant demonstrated a complete lack of integrity and honesty. With respect to mortgage financing on the flipped properties, the Applicant was able to make sure that no questions were asked by disclosing only certain parts of the information to certain parties. All of this was aimed at gaining an economic advantage that would not otherwise be available. It is the Tribunal's view that his dealings have all of the elements of fraud. The elements of fraud were recently reviewed by the Ontario Court of Appeal in *R. v. D'Andrea* [2004] O. J. No. 2330 as follows:

> The Crown was not required to prove that the accused did not have an honest belief as to the property's value; it was required to prove that the accused committed a prohibited act - an act of deceit, falsehood, or other fraudulent means - and that the prohibited act caused a deprivation evidenced by economic loss, or risk of economic loss. Those are the elements of fraud: R. v. Theroux, [1993] 2 S.C.R. 5, 79 C.C.C. (3d) 449 (S.C.C.).

It is immaterial that the Applicant was of the opinion that he could generate enough good transactions to repay the indebtedness to Agent's Equity, the fact remains that he submitted transactions for commission advances which he was well aware were not based on any realistic chance of closing, using in many cases the same list of characters. He relied on Agent's Equity to deal with each transaction in good faith without conducting an internal investigation to determine if he was attempting to pull a scam. He carried out an act of deceit to benefit himself by depriving Agent's Equity. His actions have called into question the integrity of the whole real estate profession in Ontario and caused Agent's Equity to now assume that agents will deal dishonestly with it. It has revamped its computer system based on the Applicant's actions.

What is most telling, is the Applicant's submissions in this regard. In his mind, he is the victim because Agent's Equity reported him to RECO. According to the Applicant, this action ended his ability to make a living in real estate, an activity which, at that time, he was carrying on illegally, in any event. The Applicant expressed no remorse over his dealings with Agent's Equity.

Equally, the Applicant was careful to ensure that no-one was given full information concerning the flips. On the surface, there appears to be no immediate financial gain to the Applicant arising out of the various flips, but it must be remembered that the flips involved members of a group with which the Applicant was extensively involved, none of whom the Applicant called to testify to establish that these transactions were above board. In his submissions, he was of the view that he owed RBC no duty of full disclosure and he was entitled to provide limited information to his employing broker because the sales, originally listed with his employing broker according to the MLS system, were miraculously converted to private sales at the very moment when the new, inflated purchase offer was accepted and commission earned. This secrecy is in breach of his obligation under the Act and the regulations to keep trade record sheets for each and every transaction. The regulation states:

> **17.** (1) A brokerage that represents a client who enters into an agreement that deals with the conveyance of an interest in real estate shall complete a trade record sheet that includes the following information:
>
> 1. The nature of the trade.

2. A description of the real estate sufficient to identify it.

3. The true consideration for the trade.

4. The names of all parties to the trade.

5. The names and contact information of the lawyers, if any, who are representing parties to the trade.

6. The names and contact information of all registrants who are representing or providing other services to parties to the trade.

7. The following information if a deposit is received:

i. the amount of the deposit, if the deposit is money,
ii. a description of the deposit sufficient to identify it, if the deposit is not money, and
iii. a record of the disbursement or withdrawal of the deposit, as the case may be.

8. The amount of the brokerage's commission or other remuneration and the name of the party paying it.

9. The amount of any commission or other remuneration payable to another brokerage and the name of that brokerage.

10. The scheduled completion date for the conveyance of the interest in real estate and the amended completion date, if any. O. Reg. 579/05, s. 17 (1).

(2) The broker or salesperson that represents the client referred to in subsection (1) shall enter the information referred to in that subsection into the trade record sheet. O. Reg. 579/05, s. 17 (2).

By not ensuring a trade record sheet was kept for all transactions, the Applicant was not only hiding the truth, but he was exposing his employer to sanctions under the Act.

The thrust of the Applicant's defence in dealing with these flips is that he was not the person applying for a mortgage and thus, has not failed to make full disclosure to RBC. Given the manner in which the Applicant controlled the flow of information, this position has no merit. This Tribunal has addressed this defence on very similar facts in the case of *Amar Preet Singh v. Registrar of Real estate and Business Brokers Act.* released March 31, 2005. There, as in this case, the Applicant had denied involvement or knowledge of the flips in question despite acting on the sale of three properties to one purchaser, who then sold the properties to the Applicant's sons at substantially inflated values. Documentation was incomplete or was altered although there was no direct evidence that the Applicant was involved in the alteration. Unlike this matter, in that case, the Applicant gave evidence on his own behalf. The Tribunal had no problem concluding that the Applicant was involved and upholding the Registrar. This appeal bears many similarities and this Tribunal has concluded that the Applicant was intimately involved in ensuring a flow of strategically limited information was forwarded to RBC.

CONCLUSIONS

It is appropriate to revisit the issues set out above and answer each issue specifically.

1. **Did the Applicant act in the capacity of a real estate agent while unregistered?**

   Yes, on 27 occasions.

2. **Assuming the answer to point 1 is yes, are there any mitigating circumstances?**

   There are no mitigating circumstances. The Applicant attempted to blame the Registrar for not making sure he was personally contacted and made aware of the lapse of his registration. It was and always remained his responsibility to ensure he met the requirements, regardless of communication or lack thereof from the Registrar.

3. **Did the Applicant deal with Agent's Equity in such a manner that it can be concluded that he did not act in accordance with law and with honesty and integrity?**

   The evidence is clear that the Applicant did not deal with Agent's Equity in accordance with law and with honesty and integrity.

4. **Is the Applicant's financial position such that he cannot be expected to be financially responsible in the conduct of his business?**

   There was insufficient evidence of the Applicant's current financial position.

5. **Was the Applicant knowingly involved in a scheme to flip properties and garner increased mortgage advances?**

   Yes. The Applicant limited disclosure concerning these mortgages to gain the desired result. He put his employer off the track by not creating a trade record sheet with respect to the higher value transactions and ensured that RBC only received information concerning the higher value transaction.

6. **If the answer to one or more of the above questions is yes, are there reasonable grounds to conclude that the Applicant will not carry on business in accordance with law and with integrity and honesty or in a financially responsible manner?**

   Based on a review of the evidence, there are reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

7. Should this Tribunal uphold the Proposal of the Registrar or vary it or set it aside?

This Tribunal should uphold the Proposal of the Registrar.

DECISION

By virtue of the authority vested in it pursuant to the provisions of the *Real Estate and Business Brokers Act*, the Tribunal directs the Registrar to carry out the Proposal dated September 15, 2005, to revoke the Applicant's registration.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

Released: May 9, 2006

File name: 3204.rebba.greene.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 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
DWIGHT BRANSTON WATSON

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REFUSE TO RENEW REGISTRATION
- Proposal dated: January 17, 2006

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

DWIGHT BRANSTON WATSON

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 April 19, 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 Thursday, April 20, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: April 18, 2006

FILE NAME: 3390.rebba.Watson.pre.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

DWIGHT BRANSTON WATSON

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: ANDREW DIAMOND., Vice-Chair

APPEARANCES: DONALD F. McLEOD, Counsel, representing the Applicant

JENNIFER FRIEDMAN, Counsel, representing the Registrar under the *Real Estate and Business Brokers Act*

DATE OF PRE-HEARING: April 20, 2006 Toronto

ORDER

Following attendances on April 20, 2006 at a pre-hearing before this Tribunal of Donald F. McLeod, Counsel, appearing for Dwight Branston Watson (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 and Rule 6.4 of the Rules of Practice of the Tribunal.

3. The hearing of this appeal originally scheduled to commence on May 26, 2006 is rescheduled to commence at 9:30 a.m. on Monday, August 21, 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, August 22, 2006 at the Tribunal's above chambers.

4. The Applicant anticipates filing an expert report with respect to addiction.

5. The Applicant is to advise the Respondent and the Tribunal by June 1, 2006 as to any agreed facts or admissions.

LICENCE APPEAL TRIBUNAL

_____
Andrew Diamond, Vice-Chair

RELEASED: April 21, 2006

FILE NAME: 3390.rebba.Watson.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 hearing in the above matter on April 10, 11, and 12, 2006;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing, *peremptory against all parties*, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, Tuesday and Wednesday, July 10, 11, and 12, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: April 4, 2006

FILE NAME: 3285.rebba.Siddiqui. Hearing.adj.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ALEXANDER AMEER BAKSH

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: PAOLA KONGE, Counsel, representing Alexander Baksh

TIM SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act*

DATES OF HEARING: December 4, 5 and 7, 2006 Toronto

REASONS FOR DECISION AND ORDER

Upon the application of Alexander Baksh, this hearing was conducted under Section 14 (5) of the *Real Estate and Business Brokers Act*, *2002*, S.O. 2002, Chapter 30, as amended (the "Act"), to review a Proposal by the Registrar under the Act to revoke Mr. Baksh's registration as a real estate salesperson.

FACTS NOT IN DISPUTE

Much of the evidence tendered by the Registrar was admitted by Mr. Baksh. These facts may be summarised as follows. Mr. Baksh has been registered as a salesperson under the Act since 1993. For two periods of time, from October, 1995 to February, 2001 and from December, 2001 to November, 2003, Mr. Baksh worked with the brokerage, John W. Harvey Real Estate Co. Ltd. ("Harvey Real Estate"). Since then, Mr. Baksh has been working with Re/Max Escarpment Realty Inc.

Mr. Baksh, with the encouragement of his broker, began a second business of buying run-down properties, renovating them and re-selling them. Again with the apparent concurrence of his broker, he concealed his interest in these transactions from the people from whom he bought the properties and from the people to whom he sold the renovated properties. Between September, 1998 and May, 2003, Mr. Baksh orchestrated 13 of these transactions. Twice, he did disclose his interest to the original

vendor. On two other occasions he was acting for the original vendor and did not disclose in writing that he was the beneficial purchaser. For most of these transactions, he was acting at arm's length from the original vendor although other realtors at Harvey Real Estate may have been representing these vendors.

Sometime in 2003, the Managing Broker of Harvey Real Estate became aware of this practice and told Mr. Baksh that it "was not a good idea". Despite this warning, Mr. Baksh continued to conceal his interest in real estate transactions while he was with Harvey Real Estate. Throughout the period in question, Mr. Baksh took numerous real estate courses, including courses in Real Estate ethics, which would have addressed the requirement to disclose a personal interest in real estate to the other parties.

FACTS FOUND

The facts surrounding the sale of a property which shall be referred to as "East 24th Street" are in dispute. The Registrar introduced documentary evidence concerning the transactions involving East 24th Street and called as witnesses "SP", the original owner of East 24th Street; "BM", the salesman at Harvey Real Estate who acted for SP; "Mr. P", the eventual purchaser of East 24th Street; "KL", the current President of Harvey Real Estate, and Brian Schlotzhauer, Deputy Registrar under the Act. Mr. Baksh testified on his own behalf. What follows is a summary of the evidence and of the facts found by the Tribunal.

BM is a real estate salesperson, who in the fall of 2003, worked for Harvey Real Estate. Among his clients was SP, who wished to sell an investment property, East 24th Street. The house, which was vacant, needed work and the property was listed in October, 2003 for $99,000. The price was dropped to $85,000 shortly after. An offer was made for the property by an "SR, in trust" with a closing date of October 30, 2003. Mr. Baksh acted for SR, in trust. Prior to closing, BM was concerned about how the purchase would be funded and Mr. Baksh told him it was a cash deal to be funded from the sale of another property. BM also had suspicions about the identity of the buyer and asked Mr. Baksh who he was representing. Mr. Baksh was evasive about who his client was.

Shortly before October 30, BM was advised by his client's lawyer that the purchaser was not in funds and the deal would not close on schedule. Instead Mr. Baksh requested an extension. BM asked Mr. Baksh whether he had an interest in the transaction. BM thought that Mr. Baksh might be planning to provide some or all of the funding himself. Mr. Baksh denied a personal involvement and again was evasive about his client. Ultimately an extension was granted of two weeks. When the revised closing date came, the purchaser was again unable to close. BM advised his client not to extend further but to re-list the property. At no time did BM allow any person access to the property for any purpose other than viewing it.

After the aborted attempt to sell the property, BM went to the site to change the lock box on the door, inspect the property and put up his sign again. However, when he arrived

at the site, he found Mr. P and his wife in residence. Mr. P. advised BM that he was the owner of the house, having entered into an Agreement of Purchase and Sale with SR, in trust and having been given possession of the house by Mr. Baksh. After a fraught discussion, BM persuaded Mr. P. that SP owned the property and that it should be possible to buy the property directly from her. Mr. P. had agreed to buy the property from SR, in trust for $95,000 but ultimately bought the property from its rightful owner for $85,000. SP's testimony corroborated BM's account.

Mr. P.'s evidence also corroborated BM's account of events. Mr. Baksh was acting for him in buying a house. Because one transaction had fallen through, he was becoming desperate to find a place to live. Mr. P. was not aware that the property was being "flipped" to him – that is, it was being bought by SR, in trust and on the same day being re-sold to him for a profit. When he first discovered this, sometime before the revised closing date, he was very upset but was persuaded to go along with the deal, in part because he was desperate to find a suitable home and in part because he had agreed to pay the $95,000 and was persuaded that the question of to whom and under what circumstances he was paying this money was less important than the fact that he had originally found $95,000 to be a fair price. Mr. P. testified that Mr. Baksh had given him possession of the house and he believed he was in possession under the Agreement of Purchase and Sale as the rightful owner.

Mr. Baksh testified that SR was his sister and she was buying the property in trust for his wife. This was the typical pattern of transactions Mr. Baksh used when he was buying property for renovation and re-sale but did not wish the other parties to the transaction to know his interest. The reason for the secrecy was to avoid potential purchasers from raising the price when they discovered that a realtor was interested in their property.

Mr. Baksh testified that he had intended to fund the purchase of East 24th Street through the sale of another property but that renovations of the other property were held up. He conceded that he had not finished these renovations or listed the other property at the time he caused SR, in trust to make an offer for East 24th Street. He testified that he had told Mr. P. at the outset that a relative of his was buying the property, that the re-sale was a flip and that his relative would be making a $10,000 profit on the transaction. Mr. P. was satisfied with this arrangement. Mr. Baksh did give Mr. P. access to the property for the purpose of storing some of his things there and beginning to clean up the house but did not give him the right to live in the house. Mr. Baksh conceded that he had only returned to the house once after giving Mr. P. the keys and had left it up to Mr. P. to return the keys to him when Mr. P. was finished. Mr. Baksh did not disclose this transaction to Harvey Real Estate because he never received a deposit. He made a mistake, he testified, in not disclosing his interest in the transaction to BM.

BM was a credible and straightforward witness and his evidence is supported by the testimony of both SP and Mr. P. However, Mr. P.'s evidence was confused on the question of exactly when and how he came to be living in East 24th Street before closing. Mr. Baksh's account of this is also unsatisfactory and the Tribunal concludes

that it has not heard the full story of how Mr. P. came to be in possession of East 24th Street without the consent or knowledge of the rightful owner. Mr. Baksh's evidence that he told Mr. P. of the flip at the outset is not convincing. There would be no reason for Mr. P. to buy the property from SR, in trust, when he could easily have offered to buy the property directly from SP. It is not plausible that Mr. P. would have acquiesced in the transaction as it was structured if his realtor had been completely candid with him. For these reasons, the Tribunal accepts BM's account of the events surrounding the sale of East 24th Street. The Tribunal also finds as fact that Mr. Baksh did not originally disclose his interest in the transaction to Mr. P. nor did he disclose that he intended to flip the property to Mr. P. Instead, Mr. P. was left to find out these facts from a third party some time prior to the revised closing date of the original transaction. The Tribunal finds that Mr. P. was in possession of East 24th Street with the concurrence of Mr. Baksh and without the knowledge or consent of either SP or her realtor, BM.

THE LAW

Under Section 10 of the Act, a person is entitled, on application, to be registered as a real estate salesperson, except where:

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

Section 32 of the Act provides that no one registered under the Act shall purchase or sell property without notifying the other parties to the transaction of his or her status as a real estate salesperson. When acting for the vendor, the salesperson is obliged to disclose all the facts within his knowledge that will affect the value of the property and is also obliged to disclose the details of any proposed disposition of the property.

Finally, Rule 5 of the Real Estate Council of Ontario ("RECO") Code of Ethics and Guiding Principles obliges a real estate salesperson to disclose personal interests in transactions to all parties in enough detail to permit them to make informed decisions.

DECISION

Mr. Baksh's conduct has fallen short of the standards expected under Section 10 of the Act in three respects.

First, when conducting his secondary business of purchasing property for renovation and re-sale, he did not disclose to the vendors of these properties that he was the beneficial purchaser and that he was registered as a salesperson under the Act. Nor did he disclose his status or interest in the property on the subsequent re-sale of it. When Mr. Baksh was otherwise dealing at arm's length with the vendor, this was a contravention of the RECO Code of Ethics.

Real estate salespeople are substantially more knowledgeable about the purchase and sale of properties than their clients can be expected to be. It is this expertise that forms the basis of their livelihood. But precisely because of this imbalance of knowledge and experience, there exists an ever-present possibility of an unscrupulous realtor taking advantage of a client. Because of this, the disclosure requirements in the RECO Code of Ethics are particularly important. Mr. Baksh's persistent failure to disclose his interest is a serious matter.

The second respect in which Mr. Baksh's conduct is unacceptable arose when, on two occasions, he was acting for the vendor in the transaction where he was also the beneficial purchaser and he did not disclose his interest. This is a violation of Section 32 of the Act. When acting for a vendor, a real estate salesperson's role includes advising on the value of the property and assisting the vendor to set a price. When the real estate agent is also the beneficial purchaser, this creates a particularly serious conflict of interest. The Act is specific about the disclosure expected in these circumstances. Mr. Baksh testified that one of these vendors had been informed orally of Mr. Baksh's interest. This explanation is not convincing. There would be no reason to structure the transaction as a sale to SR, in trust if the vendor knew that Mr. Baksh was the beneficial purchaser.

Finally, Mr. Baksh's conduct during the sale of East 24th Street violated the standards of honesty and integrity required of his professional in numerous ways. He not only did not disclose his interest in the transaction to either SP or her agent BM but when asked directly what his interest was, he denied any personal involvement. He also deceived his own client, the purchaser Mr. P, about his involvement in the sale. He attempted to profit personally at his client's expense. He contrived with Mr. P. to give him possession of a property without the knowledge or consent of the owner. He failed to disclose the transaction to his broker.

Mr. Baksh accepted responsibility for his non-disclosure of his interest in transactions. He offered, not as an excuse, but as an explanation, two mitigating circumstances. First, he testified that his broker had encouraged him to believe that concealing his interest was a normal business practice. Unfortunately, the broker who allegedly gave this advice was unable to testify. It would obviously be a grave matter if any broker were instructing his salespeople to believe this conduct was the norm. The Tribunal is reluctant to believe this version of events on the uncorroborated testimony of Mr. Baksh. It is possible that there was a misunderstanding between the broker and Mr. Baksh and that Mr. Baksh genuinely believed that his broker was encouraging his conduct. Even if this were so, the broker was not the only influence on Mr. Baksh's professional conduct. He also attended courses in which the requirements of disclosure would have been discussed. There were other brokers at the brokerage where he worked who he might also have consulted if he had any concerns about his behaviour. So, Mr. Baksh had the information he needed to conduct his business with honesty and integrity had he chosen to do so.

Mr. Baksh also testified that after he was warned by his manager that concealing his interests in real estate was not a good idea, he continued to do so because he had difficulty getting the secretarial staff to fill out the proper forms. As a mitigating circumstance, this is not an acceptable explanation. Among other objections, there is a form – the Confirmation of Co-operation and Representation - included as a matter of course in most real estate transactions, which may be filled out by hand and which would have been sufficient to disclose Mr. Baksh's interest in those cases where he was not acting for the vendor.

It is the position of the Registrar that Mr. Baksh's conduct can not be contained by imposing terms and conditions on his registration and therefore the only way to protect the public from further abuses of his registration is to revoke it. However, in light of this position, the conduct of the Registrar and his officials under the Act has been paradoxical. Mr. Baksh's conduct came to light three years ago. Mr. Schlotzhauer explained the delay in proceeding with the Proposal to revoke Mr. Baksh's registration by saying that RECO has been increasingly busy with cases recently and the backlog is growing. However, in the last three years, RECO has essentially left Mr. Baksh to carry on business as usual. Not only did the Registrar elect not to impose or negotiate conditions on Mr. Baksh's registration, there was no oversight of his business activities during this period. Mr. Baksh's broker was not required to undertake any supervision. Mr Baksh's Trade Records were not inspected during this period. Mr. Baksh's was at no time instructed by RECO to disclose his interest in real estate transactions pending further investigation. Nor was he asked to stop trading in real estate or to give his word that the conduct complained of would not be repeated pending the outcome of this investigation. Indeed, during this three year period, Mr. Baksh's registration was routinely renewed.

As troubling as this unrestricted delay is, it did offer Mr. Baksh an opportunity to demonstrate that his conduct had changed. The Tribunal is entitled to consider all of the past conduct of Mr. Baksh, including his conduct during the past three years. If Mr. Baksh had tendered cogent evidence that his conduct had reformed and would be unlikely to be repeated, then the Tribunal would have been in a position to consider that evidence in coming to its decision. As it is, Mr. Baksh testified that he has considered his past conduct and learned from it, but he did not offer detailed evidence of how his conduct had changed. He did not call his current broker or tender any evidence from clients. He did testify that he is no longer buying property for renovation and re-sale but the Tribunal found his assertion unconvincing.

The Tribunal believes that Mr. Baksh's concealment of his interest in real estate transactions, particularly where he was the listing agent, is a grave matter. However, even more serious was his conduct during the sale of East 24th Street. In that transaction, he repeatedly put his own interests ahead of those of his client and his brokerage. He caused hardship to the owner of the property and deceived his brokerage about the transaction, putting the brokerage in violation of its obligations under the Act.

The Tribunal concludes that Mr. Baksh's registration must be revoked. However, the Tribunal also notes the delay that has already occurred in bringing forward the revocation proposal and the fact that there is no evidence that Mr. Baksh has re-offended during this time. In light of this, the Tribunal is of the view that Mr. Baksh may be given time to conclude his business and seek alternate employment without putting the public at risk. During this time, the Tribunal expects Mr. Baksh to refrain from dealing in real estate where he has a personal interest.

ORDER

Accordingly, the Tribunal, acting pursuant to subsection 14 (5) of the Act, hereby:

1. directs the Registrar to carry out his Proposal of July 6, 2006 to revoke the registration of Alexander A. Baksh, effective July 2, 2007, and

2. orders Alexander Ameer Baksh to refrain from acting as a real estate salesperson, or providing the services of a real estate salesperson, in any transaction where he has a direct or indirect interest in the property involved, from the date of this order until the effective date of the revocation of his registration under the Act.

LICENCE APPEAL TRIBUNAL

_____
Laurie Sanford
Vice-Chair

Released: January 10, 2007

FILE NAME: 3687.rebba.baksh.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

GERALD JOSEPH McCARTHY

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002, chap c. 30, Schedule "C"

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: SUSAN PENNYPACKER, Counsel, on behalf of the Applicant

GEORGE DRAMETU, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF HEARING: January 4, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal was brought by the Applicant from a Notice of Proposal dated August 17, 2006 to not grant the Applicant a licence under the provisions of the *Real Estate And Business Brokers Act, 2002 S.O. 2002* (hereinafter the "Act"). The factual underpinning of the Registrar's decision was admitted by the Applicant as set out in the Notice of Proposal. For ease of reference the Tribunal will set it out here.

The Applicant has had a long history with the police that involves several prison terms. He voluntarily disclosed on his application form that he first came before the courts in 1972 when he was acquitted of a charge of possession of a narcotic for the purposes of trafficking. In 1973 a possession and a trafficking charge were both withdrawn. In 1974 he was found guilty of possession and received a conditional discharge with one year of probation. In 1976 a charge of possession of a weapon was dismissed and in 1978 a charge of obtaining money by false pretences was withdrawn.

He became much more seriously involved with the criminal justice system in September 1978 when he was convicted of possession of a narcotic for the purposes of trafficking and sentenced to two years less a day. He was released on parole on May 30, 1979. There is then a hiatus in his criminal activities which will be explained in a review of the

testimony of the various witnesses. He ran afoul of the criminal justice system again in 1995 when he was fined $1,500 for possession. In 1998 he was convicted of running a marijuana grow operation and given an 18 month conditional sentence. He continued his cultivation activities and was convicted again in 2000 of producing a controlled substance and given a 105-day sentence. A possession charge followed in 2001 with a $500.00 fine. Finally, in 2005 the Applicant was sentenced to eight months incarceration and three years probation for two counts of trafficking and one count of possession of property obtained by crime. He was incarcerated from September 6, 2005 to February 14, 2006 and is still on probation and will remain so until February 2009.

Based on the Applicant's lengthy criminal career and the recent conviction for which he is still serving his sentence, the Registrar came to the conclusion that the Applicant ran afoul of the registration provisions of the Act in that his past conduct afforded reasonable grounds to conclude that the Applicant would not carry on business with integrity and honesty and in accordance with law.

ISSUES:

1. On a balance of probabilities, on all of the evidence before the Tribunal, does the Applicant's past behaviour afford reasonable grounds to conclude that he will not carry on business with integrity and honesty and in accordance with law?

2. Should the Tribunal by order direct the Registrar to carry out the proposal or substitute its opinion for that of the Registrar; and

3. In the event the Tribunal decides to substitute its opinion for that of the Registrar, should it attach terms to the Applicant's registration?

EVIDENCE

The Tribunal heard evidence from the Deputy Registrar and from the Applicant and three character witnesses on his behalf.

<u>Evidence of Brian Schlotzhauer</u>

Brian Schlotzhauer is the Deputy Registrar of the Real Estate Council of Ontario ("RECO"), the administrator of the Act. He has held the Deputy Registrar position since March 31, 2006. Before that time he was Assistant Administrator and Manager of Registration, a position he had held since joining RECO in 1999. He reviewed the purpose of the Act, the qualifications for registration and, most importantly, RECO's concerns with the Applicant.

Mr. Schlotzhauer characterized the Act as consumer protection legislation. It is designed to ensure that registrants comply with a set of rules and regulations so that

consumers can carry on real estate transactions with peace of mind and confidence in their agent. With certain statutory exceptions, no person can act as a real estate agent unless that person is registered under the Act. Registration is not a right. An applicant for registration must satisfy certain educational requirements and, within several years after first being registered, complete several more courses. An applicant must also demonstrate that past behaviour does not indicate unsuitability for registration, either because of financial mismanagement or failure to act with integrity and honesty and in accordance with law. The application form asks a number of questions to determine an applicant's past behaviour.

On receipt of an application RECO conducts a review of the information disclosed to determine suitability for registration. It applies the policy set out in the Act that an applicant's past behaviour is the best indicator of their likely future behaviour. In the view of RECO, registrants must demonstrate complete trustworthiness to deal with consumers entering the biggest transaction in their lives. It is imperative that the public can proceed with complete confidence in their agents.

The witness reviewed the Applicant's past conduct. Mr. Schlotzhauer noted that the Applicant had been recently released from jail and was currently on probation. He noted a pattern of activity that dated back to before 1978 with a pattern showing a tendency to return to criminal activity over a large number of years. He asked for further information including a letter from the Applicant's probation officer and a copy of the judge's reasons for sentencing in the 2005 conviction. After a review of all the information provided by the Applicant, the Registrar made the decision to refuse registration. This decision was made in full knowledge that refusal is the most serious penalty under the Act. It was felt that the nature of the real estate industry is such that refusal was the only option under the Act.

In describing the nature of the real estate industry Mr. Schlotzhauer stated that, once registered, a real estate sales person works largely independently. A great deal of illicit behaviour can be hidden from both the employing brokerage and RECO with little opportunity to effectively monitor. Thus, prior to registration, the Registrar must be sure that a salesperson will comply with the law. Further, the inability to effectively monitor ruled out attaching terms to the Applicant's registration.

In reviewing the criminal activity of the Applicant, Mr. Schlotzhauer testified that it showed an inability to work within a set of rules and regulations. It also indicated that the Applicant was drawing others into illegal activity and therefore went directly to honesty and integrity. He did concede that the Applicant had been fully forthcoming about his criminal past but added that he had no opportunity to be otherwise because RECO does an independent background check. He did not feel that the fact that the Applicant had pled guilty was indicative of remorse as it often led to other charges being withdrawn.

In summation of the Registrar's position, Mr. Schlotzhauer stated that the pattern of offences, the continual return to criminal activity and the recent nature of the last

conviction led RECO to the conclusion the Applicant's past conduct did not support his registration at this time. He pointed out that if the Applicant could demonstrate a material change in circumstances he could re-apply after the lapse of at least 12 months.

On cross-examination Mr. Schlotzhauer admitted that the Applicant did not try to assign blame to anyone else for his criminal wrongdoing. He admitted that the charges against the Applicant arose out of possession of marijuana and did not involve fraud or dishonesty. He states that offences in the nature of fraud and dishonesty are of special concern to RECO because of the unsupervised dealings carried on by real estate salespersons.

Counsel suggested to Mr. Schlotzhauer that, by becoming a registrant, the Applicant was opting into a regulatory scheme that was different in nature from the application of the general criminal law. The suggestion was that the Applicant had never been found to be in breach of the rules and regulations governing a professional organization. Mr. Schlotzhauer did not concede that there was any difference between the Applicant's obligation to obey the general law of the land and his obligation to abide by the regulatory scheme governing real estate. He also did not agree that the fact that the Applicant had never breached a condition of bail, recognizance, probation or parole was indicative of an ability to work within a specific set of rules.

When asked why RECO had rejected the option of licensing with terms attached, Mr. Schlotzhauer stated that he did not believe that terms could be drafted to address RECO's concerns. In any event, it would put the onus on the supervising broker. He was of the view that the Applicant had to demonstrate trustworthiness before registration. He did not feel the fact that the Applicant was on probation was of any comfort as the probation officer was not in a position to supervise the Applicant in his real estate dealings with consumers.

Evidence of the Applicant

The Applicant was born in Peterborough, one of seven children. At age 20 he left home to attend college where he earned a general diploma in arts and sciences. At college he got caught up in the drug culture and started selling marijuana. In 1978 he was caught selling marijuana and was sentenced to eleven months. On his release on parole in 1979 he was hired by Woolco. He worked for Woolco for approximately eight years, became a division manager in a position of trust and managed four stores. He had the keys to the store and opened and closed the stores. After eight years on the job, Woolco began to experience financial difficulties and reduce staff significantly. The staff reductions made his management job very difficult so he left. He then invested in a limousine company and worked there until 1988. During this time he met his wife and was married in 1989. Unfortunately the limousine company did not prosper and went out of business, ultimately causing him to file for personal bankruptcy in 1992. After leaving the limousine company he became the national manager for a video company. He was earning an excellent salary, was married with a child and had bought a house.

He described this period as the happiest time of his life. During this time he testified that he had no involvement with drugs and certainly, between 1978 and 1995 there are no spots on his record.

In 1995 the video company went bankrupt and he found himself unemployed. He was financially strapped with family responsibilities. He started a company called Micro-Kill, dealing in natural pesticides, with one of his brothers but as a start-up it did not provide a living. It was sold after four years. He had various jobs, none of them substantial. At that time he started consuming alcohol excessively and started taking opiates. He then got involved in a marijuana cultivation operation and for the next ten years took drugs and dealt in drugs. While in prison from September 2005 to February 2006, he decided to take a course in rehabilitation. He earned a certificate of achievement. On his release he took a three-week course at the suggestion of his probation officer but still consumed alcohol. He did not return to heavy drinking but, nevertheless, at the suggestion of his wife, decided to join Alcoholics Anonymous. He has not consumed alcohol for a month.

The Applicant testified that his most recent conviction arose out of a traffic accident. He went off the road in Whitby. The officers attending the accident smelled marijuana in the car and a search turned up a substantial amount of the drug, and cash. He had started the real estate course and, prior to sentencing after his guilty plea, the judge let him out on bail to complete the course. What was remarkable about the real estate course is the fact that the Applicant doggedly pursued a successful outcome despite failing on a number of occasions. He had to pass three exams but ended up writing eight exams to achieve the three passes.

The Applicant told the Tribunal that at 56 years of age he feels that a career in real estate is his last hope in life of achieving something substantial. His dream would be to gain some years of experience as a salesperson and then teach the course. He sees real estate as a challenge, something to apply himself to and work at. He has spent many hours studying to complete the first part of the educational requirement. He feels that he can work well under supervision in a regulated industry.

In his personal life, the year from May 2005 to May 2006 has not been good. In addition to his arrest, conviction and incarceration, his wife started divorce proceedings in May 2005 and the divorce became final in May 2006. Notwithstanding this fact he feels he is now clear of drugs and sober and "can look things in the eye". When he was incarcerated in 2000, he failed to take rehabilitation.

The Applicant introduced four letters in support of his position that he has undergone a character change. The first was from his brother, the person with whom he had started the pesticide business. The letter states that the Applicant’s brother supports him both financially and motivationally and asks this Tribunal to give him a chance. The second letter is from a real estate salesperson who met the Applicant on the real estate course. While acknowledging that he is fully aware of the Applicant’s criminal past, the writer describes the Applicant as “an honest, trustworthy and well intentioned member of

society." The third letter comes from a colleague and friend from Woolco, now working in real estate. She is of the view that the Applicant would become a "well respected and successful real estate agent." The final letter comes from a friend of 15 years who is currently working in the real estate industry in the town where the Applicant resides. This writer is of the opinion that the granting of a licence will put the Applicant "on the track of a new feeling of self worth and hope for the future."

In cross-examination the Applicant agreed fully and frankly with most of the propositions put to him by Counsel. He admitted that when he was convicted in 1978 he was 28 years old, an adult, and aware that his actions were wrong. In 1995 he was 45 years old, not a child, and knew his activity was a bad thing but did it anyway. Fear of a jail sentence was not enough to stop him. In 1998 he was mature. His 18-month conditional sentence did not deter him. Two years later, in 2000, a period of incarceration failed to deter him from criminal behaviour. He did not learn. He feels he had learned his lesson in 1978 and remained out of the criminal justice system for 17 years. He stated that he was not engaged in criminal behaviour during this period but slid back into criminal behaviour when things turned bad in 1995. Up to the year 2005 he made a living selling marijuana.

Despite his criminal behaviour the Applicant stated that he was always honest in dealing with people. He sees drug use and abuse a "social deviance." He respects the law yet persisted in breaking it. He is not sure that honesty and integrity are linked to drug dealing. Notwithstanding these beliefs he has now decided to do something about his behaviour and has taken rehabilitation programmes.

The Applicant admitted he had been involved continuously in criminal behaviour since 1995. He was asked if there were any guarantees that he would not revert to this type of behaviour. He accepted that there were no guarantees but pointed to factors present at this time that were missing in the past. He pointed again to the substance abuse courses and his current involvement in Alcoholics Anonymous.

Evidence of Witness # 1

The Applicant produced a long time friend as his second witness. This friend had acted as his surety in the amount of $25,000.00 while the Applicant was out on bail pending his sentencing in 2005. The witness is an account manager in a privately owned steel company. He holds a position of authority with that company. He met the Applicant because his wife has had a forty-year friendship with the Applicant's ex-wife. He has known the Applicant for about eighteen years. He stepped in to act as the Applicant's surety in June 2005 to help him finish the real estate course. He wanted to give him a chance.

The witness had seen the Applicant through the bad times from 1995. He had observed the ups and downs. He noted that since getting out of jail, the Applicant has been much more focused. The Applicant has stayed away from drugs and alcohol. He has a spirit of determination in the last year. He studied hard for the real estate course. He was

devastated when he failed but went right back to his room to study more to ensure he passed.

The terms of bail required that the Applicant not leave the house without the witness, not have a cell phone and not drink or take drugs. The witness stated that he would have no qualms leaving the Applicant in his home while he went away for weekends. He felt he could trust the Applicant to honour his commitments and the terms of his bail. The witness was not disappointed.

On cross-examination the witness acknowledged that his experience in real estate was limited to buying and selling about six homes. He had no knowledge of the internal workings of a real estate brokerage. Prior to being asked to act as surety he had no knowledge of the full extent of the Applicant's criminal behaviour but once he was in possession of that knowledge he did not hesitate to act as surety. While he admits that it appears the Applicant did not learn from his mistakes with six convictions in 27 years and five in the ten years from 1995 to 2005, the witness believes the Applicant should be given a chance. He admitted that there is no guarantee that he will not have future lows.

Evidence of Witness # 2

The next witness was the Applicant's ex-wife. She has worked in nursing for 36 years. She married the Applicant in 1989 and confirmed that the marriage was very good in the early years. She was aware of the 1978 conviction and incarceration when she married the Applicant. There was a financial issue arising out of the demise of the limousine company but life was good while the Applicant worked for the video company. They had a home in Oshawa and she commuted to work at the hospital in Cobourg.

The witness stated that she was devastated when she came home in 1995 to find the house had been searched by the police. At first she thought the house had been burgled but the truth came out. She stated that the Applicant started drinking and that the marriage effectively broke down. The witness was the breadwinner for the family. She stayed in the marriage because she feared for the Applicant's well-being and hoped he would turn around. By the end of the 1995 to 2005 period, the Applicant was drinking a great deal and there was little or no communication. She decided on divorce.

When the Applicant was released from jail she had not intended for him to come and live with her, but when she realized he had nowhere to live she opened her doors to him again. She has noticed a significant recent change in the Applicant in that starting with taking the real estate course in 2004 he is committed to something. She is the one who passed the news on to him that he had passed the course and knew he would turn his life around if he succeeded. She described the Applicant as obnoxious when he was drinking. Now she says he is clean and sober. He is determined. He has developed a rapport with her and their daughter again. He is a totally different person. She feels the granting of a real estate licence will complete the process of getting him back to contributing to society and his family again.

Overall the witness described the Applicant as possessing the qualities of honesty and integrity, notwithstanding his criminal past. In fact, she says, he is too honest sometimes. She described him as having good morals and said he was not judgmental.

On cross-examination the witness stated that she did not know he was dealing drugs. She stated that there were never drugs in her home. She was aware that he was having problems with the law but feels that integrity is a different quality from the reality of a married man with a family being continually in trouble.

Evidence of Witness # 3

Witness # 3 is the younger brother of the Applicant. He has been employed by a multinational corporation for thirty-three years and is currently the National Service Manager for radiographic equipment. He described his relationship with his brother as good while they were growing up. Then their lives diverged somewhat. The witness was aware of the Applicant's problems in the late 1970s but they were not overly close at that time. In and around the late 1970s or early 1980s the witness's marriage broke down. This was a very trying time for the witness and one that he still had some difficulty discussing on the stand. Only the Applicant came forward to offer support. From there the brothers grew closer. At one point, for a period of four years, they moved in together. The witness was a single parent raising a son. When the witness was incapacitated due to illness, the Applicant took charge of the situation, cared for the witness and looked after the young boy until the witness recovered.

They ceased living together when they both got married at around the same time in 1989. In 1995, the Applicant began to fall apart. He was drinking heavily and was not a pleasant person to be around. The witness would pick up information about his involvement with the criminal justice system second hand but they were not in regular contact. He described the Applicant as "spiralling down" with occasional good times. Recently, according to this witness, the Applicant is back to being "that old Gerry" who cared for him when he was sick and looked after his son. They are in regular telephone contact, about every two weeks. They have gotten together at Christmas and shared dishwashing duties. They have gone out to a concert together. The witness would trust his brother and described him as honest and trustworthy. In defining his concept of honesty the witness stated that honesty was behaviour that involved no back dealing, double dealing or lying. Integrity, in the witness's opinion, was to carry out what was promised. In terms of following the rules, the witness stated that the Applicant is a person who will follow rules to the letter. He acknowledged that trafficking in and cultivation of marijuana constitutes breaking the rules but in the witness's opinion, the marijuana laws are a "minor part of the law."

On cross-examination the witness was asked if he did not feel that habitual criminal activity did not indicate a lack of honesty and integrity. The witness was of the view that there were shades of honesty and integrity that might apply in continual criminal activity. He did not believe that continual drug offences reflect on integrity. He felt that the

Applicant would work well in a structured environment. Without structure, he felt the Applicant might get off track. He stated that he wanted the Applicant to succeed and will support him in anything he does. In re-examination he stated that he would not have supported his brother in any undertaking from 1995 to 2005 when he was spiralling down.

ANALYSIS:

The statutory scheme for refusal of registration and appeal as set out in the Act is found in sections 10 (1) and 14h. By virtue of section 10 (1) (a) (ii) an applicant is entitled to registration or renewal:

> …except where,
>
> > (a) (ii) 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. 13. To put it simply, the Registrar may refuse to register or to renew a registration if, among other things, the conditions set out in s. 10 (a) (ii) are found to be present. S. 14 sets out the procedure that the Registrar must follow when a 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.

Given that the statute provides for an entitlement to registration, with exceptions, the onus is on the party invoking the exception provisions to prove, on a balance of probabilities, that they are applicable in any particular case. Thus, it is the Registrar who carries the burden of proof. What then is the standard of review?

In the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O. J. No. 1017 (Ont. Div. Ct.) Mr. Justice Southey, writing for a three judge panel of the Divisional Court, set out the test to be applied. Mr. Brenner had applied for registration as a motor vehicle salesperson, a regulated profession where the statute wording is identical to the wording in the Act concerning the impact of past conduct on eligibility for registration. The Applicant in that case had a lengthy criminal record for fraud, possession of narcotics, armed robbery, possession of stolen credit cards and other similar offences commencing in 1959 and continuing up to 1979. The test established by Justice Southey is as follows:

> The effect of section 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 the 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.

It is clear from this enunciation of the test and in line with the statutory wording that the focus of the Tribunal must be squarely of the past conduct of the Applicant. Past conduct can, of course, include conduct that helps to establish that a person has reformed such that an earlier course of criminal activity should not act as a prohibition to licencing. As a result the Tribunal can hear evidence of conduct to establish that an applicant will, in the future, carry on business in accordance with the law and with integrity and honesty. In the case of *Ontario (Real Estate and Business Brokers) v. Faccenda* [1994] O. J. No. 954 (Ont. Div. Ct.) Justice Adams stated "*It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief.*"

Nothing in either *Brenner* or in *Faccenda* stands for the proposition that it is the function of the Tribunal to simply defer to the decision of the Registrar unless the applicant can point to an error. The onus does not shift from the Registrar and the Tribunal must conduct its own enquiry and reach its own conclusions. This principle is clearly established in the decision of the Ontario Divisional Court in *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O. J. No. 603 where Justice Lane states at paragraph 9:

> In our view 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 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….
>
> 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.

Returning to the present case, the Tribunal must be persuaded by the Registrar, on a balance of probabilities, not that the Applicant will not, in fact, carry on business in accordance with law and with integrity and honesty, but that there are reasonable grounds for that belief based on the Applicant's past record. In support of that position the Registrar puts forward what can only be described as a lengthy criminal career on the part of the Applicant. The Applicant counters that the criminal activity in which he admits he partook is not of a nature that indicates he lacks honesty and integrity and that, when confronted with a set of specific rules, he has demonstrated and ability to follow those rules. He goes on to say that by seeking registration as a real estate salesperson he is knowingly opting into a regulatory scheme and therefore he will follow the rules because he actively sought to be bound by them. Finally, the Applicant asserts that there is evidence both of an inherent honesty and integrity as part of his character, even during the bad times, and evidence that he has passed a watershed and is now reformed.

In support of his contention that he can be trusted to follow specific rules, the Applicant cites the fact that he has never been found to breach the terms of a bail, recognizance, parole or probation. The Tribunal must take some issue with this statement. There are statements in the reasons for sentence of Judge MacLean that call that proposition into question. At page 13 of the decision during a discussion with counsel to settle the fact that the sentence was concurrent on all three charges, two of possession for trafficking and one for possession of proceeds of crime, the following discussion takes place:

> MR. SOSNA: I take it, Your Honour, the penalty is concurrent on all charges?
> THE COURT: Yes. I'm sorry, I should have indicated that. In one sense I should make the second offence more than the first but I think in the circumstances where there's a record….I mean, I'm mindful of the fact that there was a larger amount of drugs the second time. **I'm also mindful of the fact he was out on release on the first set when the second set was completed** [emphasis added], but I think I'd like to deal with it as a totality given the record.

It appears from this exchange that the Applicant had actually carried on criminal activities in 2005 during the period of his first release and the court considered a heavier sentence as a result. Applicant's Counsel was not counsel at the trial and the Tribunal is satisfied that this fact was not brought to her attention.

The Tribunal cannot accept the proposition that drug cultivation and trafficking are inherently different forms of criminal behaviour than fraud, theft, robbery or a very minor part of the law. While it is possible to conceive of a drug dealer who does not attempt to cheat his customers and abides by his commitments to both his customers and suppliers, such antisocial behaviour is designed to ensnare as many people as possible into criminal wrongdoing simply for the benefit of greater profits to the dealer. It is inherently self-serving and cares nothing for its victims. It is behaviour that does violence to the values that underpin this society, values that have been continually re-asserted despite a strong recent lobby to decriminalize simple possession of marijuana. It should also be remembered that even that lobby does not seek to decriminalize trafficking.

The Tribunal does not accept the position that the Applicant's failure to follow the general laws of Canada is not indicative of his ability to follow the very regulated structure of the real estate industry. The general laws of Canada place a very light yoke on the shoulders of the average citizen, which is easy to bear. Getting involved in cultivation of drugs requires a conscious decision to ignore the general law, a decision that the Applicant freely admitted to making in full knowledge that it was wrong. It is not behaviour entered into by accident. The inability to abide by the general law provides a strong indication that the Applicant will be unable to abide by specific laws and regulations, especially when confronted with the highs and lows of real estate deals and the temptation to get into the many get-rich quick schemes that result in a steady stream of agents coming before this Tribunal in response to a notice of proposal to revoke issued by the Registrar. There is also no merit in the proposition that the Applicant is voluntarily opting into the regulatory scheme. What the Applicant is opting into is the ability to make a living in real estate. To do so he must be bound by its regulatory structure in exactly the same way he is bound by the general law of Canada.

The fact that he knows that real estate is a regulated industry does not elevate his decision to pursue a career in that field to voluntary acceptance creating the possibility that he is more likely to comply than not.

It is the area of rehabilitation that the Applicant's case shows hope for the future. The Tribunal was most impressed by the witnesses put forward by the Applicant. He is fortunate to have such people on his side through this period. As a group the witnesses were caring decent people with a genuine concern for the Applicant. It is to be hoped that the Applicant will draw strength from them as he rebuilds his life. They all appear ready to assist to the fullest extent of their ability. The Tribunal accepts their evidence that this time there does seem to be a change in the Applicant that leads to a real belief he can turn the corner and leave his previous life behind.

The Tribunal was also impressed by the efforts the Applicant has made so far to regain the respect of his friends and neighbours. It is to be hoped that his attendance at the two substance abuse programmes and his involvement with Alcoholics Anonymous will result in an end to the behaviour that caused him to spiral down into an antisocial lifestyle between 1995 and 2005. The Applicant clearly has a great deal of ability and determination. He took the disappointment of failing his real estate exams as a challenge to study harder and make sure he passed. As evidenced by his earlier testimony about taking five years to complete a three-year Arts & Sciences diploma, it is clear that academics do not come easy to the Applicant, but he persevered. He must persevere yet again.

Notwithstanding the fact that the Tribunal is impressed with the Applicant's recent efforts to rehabilitate himself, there is not, as yet, sufficient record to offset a lengthy criminal past. The evidence of rehabilitation was limited to observations of a change in attitude, but it is in action that the Applicant will create a record to offset the negative impact of his past. He has no lengthy record of recent positive behaviour to put before this Tribunal as yet. This Tribunal faced a similar situation recently in the case of *Veras v. Registrar, Motor Vehicle Dealers Act*, released September 2005. Mr. Veras had had a long history of wrongdoing while a registered motor vehicle dealer. He had had his licence revoked and had unsuccessfully re-applied on several occasions. On the last such occasion he led evidence that he had now reformed himself. The evidence consisted of the testimony of a neighbour and friend who dealt with Mr. Veras in community and charity events. On turning him down again, the Tribunal set out the type of evidence necessary to offset a lengthy record of wrongdoing as follows:

> Mr. Veras did not heed the Tribunal's advice in 1998. Rather, he embarked on a course of further wrongdoing. The evidence of his friend goes some of the way to establish that in a one on one relationship Mr. Veras can now and does act in a trustworthy manner. What is missing is any evidence of similar trustworthiness and positive attitudes and actions in business relationships that are outside family and friends, and therefore the type of conduct that would be followed in dealing with members of the public. The evidence required must include long term involvement or employment in a position of trust, preferably in a regulated industry. The evidence should come from the employer and not simply be based on the Applicant's assertions that he has been on his best

> behaviour for some years. Community involvement is laudable and a start but much more is required.

Without attempting to define with any precision what type of evidence a future Tribunal may find acceptable, at its core such evidence must establish a high degree of trustworthiness for a significant time. Once the Applicant can establish a record of trustworthiness, it may be possible to repose public trust in him with the granting of a licence.

Finally, the Tribunal accepts the Registrar's position that the nature of the real estate industry would make it difficult to licence the Applicant on terms. In pith and substance, terms simply become a promise to abide by the rules, some of which may be slightly more onerous than those applied to other members in the community. In a business where income is made by attending at people's homes and negotiating deals outside of an office setting, the only real means of supervision would be to have a broker attend with the Applicant on every deal. Who then would be entitled to the commission? The Tribunal agrees with the Registrar that it would be virtually impossible to draft acceptable terms.

DECISION:

On a review of the evidence as a whole, taking into account the totality of the Applicant's past record, this Tribunal finds that there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The application is premature. The Applicant must provide a record of reformed behaviour of sufficient weight to offset his lengthy criminal past. If he is sincere in his rehabilitation efforts, he should be able to establish such a record. In accordance with the provisions of section 14 (5) of the Act, the Tribunal orders the Registrar to carry out the Proposal dated August 17, 2006.

LICENCE APPEAL TRIBUNAL

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D. Gregory Flude, Vice-Chair

RELEASED: January 12, 2007

FILE NAME: 3757.rebba.McCarthy

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



LAT Decisions, Rulings and Orders

Archives

- 2001 - 2002
- 2002 - 2003
- 2003 - 2004
- 2004 - 2005
- 2005 - 2006

Decisions from the Superior Court of Justice

Decisions under Travel Industry Act

Fiscal Year 2006 - 2007

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1380140 ONTARIO INC. o/a JANETRAVEL and CRUISE

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Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

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.19 AS AMENDED

TO REVOKE REGISTRATION

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

APPEARANCES: JANET ROACH, Applicant, appeared for 1380140 Ontario Inc. o/a JaneTravel and Cruise

SOUSSANNA KARAS, Counsel, appeared for the Registrar, *Travel Industry Act*

DATE OF PRE-HEARING: March 24, 2006 *by teleconference*

REASONS FOR DECISION AND ORDER

This is the hearing of a motion brought by Michael Pepper, Registrar, Travel Industry Council of Ontario (the "Registrar") for an order requesting that the Licence Appeal Tribunal (the "Tribunal") direct the Registrar to carry out his Proposal to revoke the registration of 1380140 Ontario Inc. o/a Janetravel and Cruise (the "Applicant") or alternately, to set a date for the hearing of the appeal brought by the Applicant without the necessity of the Registrar having to file a new Notice of Proposal to Revoke.

BACKGROUND

On April 13, 2005, the Registrar proposed to revoke the Applicant's registration as a travel agent for failure to file its financial statement for the year ending October 31, 2004, as required under section 24 of Ontario Regulation 806/96 as amended.

The Applicant appealed the Proposal to revoke to the Tribunal. A pre-hearing conference was held on July 25, 2005, at which time the Registrar and the Applicant filed a joint statement of fact and a joint submission. The Tribunal ordered that the Applicant comply with certain conditions as referred to in the joint statement of fact, failing which the Registrar would be at liberty to make a motion addressing his concerns, reviewing the Order made at the pre-hearing conference and proceeding with the Proposal to revoke.

The Applicant was ordered to file its financial statement for the year ending October 31, 2005, in the form authorized by section 24 of Ontario Regulation 806/96 no later than January 31, 2006. The Applicant failed to file its financial statement on time despite having received a letter from the Registrar reminding it to file the financial statement on time.

SUBMISSIONS

Soussanna Karas, counsel for the Registrar, advised the Tribunal that the Registrar received a fax copy of the Applicant's financial statement on March 1, 2006. The statement was prepared by a certified general accountant and not by a public accountant licensed under the *Public Accountancy Act* as required by section 24 of Ontario Regulation 806/96. This was the second time that the Applicant filed a financial statement with the Registrar in this manner.

Janet Roach is the principal behind the Applicant corporation. Ms. Roach stated that she sent financial information to her public accountant for preparation and submission to the Registrar's office. The required financial statement will be submitted to the Registrar's office within the next few days. On an earlier occasion she retained the services of another public accountant who was unable to prepare the required financial statement.

Delford Blythe is a certified general accountant who stated that he met with Ms. Roach in November 2005 to receive the financial information required to prepare the Applicant's financial statement. He was unaware of the time frame for submitting the financial statement and could not have done so in any event because of prior work commitments. The delay in sending the financial statement in the required manner is attributable in part to the public accountant being on vacation.

Mr. Blythe stated that he spoke or tried to speak to officials in the Registrar's office on two occasions regarding the timely filing of the Applicant's financial statement. In his opinion, the delay in filing the financial statement cannot be attributed to the Applicant's disregard of its obligations. Mr. Blythe has recently implemented a monthly accounting system for the Applicant such that the Applicant should be subsequently able to file its financial statements in a timely manner. Ms. Roach was formerly associated with another person, now

deceased, in the running of the travel agency. Ms. Roach now has full control over the running of the travel agency.

ANALYSIS

The ability of the Applicant to carry on business is at stake. The Applicant is entitled to a full hearing before the Tribunal pursuant to subsection 11 (5) of the *Travel Industry Act*, R.S.O. 1990, Chapter T.19 as Amended. It has not this opportunity as it must by law. The Tribunal's order arose at a pre-hearing conference, which is an informal meeting between the parties and/or their counsel and a member of the Tribunal.

ORDER

The Tribunal accordingly orders that this matter proceed to a hearing at the earliest possible date without the necessity of the Registrar filing a new Notice of Proposal to Revoke.

LICENCE APPEAL TRIBUNAL

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

RELEASED: April 3, 2006

FILE NAME: 2942-TIA-Jane 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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- 2004 - 2005
- 2005 - 2006

Decisions from the Superior Court of Justice

Decisions under Travel Industry Act, 2002

Fiscal Year 2006 - 2007

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- IN THE MATTER of the REGISTRATION of INTERNATIONAL INC. as a travel agent
- ALTAIR LOGISTICS LTD. o/a ALTAIR LOGISTICS LTD.
- 1461729 ONTARIO LIMITED O/A EURO TRAVEL CENTER
- RIVERWATCH INVESTMENTS INC. o/a CRUISE HOLIDAYS OF BROCKVILLE
- IN THE MATTER of JOHN D. BROOKS
- THE TRAVEL TERMINAL INC.
- BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS
- EXEC 1 TRAVEL CORP o/a GOLIGER'S TRAVELPLUS
- ANNOR DARKO ROBERTSON o/a JOY TRAVEL & TOURS
- WATAN TRAVELS INC. o/a WATAN TRAVELS INC.
- THE TRAVEL TERMINAL INC.
- 1615494 ONTARIO INC. o/a JES'HUE TRAVEL
- MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL
- BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS
- IN THE MATTER of the REGISTRATION of MCKELVEY'S TRAVEL SERVICE LTD. O/A MCKELVEY'S TRAVEL & CRUISES as a travel agent
- BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS
- IN THE MATTER of the REGISTRATION of MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL as a travel agent
- TADELE MERSHA TAMIRU
- UNIGLOBE TRAVEL GROUP
- SKYPORT CANADA INC. O/A SKYPORT TRAVELS & TOURS

- MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL
- EXEC 1 TRAVEL CORP O/A GOLIGER'S TRAVELPLUS
- 1349694 ONTARIO INC. O/A R & R FUN TRAVEL
- UNIGLOBE TRAVEL GROUP
- ROHAN JUDE RANAWEERA
- MARY FERRATO
- HOWARD FORBES
- SKYPORT CANADA INC. O/A SKYPORT TRAVELS AND TOURS
- MILESTONE TRAVEL LTD.
- RIVERWATCH INVESTMENTS INC. O/A CRUISE HOLIDAYS OF BROCKVILLE

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TRAVEL INDUSTRY ACT, 2002
S.O. 2002, Chapter 30, Schedule D

IN THE MATTER of the REGISTRATION of
FTT TRAVEL INTERNATIONAL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the *Travel Industry Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: December 13, 2006

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

FTT TRAVEL INTERNATIONAL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on April 12, 2007;

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 9:30 a.m. on Monday, the 23rd day of April, 2007.

LICENCE APPEAL TRIBUNAL

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Lynda Tanaka,
Acting Chair

RELEASED: March 19, 2007

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

ALTAIR LOGISTICS LTD. o/a ALTAIR LOGISTICS LTD.

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: SIMON DANN, Presiding Member

APPEARANCES: DINARA SAVINKOVA, Agent, representing Altair Logistics Ltd.

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Respondent" or the "Registrar")

DATE OF PRE-HEARING: March 16, 2007 Toronto

ORDER

Following attendances at the pre-hearing conference, on March 16, 2007, before the Licence Appeal Tribunal (the "Tribunal") of Dinara Savinkova, who appeared on behalf of her company, Altair Logistics Ltd., (the "Applicant" and "Altair") and Soussanna Karas, Counsel, on behalf of the Registrar, Travel Industry Act, 2002 (the "Respondent" or the "Registrar");

Ms. Karas stated the issues contained in the Notice of Proposal To Revoke Registration, dated December 22, 2006, had to do with (1) non-compliance with trust accounting procedures as outlined in Section 27 of the Regulation, (2) a working capital shortfall and, (3) compliance with invoicing requirements as stated in Section 38(1) of the Regulation.

Ms. Savinkova advised that Altair's business was freight forwarding and Altair would

occasionally assist a client with their travel arrangements. Altair would receive one payment to cover both the logistics and travel costs. Ms. Savinkova advised that the travel component was too small to bear the cost of segregated invoicing and trust account management.

Ms. Savinkova noted that the capital shortfall was based on the combined logistics and travel business revenues not the travel alone, which was much less.

Ms. Karas noted that if Altair submitted information to reflect Altair's actual travel business revenue, it could influence the shortfall requirement.

The Parties were unable to arrive at a resolution.

The Tribunal Orders that:

1. The Parties to the hearing are the Applicant and the Registrar

2. The Parties were reminded that in the event of a settlement or withdrawal by either Party, the Tribunal must be advised in writing of a settlement and or withdrawal of the proposal dated December 22, 2006. In the event the Proposal is not withdrawn, the hearing will proceed on April 19, 2007, 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.

LICENCE APPEAL TRIBUNAL

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Simon Dann
Presiding Member

RELEASED: March 26, 2007

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1461729 ONTARIO LIMITED O/A EURO TRAVEL CENTER

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, *2002* R.S.O. 2002, CHAPTER T.19 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: SAEED AHMAD KHAN, Agent, appearing on behalf of the Applicant

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF PRE-HEARING: February 22, 2007 *By Teleconference*

ORDER

Upon attendances at a pre-hearing by teleconference before the Licence Appeal Tribunal by 146729 Ontario Limited o/a Euro Travel Center, the Applicant, and the Registrar under the *Travel Industry Act, 2002*, the Tribunal makes the following order with respect to the hearing;

1. The Tribunal orders that the audited financial statement of 1461727 Ontario Limited o/a Euro Travel Center be filed with the Travel Industry Council of Ontario (TICO) by March 15, 2007.

2. In the event that the said statements are not filed with TICO by March 15, 2007, and/or are not acceptable to TICO, the matter shall be heard as scheduled on March 28, 2007.

LICENCE APPEAL TRIBUNAL

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Philomen Wright
Presiding Member

RELEASED: February 27, 2007

File Name: 3944.tia.146729 Ontario Limited.pre-hearing.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RIVERWATCH INVESTMENTS INC. o/a CRUISE HOLIDAYS OF BROCKVILLE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, c. 30 SCHEDULE D.

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: No one appeared for the Applicant, Riverwatch Investments Inc. o/a Cruise Holidays of Brockville

SOUSSANNA S. KARAS, Counsel, represented the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: February 7, 2007 Kingston

DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Riverwatch Investments Inc. o/a Cruise Holidays of Brockville ("Riverwatch") from a Proposal dated September 21, 2006, by the Registrar under the *Travel Industry Act*, 2002 (the "Act") to revoke its registration as a travel agent.

The hearing commenced at 10:00 AM, as scheduled. Shortly after, it was noted that Mr. André Belanger, President and CEO of Riverwatch, was not in attendance and no other representative of Riverwatch had appeared. The hearing was adjourned until 10:30 AM to allow Mr. Belanger an opportunity to appear. At 10:30, the hearing re-commenced. At that time, it was noted that as a result of the Pre-Hearing Order in this matter, Mr. Belanger was aware that the hearing was scheduled for February 7, 2007 in Kingston. Ms. Karas, counsel for the Registrar under the Act, advised the Tribunal that she had attempted to contact Mr. Belanger by telephone to confirm that he intended to appear at the hearing. He did not answer her call and his voice mail was full. A member of the

Tribunal staff advised that she had left a voice mail on February 6, reminding Mr. Belanger that the hearing was scheduled for the next day. The hearing then proceeded in the absence of a representative for Riverwatch, under Rule 2.12 of the Tribunal's Rules of Practice.

FACTS

Ms. Archna Gupta, a financial analyst and investigations manager for the Travel Industry Council of Ontario, was called as a witness and based on her testimony and the documentary evidence introduced, the following facts are determined.

Riverwatch was registered as a travel agent on June 30, 2005. Upon registration, Riverwatch became a member of TICO, which is a member-owned organization with oversight responsibility for the travel agency industry. TICO also provides administrative services, including financial, legal and investigatory services, to the Registrar under the Act.

Riverwatch, in its application for registration, specified a financial year-end of November 30. Under the Act, Riverwatch is required to file audited financial statements with the Registrar within 90 days of its chosen year-end. In this case, Riverwatch was obliged to file financial statements for the financial year ending November 30, 2005, no later than February 28, 2006.

By letter dated October 26, 2005, Mr. Belanger, as President of Riverwatch, was notified by TICO that the financial statements were due by February 28, 2006. The letter details the financial statements required. By letter dated March 7, 2006, TICO notified Mr. Belanger that the financial statements of Riverwatch were overdue. He was given until March 21, 2006, to file. By letter dated March 24, 2006, the Registrar notified Mr. Belanger that his financial statements were overdue and must be filed by April 7, 2006, or administrative action, including a proposal to revoke Riverwatch's registration, would be taken.

On or about May 26, 2006, Ms. Karas telephoned Mr. Belanger. He advised her that employees of Riverwatch had telephoned TICO in March and again in April, requesting an extension of time to file its financial statements. Mr. Belanger said that the accountant for Riverwatch had died in late February, 2006. At the time of his death, he had all the documents Riverwatch needed to prepare the 2005 financial statements. It took time to retrieve this paperwork and find a new accountant. The new accountant could not start preparing the financial statements until the end of tax season. It was noted that Mr. Belanger was very apologetic about the delay but that the circumstances were beyond his control. He asked for an extension until June 30, 2006. The Registrar granted this extension.

The financial statements of Riverwatch were not filed by the thrice-extended deadline of June 30. During the summer, inspectors with TICO attempted to schedule an

inspection of Riverwatch's operations. This is done routinely, usually after the first six months of registration, and is not only a review of the operations and books, but also a coaching session. Due to difficulties on both sides, the inspection had been delayed. Now TICO was ready to proceed but was advised that Mr. Belanger had married during the summer and was on his honeymoon. There was no evidence that the inspection was ever scheduled.

In August, 2005, Mr. Belanger received the fourth extension of time to file his financial statements. This time, he told the Travel Industry Council of Ontario, he had returned from his honeymoon to find his accountant was on holiday and had not finished the financial statements. He was given until August 28, 2005, to file. Again the financial statements were not filed by the extended deadline.

On September 21, 2006, a Proposal to revoke the registration of Riverwatch as a travel agent was issued by the Registrar. Mr. Belanger appealed the Proposal to the Tribunal and, in his Notice of Appeal, again requested an extension of time to file. In the Notice of Appeal, Mr. Belanger committed to have the financial statements filed by the end of January, 2007.

On January 25, 2007, the accountant for Riverwatch telephoned TICO and asked for another extension, this time until May or June, 2007. He advised that Riverwatch had been a sole proprietorship prior to its registration under the Act and had never prepared financial statements. It was incorporated sometime around the time of its registration but in order to prepare the 2005 financial statements, and the now-due statements for 2006, the accountant would have to go back to the inception of Riverwatch, a period of at least four years. The accountant advised he had received all the documents for the year 2003-2004 but had not received the bank records and invoices for the financial year 2005 from Riverwatch. Riverwatch had advised him that it would take another couple of months to provide these 2005 documents.

By letter dated January 26, 2007, TICO advised Mr. Belanger of the conversation with the accountant for Riverwatch and advised him further that the requested extension would not be granted. However, TICO offered Mr. Belanger an option in lieu of proceeding to a hearing. TICO suggested that Mr. Belanger, after seeking independent legal advice, consider voluntarily terminating Riverwatch's registration. The Registrar was willing, if this occurred, to re-register Riverwatch as a travel agent when the required financial statements had been filed. In the interim, Mr. Belanger would be free to work for another travel agent. TICO received no reply to this letter. The letter was sent by fax and the fax transmittal records show that Mr. Belanger's office did receive the letter.

After January 26, all attempts to contact Mr. Belanger, or any representative of Riverwatch, were unsuccessful. TICO attempted to serve their book of documents by Purolator on January 31, 2007. In both the morning and the afternoon, Purolator attempted delivery but both times the office was closed. Delivery was attempted again on February 1 and again the office was closed. It is noted that both days were

weekdays. A letter dated February 5, 2007, from TICO advising Mr. Belanger that the hearing would proceed and that TICO would be requesting costs, was both faxed and mailed to Mr. Belanger. This time, the fax transmittal was unsuccessful. As noted above, several attempts to contact Mr. Belanger by telephone did not elicit a reply although at least one voice mail was left.

LAW

Section 22 of Regulation 26/05 under the Act, requires travel agents with sales of less than $10 million to file audited financial statements within 90 days of their year-end. Riverwatch has sales of under $10 million.

Sections 8 and 10 of the Act, read together, give the Registrar the authority to revoke a travel agent's registration if the travel agent is a corporation and, as Section 8 (1)(d) of the Act specifies:

> (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business . . .
>
> (iv) the past conduct of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty . . .

DECISION

TICO and the Registrar have been both understanding and compassionate in their dealings with Mr. Belanger and Riverwatch. But despite repeated commitments, Riverwatch has not filed any financial statements since its registration as a travel agent in June, 2005. Nor has there been any inspection by TICO of its operations or books.

This leaves TICO and the Registrar in the dark about Riverwatch's operations. They do not know if Riverwatch is maintaining the required level of working capital. They do not know if Riverwatch is maintaining the required trust accounts to safeguard money collected from the travelling public. They do not know if there are irregularities in the operations or books of Riverwatch that might leave the compensation fund, maintained by TICO, at risk of claims against it by Riverwatch customers. They do not know if it is safe to permit the travelling public to do business with Riverwatch.

Mr. Belanger has made repeated commitments to file the required financial statements. He has not met any of these commitments and the most recent advice by his accountant is that he has not produced all the documents required to complete the financial statements for either 2005 or 2006.

Mr. Belanger, as an officer of Riverwatch, has demonstrated clear financial irresponsibility by his actions and his inaction. On the basis of his conduct, the

Registrar can have no confidence that Riverwatch will ever file financial statements as required under the Act. This is not merely a technical breach of the Act. Travel agents have stringent trust account obligations which exist to protect the travelling public. They also have working capital requirements for the same reason. Without the financial statements, as noted above, TICO and the Registrar are in the dark about the financial health of Riverwatch.

The repeated commitments made by Mr. Belanger to file financial statements and the repeated failure of Mr. Belanger to honour these commitments, leaves the Tribunal in serious doubt about the good faith of Mr. Belanger and about the financial position of Riverwatch. The Tribunal notes that as late as January, 2007, Riverwatch's accountant still had not received the invoices and bank documents for the 2005 financial year of the company. The fact that Mr. Belanger is apparently absent from his business at a time he knows a hearing into this matter was scheduled does not reassure the Tribunal. The prolonged absence of financial statements is clear and cogent evidence of financial irresponsibility and raises serious doubts about the ability of Riverwatch to operate with financial responsibility or in accordance with the law. For all these reasons, the Tribunal concludes that the Registrar was justified in his decision to revoke the registration of Riverwatch.

Counsel for the Registrar has also requested costs in this matter. Under Rule 14 of the Tribunal's Rules of Practice, the Tribunal has the authority to grant costs where one party has behaved in bad faith. Evidence of this may be the failure to attend a hearing despite notice. The party subject to costs ought to be given notice that costs will be claimed. In this case, TICO made a legitimate effort to notify Mr. Belanger that it intended to claim costs. Further, under Rule 2.12 of the Tribunal's Rules of Practice, Mr. Belanger has forfeited his right to further notice of the proceedings by his failure to attend or to send any other representative of Riverwatch to attend on its behalf.

It is appropriate to award costs against Riverwatch in this matter. Riverwatch was given many opportunities to resolve this matter and, as late as January 26, received an offer of resolution from TICO which was generous under the circumstances. Neither Mr. Belanger nor any other representative of Riverwatch has responded to this offer. Neither Mr. Belanger nor any other representative of Riverwatch notified TICO or the Tribunal that Riverwatch would not be appearing at the hearing.

Both the TICO counsel and the witness travelled from Toronto for the hearing. TICO and the Registrar also had the expense of preparing for this proceeding. These expenses were incurred as a direct result of the action and inaction of Mr. Belanger as Riverwatch's President. Therefore, considering all of the circumstances of this case, the Tribunal is prepared to award costs against Riverwatch in the amount of $800.

ORDER

1. The Tribunal, pursuant to subsection 11(5) of the Act, directs the Registrar to carry out his Proposal of September 21, 2006 to revoke the registration of Riverwatch Investments Inc. o/a Cruise Holidays of Brockville as a travel agent.
2. Riverwatch Investments Inc. o/a Cruise Holidays of Brockville is ordered to pay costs in the amount of $800 to the Registrar. These costs shall be paid within 30 days of this order by certified cheque to:

The Travel Industry Council of Ontario
2700 Matheson Blvd.
Suite 402, West Tower
Mississauga, Ontario L4W 4V9
Attn: Mr. Michael Pepper, Registrar

LICENCE APPEAL TRIBUNAL

_____
Laurie Sanford, Vice-Chair

Released: February 09, 2007

File: 3831.tia.Riverwatch.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

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

IN THE MATTER of
JOHN D. BROOKS

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: October 23, 2006

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

JOHN D. BROOKS

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 8, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa at 9:30 a.m., on Monday, March 19, 2007.

LICENCE APPEAL TRIBUNAL

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Carl F. Dombek
Chair

Released: January 16, 2007

file name: 3876.ticf.John Brooks.Adj.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

THE TRAVEL TERMINAL INC.

IN THE MATTER OF THE TRAVEL TERMINAL INC. APPEAL FROM THE PROPOSAL TO REVOKE REGISTRATION ISSUED BY THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT,* R.S.O. 2002, DATED JULY 5, 2006.

TRIBUNAL: JANE WEARY, VICE-CHAIR
PHILOMEN WRIGHT

APPEARANCES: LORIANNE IANIZZI, Agent, representing the Registrant
MARIA L. ABATE, Counsel, representing the Registrar, *Travel Industry Act*

DATE OF HEARING: November 22, 2006 TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND:

On July 5, 2006 the Registrar under the *Travel Industry Act, 2002* (the "Act") issued a Proposal to revoke the registration of Travel Terminal Inc. (the "Registrant") as a travel agent under the Act. The grounds for the revocation were that the Registrant was not entitled to continued registration as it had failed to file financial statements as required under section 22(1) of the Regulations under the Act despite numerous reminders to do so. On July 19, 2006, the Registrant appealed the Proposal.

On October 19, 2006, a Pre-Hearing was held by the Tribunal. The consequent Tribunal Order included a requirement that the Registrant supply the required financial information in the proper format by November 13, 2006 whereupon the Registrar might agree to withdraw his Proposal. The stipulated documentation was not received by that date and the matter proceeded to Hearing.

EVIDENCE:

The facts were not in dispute. They were testified to by Ms Archa Gupta, Inspection Co-Ordinator and Financial Analyst and Ms Lori Furlan, Claims Co-Ordinator, both with the Travel Industry Council of Ontario ("TICO"), the agency set up to administer the Act and Regulations thereunder. They were supported with documentation contained in Exhibit 3 and established the following:

1. The Travel Terminal Inc. was first issued a registration as a travel agent under the Act on September 29, 2004. Its' annual sales to date are less than $10 Million.

2. It notified TICO that its year-end was December 31, 2005, which resulted in its annual financial statement for 2005 being due by March 31, 2006.

3. On November 21, 2005, TICO sent the Registrant a letter reminding it of this obligation and setting out both the deadline for filing, being 90 days after the year-end, as well as the required format in bold noting that the filing must be accompanied by a "review engagement" or "auditor's opinion" and signed by a licensed public accountant.

4. On April 6, 2006, a second reminder letter was issued to the Registrant from TICO. It noted that the required information had not been received and extended the filing deadline to April 20, 2006.

5. As of April 26, 2006 nothing had been heard of from the Registrant. TICO sent a third letter which, again, extended the filing deadline, this time to May 9, 2006, but also warned that continued failure to comply would result in administrative action by the Registrar, including the possibility of a Proposal to Revoke Registration.

6. Nonetheless the Registrant did not respond. On June 9, 2006 the TICO legal department sent a letter to the Registrant asking it make contact prior to June 22, 2006 to advise of its intentions; otherwise, a Proposal would be drafted.

7. No communication was received from The Travel Terminal Inc. and the Proposal was issued.

8. At the Tribunal's Pre-Hearing of October 19, 2006, Ms Lorianne Iannizzi, President of The Travel Terminal Inc. appeared as agent and presented the Registrar's Counsel with financial statements which did not meet the requirements as set out as they were not prepared or signed by a licensed Public Accountant.

9. Despite undertaking to have the documents filed in the appropriate format and being so-ordered by the Tribunal, by the November 13, 2006 deadline no further documentation had been submitted by the Registrant.

10. On November 14, 2006, a Licenced Public Accountant reviewed the Registrant's books. His subsequent filing of the financial statements was received by TICO on the afternoon of November 20, 2006. By this time witnesses and exhibits had been prepared in order to give the Tribunal as well as the Registrant some disclosure and the Tribunal had been notified by TICO that the Hearing was to proceed.

11. Although not alleged in the Proposal, witnesses for TICO also supplied documentation revealing that payments due from the Registrant for the compensation fund as set up under the legislation have not been received despite two reminder notices and are now almost two months past the due date for submission. The Registrant advised this had been sent by regular mail to TICO on November 17, 2006.

Ms Lorianne Iannizzi is the owner and President of the Registrant. She testified that as a sole proprietor she is responsible for managing all the affairs of the corporation. She stated she was not aware that her Financial Statements were required to be reviewed by a licensed accountant, although in cross-examination she acknowledged having received and having read all the documentation sent to the Travel Terminal Inc. from TICO as referenced above. This documentation included the notice to her last November of the need for a licensed Public Accountant's review.

Ms Iannizzi advised she had not contacted TICO prior to the Pre-Hearing as she had been attempting to gather the information and had been working with an accountant to prepare the forms. After the Pre-Hearing she testified she had begun to look for an affordable accountant. The individual she eventually retained had contacted TICO on November 14, 2006 one day after the date the statements were due pursuant to the Tribunal's Order. The properly prepared statements were not delivered to TICO until the afternoon of November 20, 2006. In the meantime TICO had couriered the disclosure material for this Hearing to the Registrant and advised the Tribunal the matter was to proceed.

In submissions, Counsel for the Registrar advised that the Registrar was willing to allow the Registrant to continue its registration subject to specified terms and conditions. These conditions were to take effect over the next 12 months. They set out strict reporting requirements by the Registrant of its financial statements. Ms Iannizzi acknowledged such reporting was workable for her.

Counsel for the Registrar requested costs for the one day proceeding before the Tribunal in the amount of $400.00 pursuant to section 14 of the Tribunal's *Rules of Practice*. Ms Abate noted the significant effort undertaken by the Registrar to ensure compliance of basic mandatory registration requirements by the Registrant. Further, Counsel submitted that the Registrant had not taken appropriate action to ensure it met the Order of the Tribunal at the Pre-Hearing. The Tribunal asked Ms Iannizzi whether she had ever made any attempt to contact TICO or the Registrar to assure her good faith or that she was attempting to comply with the Act. Ms Iannizzi advised she had not done so. She stated that she had believed that the Tribunal Hearing had been cancelled on her accountant's contact with TICO on November 14 by telephone. She did not refer to the letters received by her from TICO Counsel on November 17, 2006, and again with the disclosure package on November 20, 2006, stating the Hearing was to proceed.

THE LAW:

The Act provides the Registrar with the authority to revoke a registration where, in his opinion, the Registrant is not entitled to registration under section 8 of the Act. That section provides, in part:

Registration

(1) A Registrant that meets the prescribed requirements is entitled to registration or renewal of registration by the Registrar unless,

(d) the Registrant is a corporation and,

(iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

(e) the Registrant or an interested person in respect of the Registrant is carrying on activities that are, or will be if the Registrant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;

(f) the Registrant is in breach of a condition of the registration; or

(g) the Registrant fails to comply with a request made by the Registrar under subsection (1.1).

11. (1) The Registrar shall notify an Registrant or registrant in writing if he or she proposes to,

(b) suspend or revoke a registration;

(2) The notice of proposal shall set out the reasons for the proposed action and shall state that the Registrant or registrant is entitled to a hearing by the Tribunal if the Registrant or registrant mails or delivers, within 15 days after service of the notice, a written request for a hearing to the registrar and to the Tribunal. 2002, c. 30, Sched. D, s. 11 (2).

11 (5). If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the Registrar's proposal or substitute its opinion for that of the Registrar and the Tribunal may attach conditions to its order or to a registration. 2002, c. 30, Sched. D, s. 11 (5).

Regulation 26/05 further provides:

22. (1) Every registrant shall file with the registrar the financial statements required by this section for each fiscal year. O. Reg. 26/05, s. 22 (1).

(2) A registrant who had sales in Ontario of less than $10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,

(a) annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*; or

(b) annual financial statements with an auditor's report from a licensed public accountant, if the registrant is required to obtain annual financial statements with an auditor's report under the *Business Corporations Act*. O. Reg. 26/05, s. 22 (2).

Finally, the Regulation also sets out the requirements for payments by Registrants into the compensation fund set up to protect consumers under the legislation:

53. (1) A registrant shall make payments under this section to the administrative authority,

(a) within 90 days after the end of the first half of the registrant's fiscal year; and

(b) within 90 days after the end of the second half of the registrant's fiscal year. O. Reg. 313/06, s. 1 (1).

As to the issue of costs, the Tribunal's authority is set out ion section 14 of the *Rules of Practice*, which reads as follows:

14.1 Where a party believes that another party in proceedings before the Tribunal has acted unreasonably, frivolously, vexatiously, or in bad faith, that party may make a request to the Tribunal for costs, which request shall be made with notice to all other parties to the proceedings and prior to the release by the Tribunal of its final order in the proceedings.

14.2 The Tribunal in determining whether a party has acted unreasonably, frivolously, vexatiously, or in bad faith shall consider all of the circumstances, including, without limiting the generality of the foregoing, circumstances such as a party:

1. 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;

2. failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;

3. failure to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including, without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or

4. knowingly presenting false or misleading evidence.

14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.

14.4 Where the Tribunal determines that an order for costs may be made under Rule 14.3,

1. the Tribunal when determining the appropriate award of costs shall consider all the circumstances, including without limiting the generality of the foregoing, factors such as the seriousness of the misconduct, the amount of costs incurred by the party requesting costs, or the conduct of the party requesting costs; and

2. the amount of costs shall not exceed,

1. where the Tribunal has not commenced a hearing, the sum of $400.00; or

2. where the Tribunal has commenced a hearing, the sum of $800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

REASONING AND ORDER:

The legislation sets up a regulatory scheme whereby travel agents providing consumer services in the Province of Ontario are required to meet certain conditions of operation which include reporting to the regulatory authority on their financial situation on a timely basis, as well as making contributions to the fund set up under the legislation to compensate consumers damaged due to Registrant failure. These requirements and their timelines are clearly set out in the Act. A pre-condition of doing business by any registrant must be understanding the requirements imposed and practicing due diligence in their observance.

The evidence in this case illustrates thorough failure by The Travel Terminal Inc. to meet this obligation. In her testimony Ms Iannizzi, President and Sole Officer of the business, demonstrated no remorse in her inability to meet the numerous efforts of the Registrar to assist her in complying with the basic requirements of her licence. She expressed no regret nor offered any explanation for her lack of effort to contact the regulatory authority and advise of her efforts, if there were any, to comply throughout the long months from March, 2006 when the financial statements were first due, through to October, 2006, when the Tribunal held the Pre-hearing. Frankly, her reasoning for having failed to meet the Tribunal's Order of submitting proper papers by November 13, 2006 also indicates an arrogance, which does not bode well for a confident belief in her future ability to be governed by any regulatory authority. Had she taken the Tribunal's Order to heart, she would have ensured a properly qualified accountant was retained well within the time frame needed to have the papers submitted in accordance with the deadline set out in the Order. The Tribunal is concerned with the lack of any regret expressed by the Registrant in having behaved so irresponsibly. It is also noted that the Applicant has even more recently repeated her non-compliance of regulatory obligations in having only made required payments to the Compensation Fund two months past the due date and after two reminder letters from the regulatory authority to do so. Due diligence is a minimal expectation of any licencee's operation.

Nonetheless, the Registrant is a new business and hence new to the regulatory framework imposed by the legislation. Further, she has not been the recipient of any consumer complaint nor TICO claim against the compensation fund. The President did testify she has worked hard to get the business operational and is loyal to her clients whom she hopes to continue to serve. She also testified under oath that she wants to continue working with TICO to ensure the success of her business. She has, albeit after much effort, time and expense by the public authority, come into basic compliance with the minimum requirements imposed upon her, such that at this date she is not in breach of any term or condition of her registration. She also has stated that she understands and is able and willing to abide by the terms and conditions, which the Registrar has proposed. The Registrar has suggested these terms and conditions and has expressed willingness to continue the registration of this company on that basis.

As a consequence, the Tribunal is willing to provide The Travel Terminal Inc. with further opportunity to demonstrate its ability to meet its legal obligations as a Registrant under consumer protection authority. It, therefore, concludes the Registrant may maintain its registration under the Act, subject to the express terms and conditions proposed by the Registrar. These are:

1. The Registrant will deliver to the Registrar the following interim financial statements:

    (a) an interim financial statement for the period commencing January 1, 2006 and ending September 30, 2006 to be provided on or before December 31, 2006;

    (b) an interim financial statement for the 3 month period commencing January 1, 2007 and ending March 31, 2007;

    (c) an interim financial statement for the 6 month period commencing January 1, 2007 and ending June 30, 2007;

    (d) an interim financial statement commencing January 1, 2007 and ending September 30, 2007.

2. Each of the interim financial statements referenced above shall include a balance sheet as well as an income statement. None require review by a licensed public accountant.

3. Each of the interim financial statements referenced above shall be submitted to the Registrar within 45 days of the period end.

4. If, after the review of the documents submitted as required pursuant to clause 1, the Registrar concludes that additional documentation is required to verify/determine the Registrant's financial position, the Registrant shall submit the additional documents required within 15 days from the date of the request.

It should be noted so as to be clear to the Registrant that these terms and conditions are additional to those imposed under the Act and Regulations. Consequently, the Registrant is still required to meet the reporting requirements imposed upon it by the legislation including sections 22 and 53. A breach of any of the conditions, either those imposed by this Tribunal or those imposed under the legislation, will be sufficient to trigger section 8(1)(f) of the Act.

The Tribunal has considered the Registrar's request for costs against the Registrant. It has no hesitation in agreeing that, in these circumstances, such costs are reasonably placed upon the Registrant, who, at no time, sought to reduce the expenses incurred by the taxpayers of this province to remind, cajole, and finally threaten it into meeting its statutory obligations. The explanation offered by Ms

Iannizzi that she believed the matter was resolved when her accountant called TICO on the November 14, 2006 is not acceptable, given her negligence in not personally communicating as well as the fact that the Tribunal's Order setting out a deadline for her compliance had already passed. As a consequence of her actions, determined by this Tribunal to be both frivolous and vexatious, this Hearing was necessitated. It clearly required witnesses, counsel and disclosure – all of which were prepared and forthcoming by the Registrar and hence the Ontario public. Costs are awarded against her in the amount requested of $400.00. Such sum is to be paid to the Travel Industry Counsel of Ontario within ten days of this Order.

LICENCE APPEAL TRIBUNAL

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Jane Weary, Vice-Chair

RELEASED: December 4, 2006

FILE NAME: 3709.tia. the travel terminal inc.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, CHAPTER 30, SCHEDULE D

TO REVOKE REGISTRATION AND FOR IMMEDIATE SUSPENSION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: No one appearing for the Applicant

SOUSSANNA S. KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATES OF HEARING: September 21 and October 26, 2006 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is the third time this matter has come before the Tribunal. The hearing was commenced on September 21, 2006 when Counsel for the Registrar asked for an order extending the Registrar's Order for Immediate Suspension until the conclusion of the hearing. This order was granted and the hearing was adjourned to October 5, 2006. On October 5, 2006, Counsel appeared on behalf of the Applicant and requested an adjournment until October 26, 2006. By letter dated October 20, 2006, Counsel for the Applicant informed the Tribunal that the Applicant had filed for bankruptcy on October 11, 2006 and that no one would appear at the hearing. The Tribunal commenced the hearing at 9:40 a.m. October 26, 2006 and stood the matter down for one half hour to ensure that there would be no attendance on behalf of the Applicant. No one appearing on the Applicant's behalf at 10:10 a.m. the Tribunal proceeded to hear evidence on behalf of the Registrar.

This matter is an appeal from two actions taken by the Registrar. The first, a Notice of Proposal to Revoke Registration, is dated the 12th day of July, 2006 and cites, *inter alia*, the continued failure of the Applicant to comply with the financial disclosure provisions of the *Travel Industry Act, 2002* (hereinafter the "Act") and the failure of the Applicant to ensure that its branch offices are properly managed. The second proposal invokes an emergency power of the Registrar set out in Section 12 of the Act to immediately suspend the Applicant's registration and is dated August 21, 2006. It also sets out further particulars of wrongdoing on behalf of the Applicant.

The Tribunal had before it exhibits that had been entered at the commencement of the hearing on September 21, 2006 as follows:

Exhibit #1 Notice of Proposal to Revoke Registration dated July 12, 2006;

Exhibit #2 Notice of Appeal dated July 27, 2006 and received by the Tribunal on August 1, 2006;

Exhibit #3 Order of Immediate Suspension and Notice of Further and Other Particulars dated August 21, 2006 together with two covering letters dated August 22, 2006;

Exhibit #4 Notice of Appeal dated September 6, 2006 and received by the Tribunal on September 6, 2006;

Exhibit #5 Fax from Applicant dated September 20, 2006 advising of its inability to have anyone attend the hearing of September 21, 2006;

Exhibit #6 Exchange of emails between Michael Pepper and Sanjay Soowamber dated August 22, 2006;

Exhibit #7 Exchange of emails between the Applicant and Sanjay Soowamber dated August 23, 2006;

Exhibit #8 Several emails to Soussanna Karas regarding consumer complaints;

Exhibit #9 Email from Tina Shewchuk to Soussanna Karas dated September 7, 2006 re: Consumer #2 complaint.

In addition the Registrar tendered further exhibits, which were numbered sequentially from the previous list:

Exhibit #10 Registrar's Brief of Documents;

Exhibit #11 Database printout respecting the Applicant's registration #4228458;

Exhibit #12 Financial statements of the Applicant and database summary of dealings;

Exhibit #13 Inspection Report of Timothy James dated September 25, 2006;

Exhibit #14 Notice of Bankruptcy of the Applicant;

Exhibit #15 Email regarding current claims;

Exhibit #16 Information and Summons charging the Applicant and its principal with accepting payment and new business after suspension.

THE EVIDENCE:

Evidence of Michael Pepper

Michael Pepper is the President and Chief Executive Officer of the Travel Industry Counsel of Ontario (TICO). He is also the Registrar under the Act. His duties include oversight and enforcement of the Act and the regulations passed thereunder to protect the integrity of the travel industry in Ontario and to protect the travelling public. He had previously testified in this matter and a summary of his testimony is set out in the Tribunal's Decision continuing the Order for Immediate Suspension. He re-affirmed and updated that evidence in his current evidence. For ease of reference the Tribunal will set out his earlier testimony.

At the earlier hearing Mr. Pepper reviewed the recent history of the handling of this matter between the issuance of the original proposal and the issuance of the suspension order. He stated that in and around August 21 or 22, 2006 he was contacted by Mr. Sanjay Soowamber, Manager of the Bank Settlement Plan (BSP) Canada/Bermuda, for the International Air Transport Association (IATA). Mr. Soowamber indicated to Mr. Pepper that the Applicant was indebted to BSP in an amount of approximately $156,000.00.

Mr. Pepper set out for the Tribunal the manner in which travel agents account for funds received for airline tickets for travel on IATA member airlines. Travel agents are given airline ticket stock and a plate containing identification information by IATA. When they sell airline tickets on IATA member airlines the Act requires the net amount due to the BSP to be deposited in a trust account if paid by cash or cheque or otherwise accounted for if paid by credit card. Every ten days or so the travel agent prepares and submits a reconciliation of all tickets sold, monies received and credit card transactions to the BSP who then withdraw the amount owing directly from the trust account. In the case of the Applicant, BSP was unable to withdraw an amount of $246,393.77. BSP applied against that amount an amount deposited by the Applicant as security to reduce the figure to the current debt. IATA had made attempts to recoup this amount from the Applicant but was unsuccessful. It had sent its investigator to the Applicant's offices to take possession of the IATA ticket stock and identification plates and duly notified the Registrar.

The telephone discussion was followed up by an email which was entered as part of Exhibit #6. Once Mr. Pepper received the information from Mr. Soowamber he considered that this was a case for an order for immediate suspension involving, as it did, a very large sum of unaccounted trust funds.

He issued the order and had it served on the principal of the Applicant, Ms. Harjeet Davda. Ms. Davda advised Mr. Pepper that she had entered into a settlement arrangement with IATA and that he could lift the suspension. Mr. Pepper emailed Mr. Soowamber to confirm the settlement and was advised that no settlement had been negotiated. On August 23, 2006, Ms. Davda offered to pay off the debt in an amount of $2,000 per month. IATA indicated that this was not acceptable and copied Mr. Pepper on the emails which were entered as Exhibit #7.

Almost contemporaneous with the above discussions, the Registrar's office received a complaint from a client of the Applicant, Consumer #1. Consumer #1 was awaiting a refund of $6,800 for a period of two months. He finally decided to contact the Registrar for help. Mr. Pepper pointed out that the Registrar has no coercive power to deal with consumer complaints but it can and does offer to mediate. He will also review the factual background for breaches of the Act and take appropriate measures when they are present.

Finally, on September 7, 2006 another consumer complaint was received from a client of the Applicant, Consumer #2. It appears that on August 14, 2006 Consumer #2 had paid the Applicant $2,842.00 for travel to India for one adult and one child. The Applicant subsequently advised Consumer #2 that the fare he paid was not available and he would need to pay a great deal more. Consumer #2 advised that he could not afford to pay more and he was promised a refund. The Applicant issued a cheque post-dated to August 25, 2006. On August 25, 2006 the Applicant told Consumer #2 to hold the cheque for one more day. He deposited it on August 28, 2006 only to have it returned "stop payment".

Mr. Pepper drew the Tribunal's attention to his letter to the Applicant dated August 22, 2006. He stated that he was at great pains to point out to the Applicant the reasons for his decision and the Applicant's appeal rights to permit the Applicant to move expeditiously before the Tribunal for a resolution. The Applicant did not avail itself of this facility. It waited the full 15 days before filing its appeal.

Mr. Pepper also testified that his office has been informed that the Applicant is indebted to other suppliers, not just IATA. While he acknowledged this evidence was hearsay, this Tribunal can receive hearsay evidence and make a decision according to the weight to be given to it.

In his current evidence Mr. Pepper reviewed the registrations of the Applicant. There are five in all:

2324770	1170 Burnhamthorpe Road West	retail
4228433	1170 Burnhamthorpe Road West	wholesale
3318585	1170 Burnhamthorpe Road West	retail branch
4228458	1170 Burnhamthorpe Road West	wholesale branch
4299335	2683 Islington Avenue	retail branch

The Registrar made it clear that he is seeking revocation of all of the above registrations.

In the original Notice of Proposal to Revoke dated July 12, 2006 three grounds were advanced in support. The first ground was that the Applicant has failed to pay the appropriate levy into the travel industry fund. Secondly it was alleged that the Applicant was operating a branch office at 2683 Islington Avenue without an approved branch manager. Finally it was alleged that the Applicant had failed to file financial statements in a timely manner.

With respect to the first issue, Mr. Pepper informed the Tribunal that the Applicant had tendered a cheque in the amount of $164.49 to pay its levy on August 8, 2006. It was due in mid-March. The August 8, 2006 cheque was returned NSF by the Applicant's bank. A replacement cheque received on August 18, 2006 did clear the bank.

With respect to the second issue, by letter dated April 10, 2006 TICO requested information concerning a branch manager for the Islington Avenue office. This letter gave the Applicant until April 24, 2006 to provide the necessary information. No response was received to that letter. On or about September 25, 2006 inspector Timothy James attended at the Islington Avenue office to carry out an inspection on behalf of TICO. He found that the tenants of the premises were a law firm who informed him that the Applicant had not operated a retail agency at that location for approximately two years. The Applicant had not informed TICO about the closure of this office despite efforts and correspondence directed specifically at management of this location.

Mr. Pepper advised the Tribunal that the Applicant had finally filed financial statements with TICO on October 3, 2006. They were due on April 30, 2006. The financial statements disclosed that the Applicant had gross sales of $5,218,000.00, a loss of $87,448.00 and a working capital of $3,605.00. According to the regulations, the working capital requirement for a travel business doing in excess of five million dollars in business is $35,000.00 so the Applicant had a shortfall of $31,395.00. In the normal course this shortfall would stimulate a letter pointing out the deficiency and a request to bring the number into compliance. In the circumstances of this case, the Applicant's licence was already suspended with a pending hearing so such a letter was not sent out. It will be seen by later evidence from this witness that the financial statements may have been seriously inaccurate.

The Order of Immediate Suspension and Notice of Further and Other Particulars was served by TICO on August 21, 2006. It sets out further grounds for revocation of the Applicant's registrations, namely the fact that the Applicant is indebted to IATA and there are two consumer complaints. The substance of these grounds is covered in the earlier evidence of this witness set out above. Mr. Pepper informed the Tribunal that he was contacted yesterday (October 25, 2006) by IATA to inform him that no funds were forthcoming from the Applicant and the debt is still outstanding. Indeed, the Applicant's inability to operate and pay its financial obligations as they become due is now beyond doubt given that the Applicant filed for bankruptcy on October 11, 2006.

The Notice of Bankruptcy sets out debts in the region of $1,798,000.00 and assets of $5,000.00. Of note are debts in the amount $120,000.00 to Canada Revenue Agency, $140,000.00 to Gill International, $154,000.00 to IATA, $7,000.00 to Asian Television Network and $6,000.00 to Bell Canada. In Mr. Pepper's view these amounts are current liabilities which, when applied to working capital indicate a shortfall of many hundreds of thousands of dollars. Absent from the list are consumer claims. Mr. Pepper produced an email from his staff to indicate that consumer claims are now coming in from the Applicant's clients. Currently there are five claims representing 17 passengers and $23,395.00 of services paid for but not received. If proven, these claims will be a charge on the travel industry compensation fund. In Mr. Pepper's opinion these current obligations should have been reflected in the financial statements delivered on October 3, 2006 to truly reflect the working capital position.

The final area covered by Mr. Pepper was the results of the investigation by Timothy James. Mr. James discovered that the Applicant was still carrying on business on September 25, 2006 despite being served with an Order of Immediate Suspension on August 21, 2006, which suspension was continued by Order of this Tribunal on September 21, 2006. As a result of the investigation, charges have been laid in Provincial Court against the Applicant and its principal, Harjeet Davda. Mr. Pepper indicated that more charges are pending as further investigation highlights further misconduct.

The Tribunal accepts Mr. Pepper's evidence in its entirety.

ANALYSIS:

The Registration of travel retailers and wholesalers is set out in section 8 of the Act as follows:

> Registration
>
> (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
> …
>
> (d) the applicant is a corporation and,
>
> (i) is incorporated without share capital,
>
> (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
>
> (iii) having regard to the financial position of its officers or directors or of an interested person in respect of its officers or directors, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

(v) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration;

(e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;

(f) the applicant is in breach of a condition of the registration; or

(g) the applicant fails to comply with a request made by the registrar under subsection (1.1).

By virtue of section 10 of the Act, the grounds for refusal to register or renew registration are applicable to revocations.

It is the position of the Registrar that there is ample evidence to conclude that the Applicant cannot be expected to be financially responsible in the conduct of its business under sub-clause (ii) above. It is also the Registrar's position that the Applicant's past conduct affords a reasonable belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty. The Tribunal agrees with this submission. The evidence is overwhelming that the Applicant has misapplied trust funds, run up significant trade debts and ignored its financial reporting obligations. A true analysis of its financial position indicates a massive working capital deficit. It has operated while suspended and generally shown a complete disregard for timely compliance with its disclosure obligations. In declaring bankruptcy the Applicant has practically ensured that there will be a charge on the travel industry compensation fund.

The facts of this case fall squarely within the statutory test for denial of registration. In accordance with the principles set out in *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. 1017, the Tribunal finds that the Registrar was correct in concluding that the Applicant cannot be expected to be financially responsible in the conduct of its business and that its past conduct affords reasonable grounds for the belief that it will not carry on business in accordance with law or with integrity and honesty.

ORDER:

Pursuant to the authority granted to it under the Act, this Tribunal orders the Registrar to carry out the proposal dated July 12, 2006 to revoke the registrations of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude, Vice-Chair

RELEASED: November 10, 2006

FILE NAME: 3675.tia.Baldwin Travel & Tours Ltd.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

EXEC 1 TRAVEL CORP o/a GOLIGER'S TRAVELPLUS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: GARY MacLEOD, representing the Applicant

SOUSANNA KARAS, Counsel for the Registrar

DATE OF HEARING: October 17th, 2006 TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND:

By Notice of Appeal dated May 24th, 2006 the Applicant appeals the Registrar's Proposal to Revoke its registration under the *Travel Industry Act, 2002* (the "Act"), Proposal dated April 27th, 2006. The Proposal sets out the Registrar's reasons for determining the Applicant is not entitled to registration under section 8 of the Act by alleging that the Applicant is carrying on activities that are in contravention of the legislation. It highlights the requirement that a registration is subject to terms and conditions as are consented to by the registrant or applied by the Registrar, and concludes that the Applicant has breached such conditions on a number of occasions since 1999, the final and most recent being failing to comply with obligations consented to in Terms and Conditions executed by the Applicant in January of this year. By way of a Notice of Further and Other Particulars, dated May 9th, 2006, the Registrar added to the reasons for original Proposal that the Applicant's 2005 Financial Statements, filed on May 4th, demonstrate on-going breach of terms and conditions of registration required under the legislation.

EVIDENCE:

Dorian Werda is the Manager of Administration and Claims for the Travel Industry Council of Ontario ("TICO"), a not-for-profit agency responsible for administering the Act. Part of Ms Werda's responsibilities include overseeing compliance by registrants and, in this capacity she has been designated Deputy Registrar under the Act. She is familiar with the Applicant's history as a registrant. She testified to it having been registered as a travel agent under the legislation since 1990. In 1998 it was the subject of a Registrar's Proposal to Revoke registration based on non-filing of financial statements, which Proposal was revoked a year later when the statements were received. In October of that year a second Proposal was issued based on non-filing; the Applicant's registration was reinstated in November based on it having executed signed terms and conditions which included an undertaking to file the required financial information within the times prescribed.

Four years later, in 2003, the Registrar again issued the Applicant a Proposal to Revoke registration, this time based on the corporation's financial statements revealing its failure to maintain the minimum working capital required. In February 2004 this Tribunal issued a Consent Order, allowing for the Applicant's continued registration as a travel agent, predicated on it maintaining sufficient working capital and filing its financial statements within the required time frames set out in the legislation. When the Applicant failed to meet this second condition its registration was revoked, effective April 18th, 2005. Within the month, however, the Registrar agreed to reinstate the Applicant on its undertaking to correct its then working capital deficiency of some $60,684 by May 18, 2005. The Applicant failed to meet this condition and its registration was revoked.

This past January, the sole shareholder of the corporation, Mr. Gary MacLeod, provided the Registrar's office with a letter verifying an injection of part of the capital (Exhibit 4, Tab 11) upon which the Registrar agreed to reinstate the registration subject to signed Terms and Conditions. These were executed by Mr. MacLeod and contained the provision that a still-outstanding deficiency in the amount of $30,684.00 would be forthcoming by March 31, 2006. As of that date the financial statements for the year ending December 2005 would also be made available. As of the date of the current Proposal, April 27th,2006 neither obligation had been met.

Ms Werda noted that the Registrant had in fact had its registration revoked due to its failure to file an appeal of the Proposal within the specified time frames under the legislation. On the request of Mr. MacLeod, who advised he had been out of the country on holiday at the time the Proposal was received by his office and thus unable to file his appeal within the time frames allowed, that revocation had been withdrawn in order to allow the Applicant its right to this hearing.

It was Ms Werda's position that the Applicant's registration history demonstrated its repeated inability to meet basic regulatory requirements of a registrant despite having been afforded numerous opportunities to do so over a number of years. Ms Werda stressed that the Act requires registrants maintain a set amount of working capital each

year, calculated for each registrant based on its annual sales, in order to ensure consumer risk is kept at a minimum. She testified that the amount of money supposedly injected into the company by a personal loan taken by Mr. MacLeod was in fact used to offset another debt in such a manner as to have never been put through the Applicant. Consequently, the injection never offset the Applicant's position of deficit working capital. Further, as the funds were in fact used to purchase another business of Mr. MacLeod, its inclusion as an asset actually breached Regulation 26 section 23, which excludes funds owing to related parties in the calculation of working capital. This information was conveyed to Mr. MacLeod's accountant back in January 2006 by letter from TICO (Exhibit 4, Tab 12). It was in response that Mr. MacLeod supplied the Registrar with evidence of his having put in $30,000 to the Applicant by personal cheque in January of this year. The remaining $30,684.00 has not been so deposited however, despite the Applicant having agreed to do so prior to March 31st of this year. Reminder notices of this obligation were sent to the Applicant in November 2005 and again on April 6th,2006 whereupon the earlier deadline was extended to April 20th. When neither was received by April 27th, the Registrar issued the Proposal. Ms Werda testified that receipt of the corporation's financial statements for 2005, which were received finally the first week of May (almost five weeks beyond the deadline agreed to), demonstrate that the Applicant has now amassed a working capital deficit of some $84,000.00, an increase of $24,000.00 over last year.

A prehearing into the Proposal took place at the Tribunal offices on August 2nd of this year. At that time the Parties undertook to execute Terms and Conditions whereupon the hearing date was set for November, 2006 with the proviso that it could be brought forward on the request of the Registrar. This in fact was done such that this hearing took place on October 17th as a consequence of the Registrar finding that the Applicant failed to meet the terms and conditions it had signed on August 16th, 2006. To wit, conditions dealing with the filing by August 18th of various specified documents, including a Business Plan, interim financial statements and trust reconciliations; interim financial statements on a monthly basis thereafter; and, if merging with Cruises 'n Cruises, filing a 2005 income tax return for that company by August 30th, 2006. On September 25th, TICO counsel wrote to Mr. MacLeod advising that none of these documents had been filed as promised and that she had been instructed to proceed with the Proposal by September 30th if nothing further was received (Tab 2). On October 3rd, TICO advised this Tribunal to proceed with the hearing.

In cross-examination Ms Werda acknowledged that the Applicant has never been the subject of a consumer claim against the Travel Compensation Fund, nor has it been the subject of any consumer complaint to TICO.

Ms Archna Gupta is a financial analyst employed by TICO and works there as the financial inspection co-ordinator. She is a certified management accountant (CMA) and has been employed in accounting for twenty some years. Part of her job duty is to ensure registrant compliance with the financial requirements of the legislation, including working capital and trust amounts. She is familiar with the Applicant's history under the Act.

Ms Gupta submitted copies of the Registrant's financial statements for the years ending 2001-2005, all of which had been reviewed by TICO financial inspectors, all of whom are designated CAs or CMAs. Commencing with the year ending 2001, sales for the corporation exceeded $1.5 million but were less than $5 million, requiring a working capital at the time of $25,000.00. In 2001 the company showed a working capital amount of $69,172.00 such that it had more than the amount required. The following year, however, the amount was $15,903, requiring $9,097.00 capital injection. The Financial Statement for 2003 demonstrated a working capital of $8,561.00, offset to some extent by a February 2004 receivable of $11,200.00, resulting in a required injection of $5,239.00. By 2004, the Applicant corporation's statements reflected a working capital deficit position of $35,684.00, such that an injection of $60,684.00 was needed. In 2005, the deficiency was up to $84,688.00 resulting in a current required injection of capital equal to $109,000.00 to bring it into compliance.

Due to the travel industry practice of prepayment by consumers Ms Gupta stressed the importance of registrants maintaining sufficient working capital to ensure adequate funds are available to meet overheads and suppliers. Without such, consumers are placed in a precarious position and, consequently, claims against the compensation fund managed by TICO are made more likely. She testified that it was for this reason that registrants are required to file annual financial statements. Annual filings ensure that potential liability is caught early by TICO accountants. In the case of the Applicant, these statements reveal an increasing capital deficiency over the last two years. A closer review of its Balance Sheet demonstrates that sales remain steady, but that expenses have increased drastically. Liabilities for 2003 were recorded as $39,151.00; by 2004 they had increased by 300% to $125,807.00; and, by 2005 to the current $238,138.00. The result is a shortfall of almost $85,00.00, which will translate into someone not being paid what is due (Exhibit 4, Tabs 15, 16 and 17).

Ms Gupta testified that a registrant's Financial Statements are required to be audited, but in the case of the Applicant this had not been the case such that it wasn't entirely clear what exactly made up the accounts receivable recorded for the company. Further, the requirement to include a trust fund reconciliation with year-end statements had not been met for any of the years noted. She noted that company assets included a loan of over $17,000.00, which were funds advanced to a related party owned by the same shareholder, Mr. MacLeod, and, as such, not properly included. Finally there was some confusion with regard to the purchase of a $57,000.00 automobile, which although leased to the Applicant, had been subject to a depreciation claim in the Applicant's records.

Mr. MacLeod chose to represent himself. He appeared late for the hearing and failed to bring with him any of the documentation upon which the Registrar relied and which had been disclosed to him within the time period laid out in the Tribunal's Rules of Practice. Throughout his testimony he characterized his actions as diligent and his efforts to abide by the regulatory scheme of the Act as significant. At no time did he acknowledge TICO attempts to assist him and his company by providing the Applicant with numerous

occasions to come into compliance. These efforts and opportunities, including two Consent Orders issued by this Tribunal (February, 2004 and August, 2006), all come with some significant cost to the taxpayers of this Province and yet failed to instil any remorse from the Applicant who, rather, demonstrated anger and hostility to the Registrar's counsel, witnesses and the Tribunal process.

It was the Applicant's position that the problem is not as serious as had been expressed by the Registrar, but was rather limited to paperwork with which Mr. MacLeod acknowledged he had problems. He excused his inability to abide by the Act's requirements for filing as due to his no longer employing a bookkeeper such that he was not able to get the information into TICO in a timely fashion. He testified that he had recently purchased another business, Cruises 'n Cruises, which he had rolled into the Applicant in August of this year as part of his effort to assist in smoother paperwork. It was this purchase, in August of 2005, which had involved his taking a personal mortgage for $105,000.00, which he had intended would first go through the Applicant's books and thereby satisfy TICO's insistence on additional working capital. He was clearly frustrated by the fact that this did not occur, the lawyer handling the purchase having used the funds to pay for the purchase directly from his trust account. Mr. MacLeod did not appear either to understand or to acknowledge the information provided to him by TICO; that such funds were barred from being utilized to meet working capital requirements by virtue of section 23 of Regulation 26.

Despite not having any of the documents provided, Mr. MacLeod did submit his own alleged figures upon which he chose to rely. These were not supplied to the Registrar within the disclosure period required by LAT Rules, but were allowed for purpose of his testimony at the hearing. He noted, and these figures appear to support him, that his figures for the Applicant are not those of the Registrar's taken from Financial Statements filed by the Applicant from 2004 and 2005. However, he did admit that the Forms supplied annually to TICO are initially prepared by him and he reviews all such information before his accountant files the final amounts with TICO. In cross examination he admitted these numbers provided to TICO were his responsibility and allowed that only the 2005 sales figure seemed to be grossly different to his own such figure; the filed Financial Statement showing sales close to earlier years of just under $4,000.000; whereas his figures demonstrated sales of $5,448,000.00

Mr. MacLeod stated he had attempted to meet his working capital deficiency by injecting $30,000 of his own funds into the business this year; he noted he did have some potential investors who also might be interested in assisting his cash flow; he stated that the merger had resulted in increased staff, although none was a bookkeeper; and that he foresaw decreased costs and greater sales for the future. All of this, he argued, demonstrated his ongoing sincere and honest efforts to improve his company.

In cross examination he admitted having read and understood and acknowledged and signed the Terms and Conditions of August, 2006 but did not recollect any requirement that he advise TICO if and when the Applicant decided to amalgamate/merge with Cruises 'n Cruises, nor the undertaking to provide the Regulator with specified books

and documentation in the event, despite this being the second condition contained in the document (Tab 3). Further, Mr. MacLeod acknowledged that, despite having let one employee "go" so as to reduce expenses, he had hired some six new employees by merging with Cruises 'n Cruises, which would have the effect of increasing salaries and related expenses for the second half of this fiscal year.

Mr. MacLeod admitted he found it hard to get all the information into TICO as was required under the Act and the Terms and Conditions he had signed. He hoped this would not be a problem in the future. When asked by the Tribunal, how he foresaw his doing so, he replied that he would endeavour to be more fastidious in the future; and hoped his accountant might be prevailed upon to assist him. He acknowledged he had never sat down with TICO in an attempt to explain and rectify his ongoing difficulties in meeting requirements although on one occasion there had been some talk of doing so.

Mr. MacLeod concluded that once the working capital deficiency was made to reflect the fact that his purchase of a $57,000.00 vehicle was actually only a lease, his current working capital would be amended to a smaller actual deficiency. In reply, Ms Gupta contested this conclusion noting that the vehicle capital amount had never been included in the balance sheet figures provided such that, taking into account the $30,000.00 injection provided by Mr. MacLeod earlier this year, the Applicant still needs an infusion of some $70,000.00.

THE LAW:

The *Travel Industry Act, 2002* provides as follows:

> 8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
>
> ...
>
> (d) the applicant is a corporation and,
>
> ...
>
> (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
>
> ...
>
> (iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

(e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;

(f) the applicant is in breach of a condition of the registration; or

…

10. (1) Subject to section 11, the registrar may refuse to register an applicant or may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8.

(2) Subject to section 11, the registrar may,

(a) approve the registration or renewal of a registration on such conditions as he or she considers appropriate; and

(b) at any time apply to a registration such conditions as he or she considers appropriate.

Dealing with the working capital and financial statements submitted to TICO by the Applicant for the years ending 2000 – 2004, the relevant portions of Regulation 806/93 under the *Travel Industry Act* stated:

25. (1) A registrant shall maintain a minimum working capital of $5,000 if the registrant had sales in Ontario of less than $1.5 million during the previous fiscal year.

(2) A registrant who had sales in Ontario of $1.5 million or more but less than $10 million during the previous fiscal year shall maintain a minimum working capital of $25,000.

(3) A registrant who had sales in Ontario of $10 million or more but less than $20 million during the previous fiscal year shall maintain a minimum working capital of $50,000.

(4) A registrant who had sales in Ontario of $20 million or more during the previous year shall maintain a minimum working capital of $100,000.

(5) The working capital of a registrant shall be calculated in accordance with generally accepted accounting principles and shall not include the value of any security provided under subsection 26 (1) or the account of any person with whom the registrant has a non-arm's length relationship.

The *Travel Industry Act, 2002* was proclaimed into force on July 1, 2005. In Section 23 of Ontario Regulation 26/05 under that Act, the minimum working capital requirement was maintained at $25,000 if the registrant had sales in Ontario of between $1.5 million and $10 million during the previous fiscal year.

As of January 1, 2006 section 23 was replaced by section 24 of Ontario Regulation 26/05; however the minimum working capital requirement still remains at $25,000.00, for registrant sales between $2 and $5 million.

DECISION:

The onus is on the Registrar to establish that the Applicant is not entitled to registration. The correct test to be applied by this Tribunal to the facts established at the hearing remains that enunciated in *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No 1017 where Southey J. stated at paragraph 12:

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

In 2003 the Divisional Court in *Shine Car Sales and Omar Hassan Rahim* upheld the Brenner decision, adding that the Tribunal owes no deference to the Registrar in reaching its conclusion as to the applicant's suitability for registration.

Looking to the present case this Tribunal has no difficulty agreeing with the Registrar that the Applicant has demonstrated repetitive past conduct of non-compliance with the requirements set out in the Act and regulations for registration as a travel agent. This conduct has continued on a disturbing number of occasions despite the regulator's repeated efforts to provide the Applicant with opportunities to come into compliance. Not only has this been at some cost in time and effort to the regulator, it has also utilized the Tribunal, which has twice prepared Orders that the Applicant has also breached. Nonetheless, the Applicant urges this Tribunal to dismiss such past indicators of conduct on the assurance it has made significant efforts to meet the requirements and will hope to do better in the future. This hope was not supported in the evidence by any concrete proposals of the Applicant as to how such future compliance might be attained.

While it may be that applicants from time to time may be late in filing documentation required, this Applicant has demonstrated it has not simply been late on each occasion, but that on at least four it has required the issuance of a Proposal to Revoke before the documentation was in fact filed as required. The evidence is persuasive that this requirement is more than simply a formality but underpins the very consumer protection mandate of the regulator upon which the legislative scheme is predicated. By not meeting this obligation the Applicant has demonstrated a propensity to carry on its business outside the legal framework required of it. Further, by not acknowledging the unacceptability of such action but rather seeking to rationalize it and, as well, offer no clear process by which in the future it will be turned around, the Applicant demonstrates reasonable grounds for this Tribunal to conclude its business will not in the future be carried on within the requirements of the legislation.

The evidence also firmly establishes that the Applicant has breached terms and conditions of its registration. Not just by virtue of the Regulation itself which clearly spells out the requirements of maintaining working capital set figures as well as firm timelines when statements must be filed, but – in this case – by Tribunal Consent Orders stipulating additional signed terms and conditions setting out clear time frames.

Based on the totality of all of the evidence the Tribunal has no hesitation in directing the Registrar to carry out his Proposal and revoke the Applicant's registration under the Act.

LICENCE APPEAL TRIBUNAL

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Jane Weary,
Vice Chair

RELEASED: November 9, 2006

FILE NAME: 3597.tia.Exec_1.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

ANNOR DARKO ROBERTSON o/a JOY TRAVEL & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, *2002*, S.O. 2002, CHAPTER 30, SCHEDULE D

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: ANNOR DARKO ROBERTSON, appearing for the Applicant, Annor Darko Robertson o/a Joy Travel & Tours

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Respondent" or the "Registrar")

DATE OF PRE-HEARING: October 20, 2006 Toronto

ORDER

Following attendances in person on October 20, 2006, at a pre-hearing before the Tribunal of Annor Darko Robertson, who appeared for Annor Darko Robertson o/a Joy Travel & Tours (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, December 14, 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. Counsel for the Registrar advised that the Parties had agreed on specific actions which the Applicant had committed to take and subject to the Applicant fulfilling its commitment to complete its undertaking, the Registrar will consent to the

withdrawal of the proposal dated August 11, 2006 and the matter will then not proceed to the hearing on December 14, 2006.

3. Specifically, the Applicant to...

   a. deliver corrected and amended invoices to TICO offices by or before November 17, 2006;

   b. deliver trust account statements for July, August and, September 2006 to TICO offices by or before November 17, 2006.

4. In the event a settlement is arrived at between the Parties, they must each advise the Tribunal in writing that the matter has been settled and that a hearing will not be required.

5. Should the Applicant fail to fully and in a timely manner submit the required documents, the hearing will proceed on December 14, 2006 and the Applicant shall fully comply with the applicable requirements of Disclosure as set out in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: October 24, 2006

FILE NAME: 3754.tia.joy travel.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

WATAN TRAVELS INC. o/a WATAN TRAVELS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, CHAPTER 30, SCHEDULE D

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Member

APPEARANCES: AFZAL MALLICK, Agent, representing the Applicant, Watan Travels Inc. o/a Watan Travels Inc.

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Respondent" or the "Registrar")

DATE OF PRE-HEARING: October 10, 2006 Toronto

ORDER

Following attendances in person on October 10, 2006, at a pre-hearing before the Tribunal of Afzal Mallick, Agent, who appeared as representative for Watan Travels Inc., o/a Watan Travels Inc. (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Friday, December 8, 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's Agent advised that the required financial statements had been filed with the Registrar.

3. Counsel for the Registrar confirmed this and advised that while there had also been a working capital deficiency this has been remedied. However, the Registrar was awaiting confirming evidence to show the source of the funds used to remedy the working capital deficiency.

4. The Applicant undertook to file with the Registrar the requested copies of banking documents.

5. Subject to the Applicant complying fully and in a timely fashion, the Registrar will consent to the withdrawal of the proposal dated July 5, 2006 and the matter will then not proceed to the hearing on December 8, 2006. The Applicant confirmed that future year-end filings would be submitted within the prescribed period and in conformance with the requirements of the Act.

6. In the event a settlement is arrived at between the Parties, they must each advise the Tribunal in writing that the matter has been settled and that a hearing will not be required.

7. Should the Applicant fail to fully and in a timely manner submit the required documents, the hearing will proceed on December 8, 2006 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.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: October 23, 2006

FILE NAME: 3739.tia.Watan.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

THE TRAVEL TERMINAL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002.*

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: LORIANNE IANNIZZI, Agent, representing her company as Applicant.

MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Respondent" or the "Registrar")

DATE OF PRE-HEARING: October 19, 2006 Toronto

ORDER

Following attendances at the pre-hearing conference, on October 19, 2006, before the Licence Appeal Tribunal (the "Tribunal") of Lorianne Iannizzi, who appeared on behalf of her company, The Travel Terminal Inc. (the "Applicant") and Maria Abate, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

The Tribunal Orders that:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Parties agreed that the financial information presented at the pre-hearing was substantially as required but not on the proper format.
3. By November 13, 2006 the Applicant will submit to the Registrar the required financial information on the proper format.

4. Counsel for the Registrar noted that subject to the Registrar's final review, the Registrar may consent to the withdrawal of the Proposal dated July 5, 2006 and the matter will then not proceed to the hearing on November 22, 2006.

5. The Parties were reminded that in the event of a settlement the Tribunal must be advised in writing of the withdrawal of the proposal dated July 5, 2006. In the event the Proposal is not withdrawn, the hearing will proceed on November 22, 2006 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.

6. Should this matter proceed to a hearing scheduled for November 22, 2006 at the Tribunal Chambers, 1 St. Clair Avenue West, Toronto, Ontario commencing at 9:30 a.m., the Applicant does not intend to call any witnesses and the Respondent intends to call one witness.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: October 24, 2006

FILE NAME: 3709.tia.travel.terminal.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

1615494 ONTARIO INC. o/a JES'HUE TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, *2002* S.O. 2002, CHAPTER 30, AS AMENDED

TO REVOKE REGISTRATION AND FOR IMMEDIATE SUSPENSION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MARIA ABATE, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

CAROLINE L. SINGH-FORBES, Agent, appearing on behalf of the Applicant

DATE OF HEARING: October 25, 2006 Toronto

REASONS FOR DECISION AND ORDER
TO ADJOURN THE HEARING AND CONTINUE THE SUSPENSION ORDER

This matter came on for a hearing today but at the outset the Applicant moved for an adjournment for the purposes of retaining and instructing counsel. Counsel for the Registrar strongly resisted the adjournment request and moved, in the event that the Tribunal was disposed to grant an adjournment, for a continuation of the suspension order until the conclusion of the appeal. The Applicant did not oppose the continuation of the suspension order.

Counsel for the Registrar based her objections to the adjournment of the hearing on a history of indulgences granted to the Applicant. The original Notice of Proposal to Revoke the Applicant's registration was served on May 30, 2006. The Applicant's Notice of Appeal was received at the Tribunal on June 20, 2006, outside the 15-day appeal period prescribed by the Act and did not include the required filing fee and copy of the proposal being appealed. The Tribunal wrote the Applicant's Agent requesting that the required documentation and filing fee be sent by June 26, 2006. Not having heard from the Applicant by that date the Tribunal issued a Notice of Intent to Dismiss Proceedings. This resulted in the Applicant taking steps to file the required documentation and filing fee, albeit late. The Registrar under the *Travel Industry Act,*

2002 (the "Act") consented to the late filing and the appeal process was put in motion. The matter proceeded to a pre-hearing where the date for the hearing was confirmed for October 31, 2006. During this period the Applicant was represented by an agent. On October 4, 2006 the Registrar served a Notice of Further Particulars and an Order for Immediate Suspension on the Applicant. The immediate suspension was predicated on the fact that further investigation of the Applicant had raised allegations of financial impropriety and shortfalls in the Applicant's statutorily mandated trust account. It appears that faced with the seriousness of these allegations the Applicant decided to retain counsel. In any event the Applicant waited until the last day to file an appeal of the order of immediate suspension, that is, to October 19, 2006.

The Tribunal considers that orders of immediate suspension require an expedited hearing and accordingly moved the originally set hearing date of October 31, 2006 to today, some six days earlier than originally scheduled. Expedited hearing in this type of case is necessary because of the impact of an order for immediate suspension on an applicant's business and because of extremely tight deadlines set out in the statute. In face of the expedited hearing counsel for the Registrar worked over the weekend to prepare and serve a Book of Documents on counsel for the Applicant. On Monday, October 23 counsel for the Applicant wrote to counsel for the Registrar stating he had not been retained and returning the documents. The Applicant's counsel appears to have neglected to inform the Applicant of the revised hearing date. The Applicant found out about the revised hearing date when the Tribunal called its principal yesterday to confirm her attendance. The principal of the Applicant stated that when she had consulted counsel he had informed her that there was no way he could read and digest the large volume of documents in this case in time for today's hearing. She stated that he had told her to go and seek an adjournment. He had given her no dates concerning his availability. These statements are somewhat at odds with the letter sent by counsel on October 23 wherein he denies being retained. In any event she seeks the opportunity to retain counsel to represent the Applicant at the hearing.

In granting the Applicant's request for an adjournment the Tribunal has balanced a number of factors. Firstly, there is the fact that the Applicant does not deny the behaviour that led to the issuance of the Notice in May. The Notice of Appeal states that the Applicant will be in compliance with its financial disclosure obligations by the commencement of the hearing. The Applicant stated today that, despite the lapse of approximately four and a half months, it still has not provided the Registrar with the required financial disclosure. Secondly, in the Notice of Appeal, with respect to the further particulars in support of the immediate suspension, again the Applicant does not deny the allegations. The Appeal is based on compliance with financial disclosure requirements by the start of the hearing and the payment of all impugned debts by the start of the hearing. Indeed, when dates in December and January were being discussed, the Applicant's principal seemed to feel that the adjournment acted to relieve her of her disclosure obligations until the hearing date. Clearly the Registrar has a strong *prima facie* case. Thirdly, there is the fact that the Applicant was taken somewhat unawares by the accelerated hearing date. This acceleration may serve for the purposes of an adjournment of today's date but, given the fact that the Applicant has

been aware that the hearing has been scheduled for October 31, 2006 for many weeks, it does not serve as a justification for an extension beyond that date. Fourthly indulgences have been granted to the Applicant in the past to permit time extensions to file the original appeal. Finally, there is a basic common law right to counsel of choice. As this Tribunal stated in the recent decision, Baldwin Travel v. Registrar, *Travel Industry Act, 2002* released October 6, 2006:

> There is a long legal tradition that where a party seeks to be represented by counsel they have the right to be so represented. The right maintains the fundamental underpinning of the legal system that a party has the opportunity to make full answer and defence. It is not a right that can be forfeited easily; however, there is no doubt that the right may be lost where there is unreasonable delay such that, in pith and substance, the party is using the right to counsel as a means of continually delaying a hearing on the merits.

On the record in this case it cannot be said that the Applicant has unreasonably delayed the process. It must be remembered that it suddenly faced extensive new allegations of financial impropriety only three weeks ago on October 4, 2006. It has not sought any previous adjournments and agreed in argument that the matter should proceed on October 31 as originally scheduled.

The Applicant's request for an adjournment does trigger the provisions of section 12 (4) of the *Travel Industry Act, 2002*. The immediate suspension provisions of the Act state:

> **12.** (1) If the registrar proposes to suspend or revoke a registration under section 11 and if the registrar considers it in the public interest to do so, the registrar may by order temporarily suspend the registration.
>
> **Immediate effect**
>
> (2) An order under subsection (1) takes effect immediately.
>
> **Expiry of order**
>
> (3) If a hearing is requested under section 11,
>
> (a) the order expires 15 days after the written request for a hearing is received by the Tribunal; or
>
> (b) the Tribunal may extend the time of expiration until the hearing is concluded, if a hearing is commenced within the 15-day period referred to in clause (a).
>
> **Same**
>
> (4) Despite subsection (3), if it is satisfied that the conduct of the registrant has delayed the commencement of the hearing, the Tribunal may extend the time of the expiration for the order,
>
> (a) until the hearing commences; and
>
> (b) once the hearing commences, until the hearing is concluded.

While the Applicant's conduct may not be unreasonable it has delayed the commencement of the hearing due to start today. The Tribunal does not consider that section 12(4) imports a punitive element or a requirement that the behaviour causing the delay is necessarily wrongful. Rather it addresses the reality of any form of litigious proceeding that adjournments are often requested and granted. In a matter where an adjournment is granted at the request of an applicant, in the absence of section 12(4)

such an adjournment would operate to re-instate the registration of an applicant because the hearing did not commence within the 15-day statutory period. In contrast, the registration of a well-prepared applicant who was ready to proceed might remain suspended pending the conclusion of the proceedings. It is to address this situation that the Legislature enacted section 12(4). Accordingly, while the Tribunal does not find the adjournment request unreasonable, in the light of the general admissions in the Notices of Appeal and the strong *prima facie* case against the Applicant setting out behaviour that may result in real financial harm to consumers and a claim on the statutory compensation fund, the Tribunal orders that the suspension remain in place until the commencement of the hearing on October 31.

ORDER

Pursuant to the authority granted to it under the Act and the *Licence Appeal Tribunal Act, 1999* this Tribunal orders:

1. The hearing of this matter shall continue at 9:30 a.m. on October 31, 2006 at the Tribunal's Chambers and 12th Floor, 1 St. Clair Ave West, Toronto, pre-emptory on the Applicant;
2. The suspension of the Applicant's registration is continued pursuant to the provisions of section 12 (4) until the commencement of the hearing on October 31, 2006.
3. At the hearing on October 31, 2006 the Registrar remains at liberty to seek an extension of the immediate suspension order until the hearing is concluded.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude, Vice-Chair

RELEASED: October 26, 2006

File Name: 3644.TIA.Jes'Hue Travel.motion

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

TRAVEL INDUSTRY ACT, 2002
Revised Statutes of Ontario, 2002 Chapter T.19

MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL

IN THE MATTER of the REGISTRATION of
MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 6 of the *Travel Industry Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: May 23, 2006

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

MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL
Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*
Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by MRV Enterprises Inc. o/a Uniglobe Intrigue Travel, the Applicant, and the Registrar under the *Travel Industry Act, 2002,* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: October 24, 2006

FILE NAME: 3627.tia. MRV enterprises.consent.doc

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

MRV ENTERPRISES
O/A UNIGLOBE INTRIGUE TRAVEL

Applicant

AND

REGISTRAR, *Travel Industry Act*, 2002

Respondent

MINUTES OF SETTLEMENT

WHEREAS ***MRV Enterprises o/a Uniglobe Intrigue Travel*** (hereinafter referred to as the "registrant") is registered as a travel agent (Registration No. 4574737), under the *Travel Industry Act*, 2002 and Regulation 26/05 (hereinafter referred to as the "Act" and the "Regulation");

AND WHEREAS the Registrar issued a Proposal to Revoke the Registration of the registrant on May 23, 2006, for the reason that the registrant has been carrying on activities that are in contravention of the Act and Regulation;

AND WHEREAS the registrant appealed to the Licence Appeal Tribunal on June 3, 2006;

AND WHEREAS the parties agreed to settle all of the issues outstanding in the appeal and the Proposal to Revoke Registration is hereby withdrawn,
on the following terms and conditions:

1. The parties consent to an Order of the Licence Appeal Tribunal incorporating the terms of these Minutes of Settlement and disposing of these proceedings without a hearing.

2. The registrant undertakes to deliver to the Registrar monthly trust reconciliations (a reconciliation showing total receipts from customers for travel services sold compared with cash on hand plus payments for the related travel services to be provided) starting on October 31, 2006 up to and including July 31, 2007. The trust reconciliations shall be submitted within 30 days from the end of each month.

3. The registrant undertakes to deliver to the Registrar monthly Interim Financial Statements, including a balance sheet, a statement of profit and loss and appropriate notes, starting on October 31, 2006 up to and including July 31, 2007. The Management Reports shall be submitted within 30 days from the end of each month.

4. If after the review of the documents submitted by the Registrant pursuant to clause 2 and 3 of these Minutes of Settlement, the Registrar concludes that he requires additional documents to verify/determine the financial position of the registrant, the registrant shall submit the required documents within 15 days from the date of the request.

5. The registrant shall, at all times, maintain the minimum working capital as required by the Regulation. In the event that working capital is determined to be deficient, the registrant shall correct its working capital position and submit proof thereof within 30 days of the request by the Registrar.

6. The registrant shall ensure that shareholder loans and/or advances to its business will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Regulation.

7. In the event that the registrant discontinues operations, any and all claims against the *Ontario Travel Industry Compensation Fund* are to be fully satisfied before shareholder loans then in existence are repaid.

8. The registrant shall ensure that all business records, as listed in Section 29 of the Regulation, are kept at the registrant's principal place of business, unless the Registrar consents otherwise.

MRV Enterprises o/a Uniglobe Intrigue Travel and the undersigned, acknowledge that we have read, understand and will comply with the terms of these Minutes of Settlement.

MRV Enterprises o/a Uniglobe Intrigue Travel further acknowledges that it has obtained or has had full opportunity to obtain independent legal advice with respect to the terms and conditions of these Minutes of Settlement and their legal effect and impact.

SIGNED THIS_____DAY OF OCTOBER, 2006

Ms. Rose Scurti, President	Mr. Michael Pepper
MRV Enterprises o/a Uniglobe Intrigue Travel	**Registrar, *Travel Industry Act, 2002***
I have the authority to bind the corporation	

Witness

Witness

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, S.O. 2002, CHAPTER 30, SCHEDULE D

TO REVOKE REGISTRATION AND FOR IMMEDIATE SUSPENSION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: USMAN BHATTI, Counsel, appearing on behalf of the Applicant

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: October 5, 2006 Toronto

ORDER

Pursuant to an order of the Tribunal released September 22, 2006, the hearing of this matter was adjourned to continue on October 5, 2006. By letter dated October 4, 2006, Counsel for the Applicant advised that he had just been retained and would be seeking an adjournment in order to review the Applicant's files and advise it on its future course of action. Indeed, Mr. Bhatti advised the Tribunal at the hearing that he had not had an opportunity to see any of the Applicant's documents and was not in a position to address any of the issues in the case. Mr. Bhatti requested an adjournment but took no issue with continuing the suspension order until the conclusion of the adjourned hearing.

On behalf of the Registrar Ms. Karas pointed out that the Applicant had a history of leaving things to the last minute. The evidence on the motion for a continuation of the suspension order in this case indicated that the Registrar was at great pains to ensure that the Applicant was in full possession of the Registrar's reasons and in a position to immediately appeal to the Tribunal.

It did not do so until the last day allowed for the appeal. On the present facts it has left the matter of retaining counsel until the day before the continuation of the hearing.

Ms. Karas pointed out that she had her witnesses present and was ready to proceed. An adjournment would be most inconvenient to the witnesses who would have to re-attend. Ms. Karas did concede that with the suspension order in place until the conclusion of the hearing, the public interest would appear to be protected.

Ms. Karas also advised the Tribunal that the Applicant had delivered financial statements on October 3, 2006. She stated that the initial review of the financial statements indicated there were further breaches of the legislation. An onsite visit by Travel Industry Council of Ontario inspectors to the Applicant's premises in and around September 26, 2006 had uncovered evidence that the Applicant may still be conducting business despite the immediate suspension of its registration. A search warrant was executed on the premises on October 4, 2006 and the documents seized will be reviewed for potential action under the *Provincial Offences Act*. In the circumstances, the financial statements disclosure and the fact that the Applicant may be charged would appear to be relevant to the issues currently before the Tribunal such that the Registrar may need the opportunity to serve further particulars. Further particulars may require further documentary disclosure.

There is a long legal tradition that where a party seeks to be represented by counsel they have the right to be so represented. The right maintains the fundamental underpinning of the legal system that a party has the opportunity to make full answer and defence. It is not a right that can be forfeited easily, however, there is no doubt that the right may be lost where there is unreasonable delay such that, in pith and substance, the party is using the right to counsel as a means of continually delaying a hearing on the merits. On the submissions before the Tribunal today it cannot be concluded that the Applicant has forfeited its right to counsel. It was first advised that the hearing was set for October 5, 2006 when it received the Tribunal's Order continuing the suspension in and around September 22, 2006, or approximately two weeks ago. It is entitled to consider its position and then retain counsel. The Tribunal is of the opinion that two weeks is not an inordinate amount of time to do so. Accordingly, the matter is adjourned to October 26, 2006, pre-emptory on both Parties.

Pursuant to the authority granted to it under the Act and the *Licence Appeal Tribunal Act, 1999* this Tribunal orders:

1. The hearing of this matter shall continue at 9:30 a.m. on Thursday, October 26, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, pre-emptory on both Parties;

2. The Parties shall serve on each other and the Tribunal by close of business on October 16, 2006 copies of all documents upon which it intends to rely at the continued hearing;

3. The Registrar has leave to file further particulars arising out of the Applicant's financial disclosure and the execution of the search warrant provided that such further particulars and the documentary disclosure relating thereto are served on Counsel for the Applicant and the Tribunal by close of business on October 16, 2006.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude, Vice-Chair

RELEASED: October 11, 2006

FILE NAME: 3675.tia.Baldwin Travel & Tours Ltd.order.doc

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

TRAVEL INDUSTRY ACT, 2002
S. O., 2002, Chapter 30, Schedule D

IN THE MATTER of the REGISTRATION of
MCKELVEY'S TRAVEL SERVICE LTD. O/A MCKELVEY'S TRAVEL & CRUISES
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the *Travel Industry Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: July 5, 2006

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

MCKELVEY'S TRAVEL SERVICE LTD. O/A MCKELVEY'S TRAVEL & CRUISES

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on September 27, 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, October 26, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

Released: September 25, 2006

File name: 3691.tia.McKelveys.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

BALDWIN TRAVEL & TOURS LTD. O/A DYNASTY TRAVEL ADVISORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*, CHAPTER T.19 AS AMENDED

TO REVOKE REGISTRATION AND FOR IMMEDIATE SUSPENSION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: No one appearing for the Applicant

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: September 21, 2006 Toronto

REASONS FOR RULING AND ORDER

BACKGROUND:

This matter is an appeal from two actions taken by the Registrar. The first is a Notice of Proposal to Revoke Registration dated the 12th day of July 2006 and cites, *inter alia*, the continued failure of the Applicant to comply with the financial disclosure provisions of the *Travel Industry Act, 2002*, (hereinafter the "Act") and the failure of the Applicant to ensure that its branch offices are properly managed. The second proposal invokes an emergency power of the Registrar set out in Section 12 of the Act to immediately suspend the Applicant's registration and is dated August 21, 2006. Due to a clerical error at the Tribunal until recently these two matters were handled separately despite the fact that they ought to be heard together. The first matter is scheduled to go to a pre-hearing on October 3, 2006 and to a full hearing in November. Because of the emergency nature of the second matter it must be addressed expeditiously and was scheduled on very short notice to commence today. The Applicant advised the Tribunal and the Registrar that it could not have a representative in attendance today and requested dates in the future.

The Tribunal commenced the hearing in the absence of the Applicant. At the outset of the hearing, Counsel for the Registrar brought an *ex parte* motion for an adjournment of the hearing and an order extending the Registrar's suspension order until the conclusion of the hearing pursuant to the provisions of Section 12 of the Act. She called one witness, Michael Phillip Pepper, the Registrar under the Act. In addition, nine exhibits were entered as follows:

Exhibit #1	Notice of Proposal to Revoke dated July 12, 2006;
Exhibit #2	Notice of Appeal dated July 27, 2006 and received by the Tribunal on August 1, 2006;
Exhibit #3	Order of Immediate Suspension and Notice of Further and Other Particulars dated August 21, 2006 together with two covering letters dated August 22, 2006;
Exhibit #4	Notice of Appeal dated September 6, 2006 and received by the Tribunal on September 6, 2006;
Exhibit #5	Fax from Applicant dated September 20, 2006 advising of its inability to have anyone attend today's hearing;
Exhibit #6	Exchange of emails between Michael Pepper and Sanjay Soowamber dated August 22, 2006;
Exhibit #7	Exchange of emails between the Applicant and Sanjay Soowamber dated August 23, 2006;
Exhibit #8	Several emails to Soussanna Karas regarding consumer complaints;
Exhibit #9	Email from Tina Shewchuk to Soussanna Karas dated September 7, 2006 re: Consumer #2 complaint.

Evidence of Michael Pepper

Mr. Pepper reviewed the recent history of the handling of this matter between the issuance of the original proposal and the issuance of the suspension order. He stated that in and around August 21 or 22, 2006 he was contacted by Mr. Sanjay Soowamber, Manager of the Bank Settlement Plan ("BSP") Canada/Bermuda, for the International Air Transport Association ("IATA"). Mr. Soowamber indicated to Mr. Pepper that the Applicant was indebted to BSP in an amount of approximately $156,000.

Mr. Pepper set out for the Tribunal the manner in which travel agents account for funds received for airline tickets for travel on IATA member airlines. Travel agents are given airline ticket stock and a plate containing identification information by IATA. When they sell airline tickets on IATA member airlines the Act requires the net amount due to the BSP to be deposited in a trust account if paid by cash or cheque or otherwise accounted for if paid by credit card. Every ten days or so the travel agent prepares and submits a reconciliation of all tickets sold, monies received and credit card transactions to the BSP who then withdraw the amount owing directly from the trust account. In the case of the Applicant, BSP was unable to withdraw an amount of $246,393.77. BSP applied against that amount an amount deposited by the Applicant as security to reduce the figure to the current debt. IATA had made attempts to recoup this amount from the Applicant but was unsuccessful. It had sent its investigator to the Applicant's offices to take possession of the IATA ticket stock and identification plates and duly notified the Registrar.

The telephone discussion was followed up by an email which was entered as part of Exhibit #6. Once Mr. Pepper received the information from Mr. Soowamber he considered that this was a case for an order for immediate suspension involving, as it did, a very large sum of unaccounted trust funds.

He issued the order and had it served on the principal of the Applicant, Ms. Harjeet Kaur Davda. Ms. Davda advised Mr. Pepper that she had entered into a settlement arrangement with IATA and that he could lift the suspension. Mr. Pepper emailed Mr. Soowamber to confirm the settlement and was advised that no settlement had been negotiated. On August 23, Ms. Davda offered to pay off the debt in an amount of $2,000 per month. IATA indicated that this was not acceptable and copied Mr. Pepper on the emails which were entered as Exhibit #7.

Almost contemporaneous with the above discussions, the Registrar's office received a complaint from a client of the Applicant, Consumer #1. Consumer #1 was awaiting a refund of $6,800 for a period of two months. He finally decided to contact the Registrar for help. Mr. Pepper pointed out that the Registrar has no coercive power to deal with consumer complaints but it can and does offer to mediate. He will also review the factual background for breaches of the Act and take appropriate measures when they are present.

Finally, on September 7, 2006 another consumer complaint was received from a Consumer #2. It appears that on August 14, 2006 Consumer #2 had paid the Applicant $2,842.00 for travel to India for one adult and one child. The Applicant subsequently advised Consumer #2 that the fare he paid was not available and he would need to pay a great deal more. Consumer #2 advised that he could not afford to pay more and he was promised a refund. The Applicant issued a cheque post-dated to August 25, 2006. On August 25, 2006 the Applicant told Consumer #2 to hold the cheque for one more day. He deposited it on August 28, 2006 only to have it returned "stop payment".

Mr. Pepper drew the Tribunal's attention to his letter to the Applicant dated August 22, 2006. He stated that he was at great pains to point out to the Applicant the reasons for his decision and the Applicant's appeal rights to permit the Applicant to move expeditiously before the Tribunal for a resolution. The Applicant did not avail itself of this facility. It waited the full 15 days before filing its appeal.

Mr. Pepper also testified that his office has been informed that the Applicant is indebted to other suppliers, not just IATA. While he acknowledged this evidence was hearsay, this Tribunal can receive hearsay evidence and make a decision according to the weight to be given to it.

ANALYSIS:

The statutory provisions relating to the right of the Registrar to immediately suspend the registration of a registrant are set out in Section 12 of the Act. They state:

> 12. (1) If the registrar proposes to suspend or revoke a registration under section 11 and if the registrar considers it in the public interest to do so, the registrar may by order temporarily suspend the registration.
>
> (2) An order under subsection (1) takes effect immediately.
>
> (3) If a hearing is requested under section 11,
>
> (a) the order expires 15 days after the written request for a hearing is received by the Tribunal; or
>
> (b) the Tribunal may extend the time of expiration until the hearing is concluded, if a hearing is commenced within the 15-day period referred to in clause (a).

> (4) Despite subsection (3), if it is satisfied that the conduct of the registrant has delayed the commencement of the hearing, the Tribunal may extend the time of the expiration for the order,
>
> (a) until the hearing commences; and
> (b) once the hearing commences, until the hearing is concluded.

It is clear from a reading of the statutory provisions that the legislature has greatly prescribed to powers of both the Registrar and this Tribunal when it comes to the issuance of an immediate suspension of registration. Where a registrant requires a hearing then, unless otherwise continued, the suspension order expires 15 days after Notice of Appeal is filed with the Tribunal. On the present facts the Notice of Appeal was received on September 6, 2006 and hence it expires on September 21, 2006 unless extended. It can only be extended by the Tribunal if the hearing has commenced within the 15 day period or the Applicant has delayed the commencement of the hearing. There is no evidence of delay on the part of the Applicant. The Tribunal commenced the hearing on the 15th day and adjourned at the Parties' request until October 5, 2006. If the hearing does commence within 15 days the Tribunal has a discretion to extend the suspension until the hearing is concluded.

In what circumstances should the Tribunal exercise its discretion? The Act is consumer protection legislation and has, as its aim, the creation of a regulatory regime in the travel industry to ensure that consumers who prepay for travel and related services do not turn up at the airport or at their hotel far from home only to discover that an impecunious travel company has diverted funds to an improper use. In exercising its discretion the Tribunal must keep the interests of the consumer and the purpose of the Act always before it. With this in mind the normal tests for the exercise of judicial or quasi-judicial discretion have little application. Those tests, set out in numerous cases, such as balance of convenience and irreparable harm must pale in the face of the need to protect consumers. Where the Tribunal is satisfied that to continue to permit the registrant to carry on business will likely result in harm to consumers, it must exercise its discretion in favour of an extension of the suspension order.

In granting an extension it is likely in almost every case that the registrant will suffer irreparable harm. Not only will it lose business while the suspension order stands but it will lose goodwill if it is out of business for any length of time. Accordingly, in granting an extension the Tribunal must do all it can to bring the matter on for a hearing as expeditiously as possible. The adage "justice delayed is justice denied" is still applicable.

On the facts of this matter there is clear and convincing evidence that the Applicant has acted in a manner totally inconsistent with its obligations to the travelling public at large. It has clearly misappropriated substantial trust funds owing to IATA. It has issued refund cheques to its clientele only to put stop payment on them. It has also delayed substantial refunds to another of its clients. It lied to the Registrar about a settlement with IATA in an attempt to get the Registrar to lift his suspension.

On the totality of the evidence it is impossible not to conclude that the travelling public risk harm by the continued operation of the Applicant pending conclusion of a full hearing.

It must be borne in mind, however, that, due to a clerical error at the Tribunal, the Parties did not get notice of the date of this hearing until less than 24 hours before its commencement. The Applicant was unable to attend on such short notice and the hearing was commenced without it being represented. The Applicant was under an impression that the hearing of this matter would be in November following a pre-hearing scheduled for October 3, 2006. In fairness to the Applicant, this motion should be treated as an *ex parte* motion. Any findings of fact made herein do not create an element of *res judicata* or issue estoppel against the Applicant which shall be free to argue all issues in the full hearing.

Given the urgency of dealing with a suspension order, it will be necessary to cancel both the pre-hearing and the November hearing date. The hearing is adjourned to October 5, 2006, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto. The October 5 hearing will address both the issues raised in the July 12, 2006 Notice of Proposal and the issues raised in the Order of Immediate Suspension and Notice of Further and Other Particulars dated August 21, 2006. The Registrar shall prepare and serve on the Applicant and the Tribunal copies of all documents it intends to rely on at the hearing by September 25, 2006. Given that the hearing is only 14 days away, the Applicant shall be given until 48 hours before the commencement of the hearing to serve on both the Registrar and the Tribunal copies of any documents upon which it intends to rely.

ORDER:

Pursuant to the authority granted to it under the Act and the *Licence Appeal Tribunal Act, 1999* this Tribunals orders:

1. The Order of Immediate Suspension is extended until the conclusion of the hearing;

2. The pre-hearing scheduled for October 3, 2006 is cancelled;

3. The hearing of this matter is adjourned to 9:30 a.m. on Thursday, October 5, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;

4. By close of business on September 25, 2006 the Registrar shall serve on the Applicant and the Tribunal copies of all documents upon which it intends to rely;

5. The Applicant shall serve on the Registrar and the Tribunal copies of all documents upon which it intends to rely by close of business on October 2, 2006;

6. The hearing on October 5, 2006 shall consolidate and consider all matters between the Parties as set out in the Notice of Proposal dated July 12, 2006 and in the Order of Immediate Suspension and Notice of Further and Other Particulars dated August 21, 2006;

7. The hearing set for November 30, 2006 is cancelled.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude, Vice-Chair

RELEASED: September 22, 2006

FILE NAME: 3675.tia.Baldwin Travel & Tours Ltd.ruling.doc

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

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, Chapter 30, Schedule D

IN THE MATTER of the REGISTRATION of
MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act, 2002*
made pursuant to section 10 of the *Travel Industry Act, 2002*
TO REVOKE REGISTRATION
- Proposal dated: May 23, 2006

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

MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 2, 2006;

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 Wednesday, October 25, 2006.

LICENCE APPEAL TRIBUNAL

_____
Carl F. Dombek
Chair

RELEASED: September 27, 2006

FILE NAME: 3627.tia.MRV Enterprises Inc.adj.doc

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

TADELE MERSHA TAMIRU

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS OF THE ONTARIO TRAVEL INDUSTRY COMPENSATION FUND CORPORATION UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO DISALLOW A CLAIM

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

APPEARANCES: ROBEL SHEFERAW, Agent representing the Applicant

MARIA ABATE, Counsel for the Travel Industry Council of Ontario

DATE OF HEARING: September 13, 2006 Toronto

REASONS FOR DECISION

BACKGROUND:

Tadele Tamiru (the "Applicant") appealed to the Licence Appeal Tribunal (the "Tribunal") the decision of the Board of the Travel Industry Council of Ontario ("TICO") dated April 24, 2006, finding that the Applicant is ineligible for reimbursement from the fund administered by TICO for some of the travel expenses he incurred as a consequence of him booking a return airline ticket from Toronto to Addis Ababa, from Jubba World Travel.

The fund is governed by Ontario Regulation 26/05 made under the *Travel Industry Act, 2002,* S.O. 2002, c. 30, as amended (the "Act"). The fund provides for reimbursement of monies paid to a registered Ontario travel agent for travel services that are not provided due to the bankruptcy or insolvency of a TICO registrant or an end supplier airline or cruise line, where a reimbursement has not otherwise been provided.

TICO cited three reasons for denying the Applicant's claim for reimbursement. First, the Applicant failed to claim reimbursement for the used portion of his airline ticket from Jubba World Travel prior to its failure, as he must do under subsection 57 (1) of Ontario Regulation 26/05 (the "Regulations"). Second, reimbursement is limited to the amount paid to or through any registrant for travel services that were not provided. The Applicant claims for the cost of the British Airways ticket that he purchased to travel from London to Addis Ababa. TICO was advised by Saudi Arabian Airlines that that the value of the Toronto/London/Toronto portion of the ticket that he purchased through Jubba World Travel held more value than the remaining sectors of his ticket, such that there was no refundable portion of the tickets. Third, paragraph 57(3)(9) of the Regulations provides that a customer is not entitled to be reimbursed if the claim is based on the cost, value or quality of alternate travel services. By claiming the cost of his British Airway ticket, the Applicant is claiming the cost of alternate travel services.

EVIDENCE:

The Applicant, Josie Pereira, a TICO complaints officer and Lori Furlan, a TICO claims co-ordinator, gave evidence at the hearing.

The undisputed portion of the evidence reveals that the Applicant paid $1790.00 to Jubba World Travel for a return airline ticket from Toronto to Addis Ababa. The Toronto to London return portion of his flight was to be on Air Canada. The Applicant was scheduled to fly from London to Jeddah to Addis Ababa, return on Saudi Arabian Airlines with an overnight stopover in Jeddah. When the Applicant checked into the Saudi Arabian Airlines ticket counter at London Heathrow, the airline officials discovered an error on the Applicant's ticket. His surname was misspelled. He was denied permission to fly on Saudi Arabian Airlines that day. The Applicant was forced to spend the night in London. He was able to procure a ticket from British Airways and fly to Addis Ababa the next day with an overnight stopover in Jeddah. The cost of the British Airways ticket was $1224.66 expressed in Canadian dollars. The Applicant flew British Airways from Addis Ababa to London, and on Air Canada from London to Toronto.

Saudi Arabian Airways tried to reinstate the Applicant's flight to Addis Ababa but was unable to, due to lack of space from Jeddah to Addis Ababa. The airline offered the Applicant a reservation for July 4, 2003, being three days after he arrived in London. The Applicant declined this reservation. He then purchased his ticket from British Airways. TICO submits that by him refusing the July 4th reservation and obtaining the British Airways ticket, the Applicant obtained alternate travel arrangements thereby denying him reimbursement from the fund.

The Applicant states that he was anxious to get to Addis Ababa in order to see his dying mother. The July 4th flight on Saudi Arabian Airways was not guaranteed. He could have obtained a "guaranteed" flight on July 9th but would have to bear the cost of his accommodation in London until then. The Applicant returned to Toronto on an Air Canada leaving Heathrow on August 24, 2003.

The Applicant contacted Saudi Arabian Airlines in November 2003, and was advised that his flight was cancelled due to a name change made on his reservation apparently by the travel agency. The airline stated by letter dated November 30, 2003 that it offered an alternate flight on July 4, 2003 that was declined and that if the Applicant would return his unused Saudi Arabian Airlines ticket the would get a refund.

The Applicant subsequently contacted the Canadian Transport Agency (the "CTA"). The CTA declined to intervene stating that the difficulties that the Applicant encountered were probably the result of a travel agency error and that they were advised that the Air Travel Complaints Commissioner would not intervene because the nature of the complaint was not within her jurisdiction. The CTA forwarded a copy of the Applicant's complaint and supporting documentation to TICO, which sent the Applicant a complaints form that the Applicant completed and returned to TICO, which thereupon investigated his complaint.

During the course of its investigation, TICO contacted Jubba World Travel, which refused to provide the Applicant with a refund.

The Applicant sued the Jubba World Travel in the Small Claims Court and recovered a default judgment against that travel agency which remains unsatisfied. Jubba World Travel ceased operation in August 2005.

TICO sent a claim form to the Applicant. During the course of its investigation into the claim, TICO contacted the Toronto office of Saudi Arabian Airlines and was advised that the partially used tickets were not refundable. The Toronto-London portion of the ticket had more value than the remaining sections of the ticket. The offer of a refund was a good will gesture offered to the Applicant by the Senior Manager of Saudi Arabian Airlines.

TICO staff contacted the Applicant and inquired as to whether he had contacted Jubba World Travel in writing to request a refund for the unused portion of his ticket. The Applicant advised that he didn't officially request a refund. He did not want to leave his ticket with the travel agency because the travel agent whom he dealt with was no longer working at the agency, and that he did not want to leave his ticket with persons unknown to him.

The Applicant stated that his contact at the travel agency was a person named Donna who said that she was a partner in the agency and who would be willing to investigate and mediate his complaint. Donna asked for the Applicant's ticket while advising that she would give the Applicant a receipt for the ticket. This occurred as a result of the Applicant speaking to Donna over the telephone. Donna left the travel agency before the Applicant could provide her with his ticket. The Applicant wrote to TICO in January 2006 that he went to the travel agency in order to give his ticket to Donna. That is when he learned that Donna no longer worked at the agency. Nobody at the agency seemed to know what the Applicant was talking about. The Applicant said that the "office was so

disorganized and very loud that I was not sure whom I should talk to". That is why the Applicant did not leave his ticket with anyone at the agency.

The Applicant then referred to a copy of a letter sent by the CTA to the Senior Manager System Customer Relations of Saudi Arabian Airlines in Jeddah, in which the CTA advised that it sent a letter to the travel agency requesting comment on the Applicant's complaint. The travel agency did not reply to this letter, which forms part of TICO's Book of Documents that was received in evidence at the hearing.

The Applicant stated that TICO stated that there was an error to be found on his ticket and that he should go to Small Claims Court. The Applicant recovered judgment against the travel agency for $2,500.00 plus costs and an agency fee in October 2005. The Applicant contacted TICO after obtaining judgment against the travel agent, which ultimately lead to the denial of his claim for reimbursement. The Applicant's hotel accommodation for one night in London was $145.46 expressed in Canadian dollars.

In cross-examination the Applicant stated that he personally spoke to Donna and that he verbally demanded payment from the travel agency. He put nothing in writing. He admitted that Donna did not state that the travel agency would offer him a refund nor did she say to put anything in writing. When the Applicant returned to the travel agency (and learned that Donna no longer worked there), he attempted to speak to the manager but was kept waiting. The Applicant left the travel agency without speaking to the manager. When asked which person at TICO told him that the travel agency had erred in its ticketing, the Applicant referred to a letter dated July 28, 2004, that he received from TICO. He stated that from reading this letter he believed that TICO "was on his side" and that he now thinks that he has been misled.

Josie Pereira, a TICO complaints officer, reviewed TICO's involvement in this matter. She stated that TICO had no authority to order reimbursement of the unused portion of the Applicant's ticket. The TICO investigation into this matter indicated that the travel agency did not violate any of the regulations. The letter that TICO sent to the travel agency in response to the complaint it received from the Applicant was a letter requesting information. The travel agency advised Ms. Pereira in writing that it complied with the law in its ticketing practices. She referred to the information found on the complaint form that the Applicant submitted to TICO, in which he referred to the circumstances leading to his purchasing the British Airways ticket.

Luri Furali, a TICO claims co-ordinator, confirmed that TICO's role is to reimburse consumers who do not receive the travel services they purchased because of the bankruptcy or insolvency of travel agents or wholesalers. The information that she received from Saudi Arabian Airlines indicated that although the Applicant's ticket was not refundable, the airline would reimburse the Applicant for the unused portion of his ticket as a good–will gesture. The Applicant never returned his ticket for a refund. The Applicant never made a claim for refund to the travel agency, which failed some 18 months after it issued the ticket to the Applicant. The Applicant's claim for the cost of his British Airways ticket was a claim for alternate travel.

LAW

Those sections of Ontario Regulation 26/05 relevant to this appeal are:

> 57 . (1) A customer is entitled to be reimbursed for travel services paid for but not provided if,
>
> (a) the customer paid for the travel services and the payment or any part of it was made to or through a registered travel agent;
>
> (b) the customer has made a demand for payment from,
>
> (i) the registered travel agent and the appropriate registered wholesaler,
>
> (2) A reimbursement under subsection (1) is limited to the amount paid to or through any registrant for the travel services that were not provided.
>
> (3) Despite subsection (1), a customer is not entitled to be reimbursed for:.
>
> 2. A payment to or through a registrant for any travel services that were provided or for which alternate travel services were provided or made available..
>
> 9. A claim that is based on the cost, value or quality of the travel services or alternate travel services.

ANALYSIS

The unconverted evidence disclosed that the Applicant was unable to travel the London-Jeddah-Addis Ababa portion of his ticket on Saudi Arabian Airlines on July 1, 2003, because of what appears to be a misspelling of the Applicant's surname on his electronic airline ticket.

The Applicant, anxious to visit his dying mother in Ethiopia, chose not to wait for the next flight available to him on Saudi Arabian Airlines. He purchased a new ticket from British Airways and flew to Addis Ababa at a cost of $1224,66.00. He used this ticket to return to London. He used the London-Toronto portion of his original ticket to return to Canada. The Applicant could have flown on Saudi Arabian Airlines on July 5, 2003, but would have had to bear his own expenses while in London, awaiting that flight, which was not guaranteed. His hotel bill for one night in London came to $145.00 Canadian. He had a confirmed reservation for July 9th, which would have necessitated an 8-day stay in London. The cost of the Toronto-London-Toronto portion of his ticket was valued at more than the remaining Jeddah/Addis Ababa/Jeddah, which was unused.

The Tribunal finds that the interventions made by the CTA with Saudi Arabian Airlines did not constitute a demand for payment from a travel agent under paragraph 57(1)(b) of the regulations for two reasons. The CTA wrote to Saudi Arabian Airlines to inquire into the airline's position with respect to the Applicant's case. The CTA was not acting as an agent for the Applicant. The demand referred to in paragraph 57(1)(b) must be made by a registered travel agent. Saudi Arabian Airlines, doing business at London Heathrow, is not a registered travel agent under the Act and regulations.

TICO, in the normal course of its investigation into the Applicant's complaint, requested a response from the travel agency to the Applicant's complaint. The letter sent by TICO to the travel agency is an invitation to respond and is not a demand. TICO is neither the agent of the Applicant nor is it a registered travel agent under paragraph 51(1)(b).

The Applicant in his dealings with the travel agency did not demand payment for his claim. He discussed his plight with Donna who worked at the travel agency. When he returned to the agency with his airline ticket, he learned that Donna no longer worked at the agency. He tried to, but was unable to speak to any other personnel at the travel agency.

The Applicant sued the travel agency in the Toronto Small Claims Court in October 2004, and recovered judgement against the travel agency for $2,500.00 plus costs and an agent's fee in October 2005, which was almost two months before he submitted his claim for reimbursement to TICO. The Tribunal holds that the commencement of a lawsuit against the travel agency constitutes a demand under paragraph 57 (1)(b) of the regulations.

It now becomes necessary to consider the phrase "alternate travel services" as that phrase is used in paragraphs 57(3)(2) and (9) of the regulations having regard to the fact that the Applicant did not avail himself of the alternate travel dates offered him by Saudi Arabian Airlines and that he chose to fly from London to Addis Ababa on British Airways.

The Applicant has made a demand for payment form a registered travel agent, for travel services paid for but not provided on July 1, 2003. The Applicant has not been reimbursed for what appears to be a travel agency error and the travel agency has ceased carrying on business. The travel agency was also unwilling to pay the Applicant.

The fund has been established under the regulations as a means of the travel industry reimbursing its customers in circumstances where the customer has paid for but has not received all or part of travel services purchased. Those provisions of the regulations denying reimbursement for alternate travel services are designed to prevent customer abuse. It thus becomes necessary to look at all of the customer's circumstances objectively and reasonably.

TICO relies upon the fact that the Toronto to London return portion of the airline ticket that the Applicant purchased from the travel agency is valued at a sum that is more than the unused portion of the ticket. If the Applicant were to avail himself of the Saudi Arabian Airlines offer of a flight on July 4, 2003 the Applicant would have had to spend 4 days in London at his own expense. He did not have a confirmed reservation for that date. He had a confirmed reservation for July 9th, 2003, which meant that he would have to stay in London 8 days at his own expense. His hotel accommodation was $145.00 per night and this did not include meals and other necessary expenses. If forced to stay in London for 8 days, the cost to the Applicant would have approximated the cost of his airline ticket from Toronto to Addis Ababa return. In any event, the cost to the Applicant

would have amounted to a significant portion of the value attributable to the used portion of his ticket. In the circumstances, the Tribunal finds it reasonable for the Applicant to obtain alternate travel arrangements.

The Tribunal finds that the Applicant meets the requirements of section 57 of the regulations. Unfortunately for the Applicant, and based upon TICO's calculations, the eligible amount of his claim is nil because the cost of the used portion of his airline ticket exceeded the value attributable to the unused portion of this ticket.

DECISION AND ORDER:

For all these reasons, the appeal is denied and the TICO is ordered to disallow the Applicant's claim for reimbursement from the fund.

LICENCE APPEAL TRIBUNAL

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

Released: September 20, 2006

File No. 3588.tamiru.tia.claim.doc.

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

UNIGLOBE TRAVEL GROUP

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO UNDER THE *TRAVEL INDUSTRY ACT* R.S.O 1990 c. T. 19 AS AMENDED

DENYING A CLAIM TO THE COMPENSATION FUND

TRIBUNAL: KENNETH KOPROWSKI, Vice-Chair

APPEARANCES: MALCOLM SLATER, representing the Applicant

MARIA ABATE, Counsel, appearing on behalf of the Travel Industry Council Of Ontario ("TICO")

DATE OF HEARING: August 31, 2006 Toronto

REASONS FOR DECISION

EXHIBITS:

Exhibit 1 Decision letter of Travel Industry Council of Ontario

Exhibit 2 Notice of Appeal, dated April 25, 2006

Exhibit 3 Respondent's Document Brief

BACKGROUND:

The Applicant made a claim against the Compensation Fund (the "Fund") set up in accordance with the Regulations under the *Travel Industry Act* RSO 1990 c. T.19, as amended. The claim was in the amount of $18,191.51. The Board of Directors ("Board") of the Travel Industry Council of Ontario ("TICO") denied the Applicant's claim on the ground that the claim was made beyond the six-month period within which such a claim is to be made after a major event occurs.

The major event occurred when the air carrier, Jetsgo, ceased operations on March 11, 2005. The claim submitted by the Applicant was dated December 14, 2005. Since the major event occurred on March 11, 2005, the relevant legislation then in force relating to such a matter as this, was the *Travel Industry Act* RSO 1990 c. T 19, and its accompanying regulation, which was Regulation 806/93.

The Applicant is now appealing the Board's denial of its claim.

ISSUE:

The issue in this matter is whether the expiration of the six-month limitation period in Regulation 806/93 for making a claim against the Compensation Fund bars the Applicant's claim in this matter?

EVIDENCE:

At this hearing, this Tribunal required evidence and submissions on only the issue relating to the effect of the six-month limitation period in Regulation 806/93 as a threshold issue. The reasoning was that, if this Tribunal held that the limitation period did, in fact, bar the Applicant's claim, then the matter was at an end. If, on the other hand, this Tribunal were to hold that the six-month limitation period did not apply, a hearing could then be scheduled to hear the merits of the case.

Evidence of Malcolm Slater

Mr. Slater, operating the Applicant business, Uniglobe Plus Travel Group ("Uniglobe"), stated that he had booked a trip with Jetsgo airline on behalf of a customer, a high school sports team. The team was to fly to Los Angeles, out of Toronto. Unfortunately, Jetsgo ceased operations on March 11, 2005; just before the sports team was to leave. Travel with Jetsgo, therefore, became impossible. Accordingly, at a cost of $18,191.51, Uniglobe booked alternate services with Air Canada, a different airline, to allow the team to travel as scheduled.

Mr. Slater stated that, on March 21, 2005, the Applicant sent an e-mail to TICO, requesting a claim form, in order that the Applicant could make a claim against the Compensation Fund for the amount that Uniglobe had to pay for the Air Canada tickets. A representative of TICO asked whether the claim was to be made by the customer or by the Applicant travel agent. On April 4, 2005, the Applicant asked for both a consumer and a travel agent claim form. The reason for this was that a representative of the high school said that it would pay for the cost of the alternate flight services. Payment would not be made in one amount, but would take place over a period of time. Regrettably, only the amount of $8,700.00 has been repaid, and no further payments have been forthcoming from the customer.

On April 20, 2005, a representative of TICO informed the Applicant by e-mail that a travel agent claim form should be used. Mr. Slater testified that, at the same time, the representative informed him that the form would be mailed out to the Applicant.

Mr. Slater testified that he never received the form.

Now, despite the fact that Mr. Slater had been in the travel agent business for ten to eleven years, and had made one claim before against the Fund, he stated that he did not know there was a six-month filing time deadline for making a claim against the Fund. Therefore, with not having received the claim form and not knowing that there was a filing deadline, nothing further was done at that time to file a claim with TICO.

Only when a new employee in the Applicant's office took up the matter in November of 2005 was the proper form requested again and received from TICO on November 10, 2005. The claim was submitted on December 14, 2005, and received by TICO on December 19, 2005. TICO sent a letter dated December 22, 2005, found at Tab 4 of Exhibit 3, advising the Applicant that the filing deadline was September 12, 2005, but that, if the Applicant still wished, its claim could be presented to TICO's Board of Directors for its consideration.

The Applicant sent further documentation, at TICO's request, to complete the application. Finally, by letter dated April 24, 2006, TICO advised the Applicant that its claim was ineligible for payment out of the Fund because the claim was received beyond the filing deadline of September 12, 2005.

In cross-examination by counsel for TICO, Mr. Slater acknowledged that he has been a registered travel agent for ten to eleven years. He stated that, whereas he was familiar with the provisions of the regulations under the Act as they applied to day-to-day operations of a travel agency, he was not aware of the provisions for making claims.

In response to questioning from this Tribunal, Mr. Slater stated that he once had to make a similar claim, previously, as a result of the failure of another air carrier; however, he could not remember that there was a start date and end date of any limitation period. He candidly admitted that he did not even know there was such a limitation period.

Evidence of Tina Shewchuk

Ms. Shewchuk was, at the time of this hearing, a client services representative of TICO, and had been one for five years. It was she who, at TICO, dealt with claims arising from the Jetsgo failure. She confirmed that March 11, 2005, was the date that Jetsgo ceased operating and that it was that date that was determined to be the date of the major event, pursuant to Regulation 806/93. Therefore, any registrant who was to make a claim to the Fund as a result of the Jetsgo failure had to do so by September 12, 2005, in accordance with the provisions of that same Regulation.

Ms. Shewchuk reviewed the exchange of e-mails between TICO and the Applicant, found at Tab 8 of Exhibit 3. Without detailing their contents, it is sufficient to say that only a travel agent claim form was to be sent to the Applicant, since TICO does not send out both a consumer claim form and a travel agent claim form on one claim.

On April 20, 2005, e-mail from Ms. Shewchuk to Uniglobe, found at Tab 8 of Exhibit 3, stated that a travel agent claim form would be sent out. It was this form that Mr. Slater had said, in his testimony, he did not receive.

However, it was the evidence of Ms. Shewchuk that she did, in fact, send out the form on April 20, 2005, to Uniglobe. This is confirmed, she stated, by the words, “Released on Apr 20 2005” which are stamped on the top right corner of the e-mail message. She showed to this Tribunal and to Mr. Slater the original of that e-mail with the original stamp on it, but it was not made a separate exhibit.

The form was mailed to the Applicant. That mail was never returned to TICO as undelivered. If it had been, it would have been delivered to Ms. Shewchuk herself.

The next time she heard from the Applicant was by way of telephone call in early November 2005. The call was not made by Mr. Slater himself. Ms. Shewchuk advised the caller that a claim on the Jetsgo failure was late by that date, but that she would still send a form. This form was filled out and returned by the Applicant. A copy of it is found at Tab 3 of Exhibit 3. It should be noted that the stamp reading, “Released on Nov 10 2005” (sic) appears on the top right corner (identical, except for the date, to the stamp on the e-mail dated April 20, 2005). Ms. Shewchuk also added the notation, “advised is late as filing deadline was Sept 12/0” (sic). The copy at Tab 3 left out the “5” in the designation of the year, but nothing hinged on that number’s absence. The form is further stamped as having been received at TICO on December 19, 2005.

To Mr. Slater, Ms. Shewchuk stated that there was no follow-up by TICO after the form was sent out on April 20, 2005, because, once a form is sent out, it is the responsibility of the claimant to continue with the matter.

Mr. Slater asked Ms. Shewchuk how TICO informed claimants of a filing deadline, no doubt because Mr. Slater said that he did not know of it. Ms. Shewchuk replied that TICO puts its filing deadlines on its website; the Regulations state how long a claimant has to file a claim after a major event; and, since 1997, there has been a quarterly newsletter that goes out to all registered travel agents. It is noteworthy that Mr. Slater commented that he did not even know that there was such a newsletter.

THE LAW:

The authority to pass regulations regarding the Compensation Fund is found in Section 27 (n) of the Act, which provides as follows:

> 27 The Lieutenant Governor in Council may make regulations,
> …
>
> (n) providing for the establishment, maintenance and administration of a compensation fund in trust by travel agents and travel wholesalers and **prescribing the form and terms of the trust;**
>
> (emphasis is added)

In turn, the role of registered travel agents in the Fund is found in section 44(1) of Regulation 806/93, which provides as follows:

> 44. (1) Every registrant **shall participate in the Compensation Fund and shall comply with the terms of the Fund set out in this Part.**
>
> (emphasis is added)

Section 44.1 empowers TICO to administer the Fund:

> 44.1 The Council shall administer and manage the affairs of the Compensation Fund.

The term "major event," which the evidence in this matter revealed was the start date of the filing period, is defined in section 43 of the Regulation thusly:

> 43. In this part,
>
> …
>
> "major event" means one or more events designated as a major event by the Director under subsection 57(3).

The power to designate the date of a major event is given in section 57(3) of Regulation 806/93:

> 57(3) The Director may designate one or more events as a major event having regard to,
>
> (a) the nature of the event or events;
>
> (b) the number of claims arising or potentially arising out of the event or events; and
>
> (c) the need to protect the integrity of the Compensation Fun

Finally, the authority to make a claim is both provided for and limited in section 53 of Regulation 806/93, where it states:

> 53. **A customer or a registrant shall** make a claim for reimbursement in writing to the board of directors **within six months after the event that gave rise to the claim for reimbursement.**
>
> (emphasis is added)

Two things should be noticed in section 53. First, it is the registrant who has the responsibility to make the claim. There is nothing in this section that casts any onus on TICO to ensure the registrant makes the application once TICO has sent the proper forms to the registrant. Second, the claim must be made within six months after the event that gave rise to the claim for reimbursement. The significant word, here, is "shall." It is mandatory; it is not merely permissive.

It is the provisions of section 53 that TICO relied on to deny the claim of the Applicant.

APPLICATION OF LAW TO FACTS:

This Tribunal accepts without hesitation the evidence of Ms. Shewchuk when she stated that she sent out the claim form to the Applicant on April 20, 2005. Her record keeping was not discredited in these proceedings. In contrast, Mr. Slater was not aware there was a limitation period. He was not even aware of the regular quarterly newsletter, and he did not follow up on the clear wording of Ms. Shewchuk's e-mail of April 20, 2005, that she would mail out the necessary claim form. In comparing the evidence of Mr. Slater against that of Ms. Shewchuk, this Tribunal is more impressed with the organizational skills of Ms. Shewchuk.

This Tribunal also finds that the Fund was available to the Applicant as a result of the Jetsgo failure. In addition, this Tribunal also accepts the validity of the date set as the "major event," namely, March 11, 2005, and the validity of the end date, namely, September 12, 2005.

The claim form from the Applicant was received at TICO on December 19, 2005. This Tribunal accepts that date as fact. Its receipt was over three months past the established end date for making claims.

This Tribunal has no discretion to extend that time period. In a case involving an appeal by one Howard Forbes against a decision of TICO denying a claim against the Compensation Fund, and heard April 27, 2006, the learned Vice-Chair states, at page 4 of that decision, referring with approval to a decision in a previous case,

> Vice-Chair Hunt in the 2001 decision of *Edwards-Simpson* held that the wording of section 53 was mandatory such that the Tribunal has no discretion to permit an extension of time beyond the six-month limit to file a claim.

This Tribunal would adopt that reasoning as being applicable to the case at hand.

In the instant case, the Applicant was over three months late in making its claim. This Tribunal finds no fault in the conduct of TICO's employee, Ms. Shewchuk, in this process. This Tribunal has no discretion to extend the time for filing such a claim. Accordingly, this Tribunal must conclude, on the evidence before it, that the failure to comply with the six-month filing provision in section 53 of Regulation 806/93 is a bar to the Applicant's claim against the Fund in this Appeal.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Travel Industry Act* and Regulations under the Act, this Tribunal directs the Board of Directors of the Travel Industry Council of Ontario to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
Kenneth W. Koprowski,
Vice-Chair

RELEASED: September 14, 2006

FILE NAME: 3548.tico.Uniglobe.doc

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

Licence Appeal Tribunal
Tribunal d'appel en matière de permis

Ontario

SKYPORT CANADA INC. O/A SKYPORT TRAVELS & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, *2002* S.O. 2002, Chapter 30 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: KENNETH KOPROWSKI, Vice-Chair

APPEARANCES: The Applicant did not appear and no one appeared on behalf of the Applicant

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF HEARING: August 10, 2006 Toronto

REASONS FOR RULING AND ORDER

EXHIBITS

Exhibit 1 Document Brief of Respondent.

Exhibit 2 Respondent's Document Brief #2.

Exhibit 3 Letter of July 26, 2006, from Suvara Travels Canada Inc. to Sousanna Karas, Travel Industry Council of Ontario.

Exhibit 4 Letter of August 8, 2006, from ABC Law Clerk Services to Sousanna Karas, Travel Industry Council of Ontario.

Exhibit 5 Letter from ABC Law Clerk Services dated August 9, 2006, to Sousanna Karas, Travel Industry Council of Ontario.

Exhibit 6 Application for *Travel Industry Act* registration dated December 1, 2004.

Exhibit 7 Notice of Appeal of Applicant

BACKGROUND:

This hearing arises out of a Notice of Proposal (the "proposal") dated March 13, 2006, issued by the Registrar under the *Travel Industry Act, 2002* (the "Registrar" and the "Act", respectively) to revoke the registration of Skyport Canada Inc. o/a Skyport Travels & Tours (the "Applicant") as a travel agent under the provisions of the Act.

The Registrar's proposal is brought pursuant to section 10 of the Act as read with section 11 and section 8 of the Act.

The Registrar bases his proposal on the following allegations as contained in his proposal:

1. The Registrant is and has been carrying on activities that are in contravention of the Act and regulations.

This matter was scheduled originally to be heard before this Tribunal on July 26, 2006, in Toronto, at 9:30 a.m. A Notice setting out that information had been sent out to both the Applicant and the Respondent. The Notice contained the time, place and purpose of the hearing, as required by section 6(3) of the *Statutory Powers Procedure Act* R.S.O 1990 c. S.22. It also contained the warning, as is also required by section 6(3), that, if the party does not attend at the hearing, the Tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding.

Come July 26th, Respondent's counsel and her witnesses appeared before the Tribunal, ready, willing and able to proceed with the day's hearing. The Applicant, represented by Mr. Brian Kenson, appeared but, sadly, without counsel. The lawyer that Mr. Kenson said he had retained had to withdraw, but had informed Mr. Kenson of his withdrawal only a few days before July 26th. Mr. Kenson did, however, present to this Tribunal a letter from a law firm confirming that they had been retained by the Applicant, on condition that an adjournment could be granted on July 26th. Over the opposition of Respondent's Counsel, this Tribunal granted the adjournment to August 10, 2006, which was the earliest date on which Mr. Kenson's new legal representatives could attend. This Tribunal made the adjourned hearing peremptory on the Applicant and took pains to explain to Mr. Kenson that "peremptory" meant that he must proceed with the hearing on August 10th, at 9:30 a.m., with or without a representative.

Alas, on August 10th, the Respondent's Counsel and her witnesses appeared. Regrettably, neither the Applicant nor anyone on behalf of the Applicant appeared. No one contacted this Tribunal to explain their absence. The hearing, scheduled to begin at 9:30 a.m., was recessed to 10:00 a.m. as a courtesy to the Applicant, in the hope that the Applicant and his representative would appear or that this Tribunal might receive confirmation as to why they could not be present. Neither event occurred. Such conduct is an affront to this Tribunal.

Consequently, in accordance with section 7(1) of the *Statutory Powers Procedure Act*, *supra*, this Tribunal proceeded with the hearing on August 10th, commencing at 10:32 a.m., in the absence of the Applicant. Section 7(1) states as follows:

> 7(1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

THE EVIDENCE

Evidence of Mary Ann Harrison

The first witness called by the Respondent was Mary Ann Harrison. Ms. Harrison is the Director of Operations and Chief Financial Officer of the Travel Industry Council of Ontario ("TICO"). She has been working for TICO since November 1998. In her position, Ms. Harrison is to oversee the financial inspection function relating to travel agents, and investigations and prosecutions.

Ms. Harrison reviewed the material at Tab 1 of Exhibit 1. She confirmed that the Applicant corporation was registered as a travel agent on February 15, 2005, and had specific terms and conditions attached to its registration. These are outlined in Tab 1. Of particular significance were the terms and conditions relating to the filing of financial statements, in paragraph 4 of the Terms and Conditions of Registration. Dealing with the necessity of such financial statements, reference is made to section 15(1) of the *Travel Industry Act* R.S.O. 1990 and to section 24 of Ontario Regulation 806/93. Those provisions now exist, respectively, as section 24(3) of the current Act and section 22 of Regulation 26/05. The requirements of the newer sections are the same as those of the older sections.

Ms. Harrison was careful to point out that, at page 3 of Tab 1, there appears the signature of the then President of the Applicant, signifying that he understood and would comply with the Terms and Conditions, and that he understood that, if the terms and conditions are contravened, the Registrar could take appropriate administrative action, including making a Proposal to revoke registration.

Ms. Harrison continued by saying that an Inspection Report, dated August 4, 2005, performed on behalf of TICO a little more than five months after the Applicant was registered, noted two problems. The report is found at Tab 2 of Exhibit 1. One problem involved a complaint from another registrant under the Act, Sunwing Vacations ("Sunwing"), that it had received an NSF cheque from the Applicant in the sum of $4,000.00, issued on the Applicant's trust account. TICO considers an NSF cheque drawn on a trust account to be a very serious offence. The inspection report also confirmed that the inspector could not complete his investigations because the Applicant's books and records were not available, even though they should have been at the Applicant's office. This requirement is plainly stated in paragraph 11 of the Terms

and Conditions that appear at Tab 1 of Exhibit 1. Apparently, the Applicant said that the books and records were at the office of the Applicant's accountants, for the preparation of the June 30, 2005, annual financial statements.

Ms. Harrison referred to yet another NSF cheque problem with the Applicant. At Tab 3 of Exhibit 1 is a letter dated August 8, 2005, from Suvara Travels Canada Inc. ("Suvara"), complaining to TICO of two NSF cheques issued by the Applicant, one in the amount of $5,000.00 and the other in the amount of $2,268.14. A letter dated September 16, 2005, from Suvara to TICO confirms that the problem with the cheque for $5,000.00 had still not been remedied.

The complaint from Sunwing, the lack of business records at the Applicant's premises and the two additional NSF cheques to Suvara resulted in the Registrar issuing, on August 12, 2005, its first Proposal to revoke the Applicant's registration.

The action on this Proposal before this Tribunal came to an end by a Consent Order granted by this Tribunal as a result of a pre-hearing held on December 2, 2005.

At the pre-hearing, TICO was represented by Ms. Harrison. The Applicant was represented, as well. By the terms of the Consent Order, the Applicant agreed to, among other things, the following: to undertake to deliver to the Registrar by January 31, 2006, interim financial statements from the commencement of the Applicant's business (February 15, 2005) up to and including October 31, 2005; to have the financial statements prepared by a duly authorized and licensed public accountant; to deliver to the Registrar, within thirty days of the end of each month, trust reconciliations for the applicable month for each trust account operated by the Applicant, commencing with the reconciliation for November, 2005; and to bring its working capital into compliance within fourteen days of January 31, 2006.

One has to wonder just why it was necessary to have this Tribunal Order that financial statements be prepared for the period February 15, 2005, to October 31, 2005, when, as stated earlier, the inspection report of August 4, 2005 stated that the Applicant had said that the books and records of the agency were not at the office, but were at the accountant's for the express purpose of having financial statements prepared. Just how long does it take to have those statements prepared if, as at December 2, 2005, they were not even done yet? The explanation for why the books and records were not at the office, therefore, stretches belief.

It is noteworthy that, at Tab 6 of Exhibit 1, there is a letter dated December 1, 2005 (that is, **before** the pre-hearing) from Suvara to TICO, confirming that only the amount of $1,000.00 towards the NSF cheque of $5,000.00 had been paid. Further, and also at Tab 6, there is a letter dated January 19, 2006, from Suvara to TICO (that is, **after** the pre-hearing) stating that the amounts owing to it by the Applicant were still outstanding. On January 16, 2006, TICO sent a letter to the Applicant, reminding it to submit, by January 31, 2006, the financial statements for the fiscal year ended October 31, 2005.

January 31st came and went. Still, the Applicant remained as silent as a tomb, having provided nothing to TICO by that date. So much for the Applicant's respect for Orders of this Tribunal.

Consequently, and perhaps not surprisingly, the Registrar issued, on March 13, 2006, another Notice of Proposal to revoke the Applicant's registration. But, now, in addition to the financial matters which the Registrar raised earlier with the Applicant, and in addition to the complaints that were received from other registrants (Sunwing and Suvara), there now appeared in the Registrar's quiver a complaint, not from another registrant, but this time from an actual consumer, a customer of the Applicant's. This complaint, from one <consumer's name deleted>, is set out in a letter dated February 1, 2006, from TICO to the Applicant. A copy of the letter is found at Tab 7 of Exhibit 1. In effect, <consumer's name deleted> sought, from the Applicant, refunds for airplane tickets he had purchased from the Applicant, and compensation for the Applicant's apparent errors and cancellations.

However, as if this were not bad enough for the Applicant, the Registrar was still not done with the Applicant. By letter dated February 21, 2006, from TICO to the Applicant, TICO informed the Applicant that its Form 1 had not been filed. A copy of the letter is found at Tab 11, Exhibit 1. Form 1 is the form used to provide a statement for the six months ended December 31, 2005, and due 45 days later. In this case, the due date was February 14, 2006. Failure to file a Form 1 is a default under the Act. In addition to the Form itself, there is to accompany it a cheque in the appropriate amount as payment towards the Travel Industry Compensation Fund ("Fund"), established under the Act, and to which all travel agents must contribute. The amount of the cheque is determined by the information given in Form 1. Without Form 1, there can be no cheque. Without the cheque, there can be no contribution to the Fund. Without a contribution, the Act and its regulations are violated. The Applicant was, therefore, for yet another reason, in serious difficulty.

However, the Registrar still gave the Applicant a chance. By letter dated March 7, 2006, and also found at Tab 11, Exhibit 1, TICO gave the Applicant until March 21, 2006, to file a Form 1. Yet again, by memorandum dated April 3, 2006, TICO sent a blank Form 1 to the Applicant, requiring its filing by April 7, 2006.

To all these communications to the Applicant, the Registrar was met with silence and inaction.

Furthermore, with no Form 1 forthcoming, Ms. Harrison said that a Notice of Further and Other Particulars, dated April 19, 2006, was prepared and sent to the Applicant. A copy of this document appears at Tab 12 of Exhibit 1, and refers, specifically, to the absence of Form 1.

Therefore, by the date of the Notice of Proposal which is the subject of this hearing, the Applicant was deficient in filing his financial statements, filing a Form 1 and

accompanying cheque, and settling the outstanding NSF cheque matter with Suvara and settling the complaints from the consumer, <consumer's name deleted>.

According to Ms. Harrison, the significance to TICO of these deficiencies is that, with respect to the financial statements, without those statements, there is no appropriate amount paid into the Fund, thereby giving rise to a risk to consumers. The NSF trust cheques were a sign of not operating properly and with integrity. The NSF cheques to another registrant raise the fear that other consumers and registrants would be placed at risk if the Applicant's business were not being run properly. In addition, the fact that there were two Notices to revoke the Applicant's registration within a period of seven months would also cause the Registrar to have serious concerns.

Before leaving this summary of the evidence of Ms. Harrison, reference should be made to Exhibit 5. Exhibit 5 is a copy of a letter dated August 9, 2006, and sent by facsimile transmission on the same day (the day immediately before this hearing date) from the agent for the Applicant to TICO. This agent was not the law firm that the Applicant referred to when he sought his adjournment on July 26, 2006.

The letter purports to enclose what is referred to as a Form 1 dated January 11, 2006; a money order, Form 1, in the amount of $25.50 and dated August 8, 2006; and financial statements ended December 31, 2005. Ms. Harrison pointed out two problems with the Form 1. First, the Form is dated January 11, 2006. But, if it had really been dated that day, why wouldn't the Applicant have immediately told TICO about this when he received their letters of February 21, 2006, March 7, 2006, and April 3, 2006, all asking him to file that very Form 1? It seems inconceivable that the Applicant would not have immediately informed TICO that he had sent in the Form about January 11th. This is so, especially since the Applicant was specifically asked in the correspondence to file the Form 1 and was also told that failure to do so is a violation of the Act, thereby exposing his licence to revocation. His silence on the matter is not reasonable and makes no sense whatsoever.

Secondly, how can a Form 1, sent in on January 11, 2006, contain a money order dated August 8, 2006? It cannot.

Thirdly, the Form 1 minimum payment is indicated on the Form to be $25.00. Provincial Sales Tax of 8% on that sum is to be added to it. But, 8% of $25.00 is $2.00, not fifty cents, as the Applicant calculated on his Form. The amount paid should have been $27.00 and not $25.50.

For the Applicant to say, therefore, that he had sent in his Form 1 on or about January 11th, as well as the proper contribution to the Fund, is a pious fiction which does not stand up to scrutiny. This smacks of the Applicant's credibility being strained, at best, and non-existent, at worst.

Evidence of Archna Gupta

The next witness called by the Respondent was Archna Gupta. Ms. Gupta has been with TICO since March 2006, but, before then, was a certified management accountant, and accountant for 20 years. She is a financial analyst and financial inspection co-ordinator at TICO.

It was Ms. Gupta who informed TICO by memorandum dated May 5, 2006, of yet another problem that a registrant, Royal Scenic Holiday ("Royal"), was having with the Applicant. A copy of the memorandum is found at Tab 13 of Exhibit 1. It seems that Royal had received two NSF cheques from the Applicant, one for $2,963.34 and a second for $4,784.88. These are not, in the eyes of this Tribunal, insignificant amounts. By letter dated May 11, 2006, and found at Tab 14 of Exhibit 1, TICO requested from the Applicant a response to this most recent complaint.

On May 15, 2006, a pre-hearing before this Tribunal was held in the Applicant's current appeal. This Tribunal made an Order requiring the Applicant to submit, by July 7, 2006, to the office of the Registrar, the following documents:

1. Financial statement for the year-end December 31, 2005, prepared by the Certified Public Accountant.

2. Trust Reconciliations (reconciliation of the customer deposits to trust account deposits) for the months of January through April, 2006;

3. Form 1 statement for the 6 months ended December 31, 2005;

4. Written explanation as to the customer complaint and TICO's request for explanation (see TICO letters dated February 1, 2006 and February 21, 2006 for reference and details);

5. Written explanation as to the complaints from Royal Scenic Holiday as to issuance of NSF cheque outlining steps taken to rectify the problem by June 1, 2006.

By letter dated July 11, 2006, four days after the July 7th deadline set in the Order, TICO reminded the Applicant that he had to submit the items listed in that letter. All but the trust account reconciliations remained outstanding.

However, this inaction on the part of the Applicant and non-compliance with its obligations should not be surprising, based on the evidence presented to this Tribunal. Throughout this entire scenario, the evidence has clearly shown that the Applicant has demonstrated a total and blatant disregard of instructions from TICO and of Orders of this Tribunal and of requirements of the Act and of the Regulations. The Applicant's credibility is sadly wanting in the eyes of this Tribunal. TICO has shown great patience in dealing with this registrant.

Ms. Gupta was shown the facsimile transmission of a letter dated August 8, 2006, being Exhibit 4, from the Applicant's agent, wherein, ostensibly, the outstanding complaint from <consumer's name deleted> and from Royal were dealt with. However, the copy of a letter dated June 25, 2006, from Mr. Kenson on behalf of the Applicant, and sent with the facsimile, refers to the Applicant being served with a Small Claims Court Claim by Royal on July 5, 2006. Again, how can the contents of a letter written on June 25th, refer to an action (being served with a Claim) that has already supposedly been completed on July 5th, some 10 days later? How can this Tribunal accept that letter as being truthful? That is the question that Ms. Gupta posed and is a question that stretches the credibility of Mr. Kenson to its absolute limits. It is preposterous.

Ms. Gupta further states that she did not see the letter until August 8th, and not at any time before, despite its June 25th date. In view of this Tribunal's opinion of Mr. Kenson's credibility, as stated earlier, this Tribunal has no hesitation in accepting Ms. Gupta's evidence.

Ms. Gupta also dealt with the Review Engagement Report (RER) attached to Exhibit 5. The RER, prepared by a chartered accountant, is dated August 8, 2006, and is for the Applicant's financial year ending December 31, 2005, and was, therefore, over four months late, because the regulations under the Act require that it be filed three months after the year-end. This is not even considering that it was well past the July 7th deadline, set by this Tribunal at the pre-hearing on May 15, 2006. Again, such tardiness does not instil much confidence in the Applicant's business practices. Ms. Gupta reviewed the statements with a view to determining whether the Applicant had sufficient working capital, in accordance with section 23 of Regulation 26/05. Her conclusion was that the Applicant's working capital was not in an amount to meet the requirements of that section.

The reasons for Ms. Gupta's conclusion are twofold.

First, she reviewed the value of the liabilities and of the assets on the Balance Sheet, which is page number 8 of 12 pages in Exhibit 5. But, the assets total $11,922.00. Liabilities total $10,250.00. This difference leaves the sum of $1,672.00 as working capital. Since the Applicant had less than 1.5 million dollars in sales in the previous fiscal year, 2005, section 23 requires that working capital must be a minimum of $5,000.00. Therefore, says Ms. Gupta, the Applicant did not comply with section 23. She is correct, and there is absolutely no contradictory evidence or any challenge of her testimony due to the fact that the Applicant saw fit not to attend this Hearing.

Secondly, there was reason to believe that the working capital situation might be worse than the RER indicated. This is because the RER was done as at December 31, 2005. But, it wasn't until March of 2006, some 3 months later, that Royal informed TICO that the Applicant owed it over $4,000.00. This amount would normally be added to the liabilities of the Applicant's financial records, with the result that, with that additional liability added, the liabilities would exceed the assets by slightly over $2,300.00, thereby

putting the working capital in a minus situation. This, says Ms. Gupta, was a circumstance that not only violated section 23, but also put consumers and other registrants at risk. This Tribunal agrees with that assessment.

Therefore, not only is the working capital deficient, considering the figures in the RER, but the working capital might also be in a minus situation, considering the claims against the Applicant that arose after December 31, 2005. This Tribunal, of course, cannot engage in speculation on this latter point, but there is absolutely no evidence that was forthcoming from the Applicant that would indicate that the Registrar's fears were unfounded. Ms. Gupta reminded this Tribunal that TICO must ensure that there is no risk to the Fund, or to consumers or to other registrants. But, if the financial statements are filed late, as were the Applicant's, then TICO cannot accurately determine if there is a risk without having this basic financial information.

To add to the Applicant's woes, the Statement of Loss in the RER reveals that the Applicant did not make enough money to break even. It is little wonder, according to Ms. Gupta, that the Registrar had concerns about whether the Applicant can reasonably be expected to be financially responsible in the conduct of its business.

Finally, according to Ms. Gupta, as at the date of this hearing, TICO was not aware whether the Suvara debt had yet been paid.

Evidence of Alice Yu

To deal with the debt to Royal, the Respondent called Alice Yu as a witness. Ms. Yu is the Director of Sales for Royal. She solicits business from travel agencies.

The first time Ms. Yu dealt with the Applicant was in April 2006. On that occasion, Mr. Kenson, on behalf of the Applicant, picked up two tickets and paid for them with a cheque. The cheque was returned to Royal marked NSF, although Mr. Kenson cleared up the matter shortly afterwards.

Later in April, Royal sold three more tickets for the sum of $4,784.88, which the Applicant paid for by cheque. Again, the cheque was returned NSF. Despite ongoing communications with the Applicant, and in view of Mr. Kenson's failure to keep 3 promises to replace the cheque, Royal finally instituted a legal action in Small Claims Court. The Claim was served July 7, 2006, according to Ms. Yu (not on July 5th, 2006, as Mr. Kenson stated in his letter dated June 25, 2006, already referred to as part of Exhibit 4). The amount still remains outstanding. Royal refused to accept the Applicant's offer to pay the amount by cheques in four payments, out of the fear that such cheques would, again, be returned NSF. Ms. Yu stated that, in view of this experience with the Applicant, she does not trust that agency.

Evidence of Robert Nunes

One Mr. Robert Nunes next gave evidence on behalf of the Respondent. Mr. Nunes is the chief operating officer of Suvara. He confirmed the difficulties that Suvara had with cheques from the Applicant that were subsequently returned NSF in August 2005. He confirmed that Suvara had received two cheques from the Applicant as payment for seven tickets purchased from Suvara. One cheque, for the amount of $2,268.14, was returned NSF, but was subsequently replaced. The second cheque, in the amount of $5,000.00 was also returned NSF. Only the sum of $1,000.00 has since been paid by the Applicant towards this outstanding amount.

As at the date of this hearing, the Applicant still owes the sum of $4,000.00 to Suvara. Exhibit 3 contains copies of all the correspondence from and to Suvara that deal with these unfortunate circumstances.

Mr. Nunes said that Suvara would not deal with the Applicant again because Suvara has no trust in the Applicant.

Evidence of Jose Pereira

The final witness was Ms. Jose Pereira. Ms. Pereira is a complaints officer for TICO. She assists consumers and registrants with complaints about other registrants under the Act. A copy of a letter dated February 1, 2006, found at Tab 7 of Exhibit 1, illustrates that TICO communicated to the Applicant as a result of having received a complaint from a customer, <consumer's name deleted>, already referred to earlier in these Reasons. Ms. Pereira did not receive a response to that letter. As a result, by letter dated February 21, 2006, and found at Tab 1 of Exhibit 2, a further letter was sent to Mr. Kenson at the Applicant's address. Again, no response was received.

Ms. Pereira was shown the letter from Mr. Kenson to TICO, and dated June 21, 2006, found in Exhibit 4. Ms. Pereira uncategorically stated that she had not seen the Applicant's letter of June 21, 2006, until the date of this Hearing. This Tribunal has no reason to doubt her testimony. Therefore, although she acknowledged that the matter with <consumer's name deleted> now seems to be settled, according to the Applicant's letter, nevertheless, the Applicant has failed to respond to the other matters raised in the letter of February 1, 2006. This is contrary to section 16 of the Act, which requires a registrant to respond to the Registrar when the Registrar requests information relating to a complaint about the registrant.

Assessment of Evidence

Considering that no representative of the Applicant was even present at this Hearing to cross-examine the Respondent's witnesses, or to give evidence on behalf of the Applicant, this Tribunal accepts without reservation the evidence given by those witnesses as facts found proven by the Respondent. This Tribunal finds that there is no credible evidence before it on behalf of the Applicant.

THE LAW

The authority to revoke the Applicant's registration is found in section 10 of the Act, which provides as follows:

> 10(1) Subject to section 11, the registrar may refuse to register an applicant or **may suspend or revoke a registration or refuse to renew a registration if, in his or her opinion, the applicant or registrant is not entitled to registration under section 8**
>
> (emphasis is added)

It was under the authority of this section that the Respondent issued its two Notices of Proposal.

In turn, the provisions of section 8 that are relevant to this hearing, relating to conduct of an applicant, provide as follows:

> 8(1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
> .....
>
> (d) the applicant is a corporation and,
> .....
> (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, **the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,**
> .....
> (iv) **the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation** affords reasonable grounds for belief that its business **will not be carried on in accordance with the law and with integrity and honesty, or**
> .....
>
> (e) **the applicant** or an interested person in respect of the applicant **is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations,** other than the code of ethics established under section 42;
>
> (f) **the applicant is in breach of a condition of the registration**;
>
> (emphasis is added)

Note that past conduct is a legitimate consideration in a section 8 determination.

Dealing with the issue of failing to respond to the Registrar's request for information upon receiving a complaint about a registrant, section 16 of the Act provides as follows:

> 16(1) If the registrar receives a complaint about a registrant, the registrar may request information in relation to the complaint from any registrant.
>
> (2) A request for information under subsection (1) shall indicate the nature of the complaint

> (3) A registrant who receives a written request for information **shall** provide the information as soon as is practicable.
>
> (emphasis is added)

It should be noted that a reply by a registrant to such a letter of request from the registrar is not an option – it is mandatory.

Dealing with the issues of working capital and financial statements prepared on behalf of the Applicant, for the period ended December 31, 2005, the relevant portions of sections 22 and 23 of Ontario Regulation 26/05 state as follows:

> 22(1) Every registrant **shall** file with the registrar the financial statements required by this section for each fiscal year.
>
> (2) **A registrant who had sales in Ontario of less than $10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,**
>
> (a) annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*; or
>
> (b) annual financial statements with an auditor's report from a licensed public accountant, if the registrant is required to obtain annual financial statements with an auditor's report under the *Business Corporations Act*.
>
> 23(1) This section ceases to apply on December 31, 2005.
>
> (2) A registrant **shall** maintain a minimum working capital of $5,000 if the registrant had sales in Ontario of less than $1.5 million during the previous fiscal year.
>
> (emphasis is added)

Beginning January 1, 2006, section 23 was replaced by section 24 of Ontario Regulation 26/05; however, the minimum working capital requirement still remains at $5,000.00, but the sales criterion for that amount is now $500,000.00 or less.

The relevant provisions of Ontario regulation 26/05 that deal with the Travel Industry Compensation Fund ("Fund") are as follows:

> 50. Every registrant **shall** participate in the Fund.
>
> 52(1) The Fund is composed of,
>
> (a) payments made by registrants in accordance with this Regulation and by participants or registrants in accordance with a predecessor to this Regulation;
>
> 53(1) Payments under this section **shall** be made to the administrative authority,
>
> (a) within 45 days after the end of the first half of the registrant's fiscal year; and
>
> (b) within 45 days after the end of the second half of the registrant's fiscal year.
>
> (2) A travel agent shall make payments in the amount that is the greater of the following:

1. $25 plus the applicable taxes

2. For every $1,000 or part of sales in Ontario during the preceding fiscal half-year, $0.25 plus the applicable taxes

.....

(4) A payment under this section shall be accompanied by a completed return indicating the registrant's sales in Ontario for the preceding fiscal half-year and the amount of payments owing to the administrative authority.

(emphasis is added)

APPLICATION OF LAW TO FACTS

A review of the evidence before this Tribunal in this matter overwhelmingly confirms that the above provisions applied to the Applicant's course of conduct and were breached by the Applicant.

The NSF cheques to Sunwing, Suvara and Royal which are still outstanding, showed a lack of integrity and honesty, contrary to section 8(1)(d)(iv) of the Act and showed that the Applicant is not financially responsible contrary to section 8(1)(d)(ii) of the Act.

The lack of business records at the Applicant's office was a direct violation of paragraph 11 of the Terms and Conditions of the Applicant's registration and, therefore, a violation of section 8(1)(f) of the Act.

The lack of timely financial statements was a breach of paragraph 4 of the Terms and Conditions of registration and, therefore, of section 8(1)(f) of the Act and of section 22 of Regulation 26/05, not to mention being a contemptuous disregard for the Orders of this Tribunal after the pre-hearings on December 2, 2005 and May 15, 2006.

The difficulty with which the Applicant treated <consumer's name deleted> showed a lack of integrity and honesty, contrary to section 8(1)(d)(iv) of the Act.

The lack of Form 1 filing and accompanying payment to the Fund was a direct violation of section 53(1), (2) and (4) of Regulation 26/05.

Insufficient working capital was a breach of section 23(2) of Ontario Regulation 26/05.

The Applicant's failure to respond to the Registrar's requests for information about complaints received was a direct violation of section 16 of the Act.

DECISION AND REASONS

The proper test to be applied by this Tribunal to the facts presented at this hearing is clearly stated in the case *Brenner* v. *Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017. There, Southey J., at paragraph 12 states:

> 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 addition, the authority that the Tribunal has after a hearing such as this one is outlined in section 11(5) of the Act, where it is stated:

> 11(5) If a hearing is requested, the Tribunal shall hold the hearing and **may by order direct the registrar to carry out the registrar's proposal** or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration.
>
> (emphasis is added)

On the facts as found, and on the application of the law to those facts, the Tribunal finds that the decision by the Registrar to revoke the license of the Applicant is not in error.

DECISION

Therefore, by virtue of the authority vested in it under section 11(5) of the *Travel Industry Act, 2002,* the Tribunal directs the Registrar to carry out the Registrar's proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

_____
Kenneth Koprowski,
Vice Chair

RELEASED: August 24, 2006

FILE NAME: 3486.tia.skyport.doc

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

Licence Appeal Tribunal | **Tribunal d'appel en matière de permis**

Ontario

PRE-HEARING

MRV ENTERPRISES INC. O/A UNIGLOBE INTRIGUE TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: ROSE SCURTI, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar under the *Travel Industry Act, 2002*

DATE OF PRE-HEARING: August 4, 2006 Toronto

ORDER

Following attendances on August 4, 2006, at a pre-hearing before this Tribunal of Rose Scurti who appeared for MRV Enterprises Inc. o/a Uniglobe Intrique Travel (the "Applicant") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Monday, October 2, 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. Counsel for the Registrar stated the principal issue is the Registrar's concern that the Applicant's working capital be in compliance with the Act and the Regulation;

3. While there was no resolution of the matter in the pre-hearing, the Applicant confirmed its interest in meeting the requirements of the Act and the Regulation, and agreed as follows:

    - to complete and submit the company's year end financial statements by or before September 11, 2006;

    and at the same time:

    - to submit evidence showing the company's working capital is in compliance with the requirements of the Act and Regulation;
    - to submit trust account reconciliations for the period of January 2006 through to and including July 2006; and
    - to review with a representative from the Registrar's office, the guidelines for management of a registrant's trust account and to be in compliance with those guidelines.

4. Counsel for the Registrar noted the Registrar may review the information the Applicant has agreed to submit by or before September 11, 2006, and if determined to be in accordance with the requirements of the Act and Regulation, may consider withdrawal of the Proposal dated May 23, 2006.

5. The Parties were reminded that in the event of a settlement, the Tribunal must be advised in writing of the withdrawal of the Proposal. In the event the Proposal is not withdrawn, the hearing will proceed on October 2, 2006, 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.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: August 11, 2006

FILE NAME: 3627.uniglobe.tia.prehrg.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

EXEC 1 TRAVEL CORP O/A GOLIGER'S TRAVELPLUS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: GARY R. MacLEOD, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar under the *Travel Industry Act, 2002*

DATE OF PRE-HEARING: August 1, 2006 Toronto

ORDER

Following attendances on August 1, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Gary R. MacLeod who appeared on behalf of Exec 1 Travel Corp o/a Goliger's TravelPlus (the "Applicant") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar"), the Tribunal orders that;

1. The Parties to the hearing are the Applicant and the Registrar.

2. The Parties substantially agreed to terms and conditions to be drawn up by the Registrar and signed by the Parties within ten (10) business days of the date of this Order. A copy of the said terms and conditions, signed by the Parties, shall be sent to the Tribunal.

3. The hearing scheduled for September 18, 2006 is hereby adjourned. Should a hearing of this matter be necessary it shall commence at 9:30 a.m. on Wednesday, November 15, 2006 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto.

4. If the Applicant fails to comply with the conditions currently consented to, or any signed terms and conditions, the Registrar may request an earlier hearing date in this matter.

5. In the event that the hearing proceeds, the Applicant will call up to two witnesses and the Registrar will call up to three witnesses.

6. The Parties were reminded that in the event of a settlement the Tribunal must be advised, in writing, of the withdrawal of the Proposal.

7. Should the Parties fail to reach a settlement the hearing will proceed as stated in point 3 above and the Parties shall fully comply with the applicable requirements regarding disclosure, as set out in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

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Donald Benninger, Presiding Member

RELEASED: August 2, 2006

FILE NAME: 3597.tia.Exec_1_Travel.prehrg order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

1349694 ONTARIO INC. O/A R & R FUN TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: RICHARD K. SCHILLING, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar under the *Travel Industry Act, 2002*

DATE OF PRE-HEARING: July 10, 2006 *by teleconference*

ORDER

Following attendances by teleconference on July 10, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Richard K. Schilling who appeared as representative for 1349694 Ontario Inc. o/a R & R Fun Travel (the "Applicant") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, September 6, 2006 at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.

2. Counsel for the Registrar confirmed the Applicant has filed the required Form 1 for the period ending December 31, 2005 and also submitted the required payment.

3. The Applicant confirmed the filings were submitted late and committed to future filings in a timely manner to comply with the required Regulation under the *Travel Industry Act, 2002*.

4. Counsel for the Registrar noted that subject to the Registrar's final review, the Registrar may consent to the withdrawal of the Proposal dated April 21, 2006 and the matter will then not proceed to the hearing on September 6, 2006.

5. The Parties were reminded that in the event of a settlement the Tribunal must be advised in writing of the withdrawal of the Proposal. In the event the Proposal is not withdrawn, the hearing will proceed on September 6, 2006 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.

AND WHEREAS by fax dated July 14, 2006, the Registrar withdrew their Notice of Proposal dated April 21, 2006;

NOW THEREFORE this Tribunal orders that the scheduled hearing of September 6, 2006 is cancelled and these proceedings are concluded before the Tribunal.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

RELEASED: July 20, 2006

FILE NAME: 3561.tia.1349694 Ontario Inc.prehrg order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

UNIGLOBE TRAVEL GROUP

APPEAL FROM A DECISION OF THE BOARD OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO DENYING A CLAIM FOR COMPENSATION UNDER THE *TRAVEL INDUSTRY ACT*

TRIBUNAL: JIM KENNELLY, Member

APPEARANCES: MALCOLM J. SLATER, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel for the Travel Industry Council of Ontario ("TICO")

DATE OF PRE-HEARING: July 7, 2006 Toronto

ORDER

Following attendances on July 7, 2006, at a pre-hearing before this Tribunal, of the above parties;

The Tribunal heard that this claim is related to the purchase of air tickets on Jetsgo by a group of 29 students. The Jetsgo bankruptcy of March 11, 2005 forced the purchase of replacement tickets.

Mr. Slater stated that Uniglobe Travel emailed TICO asking about reimbursement claim forms on March 21, 2005.

TICO responded with a question as to what types of claim forms were required.

There does not appear to be any other correspondence until the submission of the claim.

Uniglobe Travel (Applicant) submitted a claim in the amount of $18,191.51 dated December 14, 2005 received, according to TICO, on December 19, 2005.

In a letter of April 24, 2006 TICO denied the claim. TICO informed Uniglobe Travel Group (the "Applicant") that “under Section 53 of Ontario Regulation 806/93 enacted under the *Travel Industry Act*” a claim for reimbursement must be made “within six months after the event that gave rise to the claim for reimbursement.”

The ‘event’ was the bankruptcy of Jetsgo dated March 11, 2005. The six months plus a day claim date would have been September 12, 2005.

The hearing for August 31, 2006 remains scheduled to commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue W., Toronto.

Both parties were reminded of the disclosure requirements in the LAT Rules of Practice. The Parties were also reminded of the requirements regarding expert witnesses, should there be plans to call such witnesses.

LICENCE APPEAL TRIBUNAL

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Jim Kennelly, Member

RELEASED: July 20, 2006

FILE NAME: 3548.tia.uniglobe.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

ROHAN JUDE RANAWEERA

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: ROHAN JUDE RANAWEERA, the Applicant appearing on his own behalf

SOUSSANNA KARAS, Counsel, representing the Travel Industry Council of Ontario

DATE OF PRE-HEARING: June 21, 2006 Toronto

ORDER

FOLLOWING attendances on June 21, 2006, at a pre-hearing before this Tribunal of Rohan Jude Ranaweera ("the Applicant"), Numani Ranaweera, and Soussanna Karas, Counsel, appearing on behalf of the Travel Industry Council of Ontario ("TICO");

The Tribunal makes the following Order in respect of the hearing scheduled to commence at 9:30 a.m. on Tuesday, August 8, 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 TICO.

2. There was no settlement of the issue.

3. The Respondent provided the Applicant and the Tribunal with a copy each, of the Respondent's Documents Brief.

4. The parties to the hearing were reminded that they shall fully comply with the requirements for disclosure of documents or things, as set forth in Rule 6.3 of the Rules of Practice of the Tribunal and to deliver complete copies of disclosure materials by or before July 25, 2006.

5. In the event a settlement is concluded or the matter is withdrawn, all parties must be so advised in writing and that a hearing will not be required.

LICENCE APPEAL TRIBUNAL

_____
Simon Dann
Presiding Member

Released: June 27, 2006

File: 3496.Ranaweera.tia.claim.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

Ontario

PRE-HEARING

MARY FERRATO

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

TO DISALLOW A CLAIM

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: JOHN FLORIO, Representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Travel Industry Council of Ontario

DATE OF PREHEARING: May 11, 2006 Toronto

ORDER

FOLLOWING attendances on May 11, 2006, at a pre-hearing before this Tribunal of John Florio, appearing on behalf of Mary Ferrato (the Applicant) and Soussanna Karas, Counsel, 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 Monday, June 29, 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. There was no settlement of the issue.

3. The Respondent provided the Applicant's representative and the Tribunal, each with a copy of the Respondent's Document Brief.

4. The Parties were advised they shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

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Simon Dann, Presiding Member

Released: May 16, 2006

File name: 3446.tia.Mary Ferrato.Pre-hrg.Order.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

HOWARD FORBES

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

TO DISALLOW A CLAIM

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: HOWARD FORBES, Applicant, unrepresented

SOUSSANNA KARAS, Counsel for the Travel Industry Council of Ontario ("TICO")

DATE OF HEARING: April 27, 2006 Toronto

REASONS FOR DECISION

BACKGROUND:

By Decision Letter dated December 16th, 2005 TICO refused the claim of the Applicant for reimbursement from the Travel Industry Compensation Fund (the "Fund"). Its refusal was based on the fact that the Applicant's claim for compensation was received beyond the filing deadline set out in Regulation 806/93 under the *Travel Industry Act* (the "Act").

Mr. Forbes filed a Notice of Appeal on December 28th, 2005. The hearing occurred at the Tribunal chambers on April 27th, 2006. Mr. Forbes had one witness, his sister. TICO called one witness, Ms Lori Furlan.

ISSUE:

Should the Claim be dismissed by virtue of it having been filed beyond the limitation period of six months from the date of the event as set out in the Regulations under the Act?

EVIDENCE:

The Applicant testified that he purchased tickets from a travel agent registered under the Act, Travelways, for an Air Canada flight departing in December 2002 for $2,265.00. When he was told the tickets would not be honoured, as Travelways had not paid the carrier for the flight, he purchased two additional tickets and completed the flight. At the time he was advised to contact TICO for possible reimbursement. On doing so he was directed to contact the Canadian Transport Agency ("CTA") where he filed a complaint.

His last communication with CTA occurred on March 7, 2005 when CTA wrote the Applicant advising TICO would review any outstanding Travelways claims and provided the name of a TICO contact, Ms Furlan, her phone number as well as a reference to the TICO website – see Exhibit 3, Tab 9.

It was Mr. Forbes' evidence that he attempted to contact Ms Furlan on a number of occasions without success, but finally in late August, 2005 left a message on her voicemail. When Ms Furlan returned the call on September 1st she informed him that the Travelways claims had a compensation claim deadline of July 14, 2005 given that the Fund's Board of Directors had determined January 13th as the date of the event under the legislation. Nonetheless, she mailed him out a Claim package for him to complete. The package was stamped released on September 1; it included a cover page, which advises in bold:

> **Please note there is a six month filing deadline from the date of the event giving rise to the claim.**

It also notes in bold that it is important to submit the claim immediately, even if not completed, as supporting documentation required can be forwarded later. (Exhibit 3, Tab 2) The Claim itself consists of a 7 pages and notes on its face that the claim is against Travelways, provides the Travelways address and notes, again in bold, that the date of the event is January 13, 2005.

Mr. Forbes testified that the date of January 13, 2005 was not included on the document when it was received by him on September 6. He acknowledged however that, at the time of his initial conversation with Ms Furlan he understood the time of the event to have been January 13th.

Mr. Forbes testified that he called Ms Furlan to explain he did not have all the supporting documents. He was not clear as to when he made this call. In his written Notice of Appeal he states he did so "promptly", while in cross-examination he stated it

was “two or three days” after receipt. At the time, he acknowledges Ms Furlan stating that the deadline had been extended to September 8th and that he should send the form into TICO without the supporting documents, which could be sent later. It was his evidence that he did so. The Claim is not signed by him until September 10th and not stamped received by TICO until September 27th, 2005. Supporting documents came in on two separate occasions between that date and November 8th.

Mr. Forbes testified that his sister had actually mailed the completed Claim Form into TICO. The Applicant's sister testified she had not kept any record of dates as she hadn’t felt such to be necessary. However, she did acknowledge that she had read the Claim Form with the covering letter on September 6 and understood there were deadlines. She testified she then understood the date of the event to be January 13th, but that no deadline was clearly set out in writing. She also agreed that her brother had advised her he had called Ms Furlan who had told him the deadline had been changed to September 8th.

The Applicant's sister further testified she had instructed her brother to make the initial phone calls to TICO after receiving the CTA letter in March as he was home and she worked during the day. When her brother told her he had tried to contact TICO without success she advised him to leave a voice message, which resulted in his receiving the form on September 6th.

Ms Furlan is the TICO Claims Coordinator and was the only TICO employee to have responsibility for Travelways Claims. She testified that it was not possible for Mr. Forbes to have left any voice message for her prior to the one she returned on September 1st and from which she sent out the Claim. She testified that it was not possible to get a busy signal from her telephone line as it automatically is directed to a recording giving alternate options for information.

Ms Furlan explained that, regardless of missed time periods, she always sends out a form for Claim applications as this provides the applicant with a right of appeal. In this case she advised the deadline was July 14, six months after January 13th, 2005.

In response to questions from the Tribunal, Ms Furlan stated that had she heard from the Applicant on the day of, or just prior to the extended deadline of September 8th, she would have advised he fax the Claim cover sheet immediately so as not to jeopardize his claim. This is her usual practice as is the practice, if a claim is received just prior to or after a deadline, of using the date stamped as mailed rather than the date received. In this case, this practice was not followed, as the Claim did not reach the TICO office until September 27, 2005, close to three weeks after the final deadline had passed.

Ms Furlan explained that the deadline was amended to September 8th by TICO’s Board of Governors to attempt to best accommodate claimants who, it was recognized, had not been advised of their right to a claim until the March 7th mail out by the CTA. She further testified that 38 claims received by TICO for Travelways had been paid out before the original deadline based on January 13th.

THE LAW:

The legislation providing for payment from the Fund to the traveling public is contained in section 27 of the Act, which provides in subsection (n):

> 27. The Lieutenant Governor in Council may make regulations,
> …
> (n) providing for the establishment, maintenance and administration of a compensation fund in trust by travel agents and travel wholesalers and prescribing the form and terms of the trust;

and in subsection (p):

> 27. The Lieutenant Governor in Council may make regulations,
> …
> (p) providing for payment out of the compensation fund of claims and procedures to be followed in respect thereto;

The operation of the Fund is found in Regulation 806/93:

> 44.1 The Council shall administer and manage the affairs of the Compensation Fund.

The eligibility of the Claim is contained in section 49:

> 49. The board of directors shall determine whether a claim, or a part of one, meets the requirements of this Part and shall determine the eligible amount of the claim.

The time limit is imposed under section 53:

> 53. A customer or a registrant shall make a claim for reimbursement in writing to the board of directors within six months after the event that gave rise to the claim for reimbursement.

Earlier decisions of this Tribunal cited by Counsel include *Alpha Club* (2001) where Vice-Chair McIntosh found that the delegation to the Board of setting out the limitation period contained in section 53 is authorized by inference given the implied necessity of instilling a coherent method of managing the Fund in accordance with section 27. In this case the Claim was made by a travel agent who had submitted its claim 9 days after the deadline. Finding as a fact that the Applicant was notified that filing must occur with six months from the event giving rise to the claim and that there was no evidence of bad faith or negligence by TICO, but rather that the missed deadline was the result of the Applicant's own inadvertence, the Tribunal upheld TICO's decision to deny the claim.

Vice-Chair Hunt in the 2001 decision of *Edwards-Simpson* held that the wording of section 53 was mandatory such that the Tribunal has no discretion to permit an extension of time beyond the six-month limit to file a claim.

A similar reasoning was employed by Chair Dombek in the recent 2004 decision of *Onkar Travels*, which also upheld TICO's denial of a claim for an applicant who filed a claim 7 weeks after the expiry of the date for which claims could be submitted.

DECISION AND ORDER:

The evidence is not disputed that the claim filed by Mr. Forbes was not submitted until close to three weeks after the deadline for such submissions. Mr. Forbes requests the Tribunal allow the claim, arguing that there was never any clear indication to him as to the deadline; and what information on time limits was provided was altered reflecting some uncertainty and ambiguity in its imposition, such that the limitation imposed is not reasonable

The Tribunal does not agree with the Applicant's position. It finds from the evidence that he was alerted to the fact that possible compensation was regulated by legislation in the letter from CTA of March 7th which also clearly provided him with advice as to where more detailed information as to his possible application could be found, including Ms Furlan's telephone number and the TICO website.

His inability to contact the TICO representative for close to six months was in part attributable, according to his testimony, to personal medical concerns. There was no allegation it was in any way a result of shortcoming on the part of TICO. Mr. Forbes' testimony was vague and uncertain as to who and when and how often he attempted to contact TICO. His sister, whose evidence was forthright and consistent, advised she had left the contacting of TICO to him, and that only when she instructed him to leave a voice message was he able to communicate with Ms Furlan and commence the procedure. However, once he made contact, the evidence was unambiguous that he understood there was a deadline for processing the Claim. The Applicant's sister also admitted she understood the deadline from having read the documentation and yet, even after her brother informed her it had been extended to September 8th, there was no evidence either took steps to ensure the claim was filed within the time limit allotted.

The evidence is not disputed that, at the time of receiving the Claim package Mr. Forbes was advised he had missed the deadline of six months from January 13th. This was verbally stated to Mr. Forbes over the telephone on September 1st and clear on the form, which the Tribunal finds, as a fact was completed in this regard at the time it was received and read by the Forbes brother and sister. While it did not state the expiry date of July 14th, it did state the event date of January 13th and the deadline date of six months. Hence, by clear inference, the deadline of July 14th was clearly communicated.

Whether the Applicant called on September 8th or one day before or after (given his testimony of two or three days), it is not disputed that Ms Furlan advised the date had been extended to September 8th. The Applicant's sister corroborated that this information was given by Ms Furlan and understood. Nonetheless, despite the

testimony of the TICO witness that she would have advised he send by fax the cover sheet alone to have the Claim processed within the timeline, he did not do so, but waited another day or two until September 10th to sign it and then another unexplained time period before mailing it, such that it was not received for over two weeks.

The Tribunal does not find the TICO time extension to September 8th cause for ambiguity or uncertainty but a specifically extended timeline, which was undisputedly clearly communicated to, and understood by, both the Applicant and his sister. That the Applicant chose not to comply with it is his own doing.

For all these reasons, the appeal is denied and the TICO is ordered to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

_____
Jane Weary, Vice-Chair

Released: May 18, 2006

File No. draft.3314.tia.Forbes.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.

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

PRE-HEARING

SKYPORT CANADA INC. O/A SKYPORT TRAVELS AND TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, 2002

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: BRIAN KENSON, Agent, appearing on behalf of Skyport Canada Inc.

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF PRE-HEARING: May 16, 2006 Toronto

ORDER

FOLLOWING attendances on May 16, 2006, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") of Brian Kenson, Agent appearing on behalf of Skyport Canada Inc. (the "Applicant") and Soussanna Karas, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

After hearing from the Parties, the Tribunal makes the following Order:

1. It was agreed, on consent, that the Applicant undertakes to submit to the office of the Registrar by July 7, 2006 the following documents:

    a) Financial Statement for the year end December 31, 2005 prepared by the Certified Public Accountant;

    b) Trust Reconciliations (reconciliation of the customer deposits to trust account deposits) for the months of January through April, 2006;

c) Form 1 statement for the 6 months ended December 31, 2005;

d) Written explanation as to the consumer complaint and TICO's request for explanation (see TICO letters dated February 1, 2006 and February 21, 2006 for reference and details);

e) Written explanation as to the complaints from Royal Scenic Holiday as to issuance of NSF cheque outlining steps taken to rectify the problem by June 1, 2006.

2. If the above noted documents are not satisfactory to the Registrar or are not submitted by the deadline of July 7, 2006, the hearing as arranged to revoke the registration of the Registrant scheduled on July 26, 2006 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, will commence.

LICENCE APPEAL TRIBUNAL

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Donald Benninger
Presiding Member

Released: May 18, 2006

File: 3486.tia.Skyport Canada Inc.prehrg.doc

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

Licence Appeal Tribunal | **Tribunal d'appel en matière de permis**

Ontario

PRE-HEARING

MILESTONE TRAVEL LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, 2002

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: MICHAEL SIMAAN, Counsel, representing Milestone Travel Ltd.

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act*

DATE OF PRE-HEARING: April 7, 2006 Toronto

ORDER

FOLLOWING attendances on April 7, 2006, at a pre-hearing before this Tribunal of Michael Simaan, Counsel, appearing on behalf of Milestone Travel Ltd. (the "Applicant") and Soussanna Karas, Counsel, 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 Monday, May 8, 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. Both parties to the hearing shall fully comply with the requirements of disclosure as set forth in Rule 6.3 and 6.4 (the latter if applicable) of the Rules of Practice of the Tribunal.

3. The Applicant's Counsel shall by no later than the close of business on April 10, 2006 by way of a letter addressed to and delivered to the Registrar's Counsel set forth in that letter precisely what requirements are outstanding and required by the Registrar.

4. The Registrar's Counsel shall reply in writing to the Applicant's Counsel's enquiry as above. Such reply shall be delivered to the Applicant's Counsel by no later than the close of business on April 18, 2006.

5. The Parties respective Counsel shall no later than 10 days prior to the hearing advise in writing to the other Party's Counsel the names of all witnesses they anticipate to have testify for them at the hearing together with a brief synopsis of the anticipated testimony.

6. The hearing of this matter on May 8, 2006 shall be peremptory against both parties.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 11, 2006

File: 3411.milestone.tia.pre.doc

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

Licence Appeal Tribunal

Tribunal d'appel en matière de permis

Ontario

RIVERWATCH INVESTMENTS INC. O/A CRUISE HOLIDAYS OF BROCKVILLE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE *TRAVEL INDUSTRY ACT*, *2002* R.S.O. 2002, CHAPTER T.19 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: ANDRE BELANGER Agent, appearing on behalf of the Applicant, Riverwatch Investments Inc. o/a Cruise Holidays Of Brockville

SOUSSANNA KARAS, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002*

DATE OF PRE-HEARING: December 20, 2006 *By Teleconference*

ORDER

Upon attendances at a pre-hearing by teleconference before the Licence Appeal Tribunal by Riverwatch Investments Inc. o/a Cruise Holidays of Brockville, the Applicant, and the Registrar under the *Travel Industry Act, 2002*, the Tribunal makes the following order with respect to the hearing;

1. The parties to the hearing are the Applicant and the Registrar;

2. No issues were resolved during the pre-hearing;

3. The hearing shall proceed as originally scheduled on the 7th day of February, 2007, in Kingston, Ontario;

4. The parties shall comply with the Tribunal's Rules concerning the disclosure to each other and the delivery to the Tribunal of copies of any and all documents upon which they intend to rely at the hearing, save and except for the fact that the Registrar shall have until seven days before the hearing to deliver copies of its documents to the Applicant and the Tribunal.

5. Should this matter be resolved to the satisfaction of the Registrar without the need for a hearing, the parties shall forthwith notify the Tribunal of such resolution and that there is no need for a hearing.

LICENCE APPEAL TRIBUNAL

_____
D. Gregory Flude
Vice-Chair

RELEASED: January 3, 2007

File Name: 3831.tia.riverwatch.pre-hearing.doc

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



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There have been no decisions released under this Act for the period selected.

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