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[About LAT](#)

[Enabling Legislation](#)

[My Appeal](#)

[Decisions](#)

[Bench Briefs](#)

[Statistics](#)


Decisions

Fiscal Year 2007 - 2008

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[LAT Decisions, Rulings and Orders](#)


➤ [Bailiffs Act](#)

➤ [Building Code Act, 1992, O.Reg 360/06, Division C, Part 3](#)

- [Section 3.2 - Designer](#)
- [Section 3.3 - Sewage Systems](#)
- [Section 3.4 - Registered Code Agency](#)

➤ [Cemeteries Act](#)

➤ [Child and Family Services Act](#)

➤ [Collection Agencies Act](#)

➤ [Consumer Protection Act, 2002](#)

➤ [Consumer Reporting Act](#)

➤ [Day Nurseries Act](#)

➤ [Discriminatory Business Practices Act](#)

➤ [Film Classification Act, 2005](#)

➤ [Funeral Directors and Establishments Act](#)

➤ [Highway Traffic Act](#)

- [Section 32\(12\)\(b\)\(i\) - Medical](#)
- [Section 47\(1\)](#)
 1. (b) [Medical](#)
- [Section 47\(1\) or 17\(2\) Commercial Vehicle Operator's Registration \(CVOR\)](#)
- [Section 48.3\(2\) - Administrative Driver's Licence Suspension - \(ADLS\)](#)
- [Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - \(CVIS\)](#)
- [Section 95\(1\) - Motor Vehicle Inspection Licence - \(GARAGE\)](#)
- [Section 55.1\(3\) - Motor Vehicle Impoundment - \(MVIA\)](#)

- [Intercountry Adoption Act](#)
- [Motor Vehicle Dealers Act](#)
- [Ontario New Home Warranties Plan Act](#)
- [Paperback and Periodical Distributors Act](#)
- [Post-Secondary Education Choice of Excellence Act, 2000](#)
- [Private Career Colleges Act, 2005](#)
- [Private Securities and Investigative Services Act, 2005](#)
- [Real Estate and Business Brokers Act, 2002](#)
- [Travel Industry Act](#)
- [Travel Industry Act, 2002](#)

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Decisions under Bailiffs Act

Fiscal Year 2007 - 2008

[LAT Decisions, Rulings and Orders](#) >>

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- >> [4184-BA-REGISTRATION](#) 
- >> [JOSEPH DELBERT ADAMS - PRE-HEARING](#) 
- >> [JOSEPH DELBERT ADAMS - PRE-HEARING](#) 

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4184-BA-REGISTRATION

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE
BAILIFFS ACT, R.S.O., 1990, CH. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: No one appeared for the Applicant

ALVIN TORBIN, Counsel, appeared on behalf of The Registrar under
the *Bailiffs Act*

DATES OF HEARING: December 11, 12, 13, 2007 and
January 18, 2008

Toronto

INTERIM ORDER

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicant from a decision by the Registrar under the *Bailiffs Act*, revoking his appointment. To preserve his privacy, the Applicant will not be referred to by name.

The hearing of the appeal began on December 11, 2007 and on this first day, the Registrar presented his case and the Applicant began his evidence. On the following day, the cross-examination of the Applicant began. During the noon break, the Applicant left the hearing, despite the advice of his counsel that there would be consequences flowing from his failure to appear. The Applicant's counsel advised the Tribunal that the Applicant did not feel well enough to continue. The hearing recessed until the following day and Counsel for the Applicant was advised that, if the Applicant wished to assert a medical reason for his leaving the hearing, the Tribunal would require a detailed medical certificate disclosing the nature of the illness, the expected duration of the illness and the doctor's opinion that the illness rendered the Applicant unable to attend the hearing. On the following day, the Applicant again did not appear and his counsel advised the Tribunal that the Applicant was not medically able to continue. An adjournment was requested and was granted, peremptory against the Applicant, until January 18, 2008.

On December 27, 2007, the Tribunal was notified by Counsel for the Applicant that the Applicant did not wish him to continue as counsel and accordingly, he was withdrawing from the case. Counsel enclosed a medical certificate which simply stated that the Applicant was under medical care for an indefinite time. The certificate did not meet the requirements of the Tribunal and was meaningless as evidence of illness or health.

On January 17, 2008, the Tribunal received a letter from the Applicant requesting a further adjournment of the hearing. The Applicant asserted that his lawyer had abandoned him, which was affecting his health. The Applicant attached some correspondence which in his opinion demonstrated that the Registrar had been exerting undue influence on the police and asking that the hearing be held in abeyance until his request to the Chief of Police to investigate could be addressed. The Applicant also cited a request he has made to the Mayor, presumably of Toronto, to investigate the Registrar. He also requested an adjournment to permit him to retain new counsel. The Applicant specifically stated that he was not abandoning his appeal.

In response, by fax dated January 17, 2008, the Applicant was advised that he was to appear on January 18, 2008 before the Tribunal to present his arguments for the adjournment in person. He was also advised in the fax that if his adjournment request was not granted, the hearing would proceed and that if he failed to attend, the Tribunal might proceed in his absence without further notice to him.

By fax sent on the morning of the scheduled resumption of the hearing, the Applicant advised that "without legal skills to fully comprehend the Tribunal's rules and procedures and my current state of health, it is improbable that I could make any serious indentation on the Tribunal". The Applicant enclosed a further medical certificate. This certificate again does not provide the Tribunal with a medical opinion about the Applicant's ability to appear at the hearing. However, the certificate does state that the Applicant suffers from a psychological illness that currently prevents him from participating in any active work. The certificate is dated January 8, 2008. The Applicant invited the Tribunal to call the doctor directly for more details.

The Applicant did not appear at the resumption of the hearing. An attempt by Tribunal staff to contact him by telephone was unsuccessful. Counsel for the Registrar opposed the granting of a further adjournment, arguing that the inadequacy of the medical certificate coupled with the Applicant's conduct should be interpreted as a constructive abandonment of the appeal.

In determining whether to grant an adjournment, the Tribunal must weigh the often competing interests of the party requesting the adjournment and the public interest in having proceedings before the Tribunal conducted expeditiously. In this case, the Applicant wishes the Tribunal to hold its proceedings in abeyance to permit him to pursue other issues he has with the Registrar in other forums. It is a long standing practice of this Tribunal that proceedings commenced before the Tribunal will continue regardless of what actions the parties may wish to pursue or defend in other forums. There is no reason to make an exception in this case.

The Applicant is free to proceed with his requests for investigations in other forums but the appeal from the Registrar's decision to revoke the Applicant's appointment under the *Bailiffs Act* will proceed independently. Accordingly, an adjournment will not be granted for this reason.

The Applicant also alluded in his written request for an adjournment to what he regarded as unfair cross-examination by Counsel for the Registrar and requested an adjournment to permit him to prepare to delve into the history of his dealings with the Registrar. The Applicant is free to present his grounds for appeal any way he sees fit, consistent with the law and Rules of Practice of the Tribunal. However, the Applicant is advised that the Tribunal does not have the jurisdiction to conduct a judicial review of the Registrar's decision and therefore, questions about the motives of the Registrar in proceeding with his proposal are not properly raised before the Tribunal. An adjournment of this hearing will not be granted on the grounds that the Applicant wishes to pursue matters outside the Tribunal's jurisdiction. If the Applicant, or his counsel, feel that any question asked during a cross-examination is unfair or otherwise objectionable, the Applicant or his counsel are free to object. The Applicant may also testify on re-direct examination to clarify any matters raised during the cross-examination.

The Applicant also requested an adjournment to permit him to retain and brief another counsel. There appears to be a difference of opinion between the Applicant and his original counsel as to whether the original counsel withdrew on the request of the Applicant or on his own initiative. In light of this, if the Applicant wishes to retain another lawyer to represent him, then the Tribunal is prepared to grant an adjournment for this purpose until February 21, 2008.

Finally, the Applicant cited his health as a reason for granting a further adjournment. The Tribunal still does not have a medical opinion before it that the Applicant is medically unfit to attend at the hearing or to instruct someone to appear on his behalf. The Applicant invited the Tribunal to contact his doctor directly but it is not the role of the Tribunal to investigate the Applicant or to satisfy itself as to the Applicant's state of health. It is the responsibility of the Applicant to address this issue to the satisfaction of the Tribunal. Despite the inadequate medical certificates, the hearing has now been recessed for one day and adjourned twice. Regardless of the state of the Applicant's health, the proceedings of the Tribunal cannot be held up indefinitely. The Applicant must decide whether he is medically able to continue with his appeal or not. If he is able to either appear in person or to instruct a representative to appear on his behalf, then the hearing may proceed. If he is medically unable to either appear in person or instruct someone to represent him, then he has the option of withdrawing his appeal and re-applying for an appointment under the *Bailiffs Act* when his health permits.

Counsel for the Registrar requested that any order for an adjournment also provide for actions on the part of the Applicant to demonstrate that the Applicant does intend to proceed without further delay.

Specifically, Counsel for the Registrar asked that the Applicant be ordered to advise the Tribunal in writing, with a copy to the Registrar, as to whether the Applicant was going to represent himself at the continuation of the hearing or be represented by counsel or agent.

If the Applicant is to be represented, then the agent or counsel for the Applicant must provide the Tribunal and the Registrar with his or her name and contact information, including address and telephone number. The counsel or agent must also confirm that he or she is available to attend on the resumption of the hearing on February 21st. This is a reasonable request under the circumstances. The Applicant's repeated failure to attend in person despite the advice of his counsel and the directive of the Tribunal to do so makes it necessary that the Applicant demonstrate either that he is taking action to retain and advise someone to represent him or that he is committed to appearing on his own behalf. It is important to note that the Applicant's original counsel withdrew from the file on December 27 and as of January 18th, the Applicant has provided no evidence that he has begun seeking replacement counsel.

Counsel for the Registrar submitted that the Applicant should inform the Tribunal of his decision regarding representation by February 4, 2008. This may be too little time to permit the Applicant to find, retain and brief counsel and therefore the Tribunal will grant the Applicant until February 11th to advise the Tribunal and the Registrar about his plans to be represented.

Counsel for the Registrar also submitted that costs should be awarded in this case and he requested costs in the amount of \$350 to be paid by the Applicant to the Registrar to compensate for the time spent in attending at the Tribunal when the Applicant failed to appear. Counsel further submitted that these costs should be paid by February 8, 2008. Under Rule 14 of the Tribunal's Rules of Practice, January, 2008, a request for costs may be made by any party, on notice to the other parties, where it is felt that the other party has behaved unreasonably, frivolously, vexatiously, or in bad faith. The Tribunal in considering a request for costs shall consider all the circumstances, including whether the Applicant has failed to attend a hearing or to send a representative, without notice to the Tribunal and the other side. In this case, the Applicant failed to attend on January 18 and failed to send a representative, despite being specifically directed to do so by the Tribunal staff. His explanation that he was not legally equipped to represent himself does not excuse him from making the effort to appear. The Tribunal is accustomed to dealing with self-represented parties and would have benefited from hearing directly from the Applicant why he wanted an adjournment and what date he would prefer for a resumption. He did not notify the Registrar that he would not be attending in person, nor did he explicitly notify the Tribunal that he would not be in attendance. These would appear to be ample grounds for considering an award of costs. The Tribunal is prepared to consider the question of costs at the close of the hearing. The amount of the costs may be addressed at that time. The Applicant's future conduct may also be considered in assessing the amount of costs, if any, he should bear.

The Tribunal will not decide the question of costs in this order for two reasons. First, the Applicant was not given notice that the matter of costs would be raised.

Secondly, the amount of costs the Registrar is requesting may vary depending on the Applicant's conduct during the balance of the hearing.

ORDER

Accordingly, the Tribunal orders:

1. The hearing of this matter is adjourned until **February 21, 2008** when it will resume at the offices of the Tribunal at **9:30 AM**. This adjournment is peremptory against the Applicant.
2. On or before February 11, 2008, the Applicant or his representative will notify the Tribunal in writing, copying the Registrar, of the following matters:
 - a. whether the Applicant will represent himself in this matter or whether he will retain counsel or an agent to represent him;
 - b. if the Applicant is to be represented, then either he or his representative will notify the Tribunal and the Registrar of the name, mailing address and telephone number of the representative, and
 - c. the Applicant or his representative will confirm to the Tribunal and the Registrar that they are ready to proceed in this matter on February 21, 2008 beginning at 9:30 AM.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: January 21, 2008

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



PRE-HEARING

JOSEPH DELBERT ADAMS – PRE-HEARING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE BAILIFFS ACT TO REVOKE APPOINTMENT

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

PARTIES: RALPH SWAINE, Counsel, representing the Applicant Joseph
Delbert Adams

ALVIN TORBIN, Counsel, representing the Registrar, *Bailiffs Act*

DATE OF
PRE-HEARING: November 16, 2007

TORONTO

ORDER

A pre-hearing was held in this matter on November 16, 2007, at 79 St. Clair Avenue East, Suite 212, Toronto, Ontario before this Tribunal in the presence of Ralph Swaine, counsel for the Applicant, Joseph Delbert Adams, the Applicant, Alvin Torbin, counsel for the Registrar, *Bailiffs Act* and Cathy Phan, student-at-law.

The parties to the hearing are the Applicant and the Registrar. The purpose of this pre-hearing was to assess whether documentary disclosure ordered on October 9, 2007, had been exchanged. The Parties, through their counsel, confirmed that the Order had been complied with satisfactorily. There were other issues raised regarding the scope of the hearing, which issues are to be resolved by the parties in advance of the hearing.

The hearing of this matter is to take place on Tuesday, Wednesday and Thursday, December 11, 12 and 13, 2007, commencing at 9:30 a.m. at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

Released: November 19, 2007

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



PRE-HEARING

JOSEPH DELBERT ADAMS – PRE-HEARING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE BAILIFFS ACT TO REVOKE APPOINTMENT

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

PARTIES: RALPH SWAINE, Counsel, representing the Applicant Joseph
Delbert Adams

ALVIN TORBIN, Counsel, representing the Registrar, *Bailiffs Act*

DATE OF
PRE-HEARING: September 21, 2007

TORONTO

ORDER

A pre-hearing was held in this matter on September 21, 2007 in Toronto before this Tribunal in the presence of Ralph Swaine, counsel for the Applicant, the Applicant, Joseph Delbert Adams, Alvin Torbin, counsel for the Registrar, *Bailiffs Act*, the Registrar, Brian Pitkin and Cathy Phan, student-at-law.

The parties to the hearing are the Applicant and the Registrar. The parties have agreed that, at the hearing of this matter, the Tribunal can find as a fact that:

- a) Since his appointment in 1995 Joseph Delbert Adams has represented himself at all times as a bailiff.
- b) The sole principal at Corporate Bailiffs Services is Joseph Delbert Adams.

The parties have agreed to disclose the following documents subject to the following timetable.

Therefore the Tribunal orders as follows:

1. The Applicant shall disclose by October 22, 2007:
 - a) The order of Justice Day referred to at the pre-hearing;
 - b) Correspondence from David Daubouchi dated August 6, 1998;
 - c) Correspondence from Brian Pitkin dated January 11, 2002; and
 - d) Other documents that the Applicant intends to rely upon at the hearing.
2. The Applicant shall make best efforts to obtain the full court file that was with Justice Day;
3. The Respondent shall disclose by October 22, 2007:
 - a) The two 1994 applications submitted by Joseph Delbert Adams in respect to the *Bailiffs Act*;
 - b) A copy at the appointment of Joseph Delbert Adams by the Lieutenant Governor of Ontario
 - c) Pleadings and endorsements pertaining to civil proceedings brought by Joseph Delbert Adams in respect of his status under the *Bailiffs Act*;
 - d) Correspondence exchanged between Joseph Delbert Adams and the relevant Ministry regarding the meaning of his appointment under the *Bailiffs Act*;
 - e) Correspondence from Joseph Delbert Adams dated January 29, 1996;
 - f) Correspondence dated January 6, 1997 from Pro Bailiff Inc.;
 - g) Correspondence from the Registrar dated January 10, 2005;
 - h) Correspondence from Ralph Swaine dated February 2, 2005;
 - i) Other documents that the Respondent intends to rely upon at the hearing.
4. The Applicant shall disclose by November 6, 2007:
 - a) Any registration documents or correspondence between the Applicant and the relevant Ministry not produced by the Respondent, that the Applicant intends to rely upon at the hearing;

- b) Documents arising from those produced by the Respondent that the Applicant intends to rely upon at the hearing;
5. The Respondent shall produce by November 6, 2007:
- a) Documents arising from those produced by the Applicant that the Respondent intends to rely upon at the hearing.
6. A date for a continuation of the pre-hearing has been set, on consent of all parties, for November 16, 2007, at 9:30 a.m. to be conducted at the Landlord Tenant Board, 79 St. Clair Avenue East, Suite 212, Toronto, Ontario.
7. The hearing of this matter has been adjourned, on consent of all parties, from October 30, 2007, to Tuesday, Wednesday and Thursday, December 11, 12 and 13, 2007, commencing at 9:30 a.m. at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

Released: October 05, 2007

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



Licence Appeal Tribunal

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[Bench Briefs](#) >>

[Statistics](#) >>

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[Statistics](#) >>

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Fiscal Year 2007 - 2008

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[Statistics](#) >>

Decisions under Cemeteries Act

Fiscal Year 2007 - 2008

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>> [CORPORATION OF THE CITY OF PETERBOROUGH - PRE-HEARING](#)



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PRE-HEARING

CORPORATION OF THE CITY OF PETERBOROUGH – PRE-HEARING

APPEAL FROM A DECISION OF THE REGISTRAR,
CEMETERIES ACT (REVISED) TO DENY AN APPLICATION
FOR PARTIAL CLOSURE OF A CEMETERY

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JOHN W. HART, Counsel, appeared on behalf of the Applicant, the Corporation of the City of Peterborough

WILLIAM R. MACLARKEY, Counsel, appeared by telephone on behalf of the Registrar, *Cemeteries Act (Revised)*

JOHN SHEEHAN, Agent, appeared on behalf of the Citizens for the Protection and Preservation of the Pioneer Cemetery

ROBERT CRAWFORD, Agent, appeared on behalf of The Ontario Genealogical Society

ROB LEVERTY, Agent, appeared on behalf of The Ontario Historical Society

DATE OF
PRE-HEARING: March 5, 2008

Peterborough

ORDER

This pre-hearing took place as part of an appeal by the Corporation of the City of Peterborough (the “City”) to the Licence Appeal Tribunal (the “Tribunal”) from a decision by the Registrar, *Cemeteries Act (Revised)* (the “Registrar”) denying the City’s application to have part of The Confederation Square Cemetery (the “Cemetery”) closed in order to erect a Wall of Honour to commemorate war veterans.

Much of the discussion during the pre-hearing concerned the question of who should be the parties to this appeal. It was agreed that, since many of the persons who are interested in this matter are unrepresented by counsel, Mr. Hart, Counsel for the City, would undertake to canvass the views of people supporting the City's appeal and to determine which of them would be called as witnesses. Mr. MacLarkey, Counsel for the Registrar, agreed to coordinate with the organizations supporting the Registrar's decision and to determine which of them would testify at the hearing.

Three organizations identified themselves as supporting the decision of the Registrar. Representatives of these organizations outlined their interest, the contribution they believed they could make to the appeal and their reasons for wishing to be recognised as parties. The Tribunal agreed to add the following organizations as parties to this matter:

- Citizens for the Protection and Preservation of The Pioneer Cemetery
- The Ontario Genealogical Society
- The Ontario Historical Society

A number of people identified themselves as supporting the appeal of the City and Mr. Hart will meet with these people to coordinate their evidence. The Tribunal would appreciate it if Mr. Hart would make a copy of this Order available to the people expressing an interest in this matter, whether by publication or otherwise. In particular Mr. John Turner, Mr. David Edgerton, Ms. Ann Farquharson, Mr. Wallace C. Smith, Ms. Lynn Hopkins and the members of the Wall of Honour Committee should have access to a copy of this Order.

Mr. David Edgerton, an individual who has been active in supporting the Wall of Honour since the inception of the idea, and a number of the veterans present at the pre-hearing, support the City's appeal. However, they also wish to advance the position that the Cemetery has already been closed and, therefore, this proceeding is unnecessary. This position appeared to have support within the interested community but the City has not yet adopted this position as part of its appeal. Ms. Ann Farquharson, a member of City Council, advised the Tribunal that the City was formalizing a "Wall of Honour Committee" which would represent the views of veterans of all the services. It was agreed that this committee would be the logical organization to represent the position of the veterans who believe that the Cemetery has already been closed.

Mr. Hart agreed to meet with Mr. David Edgerton and with the Wall of Honour Committee to determine whether they might give evidence in support of the City's appeal and how the issue of the possible prior closure of the Cemetery might be handled. If the City chooses not to adopt the position that the Cemetery has already been closed as part of its appeal, then Mr. Hart will advise the Tribunal that Mr. David Edgerton and the Wall of Honour Committee wish to be recognised at the hearing for the purposes of presenting this position. Depending on the extent of their interest, Mr.

Hart will recommend to the Tribunal that they be added either as Parties or as Participants in this matter. It is important to note that this method of proceeding is for the convenience of people unrepresented by counsel and that nothing in this Order should be understood to remove any right of any individual or organization to apply to the Tribunal for recognition as a party to this appeal.

Mr. Alan Wilson, Senior Advisor to the Member of Parliament for the City, and Chair of the Member of Parliament Veteran's Affairs Committee, expressed the support of both the Member of Parliament and the Veteran's Affairs Committee for the City's appeal.

Dates and times of the hearing were also agreed to, as was the schedule of disclosure of documents.

Accordingly, the Tribunal stipulates and orders as follows:

1. The parties to this matter are as follows:
 - a. The Corporation of the City of Peterborough, Applicant
 - b. The Registrar, *Cemeteries Act (Revised)*, Respondent
 - c. The Ontario Historical Society, Added Party
 - d. The Ontario Genealogical Society, Added Party
 - e. Citizens for the Protection and Preservation of the Pioneer Cemetery, Added Party
2. Mr. Hart shall advise the Tribunal whether other interests need to be represented at the hearing and the Tribunal will make a determination of the interest and standing of those who wish to be heard. People or organizations who believe they have an interest in this matter which is not being represented by one of the Parties to this appeal may apply to the Tribunal to be added as a Party.
3. The Tribunal Rules of Practice, effective January 1, 2008 will apply to this proceeding with the exception of the timing of disclosure which is detailed below.
4. By June 12, 2008, the Parties shall disclose to each other any document, photograph or thing on which they intend to rely at the hearing. This disclosure shall include an exchange of witness lists and all disclosure required under Rule 6 of the Tribunal's Rules of Practice regarding expert witnesses.
5. If further disclosure is required, whether as a reply to the previous disclosures or because new evidence has emerged or because new parties are added to the appeal, then this disclosure will be made to all Parties by August 1, 2008.
6. The hearing will commence on **September 2, 2008 at 9:30 AM** at City Hall, 500 George Street North, Peterborough. If necessary, the hearing will continue on the dates below, all these dates being inclusive:

- a. September 3 to 5
 - b. September 8 to 12
 - c. October 14 to 17
 - d. October 20 to 24
7. Mr. Crawford, representing the Ontario Genealogical Society, advised that he had a conflict in his schedule on October 20th. He will determine whether another party might represent the interests of the Genealogical Society on that day. However, Mr. Crawford reserves his right to request a recess or adjournment on October 20th, if required.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: March 26, 2008

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



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Fiscal Year 2007 - 2008

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>> [PRECIOUS GEM TREATMENT FOSTER CARE NETWORK INC. - PRE-HEARING](#)



>> [PIONEER YOUTH SERVICES TORONTO INC. - PRE-HEARING](#)



>> [PIONEER YOUTH SERVICES TORONTO INC.](#)



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PRE-HEARING

PRECIOUS GEM TREATMENT FOSTER CARE NETWORK INC. – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE DIRECTOR, *CHILD AND
FAMILY SERVICES ACT*

TO REFUSE TO RENEW LICENSE

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: MICHEAL JAEGER, Counsel, representing the Applicant

REBECCA J. GIVENS, Counsel, representing the Director, *Child
and Family Services Act*

DATE OF
PRE-HEARING: November 30, 2007

Toronto

ORDER

A pre-hearing was conducted on November 30, 2007 before the Licence Appeal Tribunal (the “Tribunal”) in the presence of Michael Jaeger, Counsel for the Applicant (the “Applicant”) and Rebecca J. Givens, Counsel for the Director, under the *Child and Family Services Act* (the “Respondent”).

During the pre-hearing, the positions of the Parties were canvassed and presented but no settlement of the issues between the parties was reached.

The Tribunal orders that:

1. The Parties to the hearing are the Applicant and the Respondent.
2. 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 in Rule 6 of the Rules of Practice of the Tribunal. To that end, on consent, the date for disclosure of documents shall be no later than January 19, 2008.

3. The Applicant advised that they would be calling six to eight witnesses and the Respondent stated they would be calling eight or nine witnesses. The Parties agreed to exchange the names and a brief summary of the content of the witnesses testimony by no later than January 19, 2008. Neither Party expected to call expert witnesses but if they were, they would advise the other Party accordingly by no later than January 19, 2008.
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 the hearing will not be required.
5. In the absence of a settlement being reached by the Parties prior to the hearing, and on consent of the Parties, the hearing will commence at the Tribunal Chambers, 1 St. Clair Avenue West 12th Floor, Toronto, Ontario at 9:30 a.m. on Tuesday, February 19, 2008, and to continue, if necessary, 9:30 a.m. on February 20, 21, 22, 2008, and February 25, 2008.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

RELEASED: December 13, 2007

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

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Appeal
Tribunal

Tribunal
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PRE-HEARING

PIONEER YOUTH SERVICES TORONTO INC. – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE DIRECTOR, *CHILD AND
FAMILY SERVICES ACT*

TO REFUSE TO RENEW LICENSES

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: ANDREW ROMAN and
CHRISTINE O'DONOHUE, Counsel, representing the Applicant

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

DATE OF
PRE-HEARING: October 26, 2007

Toronto

ORDER

This pre-hearing arises in the course of an appeal by the Applicant, Pioneer Youth Services Toronto Inc., to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Director under the *Child and Family Services Act*, R.S.O. 1990, Chapter C. 11, to refuse to renew Pioneer's Licences to operate four children's residences.

During the pre-hearing, the positions of the parties were canvassed and presented but no settlement of the issues between the parties was reached. Several matters were agreed to and accordingly the Tribunal orders and stipulates that:

1. The hearing into this matter will commence, as currently scheduled, on November 13, 2007, at the Delta Chelsea Hotel, 33 Gerrard Street West, Toronto, Ontario, at 9:30 a.m., and will continue, if necessary on November 14, 15 and 16, 2007. The hearing will re-commence, if required, on December 12, 2007, at the Tribunal offices, 1 St. Clair Avenue West, 12th floor, Toronto, and will

continue if necessary on December 13, 2007.

2. At least seven days prior to the commencement of the hearing, counsel for the parties will exchange lists of intended witnesses. These lists may be subject to change.
3. Counsel for Pioneer will prepare a statement of which documents will be admitted by Pioneer as fact and will provide this statement to counsel for the Director at least six days prior to the commencement of the hearing.
4. The Director will withdraw Schedule "B" to the Notice of Intention. Counsel for the Director advised Pioneer that she will be introducing the contents of Schedule "B" during the hearing by way of testimony of witnesses.

LICENCE APPEAL TRIBUNAL

Laurie Sanford
Vice-Chair

RELEASED: November 1, 2007

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



MOTION

PIONEER YOUTH SERVICES TORONTO INC.

APPEAL FROM A PROPOSAL BY THE DIRECTOR, *CHILD AND
FAMILY SERVICES ACT*

TO REFUSE TO RENEW LICENSES

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: CHRISTINE O'DONOHUE, Counsel, representing the Applicant

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

DATE OF
MOTION: October 24, 2007

Toronto

ORDER

This motion arises in the course of an appeal by the Applicant, Pioneer Youth Services Toronto Inc. ("Pioneer") to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Director under the *Child and Family Services Act*, R.S.O. 1990, Chapter C. 11 (the "Act") to refuse to renew Pioneer's licences to operate four children's residences. The Director brings this motion for an order requiring certain Children's Aid Societies to produce records relating to the children in the care of Pioneer during the time from January 1, 2005 and September 4, 2007, inclusive. Pioneer opposes the motion.

Submissions

The Children's Aid Societies of Toronto, Durham, Peel and the Native Children and Family Services of Toronto have, during the relevant time, placed children in the care of Pioneer. The Director alleges in her Notice of Intention that Pioneer did not fully inform these Children's Aid Societies of matters relevant to the health and safety of the children in Pioneer's care as required by the Act. While the Director has had some communication with the various Children's Aid Societies, Ms. Renison, counsel for the Director, submits that the Director requires the records of these Children's Aid Societies to prove her case.

In the Notice of Intention, the Director also challenges the provision of treatment for the children in Pioneer's care. Pioneer describes itself as a treatment home and the

Director alleges that the program description provided to the placement agencies, including the Children's Aid Societies, was misleading. As a consequence, the Director alleges, the placing agencies may have inappropriately placed children with Pioneer. Ms. Renison submits that the records of the Children's Aid Societies regarding communication from Pioneer about the description of its programs and the detailed records of the actual programs provided for each child are relevant in determining whether Pioneer provided sufficient therapeutic care.

The Director alleges that Pioneer did not provide adequate supervision of the children and is requesting the records of communications from Pioneer to the Children's Aid Societies, and from the children to their respective placing agencies, regarding supervision. Ms. Renison submits that while the Director has the records of Pioneer regarding the level of supervision, the placing agencies have the best evidence about the level of supervision they expected and about what was reported to them both by Pioneer and by the children on this subject.

A resident in one of Pioneer's homes died while in the "one to one" care of an employee of Pioneer. The Children's Aid Society of Toronto ("CAST") conducted a program review following this death. The Director has, and has disclosed, the summary of this review but Ms. Renison submits that the details of the review, including investigation notes, are important for a full understanding of the tragedy. Further, Ms. Renison submits, the CAST program review considered a complaint made by a former employee of Pioneer together with concerns of the staff generally. Ms. Renison advises that this employee complaint and the staff concerns are a necessary part of the Director's case and the investigation by CAST is relevant to a full understanding of employee concerns.

The Director is also seeking diagnostic material from the various Children's Aid Societies, including medical reports, to support her assertions that the health and safety of the children was prejudiced while they were in the care of Pioneer. These reports also go to the question of whether adequate records were kept by Pioneer.

The various placing agencies have removed all but one child from the care of Pioneer. Ms. Renison submits that the reasons why the placing agencies decided to remove most of these children from the care of Pioneer are relevant to the Director's allegations. She suggests further that a consideration of whether and under what conditions the placing agencies would be prepared to resume placing children with Pioneer would also be helpful in determining whether Pioneer should retain its licences.

Ms. O'Donohue, counsel for Pioneer, opposes the motion on the following grounds.

First, Ms. O'Donohue submits that it is the Director's decision which is being challenged in this appeal. Therefore, only those documents which were relied on by the Director in reaching her decision to refuse to renew Pioneer's licences are relevant. Additionally, because the criteria which must be met under the Act for a licence to be renewed do not include satisfying Children's Aid Societies as to the quality of care, their evidence is not relevant to the issue of whether Pioneer has met its obligations under the Act. Because

the Children's Aid Societies are, in Ms. O'Donohue's submission, clients of Pioneer in a sense, they are strangers to this matter. Ms. O'Donohue notes that Pioneer has not been notified of any complaints by any Children's Aid Societies with respect to children in its care.

Concerning the specific question of why the various Children's Aid Societies removed children from Pioneer's care, Pioneer has raised this issue to call into question the conduct of the Ministry in connection the removal decisions. Pioneer wishes this issue to be restricted to the Ministry's conduct and not be made a consideration in determining the capacity of Pioneer to conduct its business in accordance with the Act.

Secondly, Ms. O'Donohue submits that there is enough information presently available for the Director to make her case. Twenty volumes of material have been assembled and disclosed by the Director, including information seized from Pioneer. This is a sufficient quantity of information, in Ms. O'Donohue's submission.

Thirdly, it is Pioneer's position that CAST does not have the resources or the mandate to conduct in-depth program reviews. On the other hand, the Ministry does. Therefore, the best evidence of the events surrounding the death of the resident of a Pioneer home is contained in the Ministry's records, not those of CAST.

Fourthly, Ms. O'Donohue submits that these documents were not part of the issues brought forward during the investigations by the Ministry over the past year and Pioneer should not now be called upon to defend themselves against any allegations arising from these documents. These documents are highly prejudicial, in Ms. O'Donohue's submission.

Finally, Ms. O'Donohue submits that ordering the production of these documents and records would be a jurisdictional error on the part of the Tribunal because they are so far removed from the central issue of this case, the challenge of the Director's decision, that the request for them becomes, in Ms. O'Donohue's submission, "almost an abuse of power to keep adding information" to that already disclosed.

Decision

Children's Aid Societies act *in loco parentis* for the children in their custody. When they place these children in the care of licensed operators of residences, such as Pioneer, their obligations to the children do not end. The various Children's Aid Societies pay for the services provided to the children and they are informed, both by the children directly and by the licensed operators, of the ongoing care of the children, including their supervision, the development plans in place for them and issues relating to their health and safety. Children's Aid Societies have the right and obligation to remove children from care when they consider it to be in the best interests of the child.

Therefore, it would appear that the various Children's Aid Societies would have relevant evidence regarding certain of the allegations made by the Director in her Notice of

Intention and in some cases, given their unique relationship with the child, may have the best evidence of specific incidents.

If Ms. O'Donohue is correct in her submissions regarding the relevance of the documents at issue, then the role of the Tribunal would be to conduct a form of judicial review of the decision of the Director to issue the Notice of Intention. However, the Act gives the Tribunal a considerably broader jurisdiction. The Act reads, in part:

196. A Director may refuse to renew or may revoke a licence where, in the Director's opinion,
- (a) [...] where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene,
 - (i) this Act or the regulations,
 - (ii) another Act, or the regulations made under another Act, that applies to the activity for which the licence is required, or
 - (iii) a term or condition of the licence;
 - (b) the premises where the children's residence is located or the residential care is provided do not comply with the requirements of this Part and the regulations;
 - (c) the activity for which the licence is required is carried on in a manner that is prejudicial to the children's health, safety or welfare [...]
197. (1) Where a Director proposes to [...] refuse to renew or to revoke a licence under section 196, the Director shall cause notice of the proposal, together with written reasons, to be served on the applicant or licensee, who may require a hearing [under subsection (2)]
- (4) Where an applicant or licensee requires a hearing under subsection (2), the Tribunal shall appoint a time for and hold a hearing and may, on hearing the matter,
- (a) order the Director to carry out the proposal; or
 - (b) order the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations, and the Tribunal may substitute its opinion for that of the Director.

The Divisional Court has given the Tribunal considerable guidance on its role in hearing appeals from the decisions of licensing bodies. There is a line of Divisional Court decisions relating to the powers of the Tribunal under the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42. Subsection 7(4) of that act is similar to the provisions at issue here and reads:

Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold a hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out

the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

It is sufficient for the purposes of this decision to refer to one of the Divisional Court decisions, *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers Act)* (2005), 205 O.A.C. 110 (Ont. Div. Ct.). After canvassing several earlier decisions, the Court held:

The question 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 licence have been proven, showing no deference to the initial decision of the Registrar.

Thus, the Tribunal is acting within its jurisdiction to order the production of documents potentially relevant to the issues it must consider and these documents need not have been before the Director at the time she made her decision. While it is true that satisfying a Children's Aid Society is not a criterion under the Act, the health, safety and well being of the children are criteria and the Children's Aid Societies may well have evidence that is relevant to determining whether those criteria were met by Pioneer. In determining whether the documents should be produced, the Tribunal must be governed by fundamental principles of fairness. However, this is a motion for production of documents only. Nothing in this order will preclude Pioneer from arguing issues of admissibility or making submissions as to weight of any evidence during the hearing. It is also open to Pioneer to argue for a restricted use of evidence related to why the various Children's Aid Societies chose to remove children from Pioneer's care.

Ms. O'Donohue's second submission suggests that the sufficiency of evidence is related to its volume. There is no provision in the Act or at law that limits the quantity of evidence that may be adduced in a hearing of this nature and the general test for its admissibility is its relevance to the issues being considered by the Tribunal. There is a pre-hearing scheduled in this matter. The objectives of the pre-hearing include prioritizing the Director's allegations and determining which, if any, of the issues may be addressed in a summary way at the hearing. Distilling the issues between the parties is a better way to proceed than setting artificial constraints on the volume of evidence.

Concerning the question of CAST's resources or mandate to conduct a program review resulting from the death of a child for whom it was responsible, the Tribunal accepts Ms. Renison's submission that CAST was one of several organizations, including the Coroner and the Police, which investigated the death. According to Ms. Renison, CAST was acting within its jurisdiction in conducting a program review under the circumstances. The evidence of various witnesses will refer to one or more of these investigations and it is appropriate to disclose the details of these investigations. Failure to disclose might prejudice Pioneer in preparing its defence. Issues of the competence of any body to conduct such an investigation will go to the weight the Tribunal should give such evidence.

The fact that some of the issues for which documentation is now being sought were not raised with Pioneer during the course of the Director's investigation should not be determinative of whether those documents should now be produced. It is the Notice of Intention dated September 4, 2007 which forms the basis of the Director's case against Pioneer. The documents which the Director seeks to have produced are potentially relevant in determining whether Pioneer has met the criteria set out in Section 196 of the Act and these documents should be produced.

Order

Accordingly, this Tribunal orders that:

1. The Children's Aid Society of Toronto is required to produce to the parties the following records relating to children in the care of Pioneer Youth Services Toronto Inc. ("Pioneer") between January 1, 2005 and September 4, 2007 inclusive:
 - a. Child's File Face Sheet or history indicating the name of the child, date of admission to Pioneer, date of birth of the child, date of discharge from Pioneer;
 - b. Caseworker notes of contacts with Pioneer or about the child's placement at Pioneer;
 - c. After hours or night logs indicating reports of AWOLS, injuries or other serious occurrences;
 - d. Incident Reports from Pioneer;
 - e. Serious Occurrence Reports;
 - f. All correspondence and reports from Pioneer;
 - g. Medical reports done on admission to Pioneer;
 - h. Assessment documents including Plans of Care, and
 - i. Where medication was prescribed for a child during the relevant time, a diagnostic report.
2. The Children's Aid Society of Toronto is also required to produce to the parties its records relating to;
 - a. Any child protection investigation concerning a child who resided in the residences of Pioneer during the relevant time and about whom a report was received under section 72 of the *Child and Family Services Act*, and

- b. A review of the Pioneer program conducted in 2006 – 2007.
3. Native Child and Family Services of Toronto is required to produce to the parties the following records relating to children in the care of Pioneer Youth Services Toronto Inc. ("Pioneer") between January 1, 2005 and September 4, 2007 inclusive:
- a. Child's File Face Sheet or history indicating the name of the child, date of admission to Pioneer, date of birth of the child, date of discharge from Pioneer;
 - b. Caseworker notes of contacts with Pioneer or about the child's placement at Pioneer;
 - c. After hours or night logs indicating reports of AWOLS, injuries or other serious occurrences;
 - d. Incident Reports from Pioneer;
 - e. Serious Occurrence Reports;
 - f. All correspondence and reports from Pioneer;
 - g. Medical reports done on admission to Pioneer;
 - h. Assessment documents including Plans of Care, and
 - i. Where medication was prescribed for a child during the relevant time, a diagnostic report.
4. The Durham Children's Aid Society is required to produce to the parties the following records relating to children in the care of Pioneer Youth Services Toronto Inc. ("Pioneer") between January 1, 2005 and September 4, 2007 inclusive:
- a. Child's File Face Sheet or history indicating the name of the child, date of admission to Pioneer, date of birth of the child, date of discharge from Pioneer;
 - b. Caseworker notes of contacts with Pioneer or about the child's placement at Pioneer;
 - c. After hours or night logs indicating reports of AWOLS, injuries or other serious occurrences;

- d. Incident Reports from Pioneer;
 - e. Serious Occurrence Reports;
 - f. All correspondence and reports from Pioneer;
 - g. Medical reports done on admission to Pioneer;
 - h. Assessment documents including Plans of Care, and
 - i. Where medication was prescribed for a child during the relevant time, a diagnostic report.
5. The Peel Children's Aid Society is required to produce to the parties the following records relating to children in the care of Pioneer Youth Services Toronto Inc. ("Pioneer") between January 1, 2005 and September 4, 2007 inclusive:
- a. Child's File Face Sheet or history indicating the name of the child, date of admission to Pioneer, date of birth of the child, date of discharge from Pioneer;
 - b. Caseworker notes of contacts with Pioneer or about the child's placement at Pioneer;
 - c. After hours or night logs indicating reports of AWOLS, injuries or other serious occurrences;
 - d. Incident Reports from Pioneer;
 - e. Serious Occurrence Reports;
 - f. All correspondence and reports from Pioneer;
 - g. Medical reports done on admission to Pioneer;
 - h. Assessment documents including Plans of Care, and
 - i. Where medication was prescribed for a child during the relevant time, a diagnostic report.
6. The materials provided to the Tribunal from the records of the various Children's Aid Societies shall not form part of the public record and will be limited in their distribution to the Tribunal, the parties and expert witnesses.

7. 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 these records, but any such reference shall protect the privacy of the children in care by the use of non-identifying information.
8. At the expiry of the appeal period from the Tribunal's final disposition of this matter, or of any appeal from the Tribunal's decision, the Tribunal will return the exhibits filed to the party which submitted the exhibit and the parties and all other persons, including counsel, shall return all copies of the records produced by this Order to the relevant Children's Aid Society, or shall dispose of these records in a manner prescribed by the relevant Children's Aid Society.
9. The hearing will not be open to the public during the testimony of the employees of the various Children's Aid Societies or during any testimony of any witness testifying in support of or in response to the testimony of the employees of the various Children's Aid Societies.
10. No information identifying the children placed in Pioneer programs shall be published.
11. The pre-hearing in this matter will take place at the offices of the Tribunal on Friday, October 26, 2007 commencing at 3:00 p.m.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: October 25, 2007

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



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» [4666-DNA-REGISTRATION - PRE-HEARING](#)



» [4666-DNA-REGISTRATION](#)



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PRE-HEARING

4666-DNA-REGISTRATION – PRE-HEARING

APPEAL FROM A NOTICE OF INTENTION OF THE DIRECTOR
FOR THE PURPOSES OF THE *DAY NURSERIES ACT*, R.S.O.
1990, CHAPTER D.2 AS AMENDED

TO REFUSE TO RENEW THE LICENCE OF THE APPLICANT TO
OPERATE A DAY NURSERY

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JEFFREY B. ROSEKAT, Counsel, representing the Applicant

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

DATE OF
PRE-HEARING: March 5, 2008

Toronto

ORDER

A pre-hearing was held in this matter on March 5, 2008, before the Licence Appeal Tribunal (the “Tribunal”) in the presence of Jeffrey B. Rosekat, Counsel, appearing on behalf of the Applicant, and Katharine E. Renison, Counsel, appearing on behalf of the Director, under the *Day Nurseries Act* (the “Director”).

Certain tentative proposals were made at the pre-hearing with a view to a resolution of this matter before the hearing, alternatively, the settlement of some of the issues and any other matter that may assist in the just and expeditious disposition of these proceedings.

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Monday, April 7, 2008, at the Tribunal’s Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue on April 8, 9, 10, and 11, 2008, as required:

1. The Parties to the hearing are the Applicant and the Director.
2. There were no facts or evidence agreed upon by the Parties.
3. There were no issues that were settled at the pre-hearing.
4. The Director as of date hereof has complied with the disclosure requirements under Rule 6.3 of the Tribunal's Rules of Practice, while the Applicant, not having made disclosure under Rule 6.3 as at date hereof was ordered to make full and proper disclosure under Rule 6.3 (a), (b) and (c) by no later than March 12, 2008.
5. The Director shall disclose to the Applicant all internal communications relating to this matter subject to solicitor and client privilege, in which event disclosure is not required. In addition to the foregoing, the Director shall disclose copies of all communications between the Director and any other public agency or private individual, corporation and Durham Children's Aid Society relating to the Applicant. Pursuant to Section 7.2 of the Rules of Practice, the documents disclosed shall not be accessible to the public.
6. The names, addresses and occupations of all witnesses who will be called to testify by either party at the hearing shall be disclosed in writing to the other, together with a short synopsis of what the witness will state upon testifying. The aforesaid disclosure shall be made no later than March 12, 2008.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 11, 2008

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



4666-DNA-REGISTRATION

HEARING OF A MOTION FOR AN ORDER UNDER SECTION 12
OF THE *DAY NURSERIES ACT*, R.S.O. 1990, CHAPTER D.2 AS
AMENDED (THE "ACT"), OF A NOTICE OF INTENTION TO
REFUSE TO RENEW THE LICENCE TO OPERATE A DAY
NURSERY ISSUED BY THE DIRECTOR, UNDER THE ACT

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JEFFREY B. ROSEKAT, Counsel, representing the Applicant

KATHARINE E. RENISON, Counsel, representing the Director
under the *Day Nurseries Act* (the "Director")

DATE OF
HEARING: March 5, 2008

Toronto

ORDER

Upon hearing the submissions made by Counsel for the Applicant and Counsel for the Director, and upon having read the Notice of Appeal, the Notice of Motion and the supporting affidavit;

This Tribunal orders that:

1. The Durham Children's Aid Society ("CAS") produce its records relating to any child protection investigation concerning a child who received care at the day nursery of the Applicant during the period of January 1, 2006 to February 29, 2008, and about whom a report was received under s.72 of the *Child and Family Services Act* relating to incidents occurring while the child was in the care of the Applicant.
2. The Durham CAS records relating to any child protection investigation will not form part of the public record of the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 11, 2008

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

NESTLING MONTESSORI AND DAYCARE CENTRE INC.

Appeal pursuant to the *Day Nurseries Act*, R. S. O. 1990 Chapter D. 2 as amended by the *Licence Appeal Tribunal Act* 1999 S. O. 1999 Chapter 12, Schedule G from a Proposal of the Director under the *Day Nurseries Act* to refuse a licence.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: FERHAN JAVED, Counsel, appearing on behalf of NESTLING MONTESSORI AND DAYCARE CENTRE INC., Applicant

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

DATE OF
HEARING: January 2 and 4, 2008 Toronto

CONSENT ORDER

At the commencement of the hearing on January 2, 2008, the Applicant, Nestling Montessori and Daycare Centre Inc. and the Respondent, the Director, *Day Nurseries Act*, sought an adjournment to fully canvas the possibilities of settlement. When the Tribunal reconvened on the morning of January 4, 2008, the Parties advised the Tribunal that Minutes of Settlement had been entered into and asked the Tribunal to issue a consent order without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R. S. O. 1990 chapter S.22.

Accordingly, upon the consent of the Applicant and the Respondent, this Tribunal orders that the proceedings in this matter are now concluded and disposed of without a hearing in accordance with the terms of the Minutes of Settlement dated January 4, 2008 and attached hereto as Exhibit "A".

LICENCE APPEAL TRIBUNAL

D. GREGORY FLUDE
Vice-Chair

RELEASED: January 7, 2008

SCHEDULE "A"

BETWEEN:

NESTLING MONTESSORI AND DAYCARE CENTRE
operating a day nursery at 7 Frost Street, in the City of Toronto

Appellant

-and-

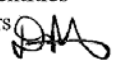
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
as represented by the Director for the purposes of the *Day Nurseries Act*

Respondent

In the Matter of an Appeal from a decision of the Director for the purposes of the *Day Nurseries Act*, R.S.O. 1990, c. D.2, to refuse to issue a licence to the appellant to operate a day nursery at 7 Frost Street, in the City of Toronto, in the Province of Ontario

MINUTES OF SETTLEMENT

The parties hereto agree:

1. The Appellant withdraws its appeal of the Director's decision to refuse to issue a licence to the Appellant to operate a day nursery.
2. Nestling Montessori and Daycare Centre, Maimar Associates Inc., Farhana Kazmi, Syed Ghulan Moeenuddin Kazmi, Akif Hussein, Bacquar Naqvi and all persons or entities related to the corporations and persons listed in this paragraph within the meaning of the Income Tax Act of Canada shall not apply for, and shall not be granted, a licence to operate a day nursery for a period of 3 years commencing January 2, 2008.
3. Farhana Kazmi and the Appellant corporation acknowledge that, as a result of her past conduct, Farhana Kazmi will not be approved as a supervisor, administrator or operator's designate for a day nursery for a period of 3 years commencing February 2, 2008. She may work as a staff member at a day nursery under the supervision of a supervisor approved by the Director.
4. The Appellants acknowledge that, as a result of her past conduct, Daniela Macri will not be approved by the Director as a supervisor, administrator or operator's designate for a day nursery operated by the Appellant or any persons or entities related to the Appellant as set out in paragraph any for a period of 2 years 

commencing February 2, 2008. She may work as a staff member at a day nursery under the supervision of a supervisor approved by the Director. 

5. If persons or entities not referenced in paragraph 2 hereof ("the new applicants") wish to apply for a licence to operate a day nursery at 7 Frost Street, in the City of Toronto, they shall file all documentation required by the Day Nurseries Act and Ontario Regulation 262 in complete form with the Toronto Region Office of the Ministry. The documentation shall include, amongst other things, the documents listed in schedule "A" hereto. If a review of the documentation in paragraphs 1, 2, 3 and 6 of Schedule A is requested prior to purchase or lease of premises for the proposed day nursery, the new applicants may request and the Director shall arrange for a licensing specialist to meet with the new applicants to give a preliminary opinion on the acceptability of the proposed premises.

In witness whereof, the parties hereto have put their hands and seals at the City of Toronto, on the 14 day of February, 2008.

Ministry of Children and Youth Services by:

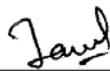


Judy MacLeod, Director for the purposes of the Day Nurseries Act

Nestling Montessori and Day Care Inc by :

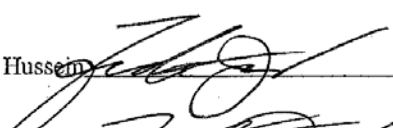
Director- I have the power to bind the corporation

Farhana Kazmi

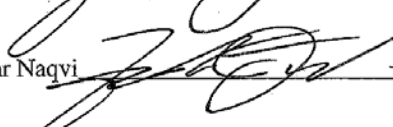


Syed Ghulan Moeenuddin Kazmi

Akif Hussein

 - for A. Hussein

Baqar Naqvi

 - for B. Naqvi

Schedule "A" to the Minutes of Settlement LAT File #4450/DNA/07/03

1. Criminal Reference checks at the Vulnerable Sector screening level for all directors of the corporation;
2. Incorporation documents (Note applicants intending to apply for municipally subsidized spaces as part of the applicants' business plan should seek information on subsidy before applying for a licence under the Day Nurseries Act);
3. Detailed floor plans showing the measurements and exact location of :
 - Any proposed renovations to playground or building
 - Play activity rooms
 - clear window glass
 - Sinks and toilets
 - Change tables
 - Sleep room
 - Kitchen or food prep area
 - Storage for food
 - Spaces for washing, dressing, toileting and isolation of children
 - Storage for toys, indoor play materials and equipment
 - Storage for required records
 - Storage for medical supplies, cleaning materials and equipment and other hazardous substances – inaccessible to children
 - Heating and electrical equipment inaccessible to children
 - Space for eating and resting
 - Space for preparation of meals
 - Storage for beds and linen
 - A staff rest area
 - Storage for outdoor play equipment
 - Office space
 - Playground measurements
 - Fencing height
 - Location of Securely closing gate
 - Written confirmation from independent certified playground inspector that playground meets Canadian Standards Association requirement
4. Detailed daily schedules for :
 - rotated use of playground
 - toddler room
 - infant room
 - preschool room

- Staffing schedules and qualifications for each room as required by O. Reg. 262

Schedule "A" to the Minutes of Settlement LAT File #4450/DNA/07/03 continued

5. Complete Policy and Procedure documents including:
 - a) Staff Policy Checklist
 - b) Behaviour Management Policy
 - c) Responsibilities in Reporting Child Abuse
 - d) Serious Occurrence Procedure
 - e) Drug Administration Policy
 - f) Sanitary Practices
 - g) Centre Policies and Procedures
 - h) Playground Safety Policy
 - i) Dismissal Procedures
 - j) Fire Drill Procedure
 - k) Notice of Intention to Apply for a Day Nursery Licence
6. Approvals from Municipal or Provincial authorities:
 - Fire Safety Plan approved by Toronto Fire Services
 - Toronto Fire Services letter confirming compliance with Fire Code requirements
 - Certificate of Inspection and Testing of fire Equipment
 - Public Health letter of approval
 - Municipal Zoning (Note 7 Frost Street is zoned only for 6 teachers and a maximum of 40 children)



- Staffing schedules and qualifications for each room as required by O. Reg. 262

Schedule "A" to the Minutes of Settlement LAT File #4450/DNA/07/03 continued

5. Complete Policy and Procedure documents including:
 - a) Staff Policy Checklist
 - b) Behaviour Management Policy
 - c) Responsibilities in Reporting Child Abuse
 - d) Serious Occurrence Procedure
 - e) Drug Administration Policy
 - f) Sanitary Practices
 - g) Centre Policies and Procedures
 - h) Playground Safety Policy
 - i) Dismissal Procedures
 - j) Fire Drill Procedure
 - k) Notice of Intention to Apply for a Day Nursery Licence
6. Approvals from Municipal or Provincial authorities:
 - Fire Safety Plan approved by Toronto Fire Services
 - Toronto Fire Services letter confirming compliance with Fire Code requirements
 - Certificate of Inspection and Testing of fire Equipment
 - Public Health letter of approval
 - Municipal Zoning (Note 7 Frost Street is zoned only for 6 teachers and a maximum of 40 children)

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

NESTLING MONTESSORI DAYCARE CENTRE INC. – PRE-HEARING

APPEAL FROM A DECISION OF THE DIRECTOR FOR THE
PURPOSES OF THE *DAY NURSERIES ACT*, R.S.O. 1990,
CHAPTER D.2, AS AMENDED

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: BAQAR NAQVI, Agent, representing the Applicant, Nestling
Montessori Daycare Centre Inc.

KATHERINE RENISON, Counsel, representing the Director for the
purposes of the *Day Nurseries Act*

DATE OF
PRE-HEARING: November 28, 2007 Toronto

ORDER

During the pre-hearing, no settlement was agreed to and the Parties agreed that the hearing would proceed on January 2 and 4, 2008. A further day was required and the Licence Appeal Tribunal has designated January 9, 2008, as the third day for the hearing.

Accordingly, the Tribunal stipulates that:

1. The Parties to this matter are the Applicant, Nestling Montessori Daycare Centre Inc. and the Director for the purposes of the *Day Nurseries Act*.
2. The Parties were advised of their disclosure requirements under Section 6 of the Licence Appeal Tribunal's Rules of Practice.

3. The hearing in this matter will commence on **January 2, 2008**, at 9:30 a.m. at the offices of the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and will continue of **January 4** and **January 9, 2008**, if necessary.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: November 29, 2007

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



PRE-HEARING

LONGBRANCH CHILDCARE o/a FUNSHINE CHILDCARE

APPEAL UNDER *THE DAY NURSERIES ACT*, R.S.O. 1990
C.D.2.

TRIBUNAL: SIMON DANN, Member

APPEARANCES: IAN GOODFELLOW, Agent, appearing on behalf of
Longbranch Childcare o/a Funshine Childcare

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

DATE OF
PRE-HEARING: June 1, 2007 Toronto

ORDER

A pre-hearing was held in matter on June 1, 2007, before the Licence Appeal Tribunal in the presence of Ian Goodfellow, agent, appearing on behalf of the Applicant and Katharine Renison, counsel, appearing on behalf of the Respondent.

Upon hearing the positions of the Parties, and upon having read the Minutes of Settlement, filed, dated June 1, 2007, and signed by the parties and by their Counsel and Agent, this Tribunal Orders as follows:

1. The Appeal of the Applicant is hereby withdrawn on the consent of all Parties.
2. The hearing of this matter is hereby concluded on the consent of all Parties.

3. This Appeal is resolved in accordance with the Minutes of Settlement, filed.

LICENCE APPEAL TRIBUNAL

Simon Dann
Presiding Member

Released: June 12, 2007

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

**Licence
Appeal
Tribunal**

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



1474434 ONTARIO INC.
O/A SUNRISE CENTRAL DAYCARE

APPEALS FROM A NOTICE OF DIRECTION AND A
NOTICE OF INTENTION OF THE DIRECTOR UNDER THE
DAY NURSERIES ACT, R.S.O. 1990 c. D.2

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

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

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

DATE OF
HEARING: April 16, 17, 18, 2007 London

ORDER

The hearing in this matter commenced on April 16, 2007, in London, Ontario. In attendance were Daniel R. Mailer, Counsel, appearing on behalf of 1474434 Ontario Inc. ("Applicant") and Katherine Renison, Counsel, appearing on behalf of the Director under the *Day Nurseries Act* ("Director").

On hearing representations from Counsel, and upon having read the Minutes of Settlement, filed, dated April 18, 2007, and signed by the parties and by their Counsel, this Tribunal Orders as follows:

1. The Appeals of the Applicant are hereby withdrawn on the consent of all parties.
2. The hearing of these matters is hereby concluded on the consent of all parties.

3. These Appeals are resolved in accordance with the Minutes of Settlement, filed.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski
Vice-Chair

RELEASED: May 8, 2007

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



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Fiscal Year 2007 - 2008

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Decisions under the Film Classification Act, 2005

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Decisions under Funeral Directors And Establishments Act

Fiscal Year 2007 - 2008

[LAT Decisions, Rulings and Orders](#) >>

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>> [4275-FDEA-Complaint - PRE-HEARING](#)



>> [3982-FDEA-CLAIM](#)



>> [RICHARD JAMES LORENZI](#)



>> [IN THE MATTER OF SUSAN JAMES](#)



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PRE-HEARING

4275-FDEA-Complaint – PRE-HEARING

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

IN THE MATTER OF A COMPLAINT REGARDING A
FUNERAL HOME;

AND

THE REFUSAL TO REFER THE MATTER TO THE
DISCIPLINE COMMITTEE.

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

HEATHER TANNER, Agent, representing the Funeral
Home

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

DATE OF
PRE-HEARING: October 11, 2007 Toronto

ORDER

During the pre-hearing the parties agreed to, and executed, terms of settlement. The Applicant provided the Tribunal with written notice of the withdrawal of his appeal, and the Tribunal now considers this matter concluded.

Therefore, the hearing previously scheduled for November 29 and 30, 2007, is cancelled.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: October 22, 2007

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

3982-FDEA-CLAIM

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

TRIBUNAL: DOUGLAS R. WALLACE, Vice-Chair

APPEARANCES: THE APPLICANT, appeared on his own behalf

STEVEN D. BEZAIRE, Counsel, appearing on behalf of the
Respondents, Leon Jannisse and Windsor Chapel Funeral Home
Limited

JULIA MACIURA, Counsel, appearing on behalf of the Board of
Funeral Services

DATE OF
HEARING

May 11, 2007

Kingston

DECISION AND ORDER

The Applicant appeals a decision of the Complaints Committee established under the *Funeral Directors and Establishments Act* denying him redress for the loss of a set of diamond earrings during the funeral services for his late wife. The issue is whether the earrings were lost through any fault of the Windsor Chapel Funeral Home (the "Funeral Home") and if so, what remedy is available to the Applicant.

FACTS:

The Applicant's late wife, <name deleted>, died after a lengthy illness on November 28, 2005. The Applicant requested the Funeral Home and its Managing Director, Albeny Janisse, to provide funeral services. In preparation for the viewing at the Funeral Home, the Applicant's two sisters-in-law took some items of clothing and jewellery to the Funeral Home to be worn by the deceased. The jewellery included a set of diamond

earrings, which the Applicant had given to his wife to mark a special anniversary some years previously. All items of jewellery were to be returned to the family following the funeral. Although the Applicant testified that both he and members of the deceased's family saw the earrings on the deceased during the viewing, when a velvet bag given to him by the Funeral Home at the end of the service was opened some five or six months later, the earrings in question were not found to be included with the other jewellery. The Applicant testified that the earrings had an appraised value of \$4,800.

PROCEEDINGS BEFORE THE COMPLAINTS COMMITTEE

The Applicant brought his concerns to the Complaints Committee, requesting compensation for the value of the missing earrings and a change in the procedure followed by Funeral Homes with respect to the handling of personal property entrusted to their care. The Complaints Committee caused an investigation to be made, considered the information provided by both the Applicant and by Leon Janisse on behalf of the Funeral Home, and gave its decision on December 13, 2006. The Complaints Committee decided not to refer the matter to the Discipline Committee but did recommend the Funeral Home put in place a thorough written policy and procedure for handling personal effects with appropriate staff training. It did not order the Funeral Home to make any payment to the Applicant for the earrings.

The reasons for the Complaints Committee's decision are set out in full on page 4 of its Decision, filed as Exhibit 2. In brief, the Committee found that the Funeral Home apparently did not follow its own policy regarding the handling of personal effects of the deceased. This policy, according to a written statement from the Funeral Home's present managing director, requires all jewellery to be placed in a special jewellery bag before the burial of the deceased and the bag to be immediately returned to the family. The family member to whom the bag is returned is to be asked to confirm that they are satisfied with the jewellery that has been returned to them. The Applicant denied receiving any request for this confirmation.

The Committee's decision not to refer the complaint to the Discipline Committee was based on the Committee's belief that the Applicant would be unable to substantiate his claim before that committee due to a number of factors: first, because the funeral director who had been in charge of the services provided was now deceased and unavailable to give evidence as to what steps had been taken to protect the deceased's jewellery; and second, because the significant time lapse between the apparent loss and its discovery suggested that the Applicant would be unable to rule out other possible causes for the disappearance of the missing jewellery.

The Committee's decision not to order restitution in whole or in part for the Applicant's loss was based on the Committee's belief that it had no jurisdiction to make such an order under the powers given to it in the *Funeral Directors and Establishments Act*.

PROCEEDINGS BEFORE THE TRIBUNAL

Evidence:

Although the Tribunal held an oral hearing, it was left with even less evidence at the end of the Hearing than had been placed before the Complaints Committee.

The documentary evidence was confined to a copy of the Applicant's complaint, the Decision of the Complaints Committee under appeal, and a few pieces of correspondence passing between the Applicant and the Funeral Home.

The only witness to give oral evidence was the Applicant.

Counsel for the Funeral Home elucidated a number of differences between the Applicant's testimony at the Hearing and the wording of his original complaint to the Board of Directors and suggested that the complaint was motivated or at least triggered by the Funeral Home's aggressive tone in attempting to collect its outstanding account. The Tribunal does not accept this suggestion and finds the Applicant's testimony to be consistent in the all-important aspects and motivated by a sincere desire to see that others receive better treatment than he did. What discrepancies there are in the written accounts of events can largely be attributed to the passage of time between the two accounts and the emotional stress the Applicant was under at the time. What motivation was drawn from the insensitive and aggressive response to his attempt to discuss his loss with the Funeral Home's managing director is understandable and did not lead, in the Tribunal's view, to a distortion of the facts.

No other witnesses were called to give evidence.

The absence of the funeral director in charge of the service for the Applicant's late wife was explained. He died suddenly, shortly after the loss of the earrings was discovered and prior to the filing of the Applicant's complaint. No explanation was given, however, for the absence of a representative of the Funeral Home to describe its policy with respect to personal effects, the steps taken, if any, to attempt to locate the missing earrings or to suggest any way the earrings could have gone missing without some fault on the part of the home. Similarly, the Applicant offered no explanation for the absence of family members who could have corroborated his evidence on such important issues as the value of the earrings, their appearance on the deceased's body during visitation, the manner in which the jewellery was returned to the Applicant and the whereabouts of the jewellery bag throughout the lengthy period from the funeral to the discovery of the loss.

Submissions by the Parties:

The positions of the Parties remained largely the same at the Tribunal as they had been before the Complaints Committee. The Applicant emphasised again his state of emotional distress at the time of dealing with the Funeral Home and the need for a

proper tracking system for personal effects. His evidence and submissions in full are set out in a written presentation filed as an exhibit. The Funeral Home continued to rely on its submission that there was a lack of continuity of evidence as to the whereabouts of the missing jewellery from the time it came into the possession of the Funeral Home to the time it was discovered missing. There was an implied suggestion that the failure to make a complaint until pressed for payment of his outstanding account indicated a possible fabrication by the Applicant. As noted above, the Tribunal, while finding the timing of events somewhat suspicious, is not prepared to accept such a theory without more concrete evidence.

The Board of Funeral Directors played a limited role in this Hearing. It took no part in the presentation of evidence but did assist the Tribunal by making a submission on the jurisdiction of both the Compensation Committee and the Discipline Committee established under the Act. The Tribunal accepts the Board's submissions on both points and agrees that neither Committee has jurisdiction to assist in the resolution of this complaint. The Compensation Committee is restricted to questions concerning the prepayment of funeral services and the Discipline Committee has disciplinary powers over funeral directors, not Funeral Homes.

Neither party made submissions on the Complaints Committee's finding that it did not have jurisdiction to award compensation to the Applicant.

Findings:

On the basis of the evidence that was given, the Tribunal finds as follows:

1. A pair of diamond earrings valued at \$4,800 belonging to the Applicant (or more precisely, the executors of the estate of the late <name deleted> were entrusted to the care of the Funeral Home.
2. The Applicant alleges that the earrings were not returned to him with the other jewellery at the end of the funeral service in accordance with the understanding between the parties.
3. There is no evidence that the Funeral Home has a procedure in place whereby personal property given into its possession is tracked, and its return to the rightful owner documented. It would have been quite feasible and reasonable for the Funeral Home to have such a procedure in effect at the time of this occurrence.
4. In the absence of such a procedure, and the production of evidence that the earrings in question were returned to the Applicant, the Tribunal accepts the Applicant's evidence that the earrings were not returned to him.
5. A failure to return personal effects entrusted into one's possession in circumstances such as this, speaks of conversion, or at a minimum, negligence

in the absence of any explanation consistent with non-negligence. The Funeral Home led no such evidence.

THE APPROPRIATE REMEDY:

THE LAW

The Tribunal considers the remedy decreed by the Complaints Committee appropriate in most respects. It cannot, however, agree with the Committee's finding when it comes to the issue of its lack of jurisdiction to order the Funeral Home to make monetary compensation to the complainant. While it is generally true that Committees and Tribunals lack the inherent jurisdiction of courts, Committees and Tribunals do have and must fully exercise the powers given to them, either expressly or by necessary implication, in their governing statutes. A review of the *Funeral Directors and Establishments Act* satisfies the Tribunal that the powers given to the Committee and Tribunal in this instance are broad enough to support the granting of an award of compensation in the amount of the fair value of the items forming the subject matter of the complaint.

Subsections 14(2), 14(9) and 14(10) of the *Funeral Directors and Establishments Act* set out the powers of the Complaints Committee and Tribunal as follows:

- (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 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-law.
- (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.

A reading of the Act makes it clear that the main purpose of this legislation is to protect the interests of members of the public dealing with funeral directors and establishments by, among other things, "establishing standards of practice for persons who operate funeral establishments" (clause 3 (3) 2) and mediating complaints between consumers and licensees (clause 3 (3) 6). Any recommendation resolving a complaint, which serves to protect the public interest or foster confidence of the public in the services they will receive from funeral directors or homes falls, in the Tribunal's opinion, well within the scope of the powers the Legislature intended to be exercised by the Complaints Committee. In the Tribunal's opinion, awarding the Complainant compensation for the value of the personal effects lost through the negligence of the operators of a Funeral Home is fair and reasonable to the Complainant and will have

the beneficial effect of encouraging Funeral Homes to adopt reasonable standards regarding the safekeeping of property entrusted to their care. It is an action which the Complaints Committee might have considered "appropriate in the circumstances" and within its jurisdiction, being "not inconsistent with the Act, the Regulations or the by-laws." In this respect the Tribunal substitutes its opinion for that of the Committee.

The Tribunal does not interpret the recent decision of this Tribunal in *Lam and Highland Funeral Home* (Released October 24, 2006) to stand for the proposition that the Tribunal lacks jurisdiction to award monetary compensation to a claimant for loss suffered as a direct result of the negligence of a Funeral Home operator in circumstances such as this. In the event that the Tribunal is mistaken in this, it must respectfully disagree with Vice-Chair Israel's decision in this case.

DECISION

In accordance with the powers granted to the Tribunal by S.14 of the *Funeral Directors and Establishments Act*, the Tribunal orders that the Complaints Committee carry out its proposal of December 13, 2006, and further orders that the Windsor Chapel Funeral Home Limited pay compensation to the Executors of the estate of the Applicant's late wife in the amount of \$4,800 covering the value of earrings entrusted into its possession.

LICENCE APPEAL TRIBUNAL

Douglas R Wallace, Vice-Chair

RELEASED: June 12, 2007

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



RICHARD JAMES LORENZI

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: TERESA OWEN, Agent, appearing on behalf of the Applicant,
Richard James Lorenzi

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

DATE OF
HEARING: February 26, 27 and 28, 2007 Toronto

DECISION AND REASONS

This is an appeal by Richard James Lorenzi from the Registrar's Proposal to Refuse to Issue Funeral Director's Licence dated October 12, 2006, pursuant to the provisions of the *Funeral Directors And Establishments Act* R.S.O. 1990, Chapter F. 36 (hereinafter the "Act"). The grounds set out in the proposal are:

1. Criminal conviction for theft and a discipline record dating to 1988;
2. Misappropriation of funds from his employer in 1999;
3. Misappropriation of funds from his employer in 2000 and 2001; and
4. Failure to disclose criminal convictions on his application for a licence in 2006.

The Notice of Appeal dated October 26, 2006 sets out five grounds for appeal:

1. The allegations of misappropriation have never been proven in a court of law and, in any event, Mr. Lorenzi did not misappropriate any funds;
2. The failure to disclose criminal convictions in the 2006 application was unintentional;

3. The 1988 conviction and discipline record represent a complete punishment for the impugned behaviour, and cannot now be raised against Mr. Lorenzi to establish a trend of inappropriate behaviour;
4. The Board of Funeral Services did not follow its registration procedure (not stated but implied in this ground is that the Applicant was prejudiced thereby);
5. Others with worse records have not been refused registration or had registration revoked.

FACTS

The major allegations against the Applicant arise out of the disappearance of funds from two funeral homes where the Applicant was manager. The Applicant left the first funeral home in December 1999. His successor contacted the funeral home's head office in May 2000 to raise concerns over aging accounts receivable. This contact led to an investigation by head office, and, in particular, an audit by the Funeral Services Administrator and Auditor who testified concerning the results of the investigation. This particular audit was one of approximately fifty audits this person has carried out for the company, Canada wide.

The audit involved a review of all of the files on aging accounts receivable and a review of the contracts, bank deposit records and receipt books. The funeral home operated computer accounting software called the ARBIS system. This system had the ability to track all accounts, bank deposits and other financial data and to produce reports. It has the ability to produce daily bank deposit listings. The daily listing should then reconcile exactly with the bank deposit slip received from the bank when funds are actually deposited. It has the ability to produce lists of accounts receivable, aged with respect to the length of time since payment was made. The aged receivables listing is used by the company to identify those accounts that require action to ensure funds are collected. Using this computerized information and hard copies of contracts and bank deposit slips the auditor was able to build a picture of financial activity while the Applicant managed the funeral home.

The result of the audit was the conclusion that the Applicant had taken substantial sums of money during his time as managing funeral director. Certain cash deposits were not accounted for and have never been found. Accounts had been subject to a process known in the industry as "lapping." Lapping is a process whereby the wrongdoer defrauds the company and client by misappropriating funds, usually cash payments. To cover up the misappropriation, the wrongdoer applies funds from other receipts to keep the defrauded account current so it is not considered delinquent in an aged receivables report. The oldest defrauded accounts receive an infusion of funds misapplied from newly received money while the aging process guarantees several months before attention is paid to the newer accounts that were the source of that diverted money. The wrongdoer can use the lapping process to cover up the misappropriation for an extended period of time. An example of lapping is shown at Exhibit 4 Tab 4 where an amount of \$720.00 cannot be accounted for but at the same time two accounts are

credited with \$73.25 despite the fact that no money is shown to have been received in the computer system for these contracts on that day. At Tab 9, the amount of \$8,000.00 was credited to another account. Exhibit 4 Tab 6 shows an account where \$8418.55 was received in cash and money order. Only \$1020.81 made to the bank that day.¹ On all files under investigation, the Applicant had made the bank deposit.

The company reported the situation to its fidelity insurers who conducted their own investigation. A claim was made for in excess of \$61,000.00.² The witness advised the Tribunal that insurers paid a settlement after concluding that the Applicant had, indeed, misappropriated funds.

The funeral home had an Administrative Assistant whose job it was to prepare deposit slips and, on occasion, attend at the bank to make the deposit. It was her evidence that she liked the Applicant and considered him as a friend. She was the person responsible for making entries into the ARBIS system. She thought that the Applicant had also been trained on ARBIS but did acknowledge with some jocularly that the Applicant was known in the company to be computer illiterate.

The Administrative Assistant testified that early on in her employment, she prepared deposit slips for the Applicant to deposit at the bank. She stated that frequently, these slips were altered by the Applicant when she received them back from the bank. Finally, she gave up preparing the slips and let the Applicant prepare them. She would then enter the data from the slips into the ARBIS system. By the end of the Applicant's time, the Administrative Assistant was not going to the bank at all.

She testified that she expressed concerns to the Applicant. She was concerned about the manner in which funds were being allocated to various accounts. When she raised the issue with the Applicant, she stated that he told her it was creative accounting and that she should not be concerned. She felt the Applicant was borrowing money and repaying it and raised that issue with him. He confirmed that he was borrowing funds and that he would make a repayment. Again, she was told not to worry. She does not know if he ever did pay the money back.

The Administrative Assistant did confirm that cash handling procedures were lax. Cash receipts were kept in a cash box in an unlocked drawer in a cabinet in her office. She testified that her hours of work were Monday to Friday during the day. It is the nature of the funeral home business that the premises are open for business during the evenings and at weekends. Funeral directors on duty during periods when she was absent from the premises had free access to her office for receipt books or to put cash received into the cash box. She could not state definitively that it was the Applicant who took all the missing money, but she did confirm that she had seen him taking money on occasion.

There also appears to have been a laxity in recording and reconciling deposits. The Administrative Assistant stated that the applicable contract number should have been

¹ Ex 4 Tabs 1-10 set out the audit results with details of accounts with missing funds.

² Ex 4 Tab 12

recorded on each cheque received and then recorded on the bank slip. It was her job to then reconcile the bank deposit slips with the ARBIS system on a daily basis. She testified that she failed to do so as she was too busy. She was aware of her failures and concerned that she might be implicated with respect to the missing funds. She admitted that she felt a duty to protect the Applicant because he was her boss, but was nervous that the “finger might be pointed at her.”

The Applicant moved to take up a new managing funeral director position in December 1999. He stayed in his new position until he was terminated in May 2001. Money disappeared during his tenure as manager of the new facility.

The Tribunal heard from a funeral director who had worked under the Applicant at the second funeral home. This individual’s particular duties were to sell pre-paid funeral contracts, a task that often required visits to clients’ homes. He recounted the tale of one such visit where, on March 23, 2000, the client had paid \$5,100.00 in cash. When he returned to the office, he followed company policy with respect to dealing with cash. He counted the money in front of another employee, put it in an envelope, signed the envelope and put the contract number on it. He then had the other employee sign the envelope. The witness entered the amount received into the computerized accounting system. He testified that he took the signed envelope into the Applicant’s office for safe keeping. The Applicant counted the cash in front of the witness and signed the envelope. That was the last the witness ever saw of the cash.³ The cash never made it to the bank.

The witness recounted a second sale where the cash handling procedure was almost identical to handling of the \$5,100.00 set out above. In this second case, the amount in issue was \$5,260.00 and the transaction occurred on March 16, 2000. The witness counted the cash in front of the client and a co-worker. Back at the office, he counted again in front of co-workers. In each case, the co-workers signed the envelope. The cash receipt was entered into the computer accounting system. The witness took the signed envelope to the Applicant. The cash was not deposited into the bank, and has never been accounted for.⁴

In November 2000, the witness was made aware that both sums of money were missing. He was called into the office by the Applicant and terminated. He felt bitter about the termination at the time, and went through some financially difficult times following his termination. He does not have fond memories of the Applicant. Notwithstanding his feelings, the witness stated that he had no reason to fabricate the story.

The Tribunal heard from another witness with regard to missing cash. At the time, the witness was the Assistant Manager of a cemetery owned by the same group as the company that employed the Applicant. The company introduced a programme whereby visitors to the visitation centre on the cemetery property could purchase cut flowers.

³ Ex 5 Tab 1

⁴ Ex 5 Tab 2

Visitation centre staff would record sales and received funds. Funds from cut flower sales were kept in a locked cash box at the visitation centre until a representative of the funeral home attended. The funds were then turned over to the representative and accounted for in the funeral home's books. On one occasion, some time in 2000, the amount had grown to \$700.00 cash. The Applicant was attending at the visitation centre so the witness gave him the cash in a sealed envelope. Nothing more was ever seen or heard of the cash.

Several months after the Applicant started at his new position, on March 29, 2000, he hired an Administrator/Accounts Clerk to look after contracts, accounts and banking. She testified that she was hired by the Applicant and informed on the first day that all cash deposits were to be given to him. When she first started her employment, the safe in the office was not used. The combination was not known. All cash was given to the Applicant who kept it in a locked drawer in his office. Later, the combination was determined and the safe was used for cash receipts. Cash, when received, was put into a slot on top. Only the witness and the Applicant knew the combination.

One of the witness's duties was to make up bank deposit slips and actually make the deposit at the bank. She reviewed deposit slips that were not in her handwriting. She identified the handwriting as that of the Applicant. She was surprised to see that the Applicant had filled out deposit slips after she started work as it was her job, not his. During the critical period, from March 29, 2000 to May 2001, when the Applicant was terminated, she stated that she took no vacation time off and lost no days from work. At most, she would have taken some time for doctor's appointments. There was no reason for the Applicant to complete deposit slips.

The witness took the Tribunal in detail through the communications with head office over delinquent accounts. She testified that she received lists from the finance department setting out unreconciled items. She would prepare a list of unreconciled items and give it to the Applicant. As manager, it was the Applicant's job to deal with these issues. She also followed up with the local bank branch to determine if the funds had actually been deposited. The branch advised that the matter would have to be taken up with the central bank office. This information was given to the Applicant who informed her that he would take care of the matter.

Six months later, the witness received the same list from head office. She was surprised to find that the Applicant had not dealt with any of the matters as he said he would. She approached the Applicant who informed her that he could not remember her giving him the earlier list. She produced the earlier list and indicated that all the matters were still outstanding. The Applicant informed her that he would look into matters. The reports were found in the Applicant's drawer after he was terminated.

Since the Applicant's departure in 2001, the reconciliation process has been tightened up. Bank and receipt reconciliations are carried out daily and problem areas are addressed immediately. There have been no further incidents of missing funds similar to those before the Tribunal.

The Applicant's employer in the period from December 1999 to May 2001 is part of a group of companies that operate funeral homes, cemeteries and visitation centres. There is a group head office that provides human resources and support services to the funeral home company, including financial services. It was the group head office that had sent the receivables lists to the Administrator/Accounts Clerk. The group controller testified before the Tribunal.

It must be remembered that leading up to January 1, 2000, there was a great deal of concern about the ability of computers to handle the year change from 1999 to 2000 – the "Y2K" problem. As a result of Y2K problems, the group had decided to change its accounting software from ARBIS to an Oracle based system. The new system was implemented for new contracts on December 14, 1999, with older data being entered within the next several months. As a result of dealing with Y2K issues, the head office finance department was behind in carrying out regular reconciliations such that a number of months slipped by before problems at the Applicant's branch were identified. The witnesses stated that they were behind by more than six months in performing reconciliations. The witness led the Tribunal through the documents in Exhibit 5 showing the numerous incidents of missing funds that never showed up.

Matters came to a head when staff raised a problem with a reconciliation. The matter was apparently dealt with when a cheque for \$2000.00 was deposited on February 19, 2001. On February 21, the payment on the cheque was denied. When the cheque was delivered by the bank it was discovered that it was the Applicant's personal cheque. Staff then began to investigate all outstanding issues. They spoke with the funeral director who had been terminated in November, 2000, about the two cash payments totaling over \$10,000.00 that he had received. He informed them, as he testified at this Tribunal, that he had counted the money in front of other staff members and given it to the Applicant. The investigation uncovered incidents of lapping⁵ and a number of incidents where cash had not been deposited in the bank.⁶

By late April 2001, the group head office had decided to call in a private investigator. The investigator spent over 22 years with the Metropolitan Police in London, UK. At the end of his career, he was a Detective Sergeant at Scotland Yard doing fraud investigations. He was a private investigator in Canada between 1999 and 2005, but is now an investigator with a major Canadian bank. Over the years, he has carried out numerous investigations.

Initially, the investigation was directed at human resource issues, but quickly turned to a fraud investigation. The investigation took two months and the file was ultimately turned over to the police for prosecution. Charges were laid against the Applicant and one other person under sections 334 (a) and (b) of the *Criminal Code of Canada*. These charges were stayed by the court at the request of the Crown because of delay in

⁵ Ex 5 Tab 3 and Tab 6 show lapping of several accounts

⁶ Ex 5 Tabs 1 & 2 were covered by the funeral director involved. Tabs 4 and 5 detail other incidents.

getting the matter to trial. The transcript of the hearing sets out the Crown's reasoning for its position regarding the stay starting at page 3, line 26 as follows:

This complaint, now according to Ms Fitzpatrick, was made in August of 2001 and the alleged offences date back to February 2000 and April 2001. Nothing was done on this matter until May 2003. So, by my calculation, the pre-charge delay is quite substantial since it is from August 2001 to May of 2003, and this was not the fault of the complainant....So given the delay that exists in our present situation here at this court, we would not get to the preliminary enquiry until likely July or August 2004..... It is my view that given the process and the delay to date, it is not in the public interest to proceed with this matter. I have considered the allegations to the extent that it is a breach of trust situation, being a theft from an employee – by an employee from an employer of about \$7,000. Obviously we consider this kind of thing a very serious matter on the face of it. I also believe that there is merit to these charges, the police certainly had their reasonable grounds to lay these charges, and there is nothing to suggest to me that this is solely a civil matter and the criminal process has been instituted for any improper purpose. I am using my discretion as an assistant Crown attorney and I will put on the record that I consulted with Mr. Bairly as well in my considerations and my ultimate decision in this, and he's in agreement with my decision.

So I am using my discretion as an assistant Crown attorney to consider all of the factor [sic] and to justify the staying of these proceedings. I have in fairness to both the complainant and the accused, not considered this case on the merits, so this stay should have no bearing on the civil case because no determination has been made in these proceedings with regards to the merits.⁷

The investigator interviewed the Applicant on May 8, 2001. He would ask a question and note down the Applicant's answer. He would then proceed to the next question and repeat the process of noting down each answer until the interview was completed. He stated that the Applicant originally denied any wrongdoing but towards to end of the interview the following exchange took place:

- Q. I have shown you a lot of missing money. Have you taken any of it yourself?
- A. Yes, the \$5,100 - that was an even amount. I have told the truth about the disbursements and writing the SC numbers. The rest I had nothing to do with. How can you hide bank drafts? It's a finance problem and like I said, they will find it. I admit I have an escort agency and cocaine problem, but without this company I wouldn't have it.....I like a pat on the back. I didn't get it. I'm wrong how I get it, I [sic] just sorry. I can't pay it back, if you want my funeral director's licence, take it. Take what I have to do, just I want out of this company.

At another point in the interview the Applicant addressed the \$2,000.00 incident where he had tried to repay with his personal cheque. The investigator read from his notes of the interview where the Applicant claimed he had lost the \$2000.00 and gave his personal cheque to replace it. When asked why he didn't report the \$2,000.00 loss to upper management, he stated that he did not have much faith in upper management. In

⁷ Ex 5 Tab 12 see the Reasons to Stay Charges in *Her Majesty the Queen v. Richard James Lorenzi and Maureen Gilbert* (2003) Court Information No 03-40021251, (OCJ)

the investigator's view, even if the loss was *bona fide*, the attempt to cover it up was fraudulent as it represented an attempt to falsify financial records.

The last witness for the Registrar was René Brakel, Manager of Inspections and Investigations for the Board of Funeral Services, the office of the Registrar under the Act. Prior to taking up his position as Manager of Inspections and Investigations, Mr. Brakel had spent thirty-five years with the Metropolitan Toronto Police. For the last seventeen years of his police career he specialized mostly in fraud investigation. He is responsible for all investigations and inspections carried out by the Board.

Mr. Brakel reviewed the Applicant's registration history. The Applicant was registered on December 31, 1993, with the first funeral home set out above. Effective December 21, 1999, his registration was transferred to the second funeral home.⁸ The Board first became aware of misappropriation allegations on May 30, 2001. At that time the Applicant was not working in the industry, having just been terminated from his second employer. In 2001, an investigation was commenced which took some time. By the time the investigation was completed, the Applicant's licence had either expired or it would expire shortly. The Registrar decided to take no further steps since the Applicant was effectively out of the industry.

The Applicant did not apply again for registration until 2006. On the 2006 Application, the following question was asked:

DECLARATION

Have you been found guilty or convicted of an offence under any law or are any charges pending against you? (This includes those instances where a conditional or absolute discharge has been ordered). Highway Traffic Act Offences are excluded.

If the answer to the above question is yes, provide details of the conviction(s) or charge(s) i.e.: nature of conviction, date of conviction, address of court house and police force which laid the charges. (Attach additional sheets if necessary.)

The Applicant answered "Yes" to this question and in the details section stated "Theft, early 1980s, St. Catharines, ON." The Applicant then completed the form by swearing an affidavit in which he affirms that the statements in the Application are true.⁹ The theft conviction relates to a charge of stealing from Dart's Funeral Home in 1988.¹⁰ The Applicant was disciplined by the Board of Funeral Services as a result of that theft.

What the Applicant did not disclose was the fact that he had two other criminal convictions. He was convicted in Brantford on January 31, 2005, with obstructing a peace officer, given a suspended sentence and put on probation for twelve months. He was convicted in St. Catharines on September 5, 1996, with driving while impaired and fined \$400.00 plus a \$40.00 surcharge.¹¹ The impaired driving occurred while he was

⁸ Ex. 5 Tab 13

⁹ Ex 3 Tab 3

¹⁰ Ex 3 Tab 5D

¹¹ Ex 3 Tab 7

driving a vehicle owned by a funeral home.¹² Further, in his renewal applications for the years 1997, 1998, 1999, 2000 and 2001, the Applicant had failed to disclose his impaired driving conviction.¹³ Mr. Brakel stated that, prior to appealing to this Tribunal, the Applicant had offered no explanation of his failure to disclose these convictions.

On cross-examination, Mr. Brakel reviewed the licence reinstatement process. The Applicant enquired about licence reinstatement by letter dated February 1, 2006. By letter dated February 23, 2006, the Board of Funeral Services replied to this enquiry.¹⁴ It set out a reduced examination requirement. The Applicant would be required to write a re-entry exam rather than a full qualification exam. He would then be required to fill out the application and subject himself to a criminal records check. The letter then proceeded to advise the Applicant that the Registrar will propose to refuse him licensing based on his past conduct. It appears from the Applicant's June 21, 2006, letter that there was some further correspondence that is not before this Tribunal, but in response to the June 21 letter, the Registrar personally answered. In the Registrar's letter, he states that, as an accommodation to the Applicant, he is prepared to permit the Applicant to apply first and complete his appeal rights to this Tribunal from any proposal to deny and then write the re-entry exam if his appeal is successful.¹⁵

In his testimony, the Applicant denied that he had misappropriated funds from either of his employers. He pointed out that the cash deposit box at his first employer was unlocked at all times and that anyone could have taken cash. He stated that cash had been handled in that manner since he became manager of the funeral home in 1991, and there was no change up to an including his departure in 1999. In his view, cash could have been removed by anyone.

He disagreed with the Administrator at his second employer. She had testified that cash was kept in a locked drawer in his office. The Applicant testified that only petty cash was locked up but cash receipts were kept in an unlocked box attached to a cupboard in the general funeral director's office where eight to ten people had easy access to it. He stated that he was rarely in the office because of numerous other duties. He agreed that it was the Administrator's job to do bank deposits and stated that he would only do bank deposits at her request. This statement, of course, directly contradicts her evidence that she was never away from the office except possibly for occasional short periods to attend doctor's appointments, that she did all of the banking and that she was surprised to see that the Applicant had filled out deposit slips and attended the bank.

The Applicant's denial stands in stark contrast to his admissions of theft and drug use made to the investigator. The Applicant acknowledged that he had signed the statement prepared by the investigator, and that it did accurately record his answers. He described the circumstances of the interview. He stated that on his return from

¹² Ex 3 Tab 8

¹³ Ex 5 Tab 14

¹⁴ Ex 3 Tab 2

¹⁵ Ex 3 Tab 4

vacation in early May of 2001, he was contacted by the investigator and one other person who met him and gave him a termination letter. Two days after his return from vacation, he attended at the investigator's office on a voluntary basis. He met with the investigator and a Vice-President of his second employer. He testified that while he admitted to taking \$5,100.00 he did not actually take it. He stated that he made this statement because he was tired of his employer calling his family saying he had a money and cocaine problem. He felt that if he admitted the theft and drug abuse problem, the situation would be ended. He just wanted out and this was his way out.

With respect to his failure to disclose his more recent criminal convictions, the Applicant did not deny that he was the culprit. He stated that, since both charges arose out of the operation of a vehicle, he thought he had been convicted under the *Highway Traffic Act*, and that he did not need to disclose these convictions. He addressed the fact that he had freely consented to the criminal record check. In his mind, he testified, he had no concerns as he had disclosed all criminal convictions. He admitted that the first charge, the charge of impaired, arose out of an accident while driving his employer's car. He did not notify the employer of the accident. He paid himself to have the car repaired.

ANALYSIS AND FINDINGS OF FACT

In analyzing the evidence the Tribunal will address the issues as raised by the Notice of Appeal.

The allegations of misappropriation have never been proven in a court of law and, in any event, Mr. Lorenzi did not misappropriate any funds.

It is clear from the transcript of the stay proceedings that the grounds for staying the charges brought against the applicant by his second employer were not based on the merits of the charges, but were based solely on the fact of pre-charge delay. There has never been a hearing on the merits with respect to these charges. In *Casale (Re)*, [2005] O.L.A.T.D. No. 311, Vice-Chair McIntosh had to address facts very similar to those in the current matter. The Applicant in that case had become involved with loan sharks. She had diverted real estate deposits to pay off the debts to the loan sharks. She was subsequently charged, but the charges were withdrawn by the Crown before trial on the basis that the applicant's defence of duress in the face of threats from the loan sharks had merit and was likely to succeed. Notwithstanding this outcome, the Vice-Chair went on to consider the behaviour giving rise to the criminal charges and found it to be deserving of censure.

The policy behind Vice-Chair McIntosh's decision, while not specifically stated in his reasons, is set out in the decision of Vice-Chair Sherman in *Zaraineh (Re)*, [2006] O.L.A.T.D. No. 457. That decision addressed a request for a stay pending the outcome of criminal proceedings, a situation faced not infrequently by this Tribunal. Vice-Chair Sherman clarified the differences between criminal proceedings and administrative proceedings, at paragraph 5, as follows:

The Tribunal denied the request for an adjournment and, in so doing, adopts the statements made by Sara Blake in her book *Administrative Law of Canada* (second edition) which it finds relevant and determinative of the issue. 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 has 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 Tribunal adopts this statement. It addresses the possibility of inconsistent results. In the absence of a stay pending the hearing of criminal charges, it is possible that a Tribunal may come to a conclusion different from that of the criminal court. This fact is equally true after the conclusion of criminal proceedings, even where the criminal case is heard on the merits. This possibility arises simply because of different burdens of proof and rules of evidence. The Tribunal concludes that the fact that the earlier criminal proceedings were stayed does not act as bar to the consideration of the underlying facts that led to the criminal charges in this proceeding. The criminal charges relate to activity only at the Applicant's second employer. There have been no charges laid with respect to funds missing from his first employer, which are squarely before the Tribunal.

The Tribunal finds there is ample evidence that the Applicant misappropriated funds from both employers. In addition to the admission made to the investigator, there is the evidence of the Administrative Assistant at his first employer. She stated that she had raised her concerns with the Applicant over his "creative accounting" and his borrowing. The Applicant had told her not to worry. The Tribunal prefers this witness's evidence to that of the Applicant. She was candid and consistent and has nothing to gain by her testimony. The Applicant, on the other hand, could only suggest that she, along with every other witness who contradicted his testimony, was mistaken. The documentary evidence which shows the Applicant's writing on all impugned bank deposit slips adds weight to this witness's evidence.

In preferring this evidence, the Tribunal is cognizant of the fact that the cash box at his first employer was accessible to employees for extended hours when the Administrative Assistant was not in her office. This gave opportunity to any employee to raid the box. It must be borne in mind, however, that open access to the cash box had been the norm since the Applicant had taken up his position as manager in 1991. If this access represented a real problem, the Applicant had eight years to rectify the situation. Indeed, it was his duty to do so. The evidence was that his successor raised cash shortfalls with head office. The Applicant's failure to do so speaks volumes.

With respect to the second employer, there is corroborating evidence from two sources that the Applicant handled cash. Firstly, there is the evidence of the Administrator. This witness struck the Tribunal as honest and sincere. She appeared to be a dedicated and highly efficient employee who took her duties seriously. She testified that the first thing she was told on being hired was that all cash should be given to the Applicant. She stated that it was kept in a locked drawer in his office. The funeral director testified that on the two occasions when he handled large cash amounts that ultimately went missing, he had counted the money in front of other staff members, and then turned it over to the Applicant. His evidence was not seriously contradicted. This evidence contradicts the evidence of the Applicant that cash was deposited in an easily accessible box in the funeral directors' office. The Tribunal prefers the evidence of the Administrator and the funeral director in this regard.

The fact remains that the Applicant admitted theft from his second employer in an interview with the investigator. His attempt to justify his admission before this Tribunal strains credibility to the limit. That attempt is not supported by the Applicant's own evidence. It was his evidence that on his return from vacation he was given a termination letter. Two days after receiving the termination letter, he met with the investigator and made the admissions of theft and drug use. It is the Applicant's position that the admission of theft and drug use is a fabrication made at the interview to stop harassment of his family. In other words, the first time he admitted theft and drug use was at the interview. In justifying why he made the statements, the Applicant stated that it was to stop company representatives calling his parents in Thorold, and his girlfriend, and telling them about theft and cocaine use. Yet there was no allegation of theft or drug use until the Applicant made his admission, therefore no calls could have been made on that subject. The justification for making the admission is total fabrication and the Tribunal accepts that the statements are true.

The Applicant's admission that he stole \$5,100.00 highlights one of the most egregious aspects of this matter. The funeral director who testified informed the Administrator that he had been fired because cash he had given to the Applicant had gone missing. He testified to the difficult times his termination had put him through. Thus, the Applicant knew the funeral director to be uninvolved in the missing money when he purported to terminate for cause. This action was callous in the extreme and caused anguish to a totally innocent party to the Applicant's misappropriation.

The failure to disclose criminal convictions in the 2006 application was unintentional

The Applicant testified that he thought that his convictions in 1996 and 2005 were *Highway Traffic Act* convictions, and that he did not need to disclose them. There is no doubt that both convictions arose out of the operation of a motor vehicle. The Applicant admitted in cross-examination that he had been present in court when he was convicted on both charges. Court proceedings are solemn occasions. The procedure brings home to an accused the seriousness with which society views the impugned behaviour. Charges are read clearly including which statute has been breached. In the case of the

Applicant, the reading of each indictment would have identified that it was contrary to section 253 (a) of the Criminal Code in the case of impaired driving and 129 (a) in the case of the obstructing a peace officer. In the case of a guilty plea, the accused is asked to agree to the factual allegations. The Applicant is asking this Tribunal to accept that he paid no attention to the proceedings which focused solely on his behaviour. The Tribunal cannot accept that proposition. The Tribunal is faced with the conclusion that the Applicant either knew he had criminal convictions when he filled out the 2006 application form, or he was willfully blind to that fact. The fact that the application contains an affidavit as to the truth of the disclosure would have the effect of elevating his failure to disclose to perjury, an indictable offence under the Criminal Code.

The 1988 conviction and discipline record represent a complete punishment for the impugned behaviour and cannot now be raised against Mr. Lorenzi to establish a trend of inappropriate behaviour.

As simple proposition of law, the Tribunal cannot accept that the 1988 conviction cannot now be raised against the Applicant. The test set out in the Act directs the Tribunal to examine the Applicant's past behaviour to determine if it provides reasonable grounds for the belief that he will not carry on business in the future in accordance with the law and with integrity and honesty. The Tribunal agrees that, having licensed the Applicant in the years following 1988 in full knowledge of the facts of the conviction and discipline, the 1988 conviction and discipline would probably not support a denial or revocation on their own. The present facts are otherwise. The 1988 conviction and discipline arose out of a theft by the Applicant of cash from a funeral home. The cash in question consisted of memorial donations.¹⁶ Standing alone, this act might suggest a momentary lapse. When considered with all of the evidence before the Tribunal, it suggests that over an extended period of time the Applicant is not trustworthy, notwithstanding an lapse of 11 years wherein he managed a funeral home without apparent problems.

The Board of Funeral Services did not follow its registration procedure (not stated but implied in this ground is that the Applicant was prejudiced thereby).

The whole of this ground of appeal appears to turn on the fact that the February 23, 2006 letter from the Board of Funeral Services required the Applicant to take a re-entry examination as a precursor to actually making his application.¹⁷ The cost of the re-entry examination was \$150.00. What actually transpired was that the Applicant was permitted to make his application to trigger his appeal rights to this Tribunal before taking the re-entry examination. No evidence was put before the Tribunal to suggest that the particular order in which the formal application and examination were to be taken has the force of law or is immutable in any manner. In any event, the whole purpose of the change was to accommodate the Applicant, at his request. The February 23, 2006 letter sets out clearly that the Registrar would propose to refuse to licence the Applicant. In conversations with the Registrar, the Applicant requested that he be permitted to make his application, and only write the examination if his application

¹⁶ Ex 3 Tabs 5 A, B and C

¹⁷ Ex 3 Tab 2

was found acceptable, either by a successful appeal to this Tribunal or because the Registrar did not issue a proposal. The effect of the changed procedure was to save the Applicant the \$150.00 examination fee and several months of studying. He cannot now be heard to complain. He has not been prejudiced in any manner by the order of handling his application established, at his request, by the Registrar.

Others with worse records have not been refused registration or had registration revoked.

The Tribunal expressed concern at the relevance of this ground of appeal at the evidentiary stage of the hearing. It was, in the Tribunal's view, available to the Applicant to make submissions of this nature in closing argument. The Applicant led no evidence and made no submissions on this ground.

After a review of the all of the evidence, the Tribunal finds the following facts:

1. The Applicant was convicted of theft of memorial funds from a funeral home in 1998, and disciplined by the Board of Funeral Services as a result;
2. The Applicant misappropriated money from his first employer during 1999;
3. The Applicant misappropriated money from his second employer during the period December 1999 to May 2001;
4. At least during part of the period December 1999 to May 2001, the Applicant had a cocaine and escort agency problem;
5. The Applicant was charged with and convicted of impaired driving under the Criminal Code in 1996;
6. The Applicant failed to disclose the criminal conviction for impaired driving on his renewal applications for licensing years subsequent to 1996;
7. The Applicant acted either knowingly or with willful blindness when he failed to disclose the 1996 conviction on subsequent applications;
8. The Applicant was charged with, and convicted of, obstructing a police officer in 2005;
9. The Applicant failed to disclose his 2005 conviction on his 2006 application; and,
10. The Applicant acted either knowingly or with willful blindness when he failed to disclose the 2005 conviction on his 2006 application.

THE LAW

The provisions of the Act govern the issuance or refusal to issue licences, rights of appeal to this Tribunal and the powers of this Tribunal as follows:

- 20.** (1) A person may apply to the Registrar for a licence to operate a funeral establishment or to operate a transfer service.

(2) A person who has successfully completed the educational requirements that are prescribed may apply to the Registrar for a licence as a funeral director.

(3) An applicant is entitled to a licence or a renewal of a licence as a funeral director or to operate a funeral establishment or to operate a transfer service except if,

(a) the applicant cannot reasonably be expected to be competent or financially responsible in the conduct of the applicant's business;

(b) the past or present conduct of the persons referred to in subsection (4) affords reasonable grounds for belief that the applicant will not operate in accordance with the law and with integrity and honesty;

(c) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for a licence;

(4) Clause (3) (b) applies to the following persons:

1. The applicant.

(5) The Registrar shall issue a licence as a funeral director, to operate a funeral establishment or to operate a transfer service, as the case requires, to every applicant therefor who pays the fee that is prescribed, complies with this Act and the regulations and is not disentitled under subsection (3).

(6) A licence is subject to such conditions as may be consented to by the applicant, imposed by the Tribunal or prescribed.

21. (1) Subject to section 22, the Registrar may refuse to issue a licence to an applicant if the applicant is not entitled to a licence under subsection 20 (3).

(2) Subject to section 22, the Registrar may refuse to renew or may suspend or revoke a licence,

(a) for any reason that would disentitle the licensee to a licence under subsection 20 (3) if the licensee were an applicant;

(b) if the licensee is in breach of a condition of the licence; or

(c) if the licensee is a corporation and the shareholders of the corporation have changed in the manner and to the extent prescribed.

22. (1) If the Registrar proposes to refuse to issue or renew a licence, proposes to issue a licence subject to conditions or proposes to suspend or revoke a licence, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or the licensee.

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

(4) If an applicant or licensee requires a hearing, the Tribunal shall appoint a time for and hold a hearing

(5) After holding a hearing, the Tribunal may by order direct the Registrar to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations and for such purposes the Tribunal may substitute its opinion for that of the Registrar

(6) 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.

(7) 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 section.

The Act clearly places the onus of establishing that the Applicant is not entitled to a licence pursuant to the provisions of s. 20 (3) of the Act squarely on the shoulders of the Registrar. In determining if the Registrar has met the onus, the Tribunal must review all of the evidence before it and come to its own conclusion without deference to the Registrar.

The purpose of the Act is to protect the public. Counsel for the Registrar urged on the Tribunal a broad interpretation of the public interest to include employers and co-workers. The Tribunal accepts this interpretation. There is no limiting language in the statute. Any attempt to limit the scope of the Act to actions which harm consumers directly would lead to an absence of relief where the funeral home business is financially sound and consumers are not harmed because the business absorbs the losses. On our facts, it is employers, their insurers and at least one co-worker who bore the brunt of the Applicant's actions.

There are three grounds for denial of a licence applicable to the Applicant under clause 20(3) of the Act and the Tribunal shall deal with each in turn.

The first ground set out in 20(3)(a) addresses competence or financial responsibility. The Registrar does not have to prove both lack of competence and financial responsibility. Proof of either will satisfy this part of the test. The Tribunal is satisfied that the Registrar has presented clear and cogent evidence that on three occasions in the past, when the Applicant was in a position of responsibility in the industry, the Applicant violated the trust reposed in him and stole money. This behaviour was carried on over an extended period of time. No evidence was put before the Tribunal to suggest there had been a change of character. The Applicant expressed no remorse. He persisted in denying his involvement despite admissions made and overwhelming evidence. The Tribunal finds the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business as a funeral director.

The second ground in 20(3)(b) focuses on the past and present behaviour of the Applicant. Having examined the Applicant's past behaviour, the Tribunal has no

hesitation in determining that there are reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. The only evidence before the Tribunal that addressed current behaviour was the Applicant's failure to disclose all of his criminal convictions in 2006. By itself, this evidence supports the final test in 20(3) but is also evidence in support of a reasonable belief that he will not carry on business in accordance with law and with integrity and honesty.

The final ground in section 20(3)(c) addresses the making of false statements in an Application. As this was a finding of fact on the evidence, there is no need for further comment. Overall, the Applicant has met all of the exceptions set out in 20(3) (a), (b) and (c) and is not entitled to a licence.

DECISION

By the authority of the provisions of section 22(5) of the Act, this Tribunal orders the Registrar to carry out the Proposal dated October 12, 2006, to refuse to issue the Applicant a funeral director's licence.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: April 19, 2007

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

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 April 18, 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 Friday, June 8, 2007.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

RELEASED: April 17, 2007

Licence Appeal Tribunal

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Decisions under Highway Traffic Act

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

Fiscal Year 2007 - 2008

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



>> [MED-SEIZ - Seizures](#)



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MED-DOWN-Downgrade

APPEAL UNDER SECTION 50(1) OF THE
HIGHWAY TRAFFIC ACT, R.S.O. 1990, CHAP.
H.8 AS AMENDED, FROM A DECISION OF
THE MINISTER PURSUANT TO SECTION
32(12)(B)(I) OF THAT ACT.

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

TRIBUNAL: PATRICK COFFEY, M.D., Member

APPEARANCES: APPLICANT, unrepresented

KIM BEINTEMA, Representing the Minister of Transportation

DATE OF
HEARING: April 11, 2007

by teleconference

DECISION AND REASONS

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

EXHIBITS

1. Letter regarding change of Class of Driver's Licence effective November 9, 2006, issued by the Ministry of Transportation (MTO).
2. Notice of Appeal Form received at the Tribunal March 8, 2007, filed by the Applicant.

3. Registrar's Submissions. Tabbed documents, tabs 1 to 33, filed by the Respondent.
4. File Summary from the Ministry of Transportation, filed by the Respondent.
5. Employer's Statement and Driver's Questionnaire, August 12, 1999.
6. Echocardiography Report. September 16, 2001.
7. Holter Monitor Report. September 17, 2001.
8. Echocardiogram Report. May 14, 2004.

FACTS

The Tribunal was informed of the following documents:

May 31, 1999 Medical report sent to the Ministry of Transportation (MTO) by Dr. <illegible> concerning the Applicant, a 59 year old, male tractor trailer truck driver, indicating as follows:

Under Complete Health History positive responses are:

- Diseases of senses
- Cardiovascular diseases (angina)
- Diseases of the musculo-skeletal system

Physical examination was found to be essentially negative with the exception of the finding of a hearing aid in the left ear.

Under History Details and Summary is written, in part:

- Right shoulder surgery
- Skin cancer removal
- Nitro patch
- Degenerative disease of lumbar spine.

June 22, 1999 Letter from Driver Review and Control to the Applicant indicating as follows:

The medical report filed for a classified licence indicates that you no longer meet the medical standards. Should you wish to keep this class of licence, you must apply for a waiver of the medical standards.

August 12, 1999 Employer's Statement and Driver's Questionnaire. (Exhibit 5).

September 7, 1999 Letter to the MTO from Internist Dr. A. Jina concerning the Applicant, Dr. Jina states, in part, that the Applicant has to undergo a repeat annual evaluation for his cardiac problems, that he has been driving his truck 10 to 12 hours a day with no symptoms except "he has had episodic chest pains which have been occurring with no specific problems". He also states, "His cardiac status has been basically of angina with mild to moderate degree of coronary artery disease."

Under Discussion the doctor writes:

Mr.....(The Applicant) at present has been quite stable in regards to his cardiac status. He will undergo a repeat Exercise Stress test and Holter Monitoring in the near future.

December 29, 1999 MAC Case Study, indicating as follows:

Recommendation: Waive to "A" Licence.
Reason: Stable

January 7, 2000 Letter to the Applicant from the MTO. This informed the Applicant that his waiver had been approved.

October 10, 2001 Follow-up medical report from internist Dr. A. Jina to the MTO, stating, in part:

Mr...(the Applicant) at present has been stable in regard to his cardiac status. He presently will be able to continue with his medications (listed). He should be able to continue his full-time job as a tractor-trailer truck driver.

September 16, 2001 Echocardiography Report. (Exhibit 6.)

September 17, 2001 Holter Monitor Report. (Exhibit 7.)

November 12, 2002 Medical Report to the MTO from Dr.? (illegible), indicating as follows:

Under Complete Health History the positive responses are:

Cardiovascular Diseases - Angina
Musculo-skeletal system - Arthritis.

Physical examination is essentially negative

Summary
Angina 1998 - nitro patch
Arthritis - on celebrex
Fit to drive.

December 19, 2002 Medical report from Dr. Jina, indicating as follows:

Discussion: Mr. (the Applicant) at present has been stable but is showing increasing ischemic cardiomyopathy. At this stage, we will be arranging coronary angiograms to evaluate his coronary artery status.

At last, he underwent coronary angiograms and we just got the report. He will need coronary artery bypass surgery and further management will depend on the outcome.

January 28, 2003 Letter to the Applicant from the MTO. This explained to the Applicant that due to the receipt of a medical report it had been decided to downgrade his Class 'A' licence to a Class 'G'.

April 28, 2004 Clinic Report from Dr. M. McFarlane of the Windsor Regional Hospital, indicating as follows:

He wrote, in part:

Active problems - (1). Ischemic heart disease, having CABG x 3, February 2003, (2.) Known left ventricular dysfunction. (3) Obstructive sleep apnea, (4) Hyperlipidemia. (5) Hypertension, (6) Query left ventricular thrombus.

Current cardiac status - he seems stable from a cardiovascular perspective. He is on appropriate secondary prophylaxis medications. I will organise a repeat echocardiogram to see if there has been any remodelling over the last few months in particular with the use of Coreg.

At this point, there are no contraindications for him regaining his truck driving licence.

May 14, 2004 Echocardiogram Report. (Exhibit 8).

June 4, 2005 Myocardial Perfusion Study, indicating as follows:

Impression: No evidence of myocardial ischemia. The findings are most in keeping with a small apical infarct. Mild reduction in resting systolic function. No other significant finding seen.

September 29, 2005 MAC CASE STUDY, indicating as follows:

Instructions: Waive to Class 'A' with annual assessment from the treating physician and signed waiver certificate starting in July 2006.

November 9, 2006 Letter from the MTO to the Applicant. The Applicant was informed that, due to the fact that he now has an implantable cardioverter defibrillator, it has been found necessary to change his Class 'A' licence to a Class 'G'.

November 6, 2006 Letter to Dr. H. Fortuna from Dr. A Jina, indicating as follows, under Discussion:

Mr....(the Applicant) at present has been reasonably stable in regards to his cardiac status. He is on medications (he lists these). At this stage he will basically continue with the treatment regimen as prescribed and would benefit with annual assessments.

September 12, 2006 MUGA Test Results, indicating as follows:

The left ventricular ejection fraction at rest is low at 39%

The left ventricle is mildly enlarged. There is apical, distal septal and posterobasal hypokinesis.

The right ventricle is enlarged and an element of global right ventricular hypokinesis is present.

March 12, 2007 Certified copy of the Applicant's driving record, indicating as follows:

No convictions or discharges.

Applicant's Evidence

The Applicant explained that now, after the treatment he has had, he feels very well. He feels that he should be able to get his licence back, especially when he sees others who, for instance, have had their epilepsy or high blood pressure adequately treated, have their driving privilege reinstated. He knows that he can go back every three months to the University Hospital, London for a check up on his pacemaker/defibrillator.

He pointed out that since he had the pacemaker/defibrillator installed, he no longer has to use a nitro patch.

He has never had a heart attack.

ISSUES

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

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

LAW

Regulation 340/94, Section 14 states:

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

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

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

Regulation 340/94, Section 17 and 18 states:

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

- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

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

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

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathises with the Applicant's desire to have his licence reinstated, so he can get back to work.

The Applicant's evidence indicates that the results of his coronary bypass operation and implantation of pacemaker/defibrillator have been satisfactory, as noted in Dr. Jina's last report, (November 6, 2006), where he writes as a conclusion: "Mr...(the Applicant) at present has been reasonably stable in regards to his cardiac status".

The Applicant's evidence indicates, "his defibrillator has not activated since installation in October 2004". (Dr. Fortuna's report of December 9, 2005.)

However, the Tribunal takes note of the CCMTA Medical Standards for Drivers, where in paragraph 3.5.9, under Implantable Cardioverter/Defibrillator it is written,

"Standard: Ineligible for a class 1, 2, 3, 4 licence".

The Applicant's evidence indicates that he had installation of a pacemaker/defibrillator, (noted in the December 9, 2005 report of Dr. H. Fortuna).

The Tribunal has no option but to uphold the decision of the Registrar.

DECISION

Upon the application by the Applicant to appeal the decision effective November 9, 2006, of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant,

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

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D.,
Member

RELEASED: April 25, 2007

The 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).

MED-SEIZ – Seizures

APPEAL UNDER SECTION 50(1) OF THE
HIGHWAY TRAFFIC ACT, R.S.O. 1990, CHAP.
H.8 AS AMENDED, FROM A DECISION OF
THE MINISTER PURSUANT TO SECTION
32(12)(B)(I) OF THAT ACT.

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

TRIBUNAL: DR. ROY MELVIN, Presiding Member

APPEARANCES: LYNDA DUNBAR, Respondent
Representative for the Minister

APPLICANT
Unrepresented

DATE OF
HEARING: April 10, 2007 Toronto

DECISION AND REASONS

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

FACTS

On March 14, 2006, the Ministry of Transportation received a report from Dr. A. Tsiapraillis, Neurologist that the Applicant was suffering from “partial complex seizures”. As a result her licence was suspended pending follow-up medical reports.

On July 13, 2006, the Neurologist reported that an EEG of January 2006 demonstrated posterior left temporal epileptiform abnormality. She was started on Dilantin and has subsequently had no seizures. The EEG of May 2006 was normal and an MRI did not reveal a structural focus. Her last seizure was in January 2006.

On August 2, 2006, she was advised by the Registrar of Motor Vehicles that her reports were reviewed and that she now qualifies for a "G" licence which was issued. In order for reinstatement of a class "F" licence she must submit medical evidence to confirm that she has been seizure-free for five years.

ISSUES

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

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

LAW

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

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

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

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

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

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

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS

The doctor's report to the Ministry of Transportation in compliance with Section 203 of the *Highway Traffic Act* reveals that the Applicant suffers from a medical disability which may affect his/her ability to drive a motor vehicle safely. Since this contravenes Regulation 340/94 Section 14(a), the Registrar was obliged to suspend his/her licence as per Section 41(1) of the *Highway Traffic Act*.

The Applicant is a paramedic who is required to hold a class F drivers licence. The Canadian Council of Motor Transport Administrators have established very strict guidelines for holding a commercial drivers licence for people with medical disabilities based on recommendations by the Canadian Medical Association.

The Applicant who suffers from a form of epilepsy and even though it is successfully controlled with medication, she must be seizure-free for five years before being considered for reinstatement of her "F" licence. This is to ensure that the risk for an attack while driving is at an absolute minimum.

This Tribunal is therefore unable to approve reinstatement of her "F" licence.

DECISION

Upon the application by the Applicant to appeal the decision dated January 11, 2007 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin, Presiding Member

RELEASED: April 20, 2007

The 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).



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Decisions under Highway Traffic Act

Section 47(1) (b) - Medical

Fiscal Year 2007 - 2008

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[May](#) >>

[June](#) >>

[July](#) >>

[August](#) >>

[September](#) >>

[October](#) >>

[November](#) >>

[December](#) >>

[January](#) >>

[February](#) >>

[March](#) >>

>> [MED-ADJ-Adjournment](#)



>> [MED- Vision](#)



>> [MED-PSYCH-Psychiatric](#)



>> [MED-PSYCH-Psychiatric](#)



>> [MED-ALCL-Alcohol](#)



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MED-ADJ-Adjournment

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

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

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

APPLICANT

Applicant

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 24, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against both parties* to commence at 1:30 p.m. on Monday, May 14, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Acting Chair

RELEASED: April 26, 2007



MED- Vision

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: PATRICK COFFEY, M.D. Presiding Member

APPEARANCES: THE APPLICANT
Unrepresented

KYLE M. BIEL
Agent for the Respondent

DATE OF
HEARING: APRIL 17, 2007

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").

EXHIBITS

- Exhibit #1. Notice of Suspension of Driver's Licence effective December 21, 2006, issued by the Registrar of Motor Vehicles.
- Exhibit #2. Notice of Appeal Form received at the Tribunal March 22, 2006, filed by the Applicant.
- Exhibit #3. File Summary from the Ministry of Transportation, filed by the Respondent.
- Exhibit #4. Registrar's Submissions. Tabbed documents, tabs 1 to 36, filed by the Respondent.
- Exhibit #5. Vision Progress Report from R. Orr. March 10, 2004.
- Exhibit #6. Vision Waiver Package. July 4, 2005.

Exhibit #7. Driving Progress Report from Skill Builders. November 15, 2006.

PRELIMINARY MATTERS

At this electronic hearing, the Applicant was assisted by a friend.

FACTS

The Tribunal was informed of the following documents:

June 4, 2004. Medical report from Dr. Richard Orr, Ophthalmologist regarding the Applicant, a 74-year-old male, indicating as follows:

It may be dangerous for this patient to continue to operate a motor vehicle.

Reasons: Visual field defect.

This VF defect is from a long-standing injury at age five. He has been driving all his life he said with no problems. Even has driven a school bus!

The attached visual fields were outside normal limits.

July 30, 2004. Letter from the Ministry of Transportation ("MTO") to the Applicant. This sets down the visual standards required under Regulation 340/94 of the *Highway Traffic Act* for driving a private vehicle (Class 'G') in Ontario. The letter goes on to say, "*You are required to submit an up-to-date report from your ophthalmologist or optometrist, which includes the results of Humphrey or Goldmann visual field tests*".

July 8, 2004. Medical Report from the Applicant's family physician, Dr. Nancy MacNabb, indicating as follows:

Summary:

1. VA less than 20/40, and see Dr. Orr's notes re visual defect left field of vision of right eye. Also, glaucoma right eye. Also, injury as child - vision OK next day.
2. Known DDD lumbar spine. No pain since surgery 1967.
3. Head injury age five - was in a coma. Recent CT shows old trauma of brain.

April 27, 2004. CT scan of head, indicating as follows:

Impression:

There is a large defect in the brain in the right parietal area with an appearance suggesting previous neurosurgery. I do not see evidence of any space occupying lesion nor abnormal contrast enhancement.

March 10, 2004. Vision Progress report from Dr. R. Orr. (Exhibit #5)

August 19, 2004. Letter from the MTO to the Applicant. In this letter, the MTO informed the Applicant that since a medical report had been received, it had been decided that his driving privilege should be suspended.

September 7, 2004. Report of Examination of Visual Functions from Walkerton Driver's Exam. Centre. Indicating as follows:

Has incomplete left homonymous hemianopia which he has had since a childhood injury.

July 4, 2005. Vision Waiver Package. (Exhibit #6).

November 10, 2005. Ophthalmic Consultation Report from Dr. R. Orr, indicating as follows:

1. Traumatic cataract right eye.
2. Well controlled glaucoma.
3. Old, well compensated VF defect.

April 25, 2006. Medical report from Dr. D. Nicolle, Department of Neuro-Ophthalmology, University Hospital, London, indicating as follows:

Summary:

The Goldmann visual fields do show a left central homonymous scotoma of about 10-20 degrees in size. This has been picked up by the automated visual fields which only test the central vision and really the peripheral vision. My feeling is that this has probably been there since childhood. I think he would benefit from right cataract surgery and I have suggested he should see Dr. Orr again.

September 1, 2006. Driver Evaluation Report from of Skill Builders Physiotherapy & Rehabilitation Centre, Barrie, Ontario, indicating as follows:

Comments: [the Applicant] demonstrated today that he has potential to make improvements to learn the necessary compensatory strategies to allow him to compensate fully for his decreased left visual field. We recommend 3 to 4 driving lessons to work on improving his abilities and consistency in using these techniques. He will benefit from the use of convex mirrors as well. He understands that he needs to do well during the lessons and that no critical errors can be noted. This was explained to him, who was here on his own for the feed-back session. It appears that he is an excellent driver rehab candidate.

November 15, 2006. Driving Progress Report (Exhibit #7) from of Skill Builders, indicating as follows:

Overall Outcome:

Driving is not recommended.
Critical error made during lesson - lessons terminated.
Errors related to vision deficits.

December 18, 2006. MAC Case Study Report, indicating as follows:

Instructions: Remain suspended.

Reasons: [the Applicant] made a critical error and target errors during the functional driving assessment and thus failed the functional driving assessment.

December 21, 2006. Letter from the MTO to the Applicant informing him that it had been decided that he is not a suitable candidate for the vision waiver program.

March 29, 2007. Certified copy of Applicant's Driving Record, indicating as follows:

No convictions.
Current demerit points - Zero.

APPLICANT'S EVIDENCE

The Applicant was assisted in this by his friend.

The Applicant said that the first time he had his visual field tested (by Dr. J. Orr) was in early 2004. He was told that there was a defect in his visual field which he had probably had since childhood. But all through his life, he did not find any appreciative problem from this and was driving a car safely. He has driven a school bus and a truck. He drove to Alaska and back. He has driven to Vancouver Island three times. But as a result of this defect being found, he was not allowed to drive.

He spoke about the driving lesson he had at Skill Builders Rehabilitation Centre in Barrie, and wanted to point out that he was not used to driving on busy streets since he lives in the country, and was being tested in an environment that he will seldom, if ever be, driving in.

Moreover, with reference to the error he was accused of making in this lesson, the driving instructor admitted that when a collision nearly occurred, the other driver was at fault. The Applicant said that when the instructor had to suddenly apply the brakes, he was just on the point of doing the same thing.

ISSUES

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

LAW

Regulation 340/94, Section 14 states:

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

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

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

Section 47(1) states:

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

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

- (c) a CVOR certificate,

on the grounds of,

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

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathizes with the Applicant's desire to be able to drive once more.

The Applicant's evidence indicates that he suffers from a visual field defect, as noted by Dr. J. Orr in his medical report of June 4, 2004 and by Dr. D. Nicolle in his medical report of April 25, 2006.

However, the Tribunal takes note of the fact that Dr. J. Orr in his report of November 10, 2005, writes that this defect "is a well compensated visual field defect".

The Applicant's evidence indicates that during one of the driving lessons he had at the Skill Builders Rehabilitation Centre, the lesson had to be terminated because of a "critical error made during lesson" and it was written in the Overall Outcome, "Driving is not recommended".

Therefore, taking note of this driving report from Skill Builders Rehabilitation, the Tribunal is obliged to uphold the decision of the MTO. The Tribunal encourages the Applicant to continue with the driving rehabilitation lessons, because after the initial evaluation performed by Skill Builders Rehabilitation it was written in the report, "It appears that he is an excellent driver rehab candidate".

DECISION

Upon the application by the Applicant to appeal the decision of the Registrar of Motor Vehicles ("Registrar") to suspend his 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

Patrick Coffey, M.D.
Presiding Member

RELEASED: April 26, 2007

The 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



MED-PSYCH-Psychiatric

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

KIM BEINTEMA, Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: April 19, 2007 *by teleconference*

DECISION AND REASONS

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

FACTS

On September 28, 2006, the Registrar of Motor Vehicles received an unsolicited medical report from Dr. J. Hillen, Psychiatrist, that the Applicant was suffering from a psychosis and may be a threat to safe driving.

On October 16, 2006, the Ministry of Transportation advised the Applicant that her driver's licence was being suspended for medical reasons and that reconsideration for reinstatement would depend on satisfactory, up-to-date medical information, as requested.

On November 8, 2006, Dr. Hillen submitted a complete history and case management. The Applicant suffered a major depressive episode in 2005, resulting in hospitalization for approximately 2 months. She responded well to medication.

In August 2006 the Applicant was again admitted to hospital because of a recurrence of symptoms and after three weeks and clinical response to treatment, was discharged on medication to be followed regularly by her psychiatrist.

Visits in September 2006, revealed a complete absence of psychotic symptoms. Certain drug side effects were corrected by dosage adjustments. She has remained entirely compliant with treatment.

On January 10, 2007, the Ministry's Medical Advisory Committee reviewed the above reports and recommended her licence remain suspended pending a longer period of stability (one year).

On February 6, 2007, Dr. J. Hillen submitted a follow-up report that the Applicant was compliant and that her mental state had returned to normal. He noted that the one-year stability suggested by the Medical Advisory Committee would end in August 2007, and that he would advise the Ministry of any adverse changes before that time.

On March 13, 2007, the Registrar advised it had received Dr. Hillen's report and would consider reinstatement with his next report of stability in August 2007.

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 Doctor's report to the Ministry of Transportation in compliance with Section 203 of the *Highway Traffic Act* ("HTA") reveals that the Applicant suffers from a medical disability which may affect her ability to drive a motor vehicle safely. Since this contravenes Regulation 304/94 Section 14(a) the Registrar was obliged to suspend her licence to drive per Section 47(1) of the HTA. The Medical Advisory Committee will allow reinstatement if her psychiatrist confirms a one-year period of compliance and symptom-free functioning. Her psychiatrist had affirmed that she has been entirely normal on treatment since August 2006.

I expect, therefore, that if she continues on this course for another three months, she may qualify for reinstatement subject to her doctor's confirmation of compliance and being symptom free.

At this point in time the Tribunal sees no reason to shorten the one-year requirement.

DECISION

Upon the application by the Applicant to appeal the decision effective October 26, 2006, of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.,
presiding Member

RELEASED: April 30, 2007

The 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



MED-PSYCH-Psychiatric

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, Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: April 10, 2007 *by teleconference*

DECISION AND REASONS

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

FACTS

This 43-year-old Applicant has appealed his long-standing suspension of driving privileges with no accompanying documentation to substantiate his claim other than his own submission, which is difficult to decipher.

On July 20, 2000, the Ministry of Transportation ("MTO") received a medical report from a Dr. J. Bishop, Psychiatrist, that the Applicant was suffering from a Bipolar Disorder and substance abuse, and was prescribed medication.

On September 25, 2000, the Registrar of Motor Vehicles advised him that his licence was suspended for medical reasons and that reconsideration would depend on up-to-date medical information as requested. To date there are no subsequent medical reports on file.

The Applicant states that in 1998 he sustained a broken leg in a car accident, that he had a nervous breakdown in 2000 after his father died and that he was a volunteer patient at the London Psychiatric Hospital for about three weeks in 2004. He is now under the care of Dr. Doa, Psychiatrist. His family doctor is Dr. Cortez, London, Ontario, who stopped his medication about 3 months ago.

The Applicant's mother participated as a witness in the teleconference. She identified herself and gave evidence. She testified that she was never given the opportunity to see the letters from the Ministry requesting medical follow-up, nor does she think he understands the implication of this request. She is considering taking measures to obtain his power of attorney.

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 suspension in 2000 was based on medical information that the Applicant was suffering from a disability which puts him at risk for driving a motor vehicle safely.

It appears the Applicant is still suffering from this disability.

The Ministry of Transportation has received no further medical information to determine whether there has been sufficient improvement to allow him to drive safely and none was provided to the Tribunal.

DECISION

Upon the application by the Applicant to appeal the decision effective October 12, 2000, 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

Roy Melvin, M.D.,
presiding Member

RELEASED: April 17, 2007

The 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



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: PATRICK COFFEY, M.D., presiding Member

APPEARANCES: NICHOLAS CHARITSIS, Counsel, representing the Applicant

KIM BEINTEMA, representing the Registrar of Motor Vehicles

DATE OF
HEARING: April 12, 2007 *by teleconference*

DECISION AND REASONS

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

EXHIBITS

1. Notice of Suspension of Driver's Licence effective October 20, 2006, issued by the Registrar of Motor Vehicles.
2. Notice of Appeal Form received at the Tribunal March 6, 2007, filed by the Applicant.

3. File Summary from the Ministry of Transportation, filed by the Respondent.
4. Registrar's Submissions. Tabbed documents, tabs 1 to 19, filed by the Respondent.
5. Report from Ray Bryan, "Skills for Life Consulting", February 10, 2007.
6. MAC Case Study. March 22, 2007.

FACTS

The Tribunal was informed of the following documents:

August 13, 1997 Medical report sent to the Ministry of Transportation ("MTO") from Dr. D. Wong, concerning the Applicant, indicating as follows:

Complete Health History: No positive responses.
Physical Examination: Essentially normal.
Summary: Healthy 46 year old.

October 17, 1997 Letter from the MTO to the Applicant. The Applicant was informed that the last medical report did not contain specific information concerning his past and present use of alcohol and, therefore, his driving privilege had to remain under suspension.

October 30, 1997 Letter from Dr. Preston Tran to the MTO. In this, the doctor explained, in part, that the Applicant had been a patient at his clinic since 1992. He said the Applicant had been affected by a number of stressors in his life which caused him to turn to the use of alcohol, "eventually partaking of as much as 6 to 12 drinks a day (mixture of beer and "hard" liquor), four to five days a week. This alcohol use culminated in his prosecution for impaired driving and the suspension of his driving privilege in 1991."

The letter went on to say that the Applicant, after his conviction and suspension, completed a 30-day in-patient rehabilitation program for alcohol addiction at the Founder's Hall, followed by attendance at Alcoholics Anonymous for 90 days.

August 17, 2000 Medical Report from Dr. Preston Tran, indicating as follows:

Complete Health History: Positive for Addiction to alcohol and sedatives.
Physical Examination: Essentially normal.
Summary: Patient consumes 10 to 12 drinks per week still.
He requires nightly sedative for sleep.
Otherwise, in good general physical health.

March 22, 2001 Letter from the MTO to the Applicant. This informed the Applicant that his last medical report had been approved for a Class 'G' licence.

October 10, 2006 Letter from the MTO to the Applicant, informing him that, as the result of receiving a medical report, it had been decided to suspend his driving privilege. The letter went on to say, in part:

We will be pleased to reconsider your case upon receipt of medical information satisfactory to the Registrar. Therefore, you must arrange for the ministry to receive an up-to-date, detailed report from a physician who specialises in addictions medicine. This report must indicate that you have undergone treatment for alcohol abuse and are actively participating in a relapse prevention program. The report must confirm that you have remained seizure free and abstinent from alcohol for a period of one year and must include laboratory test results (MCV and GGT). Earlier reconsideration may be considered upon a favourable recommendation from an addiction specialist confirming the successful completion of an alcoholic rehabilitation program.

December 4, 2006 Report from Ray Bryan, Addictions Counsellor of "Skills for Life Consulting", Hamilton, Ontario regarding the Applicant. In this, Mr. Bryan stated that he had met the Applicant and recommended that the Applicant attend a minimum of six counselling sessions.

February 12, 2007 Clinical Summary from Ray Bryan of "Skills for Life Consulting". (Exhibit 5), indicating as follows:

Mr. Bryan explained his counselling/therapy for the Applicant. He attributed the increased consumption of alcohol by the Applicant to stress. He stated in his report, (referring to the seizure suffered by the Applicant), "When <the Applicant> realised that he was drinking too much, he stopped abruptly. The sudden withdrawal from alcohol was likely the cause of the seizure".

The Applicant completed his treatment program on February 8, 2007. This consisted of six sessions at the Applicant's residence.

March 22, 2007 MAC Case Study. (Exhibit 6). Instructions were for the Applicant to "Remain Suspended".

March 29, 2007 Letter from the MTO to the Applicant. The MTO decided that the driving privilege of the Applicant should remain under suspension, and asked for further medical information and reports similar to what was indicated in their letter of October 10, 2006.

March 12, 2007 Certified copy of Applicant's driving record, indicating as follows:

October 7, 1988 Driving with more than 80 mgms alcohol in blood

June 1, 1990 Driving with more than 80 mgms alcohol in blood.

November 4, 1991 Impaired driving.

Current demerit points - zero.

Evidence of Expert Witness

Ray Bryan is Joint Manager of "Skills for Life Consulting" of Hamilton, Ontario. He has a Diploma (Addiction Case Worker), (2003), from McMaster University, Hamilton, Ontario.

Mr. Bryan testified that most of his work is with patients who are addicted to alcohol. The number of patients afflicted with this alcohol problem that he has treated in the last four years is well into the thousands.

For the Applicant he applied the "Standardised Assessment Tools" package and used "tools for life functioning" in six sessions in the Applicant's residence, each session lasting about one hour. He found the Applicant was compliant and willing to take part. Mr. Bryan was of the opinion that the goal in the Applicant's case had to be alcohol abstinence and the Applicant was striving for this. The last session was on February 8, 2007. He has had several follow-up conversations with the Applicant since then.

ISSUES

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

LAW

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS

The Tribunal sympathises with the Applicant's desire to have his driver's licence reinstated.

The Applicant's evidence indicates that he has completed six sessions of an alcohol rehabilitation program, (last session February 8, 2007), with "Skills for Life Consulting", and that he is interested in continuing to attend AA meetings, and, if necessary, will apply for more rehabilitation sessions with "Skills for Life Consulting".

The Applicant's evidence indicates that he suffers from Chronic Alcoholism and has done so since at least 1988, and perhaps before (as noted in the copy of the MTO Driving Record of March 12, 2007). He suffered a serious complication of alcoholism, a withdrawal seizure, as recently as August 2006, although he completed a 30-day inpatient rehabilitation program at the Founder's Hall in 1991, (as noted in Dr. Preston Tran's letter of October 30, 1997).

The evidence also indicates that in spite of the Applicant losing his driver's licence because of alcohol in 1991, Dr. Preston Tran's letter of October 30, 1997, showed that the Applicant was still consuming a more than moderate amount of alcohol, (it stated that he was partaking of as many as 6 to 12 drinks a day, a mixture of beer and "hard" liquor). Also, the evidence indicates that the Applicant was consuming enough alcohol to suffer a withdrawal seizure in August 2006.

Therefore, it is the opinion of the Tribunal that the goal for the Applicant, with his degree of alcohol dependence, has to be nothing less than abstinence from alcohol and this has to be monitored carefully. The Tribunal recognises that the Applicant completed an excellent program with Skills for Life Consulting, but this did not include laboratory testing for MCV and GGT levels. It is the recommendation of the Tribunal that the Applicant complete a recognised addiction program, a 12-month period of abstinence and interpretation of biochemical markers (MCV and GGT).

DECISION

Upon the application by the Applicant to appeal the decision effective October 20, 2006, of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant,

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

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D., presiding Member

RELEASED: April 25, 2007

The 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



MED-ADJ-Adjournment

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. ROY MELVIN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

KIM BEINTEMA, Agent, representing the Registrar of Motor
Vehicles

DATE OF
HEARING: April 17, 2007

Toronto

ORDER

A hearing was scheduled to be heard on April 17, 2007, in the above matter;

At the onset of the hearing of April 17, 2007, the Respondent suggested that the hearing be adjourned to allow the Ministry of Transportation time to review an additional medical report submitted by the Applicant. The Applicant had no objection to such suggestion.

NOW THEREFORE, upon consent of both parties, the Tribunal orders that this matter is adjourned, *peremptory against* both parties, to commence at 9:30 a.m., on Thursday, May 17, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin
Presiding Member

RELEASED: April 19, 2007

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MED-SEIZ – Seizure

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

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

APPLICANT
Unrepresented

DATE OF
HEARING: March 29, 2007

Electronic

DECISION AND REASONS

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

EXHIBITS

Exhibit #1 – Notice of Suspension of Driver's Licence effective September 19, 2004 issued by the Registrar of Motor Vehicles.

Exhibit #2 – Notice of Appeal Form received at the Tribunal February 16, 2007, filed by the Applicant.

FACTS

The Tribunal was informed of the following documents.

August 19, 2004

Letter from Physician A, Upper Wentworth St., Hamilton, Ontario to the Ministry of Transportation (MTO) regarding the Applicant, a 59-year-old male, indicating as follows:

The above patient has reported to me that he has had a seizure. He should not be driving at this time. Until further notice, he (the Applicant) should have his licence suspended. If you require further information, please do not hesitate to contact this office.

September 9, 2004

Letter from the MTO to the Applicant. The letter informed the Applicant that a medical report had been received, and as a result, it had been decided that his driving privilege should be suspended. The letter went on to say, "We will be pleased to reconsider your case upon receipt of medical information satisfactory to the Registrar. Therefore, you must arrange for this office to receive an up-to-date report from a physician familiar with your medical history or a neurologist regarding your reported seizure". The letter then described in full, the details required in this report.

July 25, 2004

Medical report from Physician B, of Hamilton Health Sciences, indicating, in part, as follows:

The MRI of the brain does show quite marked cerebral atrophy and micro vascular ischemic change. This is, as you know, almost certainly due to the alcohol, which we know he has consumed in the past.

July 10, 2004

Medical report from Physician C and Physician D on the MRI of head done on the Applicant, indicating as follows:

Opinion: Bilateral maxillary sinusitis. Cerebral atrophy somewhat advanced for this patient's stated age. Non-specific white matter foci likely due to microangiopathic ischemic change.

July 21, 2004

Medical report from Physician H on the CT of head done on the Applicant, indicating as follows:

Interpretation: There is no evidence of an acute bleed or infarct identified.

July 21, 2004

Medical report from Physician I on the chest x-ray done on the Applicant, indicating as follows:

Conclusion: Mild hyperinflation. No other active or acute disease.

October 20, 2004

Letter from the MTO to the Applicant. In this, it was stated, in part, that the MTO required an up-to-date assessment from a physician familiar with his history or a physician specialising in Addictions Medicine regarding his consumption of alcohol. Also, it was stated in the letter that the result of an EEG was required. The letter went on to say, "The report must confirm that you are free from further seizures and that the cause of these falls or seizures has been determined and successfully treated".

January 27, 2005

Letter from to the MTO from Physician J, an Internist and specialist in Addiction Medicine re the Applicant, indicating as follows:

Laboratory Investigations:
The MCV was reported 102 fL where the upper limit is 97 fL.

The GGT was reported as 120 U/L where the upper limit is 60 U/L.

Alcohol Screening Test Results:
AUDIT score was 10.

Diagnosis:

The Applicant has the disease of alcohol dependency. His MRI showed a quite marked cerebral atrophy and micro vascular ischemic change.

Recommendations:

The Applicant should be referred to an inpatient alcohol treatment facility. He will also require follow-up treatment after the inpatient program has ended. He will need to receive regular MCV and GGT tests through his family doctor.

June 15, 2006

Letter to the MTO from neurologist Physician K, indicating, in part, that, in her opinion, the episode in July 2004, was a vaso-vagal event. And she ended the letter by writing, "From my point of view, I do not see any reason why he cannot drive".

December 13, 2006

Medical Report completed by an unknown doctor. (The name is illegible and there is no address), indicating as follows:

Under Complete Health History he has indicated "No" to all the diseases written, and the report on the Medical Examination is largely illegible.

February 1, 2007

Letter from the MTO to the Applicant. In this, the MTO informed the Applicant that it had been decided that his driving privilege should remain under suspension. The letter went on to say, "As previously requested, we also require an up-to-date assessment from your treating physician, confirming that you have remained abstinent from alcohol for a period of one year, supported with up-to-date bio-chemical markers (MCV and GGT)".

February 27, 2007

Certified copy of the Applicant's driving record, indicating as follows:

April 17, 1998. Impaired driving.

Current demerit points - zero.

APPLICANT'S EVIDENCE

The Applicant asserted more than once that the event or "seizure" that occurred in July 2004, was because of pain he had in his right leg at that time. He said that he had been having pain in his legs for some time, but in spite of this, Physician A refused to send him

to a specialist. He also asked Physician A to send him back to see Physician B, but he would not. The Applicant was quite indignant about this.

He was asked if he had made any attempt to give up alcohol. He replied that he did this for about a year around 2004. He was asked if he was drinking alcohol at present. He said that he took the occasional beer. He tended to ramble and be repetitive.

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

In the CCMTA Medical Standards for Drivers, under "Alcohol dependence and withdrawal seizures",

Standard: May not drive any motor vehicle for 12 months during which time the individual must remain seizure-free and alcohol-free.

Earlier relicensure may be considered upon favourable recommendation from an addiction specialist recognised by the licensing authority and the successful completion of an alcohol rehabilitation program.

The Tribunal sympathizes with the desire of the Applicant to be able to drive again.

The Tribunal considers it a fact that the following medical reports indicate that the Applicant suffers from cerebral atrophy and micro-vascular ischemic change: Physician B, (July 20, 2004), Physician C and Physician D, (July 10, 2004), and Physician J, (January 27, 2005) . And Physician B, in his above report, attributed, "almost certainly", these pathological changes to alcohol.

In the January 27, 2005 medical report from Physician J, this specialist in Addictions

Medicine diagnosed the Applicant as suffering from "alcohol dependency". He quoted the results of the Laboratory bio-chemical markers for alcohol which were high.

In the report from neurologist, Physician K, (June 15, 2006) this doctor diagnosed the episode suffered by the Applicant in July 2004, as a vaso-vagal event.

The Tribunal considers it a fact that the Applicant suffers from alcohol dependency. The Tribunal has not been informed of any steps the Applicant has taken towards alcohol rehabilitation, nor any reports indicating that he has abstained from alcohol for a year, as required by the Registrar. Therefore, the Tribunal is obliged to uphold the decision of the Registrar.

DECISION

Upon the application by the "Applicant" to appeal the decision dated September 19, 2004, of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. Patrick Coffey,
Presiding Member

RELEASED: April 24, 2007

The 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



MED-ADJ

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. ROY MELVIN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

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

DATE OF
HEARING: April 24, 2007

Toronto

ORDER

A hearing was scheduled to be heard in Toronto on April 24, 2007, in the above matter. The most recent medical report from the Applicant's Neurologist suggested a "practical road test," and the Ministry's letter of April 18, 2007 advised the Applicant that reinstatement could not be considered without a "satisfactory driving evaluation from a rehabilitation centre". Apparently this letter was not received by the Applicant.

Therefore, on consent of the Parties, the Tribunal orders that this matter is adjourned, to commence at 9:30 a.m. on Thursday, July 26, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin
Presiding Member

RELEASED: April 26, 2007

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis

MED-ALCL – Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: DR. PATRICK COFFEY, Presiding Member

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

APPLICANT
Unrepresented

DATE OF
HEARING: April 3, 2007

Toronto

DECISION AND REASONS

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

EXHIBITS:

Exhibit #1 – Notice of Suspension of Driver’s Licence effective March 4, 2007, issued by the Registrar of Motor Vehicles.

Exhibit #2 – Notice of Appeal Form received at the Tribunal March 1, 2007, filed by the

Applicant.

FACTS:

The Tribunal was informed of the following documents:

December 22, 2006. Medical Condition Report concerning the Applicant, a 68 year old male, retired civil and structural engineer, sent to the Ministry of Transportation (MTO) by psychiatrist, Dr. Ken Balderson of St. Michael's Hospital, Toronto, indicating as follows:

Medical condition: Alcohol dependence.

Chronic alcoholism poses risk to road safety.

February 22, 2007. Letter from the MTO to the Applicant. This informed the Applicant that a medical report had been received, and as a result, it had been decided that his driving privilege should be suspended. The letter went on to say, "We will be pleased to reconsider your case upon receipt of medical information satisfactory to the Registrar. Therefore, you must arrange for this office to receive an up-to-date, detailed report from a physician who specialises in Addictions Medicine". The letter then described, in full, the details required in this report.

March 10, 2007. Letter from the Applicant to the Licence Appeal Tribunal. (Exhibit # 3). In this three page letter, the Applicant explained, in part, that he is a retired civil and structural engineer, who, for the last 12 years has been renovating properties. Since his driver's licence has been suspended, he has been forced to pay to have building materials delivered to his work sites and to employ someone to drive him to suppliers, "a project which I estimate has cost me \$250,000 in the last six years".

The Applicant went on to describe how financially supportive he has been to his son and daughter.

He described how last November he gave his 25 year old daughter quite a large sum of money for expenses and, on the telephone, "made it clear to her that her financial reliance on me is no longer acceptable". This led to a heated argument, and he discovered later that his daughter had recorded this conversation on her cell phone. Then, his daughter "persuaded my wife to attend a meeting she had arranged with my personal doctor", and at this meeting this telephone conversation was played back for the benefit of the doctor, which "convinced him of the need to have me committed to a secure mental health facility".

Then, one day, "To my shock and humiliation, I was arrested by police at my home and taken to the mental health department of St. Michael's Hospital, where I was detained for 30 hours". He was subjected to a psychiatric evaluation and next day released, after he was "found to be mentally competent".

The Applicant stated that in 50 years of driving he had never had an accident. He described the responsible jobs he had had in his professional life.

He ended the letter by writing, "I am in contact with <counsellor's name deleted> from the Centre for Addiction and Mental Health and also am registered with Community Outreach Programs in Addictions, to attend meetings. (It should be noted, however, that my contact with these organisations should not in any way be construed as an acceptance of the accusations of alcoholism leveled against me)."

March 5, 2007. Letter written by the wife of the Applicant: (This accompanied the letter written by the Applicant to the Licence Appeal Tribunal).

At a meeting with Dr. Balderson (St. Michael's Hospital), he told my husband that he had sent a letter to the Ministry of Transportation to suspend his licence. Dr. Balderson recommended that my husband call the CAMH for an assessment. On February 12th, 2007 we met with a counsellor, <name deleted>. She arranged for my husband to register for a program to talk about his drinking and to monitor his progress. He has now registered for the program with COPA. Since he needs his car for his work doing renovations, this suspension for a year will cause serious economic problems. Because he has never had an accident, nor any record of drinking and driving and because he has agreed to go to the program to monitor his drinking, he would ask you to reconsider this suspension. He can provide you with his insurance company's number to confirm this.

March 5, 2007. Certified copy of Applicant's driving record, indicating as follows:

No convictions or discharges or other actions.

Current demerit points – zero.

Applicant's Evidence: (This was derived from what the Applicant stated at the hearing on April 3, 2007, and how he answered questions posed to him at this hearing.)

The Applicant described what happened to him on the day he was taken by the police to the psychiatric department of St. Michael's Hospital on the 21st of December 2006. He was taken to the 17th (psychiatric) floor, met Dr. Balderson, with whom he had three sessions, that day and the following day and then he was considered fit to be discharged home. He had blood tests but does not know the results. Dr. Balderson told him that he considered that he should not drive and he seemed to be concerned about alcohol.

He said that he does not drink and drive. He has never been in a car accident.

He said that he only drinks wine. He drinks every day. At first, he admitted to drinking about two glasses of wine a day, and, later, said it was four, and later on still, mentioned the fact that he drinks, or did drink, 3/4 of a bottle a day. He spreads out his wine drinking so that he does not feel intoxicated.

Evidence of the Applicant's Friend

A friend came with him to the hearing and he gave the following evidence. He said that he has known the Applicant for about two years. Since the Applicant lost his driver's licence, he drives him around quite a bit. He finds the Applicant a very likable man. He does not feel that the Applicant's alcohol consumption is excessive and he does not drink "hard liquor". The friend said that it is important that the Applicant retains his driving licence because he needs this for his 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:

In the CCMTA Medical Standards for Drivers, under “The Effects of Alcohol” and under 13.2, “Alcohol dependence and alcohol withdrawal seizures”, the Standard is stated as follows:

May not drive any motor vehicle for 12 months during which time the individual must remain seizure-free and alcohol-free.
Earlier relicensure may be considered upon favourable recommendation from an addiction specialist recognised by the Licensing Authority and the successful completion of an alcohol rehabilitation program.

The Tribunal sympathises with the Applicant's wish to be able to drive again, especially since he needs to drive in his work.

The Applicant's evidence indicates that he is able to drive safely. He has a good driving record.

The Applicant's evidence indicates that he has been in contact with the Centre for Addiction and Mental Health and has registered with Community Outreach Programs in Addictions.

However, the Tribunal finds it a fact that psychiatrist, Dr. K. Balderson, wrote in his medical report of December 22, 2006, that the Applicant suffered from alcohol dependence and that his chronic alcoholism posed a risk to road safety.

The Tribunal has not been informed of any assessment from a medical specialist in Addictions Medicine, as required by the Registrar. The Tribunal has no option but to uphold the decision of the Ministry of Transportation.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 4, 2007, of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. Patrick Coffey,
Presiding Member

RELEASED: April 12, 2007

The 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



MED-ADJ

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. ROY MELVIN, Presiding Member

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

DATE OF
HEARING: April 5, 2007 Toronto

ORDER

A hearing was scheduled to be heard in Toronto on April 5, 2007, in the above matter. Due to weather and traffic conditions on the day of the hearing, the Applicant could not attend at the scheduled time and requested, by telephone, that a new date be set. The Respondent had no objection to such suggestion;

Therefore the Tribunal orders that this matter is adjourned, to commence at 9:30 a.m., on Tuesday, May 15, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin
Presiding Member

RELEASED: April 11, 2007

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



MED-MDIS

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. ROY MELVIN, Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles
APRIL BROUSSEAU, Solicitor for Applicant

DATE OF
HEARING: March 22, 2007

Toronto

DECISION AND REASONS

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

FACTS:

The Applicant is a 60-year-old bus driver holding a class B licence, who is subject to submitting periodical medical examination reports to the Ministry of Transportation.

On July 5, 2004, his family doctor advised the Ministry that the Applicant was suffering from paranoid delusions and denied treatment. He also refused to allow his doctor to insert this information on the Ministry's prescribed form. This resulted in the Registrar's letter of July 30, 2004, advising that his licence was being suspended for medical reasons. Reconsideration would depend on up-to-date satisfactory medical information as requested, preferably from his psychiatrist, and to include a complete history, diagnosis, prognosis and degree of compliance with treatment.

On April 25, 2005, his doctor submitted a report that the Applicant's condition had resolved with treatment and that he was now symptom free.

On June 2, 2005, the Registrar advised that on review it appears necessary for him to submit a psychiatrist's report for consideration of reinstatement.

Prior records for this Applicant show that, in 1998, he was reported to be suffering from an acute paranoid disorder, which resulted in the suspension of his driver's licence.

The Applicant attended a series of counselling sessions with a psychologist. A comprehensive report from a psychiatrist on October 5, 1998, declared him to be free from psychiatric disorder with no further treatment recommended.

On December 2, 1998, his appeal was upheld and his licence reinstated.

The current issue is that an up-to-date psychiatrist's report is outstanding. His doctor's report of April, 2005, does not describe the Applicant's signs, symptoms and behaviour patterns that justify the diagnosis nor does he/she specify the exact treatment or how the indicators have changed to the point where he is considered normal.

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, in compliance with Section 203 of the *Highway Traffic Act*, reveals that the Applicant suffers from a medical disability which may affect his ability to drive a motor vehicle safely. Since this contravenes Reg. 340/94 Section 14 (a), the Registrar was obliged to suspend his/her licence as per Section 47(1) of the *Highway Traffic Act*.

In addition Reg. 340/94, Section 17(1)(i); requires that the holder of a class B licence have

no established medical history of psychiatric disorder unless it is corrected or controlled.

Section 32 (12)(b)(ii) of the *Highway Traffic Act* provides that the Minister may suspend or cancel a driver's licence where the person fails to submit or successfully complete the examination authorized by regulation.

Since the requested psychiatric report is outstanding, this Tribunal is unable to determine whether the Applicant's present condition poses a significant threat of safety to himself or others. There has been no medical progress note from his family doctor for almost two years.

If it is too difficult or prolonged to obtain a psychiatric evaluation, a more complete up-to-date report from his family doctor would receive consideration.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 9, 2004, of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin, Presiding Member

RELEASED: April 4, 2007

The 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



MED-ADJ

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. ROY MELVIN, Presiding Member

APPEARANCES: APPLICANT, unrepresented

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

DATE OF
HEARING: March 30, 2007

By teleconference

ORDER

A hearing was scheduled to be heard by teleconference on March 30, 2007, in the above matter;

At the onset of the hearing of March 30, 2007, the Respondent suggested that the hearing be adjourned to allow the Ministry of Transportation time to review an additional medical report submitted by the Applicant; the Applicant had no objection to such suggestion;

NOW THEREFORE, upon consent of both parties, the Tribunal orders that this matter is adjourned, *peremptory against both parties*, to commence by teleconference at 9:30 a.m., on Tuesday, May 1, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Dr. Roy Melvin
Presiding Member

RELEASED: April 5, 2007

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

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

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[MVIA](#) >>

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[>> SALERNO & SON HAULAGE LIMITED - PRE-HEARING](#) 
[>> K.J.S. TRANSPORT INC. - PRE-HEARING](#) 
[>> 4448-CVOR-1656788 ONTARIO INC. O/A SERVICE PLUS TRANSPORTATION AND ANTONIO C. GIONFRIDDO-Dismissal](#) 
[>> 1656788 ONTARIO INC. o/a SERVICE PLUS TRANSPORTION and ANTONIO C. GIONFRIDDO](#) 
[>> MR. EXPEDITE INCORPORATED - PRE-HEARING](#) 
[>> 1605599 ONTARIO LTD.](#) 
[>> LOCOMOTE SYSTEMS INC. and CENTINEL EQUIPMENT LEASING INC.](#) 
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PRE-HEARING

FUNLAND OUTDOOR AMUSEMENTS LTD. – PRE-HEARING

APPEAL FROM AN ORDER DATED NOVEMBER 22, 2007, OF
THE DEPUTY REGISTRAR OF MOTOR VEHICLES MADE
PURSUANT TO SECTION 47(1) OF THE *HIGHWAY TRAFFIC
ACT* (THE “ACT”)

TO CANCEL AND SEIZE THE PLATE PORTION OF PERMITS
FOR ALL COMMERCIAL MOTOR VEHICLES ISSUED TO CVOR
CERTIFICATE #123-495-391

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: FRED LAUGHLIN, Agent, representing the Applicant, Funland
Outdoor Amusements Ltd.

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles

DATE OF
PRE-HEARING: February 12, 2008

Toronto

ORDER

A pre-hearing was held on February 12, 2008, before this Tribunal, in the presence of Fred Laughlin, Agent, and John Robertson, appearing on behalf of Funland Outdoor Amusements Ltd. (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 one-day hearing scheduled to commence at 9:30 a.m. on Tuesday, April 8, 2008, 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 acknowledges receipt of the Registrar's disclosure material contained in its Appeal Book filed with the Tribunal on February 7, 2008.
3. The Registrar intends to rely on the testimony of one witness at the hearing, a carrier safety rating administrator. In the event the Registrar intends to summons an additional witness, it shall provide the Applicant with reasonable information thereof by March 14, 2008.
4. The Applicant intends to rely on the testimony of three witnesses: John Robertson, President, of the Applicant company; the owner/operator of Fred's Towing; and an independent trucking operator to be determined. Particulars and reasonable information as to the anticipated evidence of such witnesses will be supplied to the Registrar, along with any other necessary disclosure, by March 14, 2008.
5. The Applicant does not dispute its past registration history and operator record, contained in the Registrar's disclosure material, as filed to date.
6. The sole issue for the appeal is the Applicant's entitlement to retain its plate permits, under section 47(1) (a) of the Act, for trailers owned by it and necessary for the continuation of its business operation.
7. The Tribunal's Rules of Practice, effective January 1, 2008, apply to these proceedings.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: February 15, 2008

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



PRE-HEARING

SALERNO & SON HAULAGE LIMITED – PRE-HEARING

APPEAL FROM A DECISION OF THE REGISTRAR OF MOTOR
VEHICLES, UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990,
CH. H.8, AS AMENDED

TO SUSPEND A CVOR CERTIFICATE AND TO SEIZE THE
PLATE PORTION OF THE PERMIT

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: MARK REYNOLDS, Agent, representing the Applicant

PATRICK MOORE, Counsel, representing the Registrar of Motor
Vehicles

DATE OF
PRE-HEARING: January 24, 2008

Toronto

ORDER

During the pre-hearing, no settlement was agreed to but the parties did agree on certain matters.

Accordingly, the Tribunal orders that:

1. The Applicant will disclose its witness list on or before February 29, 2008.
2. The Applicant shall disclose all other documents or things required to be disclosed under Rule 6 of the Tribunal's Rules of Practice of January 2008, to the Registrar of Motor Vehicles on or before March 7, 2008.

3. If the Registrar of Motor Vehicles wishes to rely on further documents or things in response to the Applicant's disclosure, then the Registrar shall disclose this material by March 21, 2008.
4. The hearing in this matter will occur on **April 15, 2008** commencing at **9:30 a.m.**, at the offices of the Licence Appeal Tribunal, continuing on April 16, 2008.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: February 8, 2008

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



PRE-HEARING

K.J.S. TRANSPORT INC. – PRE-HEARING

APPEAL FROM AN ORDER BY THE DEPUTY REGISTRAR OF
MOTOR VEHICLES

TO SUSPEND AND SEIZE THE PLATE PORTION OF PERMITS
FOR ALL COMMERCIAL MOTOR VEHICLES ISSUED TO CVOR
CERTIFICATE #142-119-631

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: LARRY YOUNG, Agent, representing K.J.S. Transport Inc.

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles

DATE OF
PRE-HEARING: January 21, 2008

Toronto

ORDER

A pre-hearing was held on January 21, 2008, before this Tribunal, in the presence of Larry Young, Agent, representing K.J.S. Transport Inc. (the “Applicant”) and Murray Forbes, Counsel, representing the Registrar of Motor Vehicles (the “Registrar”).

The Tribunal makes the following order respecting the one-day hearing now scheduled to commence at **9:00 a.m.** on Tuesday, March 4, 2008, at the Tribunal’s Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Applicant shall provide the Registrar with the following, on or before **February 15, 2008**:
 - i) The registration details, including date of registration, of all vehicles owned and/or operated by the Applicant;
 - ii) A list of all drivers, date of hire and evidence of termination if applicable;

- iii) Confirmation of name, position, duties and date of employment of safety personnel;
 - iv) Details as to the change in safety policies and procedures and dates of implementation;
 - v) Evidence of inspections not included in the CVOR at the time of Registrar's consideration.
2. The Parties agree that the Licence Appeal Tribunal's Rules of Practice dated November 3, 2003, shall apply to these proceedings.
 3. On consent of the Parties, the commencement time of the hearing, scheduled for March 4, 2008, has been changed to **9:00 a.m.**

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: February 6, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



4448-CVOR-1656788 ONTARIO INC. O/A SERVICE PLUS TRANSPORTATION
AND ANTONIO C. GIONFRIDDO-Dismissal

HIGHWAY TRAFFIC ACT

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

IN THE MATTER OF an appeal by
1656788 ONTARIO INC. O/A SERVICE PLUS TRANSPORTATION
AND ANTONIO C. GIONFRIDDO

AND IN THE MATTER OF the SUSPENSION AND SEIZURE ORDER of the
Registrar of Motor Vehicles made pursuant to section 47(1) of the Act

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

1656788 ONTARIO INC.
O/A SERVICE PLUS TRANSPORTATION
AND ANTONIO C. GIONFRIDDO

Applicants

- and -

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (the "Act"), 1656788 Ontario Inc. o/a Service Plus Transportation (CVOR Certificate #152-393-338) and Antonio C. Gionfriddo (CVOR Certificate #092-388-006) (the "Applicants") initiated an appeal from the Suspension and Seizure Order of the Deputy Registrar of Motor Vehicles (the "Registrar") effective October 16, 2007, of the CVOR Certificates and the plate portion of permits for all commercial motor vehicles and trailers of the Applicants.

The Pre-Hearing Order in this matter released to the Parties on January 18, 2008, states:

The Applicant may, within ten (10) days of the release date of this Order, provide written submissions to the Tribunal as to why the appeal should be allowed to continue, including an explanation of the Applicant's failure to attend at the pre-hearing conference. If the Applicant fails to provide sufficient reasons why the appeal should be continued, the Tribunal shall issue a final Order dismissing the appeal.

The Applicants have not provided such written submissions.

Accordingly, the Tribunal orders that:

1. The Applicants' appeal is dismissed, and the Tribunal's file is closed as of this date.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka, Chair

RELEASED: February 6, 2008

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

Licence Tribunal
Appeal Tribunal
Tribunal d'appel
en matière
de permis



1656788 ONTARIO INC.
o/a SERVICE PLUS TRANSPORTION
and ANTONIO C. GIONFRIDDO

IN THE MATTER OF an appeal by 1656788 Ontario Inc. o/a Service Plus Transportation (CVOR Certificate #152-393-338) and Antonio C. Gionfriddo (CVOR Certificate #092-388-006) dated October 5, 2007, for a pre-hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the Highway Traffic Act, R.S.O. 1990, c.H.8, as amended;

AND IN THE MATTER OF a Suspension and Seizure Order by the Deputy Registrar dated October 2, 2007, of the CVOR Certificates and Vehicle Permits of 1656788 Ontario Inc. o/a Service Plus Transportation;

AND IN THE MATTER OF the performance condition issued on August 15, 2005 and the safety record of 1656788 Ontario Inc. o/a Service Plus Transportation;

AND IN THE MATTER OF unpaid fines of 1656788 Ontario Inc. o/a Service Plus Transportation and Antonio C. Gionfriddo.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent, the
Deputy Registrar of Motor Vehicles

DATE OF HEARING: December 14, 2007 Toronto

ORDER and NOTICE OF INTENT TO DISMISS

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

The issue in this matter, as written in the Applicant's Notice of Appeal, is as follows:

Suspension & Seizure

- a) Safety Record
- b) Misconduct by which the Applicant is responsible
direct/indirect
- c) Previous convictions from other CVOR
- d) Order is based on payment of fines.

A pre-hearing was held on December 14, 2007, in the presence of counsel for the Respondent. Counsel for the Respondent confirmed the Registrar's position to pursue the suspensions as provided in, sections 47 and 47.1 of the *Highway Traffic Act*.

The Applicant filed a Notice of Appeal on or about October 5, 2007. On the Notice of Appeal Form, the Applicant checked off a box indicating a request for a pre-hearing. The Respondent consented to the pre-hearing in person. The Parties were also advised in the Tribunal's letter of November 1, 2007, that a pre-hearing is mandatory. According to Tribunal records, a Notice of Pre-Hearing was delivered to the Applicant on November 22, 2007. It was sent by Purolator Courier, and records show successful delivery. A copy of Tribunal's Rules of Practice was also included.

The Applicant was also advised on December 13, 2007, that a pre-hearing would be held in person. A Tribunal staff member left a voice message at the Applicant's contact telephone number on Thursday, December 13, 2007, before the pre-hearing, on December 14, 2007.

The Applicant did not attend the pre-hearing scheduled for 9:30 a.m. At 10:10 a.m., following another attempt by a Tribunal staff member to reach the Applicant by telephone, the pre-hearing was commenced in the absence of the Applicant.

There is no indication that the Applicant made any attempt to contact the Tribunal. Counsel for the Registrar advised they had not been contacted by the Applicant regarding the Applicants' attendance or non-attendance at the pre-hearing conference.

Rule 2.10(d) of the Tribunal's Rules of Practice provides that the Tribunal may dismiss an appeal where it is abandoned. Rule 2.12 provides that where a party fails to attend before the Tribunal, the Tribunal may treat the appeal as abandoned.

The Member finds that Rule 2.12 applies to any scheduled proceeding before the Tribunal, including the pre-hearing and the hearing.

The Tribunal therefore finds this appeal should be treated as abandoned and intends to dismiss the appeal unless sufficient reason is given, in accordance with the directions herein, within ten (10) days of the release date of this order why it should not be dismissed.

The Tribunal makes the following order respecting the hearing scheduled to commence

at 9:30 a.m. on February 29, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

Pursuant to s.4.6 of the *Statutory Power Procedures Act* R.S.O. 1990 c. S. 22, and the Tribunal's Rules of Practice, the Tribunal hereby gives notice to the Applicant that it intends to dismiss this proceeding unless, within the time frame specified below, the Applicant provides sufficient reason why the proceeding should not be dismissed.

The Applicant may, within ten (10) days of the release date of this Order, provide written submissions to the Tribunal as to why the appeal should be allowed to continue, including an explanation of the Applicant's failure to attend at the pre-hearing conference. If the Applicant fails to provide sufficient reasons why the appeal should be continued, the Tribunal shall issue a final Order dismissing the appeal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: January 18, 2008

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



PRE-HEARING

MR. EXPEDITE INCORPORATED – PRE-HEARING

IN THE MATTER OF AN APPEAL FROM A NOTICE OF
SUSPENSION AND SEIZURE ORDER ISSUED BY THE DEPUTY
REGISTRAR, *HIGHWAY TRAFFIC ACT*, ON APRIL 20, 2007.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: HARVEY CAPP, Q.C., Counsel representing the Applicant,
Mr. Expedite Incorporated

MURRAY FORBES, Counsel representing the Deputy Registrar of
Motor Vehicles

DATE OF
PRE-HEARING: August 20, 2007

Toronto

ORDER

The Tribunal held a pre-hearing at which Counsel representing the Parties attended. The Tribunal was advised of an Agreement reached between the parties whereby the Applicant has made, and has undertaken to continue to make, monthly payments on specified outstanding debts in the amount of \$10,000.00. On the condition that such payments continue as agreed, the Deputy Registrar has undertaken to set aside his Order dated April 20, 2007. Now therefore this Tribunal orders:

1. The Deputy Registrar will immediately issue the Order to set aside the Suspension and Seizure Order dated April 20, 2007 on the conditions agreed upon, and to reinstate the Applicant's carrier rating from "Conditional" to "Satisfactory Unaudited".

2. The proceedings currently before this Tribunal are no longer necessary. The Applicant withdraws its appeal and the date set for the Hearing of October 1, 2007 is no longer required.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: August 24, 2007

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

1605599 ONTARIO LTD.

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

AND IN THE MATTER OF the Suspension and
Seizure Order of the Registrar of Motor
Vehicles, dated March 14, 2007, of the
Commercial Vehicle Operator's Registration
(CVOR) #141-690-493, issued to 1503882
Ontario Ltd.

AND IN THE MATTER OF the Suspension and
Seizure Order of the Registrar of Motor
Vehicles, dated March 14, 2007, of the
Commercial Vehicle Operator's Registration
(CVOR) #148-953-454, issued to 1605599
Ontario Ltd.

AND IN THE MATTER OF the Suspension and
Seizure Order of the Registrar Motor Vehicles,
dated March 14, 2007, of the Commercial
Vehicle Operator's Registration (CVOR) #116-
216-693, issued to Pretzy Inc.

TRIBUNAL: HARINDER S. GAHIR, Vice-Chair presiding

APPEARANCES: PETER EBERHART, Agent for the Applicant
1605599 Ontario Ltd.

PATRICK MOORE,
Counsel for the Registrar of Motor Vehicles

DATE
OF HEARING: July 9, 2007 Toronto

REASONS FOR DECISION AND ORDER

An oral hearing was held on July 9, 2007, 2006 at Toronto, Ontario to consider the appeal by 1605599 Ontario Ltd., ("Applicant") pursuant to section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended (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 Act.

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by 1605599 Ontario Ltd. (the "Applicant") the Order of the Deputy Registrar dated March 14, 2007 (the "Order"), which reads as follows:

WHEREAS on January 8, 2007, a Notice of Suspension and Seizure was issued proposing a 30-day suspension of the CVOR certificate issued to 1503882 Ontario Ltd., 1605599 ONTARIO LTD. and PRETZY INC, and suspension and seizure of the plate portion of permits for all commercial motor vehicles and trailers registered in the names of 1503882 ONTARIO LTD., 1605599 ONTARIO LTD. and PRETZY INC.

AND WHEREAS on March 13, 2007 you had the opportunity to make submissions at a meeting with the Deputy Registrar to show cause why the Suspension and Seizure Order should not be issued;

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the *Highway Traffic Act* that as of March 21, 2007, CVOR certificate # 141-690-493, #148-953-454 and # 116-216-693 and plate portion of permits for all commercial motor vehicles and trailers issued to 1503882 ONTARIO LTD., 1605599 ONTARIO LTD. and PRETZY INC. be suspended for 30-days and thereafter until all outstanding fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

(Exhibit 3, tab 17)

THE EVIDENCE

The Registrar presented documentary evidence consisting of a Respondent's Appeal Book, which the Tribunal marked as Exhibit 3; ICON report of the Applicant and associated Companies, which the Tribunal marked as Exhibit "4", as well as testimony of Adele Di Paolo. The Applicant did not provide any oral or documentary evidence, nor was any of its officers present at the hearing. The agent for the Applicant, at the outset of the hearing, submitted that only 1605599 Ontario Ltd. is appealing the decision of the Deputy Registrar.

Summary of Testimony of Adele Di Paolo

The only witness for the Deputy Registrar was Adele Di Paolo who testified that she is employed with 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 Program Manager. Following this, a decision is made and the file is submitted to the Deputy Registrar for his review and action. This procedure was followed in this matter, and the Deputy Registrar approved the Suspension and Seizure Order and signed it on March 14, 2007.

Di Paolo further testified that the grounds for the Suspension and Seizure Order were based upon the record of unpaid fines and the safety record, including violation rate, safety rating, accidents, convictions and inspections of the Applicant and the other related companies 1503882 Ontario Ltd. (the "150 Company") and Pretzy Inc.

Di Paolo briefly reviewed the Ministry's publication titled "Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline" (exhibit 3, tab 18) providing ratings that are applied to operators of commercial motor vehicles using Ontario's roadways. These ratings identify safety performance of commercial vehicle operators. She stated that one out of five possible ratings is given 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 its threshold. An operator's violation rate that exceeds 100% of its 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 very poor and 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 testified that prior to a facility audit, the corporate officers of an operator are told when such an 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. On July 19, 2005 the Ministry conducted a facility audit of the operations of the 150 Company, and afterwards issued the facility audit findings. The findings were given to the Corporate Officers of the Applicant, Leonard Prasow and Barnara Prasow. In a nutshell, the findings are as follows:

Compliance rate of the Driver's	52.9 %
Vehicle Compliance Achieved	30.3%
Safety Program and Training Compliance rate	11.1%
Outstanding fines	\$1,700.00

The Safety Record Review provides, in part, the following information:

The 150 Company has a current violation rate of 186.26%. The Company is affiliated to the Applicant and Pretzy Inc.

The 150 Company failed a MTO facility audit on July 21, 2005 and since the failed audit, the violation rate of the 150 Company has increased to 201.3%

The 150 Company had a 100% Out-of-Service (OSS) rating, which exceeded provincial average of 35.3%

Outstanding Fines

- The 150 Company - \$1,700
- Pretzy Inc. - \$527.50
- The Applicant - \$1,022.50

As of December 21, 2006, the 150 Company and Pretzy Inc. had no commercial vehicles registered under their name. The Applicant had nine commercial motor vehicles registered under its name.

The Registrar had issued a warning letter to the Applicant in January 2006.

Approximately four drivers had failed to produce their licences and were driving while being under suspension.

(Exhibit 3, tab 3)

Di Paolo went on to testify that as, a result of the facility audit findings of July 2005, a safety record review dated December 2006 of the 150 Company, and a safety record review of the associated Companies, the Deputy Registrar issued a Notice of Suspension and Seizure dated January 8, 2007 (Ex. 3, tab 1), proposing to suspend for 30 days the Applicant's CVOR registration as well as the plate portion of the permits for all commercial vehicles and trailers registered in the Applicant's name. A show cause hearing, pursuant to the above proposal, was held on March 13, 2007. The Deputy Registrar and other officials, the Applicant's President, Leonard H. Prasow and the Applicant's agent were present. Full notes of what transpired at that meeting were produced at to the hearing (Exhibit 3, tab 14).

The Applicant did not provide any satisfactory action plan at the meeting. However, Prasow provided the following information at the meeting:

- He will be closing the operations of 150 Company and the Applicant, as he has a business opportunity in British Columbia and will be terminating his CVOR certificates in Ontario within 60 days.
- The companies do not have owner operators.
- He does not have any active commercial motor vehicle in Ontario. Currently he has pro-rated plates which he will be operating in British Columbia.

(Exhibit 3, tab 14)

After the show cause hearing, the Deputy Registrar remained concerned about 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 on March 14, 2007.

Di Paolo testified that the safety record of the Applicant continued to deteriorate after the issuance of the Notice of Suspension and Seizure. A six-month analysis report of 150 Company, for the period May 2006, to November 2006 (page 37 ex 3) showed an overall violation rate of 371.2% of the threshold. Di Paolo testified that this is unacceptable as it is unsafe for the Ontario motoring public.

Di Paolo testified that the Registrar pursuant to Section 17.1(1) of the Act and based on the safety record of the 150 Company and Pretzy Inc., and, as a result of Notice of Suspension and Seizure, issued to the above companies in January 2007, an "Unsatisfactory" rating respecting the operations of the above companies.

Applicable Legislation

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*.

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.

ANALYSIS

The onus of proof rests upon the Registrar to prove that the evidence presented to the Tribunal affords reasonable grounds for the issuance of a Notice of Suspension and Seizure Order. The Tribunal has analysed and considered the issues in this matter, as well as the testimony presented by the Registrar's witness, the documentary evidence filed respecting the record and the submission of the parties.

The Corporate Officers, at the time of Facility Audit of 150 Company, have been provided opportunity to make improvements in safety of its operations. However, the safety records of the Company deteriorated with the passage of time.

Registrar's Counsel submitted that non-payment of fines is indication of bad faith on the part of CVOR holder. The record has established that the overall OSS violation rate of 150 Company was 100%, at the time of Safety Review, which was way over the industry average of 35%. This rate was not improving with the passage of time. The Registrar had audited the Company in July 2005, had made many recommendations, unfortunately the record became worst after the audit. Although the safety record of 150 Company would warrant suspension of the CVORs of the related companies, however, the safety record of the Applicant is not acceptable either. The Applicant had amount of \$1,095.00 and 150 Company had amount of \$1399, as outstanding fines on the hearing date. The Registrar's Counsel submitted that a 30-day suspension was not excessive in light of the safety and violation history of the Applicant and related Companies. There was no person from the Applicant to provide evidence with respect to what the company had done to improve the operations or as to inability to pay the fines.

The Applicant's agent did not dispute the evidence of the Respondent with respect to the safety violations of the Applicant and related Companies. However, he submitted that there is evidence that some fines have been paid. He contended that the only company appealing was the Applicant. The violation rate of this company was only 66%, which has improved from its previous violation rate. He submitted that there is no rationale as to why a 14-days suspension is not appropriate. He pleaded for the mercy of the Tribunal in reducing the period of suspension. He submitted that the Applicant's operation is very small and the 30-day suspension will really hurt the operations of the Applicant.

The Tribunal has found that the 150 Company's operations were in non-compliance with the Regulations and the Act, and were certainly considered unsafe. The Registrar, at times, had warned the Company about its unsafe operations and had urged it to rectify the same. The company chose to ignore the warnings given by the Registrar and the company's performance continued to declined.

The Registrar had issued a warning letter to the Applicant in January 2006, due to its violations of the Act and Regulations. The overall violation rate of the Applicant based on the safety record review of December 2006, was 66.05%. It is alarming that such a review had revealed that four of the Applicant's drivers were driving while under suspension.

The evidence in this matter, both the oral testimony of Ms. Di Paolo and the documentary evidence, is compelling and overwhelming. This was not disputed by the Applicant's agent. The Tribunal accepted the Registrar's evidence, as presented. The conduct of the Applicant, as evidenced on record, indicates a complete disregard for safe operations and compliance governing the operation of commercial vehicles in Ontario. The Applicant ignored the various warnings given to it regarding its unsafe operations. There has been no evidence placed before the Tribunal to persuade it that genuine and meaningful rectification of past proven unsatisfactory operations are being instituted or have been instituted.

Moreover, the safety record of the Applicant cannot be seen in isolation from the safety record of the related companies. Pursuant to the provisions of subsection 47.(1) (f) of the Act, "the Registrar can act when he has reason to believe, *having regard to the safety record of the holder or of a person related to the holder*, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with the Act, the regulations and other laws relating to highway safety". The related person provision addresses a very important safety concern. It prevents an operator which has its CVOR at stake for Safety issues, from simply using or creating another corporate entity and proceeding with the same unsafe practices before until the safety threshold is exceed again.

The record has established, and as admitted by the Applicant, that 150 Company and Pretzy Inc. are related persons, by way of having common officers and shareholders.

Section 17.(4) defines the related person as follows:

17.(4) An applicant is related to a person for the purpose of subsection (3) if,

- (a) the applicant and the person are **related** individuals;
- (b) either the applicant or the person is a partner of the other or was a partner of the other or they have or have had partners in common;
- (c) either the applicant or the person, directly or indirectly, controls or controlled or manages or managed the other; or
- (d) the applicant and the person have or have had common officers or directors or they are or have been controlled, directly or indirectly, by the same shareholders.

Accordingly, the Tribunal finds that having regard to the safety record of the Applicant and related companies, the Applicant will not operate a commercial vehicle safely in accordance with the regulations and other laws relating to highway safety. Therefore the Tribunal confirms the Suspension and Seizure Order dated march 14, 2007.

LICENCE APPEAL TRIBUNAL

Harinder S. Gahir
Vice-Chair

Released: August 29, 2007

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



LOCOMOTE SYSTEMS INC. and
CENTINEL EQUIPMENT LEASING INC.

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

AND IN THE MATTER of the Suspension and Seizure Order
of the Registrar of Motor Vehicles, dated January 22, 2007,
of the Commercial Vehicle Operator's Registration (CVOR)
#097-214-498, issued to LOCOMOTE SYSTEMS INC.

AND IN THE MATTER OF the Suspension and Seizure
Order of the Registrar of Motor Vehicles, dated January 22,
2007, of the Commercial Vehicle Operator's Registration
(CVOR) #104-155-932, issued to CENTINEL EQUIPMENT
LEASING INC.

TRIBUNAL: HARINDER S. GAHIR, Presiding Vice-Chair

APPEARANCES: MIRIAM ISENBERG, Q.C., appearing on behalf of the
Applicants, Locomote Systems Inc. and Centinel Equipment
Leasing Inc.

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

DATE
OF HEARING: July 4 and July 5, 2007 Toronto

REASONS FOR DECISION AND ORDER

Locomote Systems Inc. (hereinafter "Locomote") appealed to this Tribunal from the decision of the Deputy Registrar to suspend its Commercial Vehicle Operator's Registration (hereinafter "CVOR") dated January 22, 2007. The other Applicant, Centinel Equipment Leasing Inc. (hereinafter "Centinel") appealed the decision of the Deputy Registrar of Motor Vehicles, of the same date, to suspend its CVOR Registration contemporaneous with the suspension of the registration of Locomote, for being a related company of Centinel.

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Deputy Registrar of Motor Vehicles (the "Registrar"), with conditions.

BACKGROUND

The Registrar through his Order issued on November 14, 2005, pursuant to sections 47 and 47(1) of the *Highway Traffic Act*, suspended CVOR certificate 097-214-498 and Registrant Identification Number 104-155-932 and the plate portion of permits for all commercial motor vehicles and trailers registered in the names of Locomote and Centinel (jointly "the Applicants") for an indefinite period until all outstanding fines are paid to the Courts.

Locomote has had a lengthy history of ministerial interventions, due to safety issues, commencing February 1991 (Exhibit 4, Tab 8). The reason for the current Ministry intervention in 2005 was the Applicant's non-payment of outstanding fines and the past ministerial Interventions. On the day of the show cause hearing with the Ministry, on December 12, 2005, the outstanding fines amounted to \$42,254.50, which the Applicants had brought down to \$20,485.76 by the date of the hearing.

The Suspension and Seizure Order of the Registrar dated January 22, 2007 provides as follows:

WHEREAS on January 23, 2006 the proposed Notice of Suspension and Seizure Order dated November 14, 2005 of all plates and CVOR certificate 097-214-498 and Registrant Identification Number 104-155-932 and the seizure of all plates and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Locomote Systems Inc. and Centinel Equipment Leasing Inc. was SET-ASIDE by the Deputy Registrar of Motor Vehicles with the following performance condition:

"PERFORMANCE CONDITION"

LOCOMOTE SYSTEMS INC. – CVOR 097-214-498

AND

CENTINEL EQUIPMENT LEASING INC. – CVOR 104-155-932

The CVOR Certificate, plate portion of permits and numbered plates issued to Locomote Systems Inc and Centinel Equipment Leasing Inc., will be subject to a Suspension and Seizure Order in the event of:

- Any outstanding fines registered in the name of Locomote Systems Inc. on December 31, 2006.

AND WHEREAS Locomote Systems Inc., CVOR 097-214-498 has failed to meet the Performance Condition set out in the Set-Aside Notice of Suspension and Seizure dated January 23, 2006

TAKE NOTICE that the Set-Aside Notice of Suspension and Seizure dated January 23, 2006 be RESCINDED.

AND TAKE NOTICE that pursuant to Sections 47 & 47.1 of the Highway Traffic Act the CVOR certificate 097-214-498 and Registrant Identification Number 104-155-932 and the plate portion of permits for all commercial motor vehicles and trailers registered in the names of Locomote Systems Inc. and Centinel Equipment Leasing Inc. be indefinitely SUSPENDED until all outstanding fines are paid to the courts.

AND TAKE NOTICE that the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

AND TAKE NOTICE that this is based on the failure of Locomote Systems Inc. to meet the Performance Condition set out in the Set-Aside Suspension and Seizure Notice dated January 23, 2006.

NOW THEREFORE IT IS ORDERED that pursuant to Sections 47 & 47.1 of the Highway Traffic Act that as of the 5th day of February, 2007 CVOR, certificate 097-214-498 and Registrant Identification Number 104-155-932 and the plate portion of permits for all commercial motor vehicles and trailers registered in the names of Locomote Systems Inc. and Centinel Equipment Leasing Inc. be indefinitely SUSPENDED until all outstanding fines are paid to the courts and the plate portion of permits for all commercial motor vehicles and trailers registered in names of Locomote Systems Inc. and Centinel Equipment Leasing Inc. and plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This suspension and Seizure will be effective at 9:00 a.m. Eastern Standard Time on the 5th day of February 2007 and thereafter until all fines are paid to the court.

Dated at St. Catharine's this 22nd day of January 2007.

GROUND OF APPEAL

The relevant grounds of appeal included in The Notice of Appeal, Exhibit 2, include the following:

1. The Applicant was not given a fair opportunity to present its case at the original show cause hearing as its lawyer who was knowledgeable concerning these matters and had represented the Applicant since 1989 was scheduled to go on holidays for which all arrangements had been made. The Ministry of Transportation refused to re-schedule the hearing/meeting to accommodate the Applicant and its lawyer. There was no urgency on the matter as the major issue was the collection of fines. The Applicant had recently passed a Ministry audit and was found to be safe. The Applicant was forced to retain an agent to assist it.
2. The material, documents and information adduced at the meeting were ignored and an order was issued contrary to this evidence produced.
3. The order is based on requiring the Applicant to pay all fines. Some of these fines do not pertain to the Applicant's operation.

4. There are fines that have already been paid and yet they still appear on the ICON showing as unpaid and Ministry required the Applicant to pay again.
5. The Applicant (Centinel Equipment Leasing Inc.) is a separate limited company. It had no convictions. It leases equipment to Locomote Systems Inc. as well as to other companies. The Applicant is subject to many agreements with financing/leasing companies with respect to its equipment, which would go into default if the Applicant was not allowed to lease its equipment to other companies. This company has separate CVOR, which is not in default.

EVIDENCE

The Parties' evidence consisted of the oral testimony of the Registrar's witness, Adele Di Paolo, and of the Applicants' witness, Tony Santos, and documentary evidence which was marked as follows:

Exhibit 1	Suspension and Seizure Order of the Registrar dated January 22, 2007.
Exhibit 2	Notice of Appeal of the Applicants received at the Tribunal February 1, 2007.
Exhibit 3	Tribunal's Pre-hearing Order dated May 2, 2007.
Exhibit 4	Respondent's Appeal Book.
Exhibit 5	Supplementary Respondent's Appeal Book.
Exhibit 6	Record of outstanding fines.
Exhibit 7	Offence Action/Disposition Table – ICDISPCD.
Exhibit 8	List of Charges relating to Quebec Plates.
Exhibit 9	ICON report dated July 3, 2007.
Exhibit 10	Letter from the Applicants' Solicitor to the Ministry.
Exhibit 11	ICON report dated April 26, 2007.
Exhibit 12	Letter from Locomote Systems Inc. to Lillian Sleeth dated March 24, 2007.

Testimony of Adele Di Paolo

The only witness for the Deputy Registrar was Adele Di Paolo, who has been employed with the Ministry of Transportation (the "Ministry") as a Carrier Safety Rating Administrator since 2005 and previously worked with the Ministry as a CVOR analyst. In her current position Di Paolo reviews and analyses files of commercial vehicle operators for compliance in operations. If intervention were required pursuant to her review and analysis of an operator's file, she would refer the file to the 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. The Deputy Registrar approved the Suspension and Seizure Order and signed it on January 22, 2007. The analysis was prepared by John Miller, the Carrier Safety Administrator and not by Di Paolo. She testified that Mr. Miller retired in mid-June 2007. She stated that she worked as a team with Mr. Miller. If one was busy the other would take over the file. She testified that she had reviewed the present file. She reviewed all the documents in Exhibits 4 to 10.

In cross-examination, she agreed that she was not involved with the file of this Company; however, she reviewed all the files before coming to the hearing. She agreed that the last time the Ministry had audited the company was in July 2003, and that the Company had passed the audit. She agreed that there are instances when a person or company has paid the fines but the arrears still show on the ICON system.

She agreed that the Company's safety rating in 2006-2007 was satisfactory. She insisted that the Suspension and Seizure Order was issued only due to outstanding fines and Ministry interventions. She testified that, as of the hearing date, the outstanding fines are in the amount of \$20,485.76.

Testimony of Tony Santos

In his testimony, Mr. Santos stated that he has been involved with the company since 1989. Locomote is a steel hauler and leases all its equipment from Centinel which is a related company. His wife owns both companies and he has been the Manager of the two companies since their incorporation. He confirmed that Centinel is not a carrier as it is only a leasing company that also leases vehicles and equipment to other unrelated companies. Santos stated that Centinel started with one truck in 1989 and now has a fleet of 35 trucks. Seven more trucks will be added to this existing fleet in August 2007.

Santos explained that Locomote, at the initial stage of the business, started getting tickets for over weighing, which prompted the company to design special aluminium trailers after consultation with the Ministry. He claimed that since then Locomote has made numerous improvements.

He claimed that as of January 2007, Locomote has retained the services of an independent company to do audits of the Applicants. Santos further testified that the company's yard there are ten TV screens showing safety procedures at all times for the

drivers and other staff. Locomote has also retained the services of a safety supervisor who teaches safety to the company's drivers. Santos went on to state that Locomote is educating the drivers more and more in order to improve the CVOR rating. He stressed that the CVOR record speaks for itself. Santos claimed that due to the company's safety record, the automobile insurer has lowered the insurance premium on the company's trucks to about \$100,000.00 per year, effective May 2007.

Santos went on to state that most of the outstanding fines, on the date of the hearing, are fines which were levied against Locomote on the Quebec plates, starting in 1998. He testified that the company never owned Quebec plates. All the company's trucks are registered in Ontario. He stated that the company is willing to pay off all the outstanding Quebec fines in order to get rid of the matter except for one large fine in the amount of about \$13,000.00.

Upon being asked as to why Locomote did not pay the fines on Quebec tickets, he stressed that he felt that those were not Locomote's plates. He thought that the Ministry would investigate this matter. He testified that in a meeting with the Ministry staff at the end of 2005, he had made a commitment to pay his fines excluding the fines on Quebec plates. He testified that, at the pre-hearing, he understood that the Ministry would try to supply supporting material, wherever available, with respect to the fines on Quebec plates, but the Ministry did not supply this material at the hearing.

In cross-examination, Santos testified that when Locomote came to know about the fines on the Quebec plates, it was too late to take any steps as the appeal period had already expired. He stated that Locomote had made some enquiries about the real owner of the Quebec plates, and had found out that these plates belonged to Transport Locomote. With regard to the fines on Quebec plates, he mentioned that the Ministry never bothered him from 2004 until now. He pleaded for more time in order to resolve the matter of the above fines by making a deal with collection agencies. He stated that Locomote would try to retain a lawyer to investigate this matter. He testified that company did not do so earlier because he thought that the Ministry would assist him in resolving the issues.

THE LAW

The relevant provision for the actions of the Registrar are set out in sections 47, 47(1) and 50 of the *Highway Traffic Act*. They are as follows:

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 there under 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.

(3) 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.

ANAYLSIS

Locomote received its CVOR in 1991, and soon after was the subject of the Ministry intervention. Exhibit 4, Tab 8 shows the Carrier Record of Locomote. The first Ministry intervention was in February 1991, when it issued a warning letter for non-compliance issues. The Ministry conducted a facility audit in January 1992. The Company failed an audit performed by the Ministry in September 1996. In December 1996 and April 1996, the Deputy Registrar issued a show cause notice to the company. In April 1998, the company appealed a seven-day Suspension Order to the Licence Suspension Appeal Board, which the Board reduced to a five-day suspension. The Deputy Registrar sent a warning letter to the company in January 2000. The company, again, failed the Ministry audit in April 2000. The Ministry sent another warning letter to the company in February 2002. The company passed the audit in July 2003. The present proceedings were triggered by a long record of outstanding fines amounted to \$42,254.50.

Up to the date of the hearing, Locomote had paid off a substantial amount of the fines levied against it by Ontario Courts, except for unpaid fines amounting to approximately \$20,073.14, as described in Exhibit 6, which Santos contends does not belong to it. Santos claimed that these were wrongful convictions against it given that he never received any notice of fines and convictions were entered in default.

Prior to the present proceedings, the evidence has established that the Ministry did not take serious steps to force Locomote to pay these fines as the Ministry wanted Santos to take appropriate steps to resolve the issue. In a show cause hearing on December 12, 2005, the Deputy Registrar advised Santos that he would have to resolve the Quebec issue with the Courts and/or his lawyers. There is no evidence before the Tribunal that Locomote took serious steps to resolve the matter. As the Respondent's counsel put it, Santos did not even provide any proof to the Director that the vehicles subject to those convictions did not belong to Locomote.

Santos should be commended for the steps he took to improve the safety record of the company. However, the issue of the outstanding fines cannot be ignored. The Tribunal does not have jurisdiction to look behind the conviction records. If Santos seriously believed that the company was wrongfully convicted, it was up to him to take the appropriate steps to clear its records.

Santos took the position that at the time of show cause hearing, which prompted the present proceedings, he had not been given a fair opportunity to present his case because his lawyer was going on vacation and the Director refused to reschedule the hearing. Having gone through all of the elements of procedural fairness, the Tribunal finds that the Order cannot be impugned on these grounds. The statutory right to appeal to this Tribunal in the event of dissatisfaction with the Director's Order has provided an opportunity to cure any defects in natural justice or procedural fairness at the time of the show cause hearing. (*Posluns v Toronto Stock Exchange and Gardine*, (1984) 46 D.L.R. (2d) 210 (Ont. H. C.) *Herelkin v. University of Regina* [1979] 2 S.C.R. 561)

The Applicants have advised that they needed a period of one year to deal with the matter. The Tribunal does not agree as at the show cause hearing of December 2005, the Deputy Registrar had advised Santos of the necessity to resolve the matter.

ORDER

Having considered the evidence and submission of the Parties, the Tribunal varies the Order of the Registrar by making the following order:

Locomote will have 60 days from the date of this order to settle and pay off all the outstanding fines. If Locomote fails to settle this matter within the above period of time, the Registrar will carry out his Suspension and Seizure Order until the above fines are paid off.

The Tribunal will now consider whether the above order of the Tribunal should cover the operations of Centinel by application of subsection 17(4) and subsection 47(1)(f) of the Act.

The Tribunal finds on the basis of the evidence, that these two companies are related because they are operated out of same location and share the same Manager. The Applicants' solicitor submitted that Centinel is a leasing company and does not operate as a carrier, and that therefore subsection 17(4) and subsection 47(1)(f) of the Act should not apply to its operations. She further submitted that the actions of the Deputy Registrar are of a collection agency and not related to the safety of Centinel. The Tribunal finds that the outstanding fines certainly stem from the safety issues of Locomote. It is important that Locomote pays the fines, as non-payment is in contempt of the Court and demonstrates unwillingness to follow the regulatory scheme and thereby defeats the purpose of the regulatory scheme. Centinel, having a CVOR, can step in the business of Locomote. The Tribunal considers that failure to include Centinel into the Suspension and Seizure Order would simply create a situation where Santos

could circumvent the impact of the Suspension by transferring the operations to Centinel Equipment Leasing Inc.

The evidence clearly indicates that Locomote and Centinel are related companies under section 47(1)(f) and as defined in section 17(4) of the *Highway Traffic Act*. Therefore, the Tribunal's decision will apply to both companies.

LICENCE APPEAL TRIBUNAL

Harinder S. Gahir, Vice-Chair

RELEASED: August 16, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



JELFTON C. WILLIAMS AND
J.W. EXPRESS CARTAGE INTERNATIONAL INC.

In the Matter of an Appeal by JELFTON C. WILLIAMS and J.W. EXPRESS CARTAGE INTERNATIONAL INC. under s.50.(1)(a) of the *Highway Traffic Act* R.S.O. 1990 c. H-8, as amended (the “Act”) from a Cancellation and Seizure Order of the Deputy Registrar of Motor Vehicles dated December 6, 2006 made pursuant to s. 47(1) of the Act.

TRIBUNAL: JANE WEARY, Presiding Vice-Chair

APPEARANCES: JELFTON. C. WILLIAMS, representing
J. W. Express Cartage International Inc.

MURRAY FORBES, Counsel, representing the
Deputy Registrar

DATE OF HEARING: July 31, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

Jelfton C. Williams and J.W. Express Cartage International Inc. (the “Applicants”) appeal to this Tribunal the Order of Cancellation and Seizure (the “Order”) issued on December 6, 2006 by the Deputy Registrar (the “Registrar”). The Order will cancel their Commercial Vehicle Registration (“CVOR”) certificates, numbered 104.920.148 and 150.414.496 respectively, as well as remove the plate portion permits of all their commercial vehicles.

Global Destiny Transport and Recycling Inc. (“Global”), while also named in the Registrar’s Order, chose not to appeal the Order despite the wife of the Applicant and President of the company being present in the hearing room and advised of her right to do so.

In October, 2006 a Notice of Cancellation and Seizure signed October 26, 2006 by the Deputy Registrar was sent to the Applicants and Global – Exhibit 3, Tab 4. Based on the Applicants' Ministry of Transport ("Ministry") Carrier and Safety Record, it invited the Applicants and Global to meet with the Registrar to show cause why the Order should not be issued against them. Both Mr. Jelfton Williams and his wife attended a meeting with the Registrar on November 21, 2006. Despite their submissions, the Registrar remained concerned and the Order was issued as noted in early December.

A Pre-hearing Order issued by this Tribunal following appearances by the Parties on May 18, 2007, noted the following as issues for this Hearing:

1. Whether the Registrar had adequate and sufficient grounds to issue the Order;
2. How does new evidence of the Applicants' measures to rectify matters concerning the Registrar affect the Order; and
3. How does Global's decision not to appeal the Order affect the outcome?

The Pre-hearing Order directed the Parties to provide disclosure of evidence one to the other by a stated date. The Tribunal specifically required the Applicants to provide the Registrar with their proposed action plan for future activity and supporting documentation by July 1, 2007.

EVIDENCE

In his opening to the Tribunal, Counsel for the Registrar advised that, despite Global not preceding with an appeal, evidence of its role in the Applicants' registration history would be adduced given its relevance to the Registrar's assessment of the Applicants' continued certification under the Act.

In his opening remarks the Applicants, both represented by Mr. Williams, advised they were prepared to accept the Registrar's Order if given time to arrange business affairs. On being advised by Mr. Forbes that cancellation and seizure of the certificates and commercial plates would include cancellation of permits to operate inter-provincially as well as between America and this country, Mr. Williams opted to proceed with the appeal.

Adele DiPaolo is a Carrier Safety Rating Advisor with the Ministry. In her employment she conducts analyses of carrier safety ratings and reports her findings to the Registrar for the purpose of determining whether a cancellation order needs to be issued. Ms. DiPaolo testified that she performed such an analysis on the Applicants and Global. In doing so she relied on the Ministry's CVOR computer registration system which monitors all information inputted on safety performance and audits of certified carriers. Such data is generated on

accidents, suspensions and convictions on a daily basis, once such information is received by the Ministry. The information is tracked and computed with additional factors relevant to the carrier, primarily its fleet size, to determine a “threshold” value. This threshold value, in turn, determines a carrier’s safety rating.

According to Ms. DiPaolo, the Ministry will conduct a facility audit of the carrier once its violation rate exceeds 65% of threshold; over 100%, it will apply a sanction. Sanctions include downgrading the safety rating each carrier is given. There are five safety ratings available: on first certification a carrier is rated “satisfactory unaudited”. After an initial Ministry audit, it becomes either “satisfactory” or “conditional”, the latter where it has failed the audit or has a violation rate of between 65% and 80%. Ms. DiPaolo testified only 1% of carriers receive this, the lowest operational rating. At either end of the spectrum lie an “excellent” rating or “unsatisfactory”. The latter occurs where a suspension is in effect. All this information is set out in the Ministry Guideline made available to carriers, and to the public in general online – Exhibit 3, Tab 27.

Ms. DiPaolo presented the analysis she had prepared prior to issuance of the Order. The information was all made available to the Applicants and Global at the show cause hearing last November. It includes Ministry CVOR system data on the Applicants dated October 24, 2006 (Exhibit 3, Tabs 7 and 8) and on Global on October 28, 2006 (Tab 10). It reveals performance data showing that Jelfton C. Williams, registered since February 1999, had a fleet size of one vehicle and was rated Satisfactory Unaudited with an overall violation rate of 124.3% (224% of threshold) based on three safety related driver convictions. According to her Report at Tab 7, Mr. Williams had an accident earlier that year (January, 2006) for which he was charged with Careless Driving, having struck the car in front of him while talking on a cell phone. This had generated sufficient points (8) to have brought him significantly beyond the threshold tolerance and into the concern of the Registrar, with the consequence of the Order being issued.

Ms. DiPaolo testified the Registrar is concerned with the nature of the accident – following too closely – which demonstrates careless operation by the carrier.

Prior to this accident he had one accident back in 2004, generating 4 points on his Ministry Carrier Safety Record; and two in 2003, one of which generated 2 points and the other zero. All three resulted in property damage only, unlike the most recent 2006 accident which had caused injury. However, the 2004 accident had also resulted in a conviction against him for improper left turn and this conviction had added another 4 points to his Carrier Record. When other inspection failures and convictions (including one in May, 2004 for use of a plate, numbered PT9484, not in accordance with the Act) are added in, Ms. DiPaolo’s analysis reveals Jelfton C. Williams had an overall violation rate in February 2005 at 104% (being 189.4% of threshold). A Notice of Suspension and Seizure had been issued to the Applicant a few weeks earlier, on January 21, 2005, based on

this safety record as well as on fines outstanding by the Applicant to the Ministry of Finance. The majority of these fines were for parking infractions, although one large amount was due to an NSF cheque provided to the Ministry by the Applicant. Once the Registrar had written proof that these outstanding fines had been paid in May 2005, he rescinded the order (Tab 22).

Ms. DiPaolo testified to Ministry searches she conducted, which had revealed that Mr. Williams today has a further \$335.00 owing to the Ministry on outstanding fines with the Attorney General for a conviction entered July 2006 for driving without insurance.

J.W. Express Cartage operates from the same address as Jelfton Williams. Jelfton Williams is the Ministry contact person and representative. In August, 2006 the company it failed a facility audit resulting in its rating with the Ministry dropping from Satisfactory Unaudited to Conditional (Exhibit 3, Tabs 8 and 17). This assessment was largely based on inaccurate or missing log information recorded by Mr. Williams and another driver over four days in April, 2006, as well as non-production of vehicle maintenance records for two separate dates: one in November, 2005, the other in April, 2006.

Finally Ms. DiPaolo gave evidence that Global, operated by the Applicant's wife, first applied for certification with the Registrar in April, 2005, during the period that the Applicants' certification status was "conditional" and subject to a Suspension Order. While that Order was rescinded on May 27, 2005, as noted above, Global's application was denied on May 30th based on the Registrar's conclusion that Global was directly or indirectly controlled or managed by the Applicants and he was concerned with their safety record. The denial was not appealed. Nonetheless, Global reapplied for certification by application to the Registrar in July, 2006 noting it owned two commercial vehicles (Tab 18). When this application was subject to a Notice of Refusal in August, Global did not appeal. However, a Ministry search in October by Ms. DiPaolo showed that Global now owned three commercial vehicles.

The Registrar relies on these facts to establish grounds for his belief that the Applicants' certification under the Act should be revoked.

Mr. Williams's evidence was open and consistent. He appeared to be an honest, hardworking man who relied on the business of haulage and trucking for his support of extended family.

He stated that he was inexperienced in the operation of a business but had worked with his father and then his sister, in J.W. Cartage International. He readily admitted that he manages J.W. Cartage for his sister. His father's certified business is no longer active. Along with his wife's company Global, eleven vehicles are owned and operated. A number of the vehicles owned are leased out to other carriers on contractual basis. For example, he noted that when

Global was not given a CVOR certification, he leased Global vehicles through his own certified company. Although other drivers may therefore be employed, Mr. Williams does do a lot of the driving, especially if he is needed when a driver is busy or a truck needs an operator and its usual driver is not available. Mr. Williams advised that any driver can drive any of the eleven trucks.

In cross-examination, Mr. Williams readily and candidly agreed that Global had applied for registration in April 2005 because J.W. Cartage International appeared to be in trouble due to unpaid fines with the Office of the Registrar. Again, he readily acknowledged it had reapplied this July, two days after he had been charged with driving without an insurance card as well as driving a vehicle registered to Global which was not certified with a CVOR. He stated that he feared such charges would “shaft” his registration with the Ministry and thus he needed his wife’s company to receive the correct certification in order to keep the business viable. Mr. Williams advised he wanted to act within the rules and regulations and was willing to do anything required in order to keep his and his family business running. He stated he would pay any outstanding fines and would abide by more frequent inspections of his vehicles. He did not submit any action plan as was required of him in the Pre-Hearing Order. Neither did he give any evidence as to specific operating procedures, training, documentation or planning which might ensure satisfactory compliance rates concerning facility audits and driving records in the future for either or both Applicants.

THE LAW

The *Highway Traffic Act*, R.S.O. 1990, c.H.8 stipulates:

- 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 of 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). R.S.O. 1990, c.H.8, s. 47 (1); 1996, c. 33, s. 7 (1, 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. 2001, c. 9, Sched.O, s.6 (1)

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar. R.S.O. 1990, c. H.8, s. 50 (2); 199, c. 12, Sched. G, s. 24 (6).

DECISION

This Tribunal has authority granted under the Act to uphold, modify or set aside the Registrar's Order. Having heard the evidence and considered the position of both the Applicants and the Registrar, the Tribunal upholds the Order.

The basis for the decision lies in the fact that this case concerns a regulated industry where public safety and protection is deemed sufficient cause to require that registrants abide by Ministry imposed operational obligations. Under the Act, the Registrar is to ensure such requirements are met and is given the power to impose sanctions where they are not. While given the benefit of the doubt at the commencement of operation by assuming an operator will abide by these obligations, evidence amassed during the course of operation may eventually lead the Registrar to conclude that such assumption was incorrect. In such a case, an Order such as the one here in issue, is released to the registrant operator.

The evidence on Mr. Jelfton William's role in both Applicant companies as directing mind and driver was not contested. The same holds true for the evidence relied upon by the Registrar to demonstrate the Applicants' poor threshold ratings based on accident history in the case of Jelfton C. Williams and Ministry compliance audit in the case of J.W. Cartage. There is no doubt that these histories establish a basis for some concern for the protection and safety of the public on Ontario roads. The concern arises not so much from the actual accidents themselves, as accidents are simply that and can indeed happen to even the most careful and prudent operator. Nor is the concern predicated on the findings of the Ministry audit of inadequate or incomplete logbook record keeping primarily in one-month period last year by drivers for the Applicant J.W. Cartage.

The real concern arises from the response by Mr. Williams to the Registrar's communications outlining these infractions and his consequent intended action of canceling the registrations. The Registrar specifically requested Mr. Williams to present an action plan showing concrete steps he would take to ensure he will operate the Applicants in compliance with the Act's requirements. Despite evidence of his being given this opportunity at the show cause hearing held at the Office of the Registrar in November, 2006, and again at the pre-Hearing by this Tribunal on May 18, 2007 and, finally, at the hearing itself, he never provided such a Plan. At the hearing, Mr. Williams, a seemingly honest and hard-working individual, appeared complacent to simply attest he "intended to meet his legal obligations." His only practical solution to doing so, however, was his statement he would be willing to have more technical inspections of his vehicles. The technical condition of his vehicles is not in issue. What is in issue is the lack of plans to improve – neither rejecting to utilize cell phones while operating or undertaking to comply with additional safety training programmes. What is also in issue are his failures to meet requirements for log keeping by himself and other

driver operators employed by the Applicants, but no evidence was presented as to proposed additional training or driver reporting on daily updates to such manuals. Finally, the Registrar has clearly notified him of the ongoing issue of outstanding fines. Mr. Williams provided no evidence to demonstrate his efforts to meet this outstanding obligation which is of particular concern given the fact that the last time such was evidenced the matter was only resolved after threats by the Registrar to cancel registration.

The Tribunal is also not satisfied with Mr. Williams' testimony concerning the evidence of his operating Global vehicles while not registered. Mr. Williams appeared sincere in his belief that Global's attempted registrations, while his own registration status was threatened, were entirely proper and appropriate. This Tribunal disagrees. Given his ready agreement that it was he, and not his wife, who actively managed and controlled the enterprise, Global is indeed a "related" company, as such is meant by section 47. Thus the Tribunal concludes these steps were nothing more than attempts to avoid the consequences of de-registration of his other business interests by remaining in the same business, albeit under a different name.

Further, it is incredulous to think, as Mr. Williams testified, that he really believed he was operating within the law as a legitimate CVOR holder when charged with the operation of a Global vehicle on July 6, 2006. The Order refusing Global certification had been issued by the Registrar one year earlier and is clear in its wording (Tab 19). Mr. Williams may not be experienced as he alleged; however by this point he had been registered in the same regulated industry under more than one company name for over seven years (since 1999) and must, therefore, be presumed to understand the rudiments of the regulatory scheme, primarily something as rudimentary as a bare refusal to register. Indeed, the Tribunal finds that he did so comprehend, given that Global reapplied for certification on July 10th, some four days AFTER the charge (Tab 18).

Therefore, based on the Applicants' past and present conduct demonstrating a clear propensity for passivity and an inability to conduct their affairs proactively to accept responsibility for and improve performance clearly determined inadequate as a registered carrier, the Tribunal confirms the decision of the Registrar dated December 6th, 2006.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

Released: August 29, 2007

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



PRE-HEARING

X5 GROUP OF COMPANIES LTD. – PRE-HEARING

IN THE MATTER OF AN ORDER BY THE DEPUTY REGISTRAR
OF MOTOR VEHICLES DATED MAY 7th, 2007, REFUSING TO
ISSUE A CVOR CERTIFICATE TO X5 GROUP OF COMPANIES
LTD.

TRIBUNAL: ELIZABETH SPROULE, Presiding Member

APPEARANCES: LARRY YOUNG, Agent representing the Applicant, X5 Group of
Companies Ltd.

MURRAY FORBES, Counsel representing the Deputy Registrar of
Motor Vehicles

DATE OF
PRE-HEARING: August 7, 2007

Toronto

ORDER

A pre-hearing was conducted on August 7th, 2007, before this Tribunal, in the presence of Larry Young, agent representing the Applicant, Gagandeep Singh Chhokar, a director of the Applicant, and Murray Forbes, Counsel, representing the Deputy Registrar of Motor Vehicles;

The Tribunal makes the following Order respecting the one-day hearing now scheduled to commence at 9:30 a.m. on November 13th, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;

1. The Applicant shall provide the Deputy Registrar with a list of the vehicles owned and operated by the Applicant, and the names of the drivers of those vehicles, on or before August 14th, 2007.
2. The Parties shall comply with the disclosure requirements set out in Rule 6 in all other respects.
3. The Parties agree that the current directors of record of the Applicant are Gagandeep Singh Chhokar and Gursewak Singh Uppal.

4. The Parties agree to a further pre-hearing to commence on September 27th, 2007, the original hearing date, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;
5. The hearing date of this matter was changed, on consent of both parties, to November 13th, 2007, to commence at 9:30 a.m. at the Tribunal's Chambers noted above.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: August 13, 2007

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

Licence
Appeal
Tribunal

Tribunal d'appel
en matière
de permis



PRE-HEARING

IMAGE FREIGHT INCORPORATED – PRE-HEARING

IN THE MATTER OF an appeal by Image Freight Incorporated (CVOR Certificate #143-952-690) dated June 8, 2007, for a prehearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, c.H.8, as amended;

AND IN THE MATTER OF a Suspension and Seizure Order by the Deputy Registrar dated April 16, 2007, of the CVOR Certificates and Vehicle Permits of Image Freight Incorporated, Full Source Truck Lines Incorporated, 1432560 Ontario Limited and 1672657 Ontario Incorporated;

AND IN THE MATTER OF a Suspension and Seizure Order by the Deputy Registrar dated May 1, 2007, of the CVOR Certificates and Vehicle Permits of Image Freight International Incorporated;

AND IN THE MATTER OF the relationship between Image Freight Incorporated, Full Source Truck Lines Incorporated, 1432560 Ontario Limited, 1672657 Ontario Incorporated, Image Freight International Limited, 2078020 Ontario Incorporated operating as Hind Transport and Lamb's Contracting Limited;

AND IN THE MATTER OF the safety record including accidents, convictions, and vehicle inspections by Image Freight Incorporated and unpaid fines by Image Freight Incorporated and 1432560 Ontario Limited and unpaid IRP permit fees by 1672657 Ontario Incorporated.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES:

MURRAY FORBES, Counsel representing the Deputy Registrar of Motor Vehicles

DATE OF
PRE-HEARING: August 1, 2007

Toronto

ORDER and NOTICE OF INTENT TO DISMISS

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

The issue in this matter, as written in the Applicant's Notice of Appeal, is as follows:

"verbal agreement not kept made on March 27, 2007, between <names delted>. Due to broken agreement I lost 60K will be claiming from MTO."

"owner operator's truck is being held for no reason as it is not a part of company. This is a loss of 30K which I will be claiming from MTO."

"I will take on that verbal agreement was made and not honoured."

Counsel for the Respondent confirmed the Registrar's position to be as stated in the legislation *Highway Traffic Act*, section 47.1, subsection (4):

CVOR certificate holder may not transfer vehicle

A CVOR certificate holder shall not transfer any commercial motor vehicle for which a permit has been issued in Ontario in the holder's name without the consent of the Registrar from the time the holder receives a notification under subsection (1) that the Registrar proposes to suspend or cancel their plate portion of the permit or CVOR certificate or to limit the number of commercial motor vehicles that may be operated under their CVOR certificate until the suspension, cancellation or fleet limitation takes effect, is withdrawn or is finally confirmed, modified or set aside on appeal.

and section 47.1, subsection (6):

Registrar not to withhold consent without reason

The Registrar shall not withhold consent under subsection (4) or (5) if the certificate holder or operator satisfies him or her that the transfer is not being made for the purpose of avoiding the proposed suspension, cancellation or restriction.

Following the attendance on August 1, 2007, at a pre-hearing before this Tribunal of Murray Forbes, Counsel appearing on behalf of the Deputy Registrar of Motor Vehicles (the "Respondent"), the Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on September 20, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario. The Applicant or his agent did not attend the pre-hearing.

Pursuant to s.4.6 of the *Statutory Powers Procedure Act* and the Tribunal's Rules of Practice the Tribunal hereby gives notice to the Applicant that it intends to dismiss this proceeding unless within the time frame specified below the Applicant provides sufficient reason why the proceeding should not be dismissed.

The Applicant may, within ten (10) days of the release date of this order, provide written submissions to the Tribunal as to why the appeal should be allowed to continue, including an explanation of the Applicant's failure to attend at the pre-hearing conference. If the Applicant fails to provide sufficient reasons why the appeal should be continued, the Tribunal shall issue a final Order dismissing the appeal.

Reasons for Intent to Dismiss:

The Applicant filed a Notice of Appeal on or about June 8, 2007. On the Notice of Appeal Form, the Applicant checked off a box indicating a request for a pre-hearing conference. The Respondent consented to the prehearing in person. According to Tribunal records, a Notice of Pre-Hearing was delivered to the Applicant on July 10, 2007. It was sent by facsimile, and records show successful delivery. Original copies were sent by regular mail along with the copy of Tribunal's Rules of Practice.

The Applicant was advised on July 31, 2007, that a pre-hearing would be held in person. A Tribunal staff member left a voice message at the Applicant's contact telephone number on Wednesday, before the prehearing, on August 1, 2007.

The Applicant did not attend the pre-hearing conference scheduled for 9:30 a.m. At 10:10 a.m. the prehearing conference was commenced in the absence of the Applicant.

There is no indication that the Applicant made any attempt to contact the Tribunal. Counsel for the Registrar had advised they had not been contacted by the Applicant regarding the Applicant's attendance or non-attendance at the prehearing conference.

Rule 2.10(d) of the Tribunal's Rules of Practice provides that the Tribunal may dismiss an appeal where it is abandoned. Rule 2.12 provides that where a party fails to attend before the Tribunal the Tribunal may treat the appeal as abandoned.

The Member finds that Rule 2.12 applies to any scheduled proceeding before the Tribunal, and is not restricted to hearings; it applies to pre-hearings as well.

The Tribunal therefore finds this appeal should be treated as abandoned and intends to dismiss the appeal unless sufficient reason is given within ten (10) days of the release date of this order why it should not be dismissed.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: August 8, 2007

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

PRE-HEARING

MR. EXPEDITE INCORPORATED – PRE-HEARING

In the matter of an application by Mr. Expedite Incorporated, dated May 24, 2007, pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of a Suspension and Seizure Order of the Deputy Registrar dated April 20, 2007.

TRIBUNAL: JANE WEARY, Vice Chair

APPEARANCES: HARVEY CAPP, Q.C.
Counsel for the Applicant, Mr. Expedite Incorporated

MURRAY FORBES,
Counsel for the Deputy Registrar of Motor Vehicles, Ministry of
Transportation

DATE OF
PRE-HEARING: July 9, 2007

ORDER

A pre-hearing was conducted on July 9, 2007, before this Tribunal with presence of Harvey Capp, Q.C., Counsel representing the Applicant, Murray Forbes, Counsel representing the Ministry of Transportation, Herman and David Goldman, the Applicant. The Tribunal makes the following Order.

1. At the request, and on consent, of both Parties this Pre-hearing is adjourned to August 20, 2007 at 9:30 a.m. at the Tribunal Chambers, 1 St. Clair Avenue West, Toronto.
2. The Applicant today provided Counsel for the Deputy Registrar, and filed with the Tribunal, a photocopy of a receipt indicating payment by it in the amount of \$1,600.00 to the Ontario Court of Justice on July 5, 2007.
3. Counsel for the Deputy Registrar has filed its disclosure documentation with the Tribunal and provided a copy of same to the Applicants.

4. The date scheduled for the hearing by the Tribunal with the appeal remains October 1, 2007.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice Chair

RELEASED: July 10, 2007

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

PRE-HEARING

1503882 ONTARIO LTD., 1605599 ONTARIO LTD. and
PRETZY INC.

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

AND IN THE MATTER of the
Suspension and Seizure Order of the
Registrar of Motor Vehicles, dated
March 14, 2007, of the Commercial
Vehicle Operator's Registration (CVOR)
#141-690-493, issued to
1503882 ONTARIO LTD.,

AND IN THE MATTER OF the
Suspension and Seizure Order of the
Registrar of Motor Vehicles, dated
March 14, 2007, of the Commercial
Vehicle Operator's Registration (CVOR)
#148-953-454, issued to
1605599 ONTARIO LTD.

AND IN THE MATTER OF the
Suspension and Seizure Order of the
Registrar of Motor Vehicles, dated
March 14, 2007, of the Commercial
Vehicle Operator's Registration (CVOR)
#116-216-693, issued to
PRETZY INC.

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: PETER EBERHART,
Agent For the Applicant, 1605599 ONTARIO LTD

PATRICK MOORE,
Counsel for the Registrar of Motor Vehicles

DATE OF
PRE-HEARING: May 22, 2007

ORDER

A pre-hearing was held on May 22, 2007, in the presence of Peter Eberhart, the Agent for the Applicant, 1605599 Ontario Ltd. and Patrick Moore, Counsel for the Registrar. On consent of the parties present, the Tribunal makes the following Order:

1. The Parties to the hearing are:
1605599 Ontario Ltd and
The Registrar of Motor Vehicles.
2. It is agreed by the parties that the Issues to be heard at the hearing have been narrowed as follows:
 1. Examination of the record of 1605599 Ontario Ltd in relation to the Suspension and Seizure Order.
 2. Examination of the record of 1503882 Ontario Ltd., as a related company to 1605599 Ontario Ltd.
 3. The Applicant contends that the application of the Anti-Avoidance provisions by the Registrar, is excessive in relation to the companies.

BACKGROUND TO THE ISSUES

The Applicant is not disputing the facts of the record of the two numbered companies. However, the Applicant will explain the circumstances leading to the record of the companies and will summarize efforts undertaken to avoid the suspension.

According to the Agent for the Applicant, 1605599 Ontario Ltd. is the only company appealing the Order. This is because the other two companies have been out of business for a number of years and 1605599 Ontario Ltd. itself is winding up operations.

Counsel for the Respondent agreed that there was no record of activity for Pretzy Inc. in recent years and its record is not an issue before the Tribunal. However, the two numbered companies were in operation at least up to the fall of 2006 and their current and previous records, each on its own and as related companies, are important.

3. DISCLOSURE

The Applicant intends to disclose a copy of a statement of claim respecting a dispute between 1503882 Ontario Ltd. and an outside company.

The Applicant shall make best efforts to obtain a record of outstanding fines of the numbered companies, showing how the companies have disposed of or will dispose of the items. Where attempts fail, the Applicant shall seek the co-operation of the Registrar to obtain the record.

The record of outstanding fines shall be accompanied by proof of payment, and/or any relevant supporting documentation, where appropriate.

The Applicant shall make full, complete and timely disclosure of these documents to the Registrar, in order to effect proper Disclosure to the Tribunal, at least ten days prior to the hearing, as required by Rule 6 of the Rules of Practice of this Tribunal.

Full disclosure has already been effected by the Registrar and no further disclosure is anticipated by the Registrar. Should further disclosure be required, the Registrar shall make same at least ten days prior to the hearing, as required by Rule 6 of the Rules of Practice of this Tribunal.

The process of Disclosure between the parties shall be completed in a timely manner, in order to effect proper Disclosure to the Tribunal, at least ten days prior to the hearing, in accordance with the Tribunal's Rules of Disclosure.

4. The following witnesses shall be called:

For the Applicant:

Leonard Prasow, Principal of all three companies

For the Respondent:

Adele Di Paolo, Carrier Safety Rating Administrator.

The hearing is scheduled for one day, commencing at 9.30 a.m. on Monday, July 9, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Philomen Wright, Presiding Member

RELEASED: May 24, 2007

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

PRE-HEARING

JELFTON C. WILLIAMS,
J.W.CARTAGE INTERNATIONAL INCORPORATED and
C. GLOBAL DESTINY TRANSPORT & RECYCLING INCORPORATED

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

AND IN THE MATTER of the
Cancellation and Seizure Order of the
Registrar of Motor Vehicles, dated
December 6, 2006, of the
Commercial Vehicle Operator's Registration
(CVOR) Certificates #104-920-148 and
150-414-498, issued to
WILLIAMS, JELFTON C., J.W. EXPRESS
CARTAGE INTERNATIONAL INCORPORATED
and GLOBAL DESTINY TRANSPORT &
RECYCLING INCORPORATED.

TRIBUNAL: PHILOMEN WRIGHT, Member

APPEARANCES: DAVE MARYNUIK, Counsel for the Applicants
WILLIAMS, JELFTON C. and J.W. EXPRESS CARTAGE
INTERNATIONAL INCORPORATED,

MURRAY FORBES,
Counsel for the Registrar of Motor Vehicles

DATE OF
PRE-HEARING: APRIL 11, 2007

PRE-HEARING ORDER

A pre-hearing was conducted in the presence of Counsel for the Registrar of Motor Vehicles and Counsel for the Applicants, Jelfton C. Williams and J.W. Express Cartage International Incorporated.

As a preliminary matter, the Tribunal addressed the issue of the Cancellation and Seizure Order of the Registrar of Motor Vehicles, respecting C. Global Destiny Transport & Recycling Incorporated, (GLOBAL).

By way of post pre-hearing submissions, Counsel for the Applicants, Jelfton C. Williams and J.W. Express Cartage International Incorporated stated that Global had paid the required fees in order to appeal the Order of the Registrar.

While it is true that Global's name appears in several documents on file, the Tribunal finds that there is no evidence before it in the form of a Notice of Appeal or any correspondence that would suggest Global's intention to appeal the Order.

Further, Global was not present and was not represented at the hearing.

Consequently, in the absence of any evidence to the contrary, the Tribunal concludes that Global has not appealed the Order of the Registrar and is not a party to these proceedings.

The Tribunal therefore orders:

1) The Parties to the hearing are:

- (a) Jelfton C. Williams, and
- (b) J.W. Express Cartage International Incorporated
- (c) The Registrar of Motor Vehicles

2) It is agreed by the parties that the Issues of Appeal to be heard at the hearing have been narrowed as follows:

- a. Did the Respondent have sufficient grounds to affect the Order of Cancellation and Seizure?
- b. Is there new evidence to show that the Applicant, Jelfton C. Williams acting on his own behalf and as a principal of the other Applicant, J. W. Cartage International Incorporated, has taken steps to rectify the situation?
- c. What is the effect, if any, of the lack of appeal by C. Global Destiny Transport & Recycling Incorporated, named in the Order, on the outcome of the appeal of Jelfton C. Williams and J.W. Cartage International Incorporated?

Background to Issue # 2

Counsel for the Applicants submitted that Mr. Williams has an action plan, which if followed, will probably rectify the situation.

Counsel for the Applicants further submitted that the parties are making best efforts at resolving the problems which led to the Order.

Counsel for the Respondent submitted that Mr. Williams has met with the Deputy Registrar, and that negotiations between the parties will continue, with a view to the imposition of a penalty lesser than cancellation.

He also submitted and with ongoing negotiations, the issues may possibly be resolved, and that a satisfactory action plan is required from the Applicants.

3) DISCLOSURE

Counsel for the Applicants shall provide to the Respondent, the proposed action plan, along with supporting documents for execution of the plan by Mr. Williams.

The process of Disclosure between the parties shall be completed by July 1, 2007, in order to effect timely Disclosure to the Tribunal, at least ten days prior to the hearing, in accordance with the Tribunal's Rules of Disclosure.

The parties shall advise the Tribunal, by July 16, 2007, respecting whether or not an agreement has been struck between the parties, such that the appeal shall proceed as scheduled below, or is withdrawn by the Applicants.

4) The following witnesses shall be called:

For the Applicants:
Jelfton C. Williams

For the Respondent:
Adele Di Paolo, Carrier Safety Rating Administrator.

5) The hearing is scheduled for one day, commencing at 9.30 a.m. on Tuesday, July 31, 2007, at the Tribunal's chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Philomen Wright, Presiding Member

RELEASED: May 18, 2007

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



JOHN LINEK INCORPORATED, LINE X LOGISTICS INCORPORATED, STANISLAW
AND JOHN LINEK

IN THE MATTER OF AN APPEAL BY JOHN LINEK
INCORPORATED, LINE X LOGISTICS INCORPORATED,
STANISLAW AND JOHN LINEK TO THE LICENCE APPEAL
TRIBUNAL UNDER SECTION 50(1) OF THE HIGHWAY TRAFFIC
ACT FROM AN ORDER OF CANCELLATION AND SEIZURE BY
THE DEPUTY REGISTRAR OF MOTOR VEHICLES DATED
OCTOBER 12, 2006 CANCELLING THE COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION ("CVOR") CERTIFICATES AND
ORDERING THE SEIZURE OF THE NUMBER PLATES OF JOHN
LINEK INC, LINE X LOGISTICS INCORPORATED AND
STANISLAW AND JOHN LINEK,

AND

IN THE MATTER OF AN ORDER BY THE DEPUTY REGISTRAR
OF MOTOR VEHICLES DATED MARCH 30, 2006, REFUSING TO
ISSUE A CVOR CERTIFICATE TO L ENTERPRISES LTD.

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JOHN LINEK, representing himself and the other Applicants

MURRAY G. FORBES, Counsel, representing the Ministry of
Transportation

DATE OF

HEARING: February 23, 2007

Toronto

DECISION AND ORDER

This is an appeal by the Applicants to the Licence Appeal Tribunal (the "Tribunal") from an Order dated October 12, 2006, by the Deputy Registrar of Motor Vehicles (the "Deputy Registrar") under Section 47(1) of the Highway Traffic Act (the "Act") to cancel the CVOR certificates and seize the number plates of the Applicants.

FACTS

Mr. John Linek lives in Chicago and owns a number of trucking companies, including John Linek Incorporated ("JLI") and Line X Logistics Incorporated. He is also in partnership with his father, Stanislaw Linek, in a trucking operation. He runs long haul trucking operations in America. Some of these routes go from California to Toronto via Chicago. In the fall of 2004 not all of the companies owned by Mr. John Linek and operating in Ontario had CVOR certificates. The Deputy Registrar learned of this and, at approximately the same time, became concerned about the safety record of some related trucking companies that Mr. Linek owned. Accordingly, the Deputy Registrar on February 25, 2005 issued a Notice of Suspension and Seizure proposing a 30-day suspension of the CVOR registrations of a group of companies owned by Mr. Linek.

As a result of this proposed suspension and of subsequent conversations with the office of the Deputy Registrar, Mr. Linek agreed to terminate the certificates of a number of related companies and to consolidate his Ontario trucking operations under one CVOR certificate, in the name of JLI. He also agreed to terms and conditions to the CVOR and proposed an action plan to improve the safety record of his operations. On April 19, 2005 the suspension proposal was rescinded. Two performance conditions were attached to the CVOR of JLI. First, the overall violation rate of the JLI fleet could not exceed 65% of a statistically determined threshold rate. Secondly, the overall out of service rate for the fleet could not exceed 35%. Failure to meet either of these conditions would result in the cancellation of the CVOR certificate.

By August, 2005, the operations of JLI were in danger of exceeding the threshold rates agreed to and a warning letter was issued on August 12, 2005. The situation did not improve. In the spring of 2006, a company called L Enterprises Ltd. applied for a CVOR registration. The registration was refused when Ministry of Transport officials learned that L Enterprises Ltd was owned by Mr. Linek's wife, who has no prior experience in running a trucking fleet. By July 2006, the terms and conditions of the JLI CVOR certificate were not being met. While the overall violation rate was 51.6% of the threshold, the out of service rate was an unacceptable 100%. Therefore on August 14, 2006, the Deputy Registrar issued a proposal to cancel the CVOR certificate of JLI unless Mr. Linek could show cause why this should not happen. Mr. Linek filed written submissions, but the Deputy Registrar concluded that the submissions were essentially the same action plan put forward in April, 2005. Accordingly, he proceeded to issue an Order to cancel the CVOR certificate and seize the number plates of JLI, together with those, if any, of the other Applicants, effective November 6, 2006.

Mr. Linek argued that the effect of consolidating his operations under one corporate name might have been to lower his safety performance ratings. However, Mr. John Miller, a Carrier Safety Rating Officer with the Ministry of Transportation, testified convincingly that this was not the case. The performance records of JLI do not include any records of the prior operations. Problems occurring prior to April 19, 2005 are not part of the performance record of JLI. Mr. Linek argued that some of the out of service violations might have been caused by misunderstandings between the inspectors and

some of the truck drivers who do not speak English fluently. However, he conceded during cross examination that records show several of the incidents involve English-speaking drivers. Mr. Linek also suggested that some inspections involved only paperwork violations. However, Mr. Miller, in his testimony, noted that the majority of incidents were serious safety violations, not merely administrative matters. Mr. Linek also suggested that on several occasions the drivers had complained to him about biased inspections. However, Mr. Linek was unable to produce any evidence of these assertions and the Tribunal does not accept them.

LAW

Mr. Forbes explained the Federal provisions governing inter-provincial and international commercial trucking operations and the Tribunal is grateful for his lucid submission.

As of January 1, 2006, inter-provincial and international commercial trucking operations are governed by the federal *Motor Vehicle Transport Act* (1985, c. 29 (3rd Supp.)) (the "Federal Act"). The Federal Act in turn gives Ontario the authority and jurisdiction to regulate inter-provincial and international commercial trucking which travels through Ontario. Under the Federal Act, an international or inter-provincial carrier need only apply for one provincial CVOR certificate in order to be able to carry on operations across Canada. However, the loss of a CVOR certificate in any one province disallows operations throughout the country.

Because the Federal Act, in Section 8(3)(a), expressly continues the jurisdiction of any provincially created right of review of a decision to revoke a CVOR certificate, this Tribunal has the jurisdiction to hear this matter.

Under Section 47 of the Act, the Deputy Registrar may cancel a CVOR certificate and seize the number plates of CVOR holder in Ontario if the Deputy Registrar considers that the safety record of the CVOR holder is such as to give him reason to believe that the holder will not operate a commercial motor vehicle safely.

Under Section 17 of the Act, the Deputy Registrar may also refuse to issue a CVOR certificate to a company owned and operated by anyone related to a person whose CVOR certificate has been cancelled.

DECISION

The Deputy Registrar has put forward a compelling case for cancelling the CVOR certificates of JLI and those, if any, of the other Applicants. The poor maintenance of the JLI fleet poses a substantial risk to the driving public in this province. Mr. Linek was unable to offer any convincing evidence as to why the JLI certificate should be continued.

It is important to note that this cancellation will mean the JLI will be unable to operate in any province in this country. Nor will any person related to Mr. Linek, including his father and his wife, be able to apply for a CVOR certificate. Mr. Linek will be able to re-apply for a CVOR certificate if and when he is able to show that significant changes have been made to his safety practices, including his maintenance operations.

ORDER

The Tribunal, by the authority vested in it under Section 50(1) of the Act, orders the Deputy Registrar to carry out the Cancellation and Seizure Order dated October 12, 2006 cancelling the CVOR certificates of the Applicants and seizing the Ontario permits and number plates of their vehicles.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

Released: April 3, 2007

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

PRE-HEARING

LOCOMOTE SYSTEMS INCORPORATED and
CENTINEL EQUIPMENT LEASING INCORPORATED

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

AND IN THE MATTER of the
Suspension and Seizure Order of the
Registrar of Motor Vehicles, dated
January 22, 2007, of the Commercial
Vehicle Operator's Registration (CVOR)
#097-214-498, issued to
LOCOMOTE SYSTEMS
INCORPORATED;

AND IN THE MATTER OF the
Suspension and Seizure Order of the
Registrar of Motor Vehicles, dated
January 22, 2007, of the Commercial
Vehicle Operator's Registration (CVOR)
#104-155-932, issued to CENTINEL
EQUIPMENT LEASING
INCORPORATED.

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: For the Applicant TONY SANTOS,
Manager of LOCOMOTE SYSTEMS INCORPORATED

MIRIAM de EISENBERG, Q.C.,
Counsel for the Applicants,

MURRAY FORBES,
Counsel for the Registrar of Motor Vehicles

DATE OF
PRE-HEARING: March 28, 2007

PRE-HEARING ORDER

A pre-hearing was held on March 28, 2007, in the presence of the Applicant and the parties' representatives. The Tribunal makes the following Order:

1. The Parties to the hearing are:
 - (a) Locomote Systems Incorporated, (Locomote) and
 - (b) Centinel Equipment Leasing Incorporated, (Centinel)
 - (c) The Registrar of Motor Vehicles
2. It is agreed by the parties that the issues to be heard at the hearing have been narrowed as follows:
 1. Which of the unpaid fines attributed to Locomote by the Registrar, were truly incurred by Locomote and resulted in the action taken by the Registrar, as shown in the Notice to the Applicants, dated November 14, 2006.
 2. Should "new" fines incurred by Locomote be considered by the Tribunal, as a part of this appeal?
 3. Pursuant to S. 47(1) of the *Highway Traffic Act*, should Centinel, as a company related to Locomote, be subject to the same Suspension and Seizure Order of its CVOR as Locomote, given that Centinel has no fines levied against it and has never been the subject of any proceeding?

Background to Issue # 1

Counsel for the Respondent stated that effective the day before the pre-hearing, there were 44 fines outstanding against Locomote.

However, Counsel for the Applicants stated that among those outstanding fines, there are fines which have been paid but are shown as unpaid. Further there are new amounts of unpaid fines, of which Locomote was not aware.

There are also unpaid amounts attributed to Locomote Systems which were incurred by Transport Locomote, an unrelated company operating out of Quebec.

Further, as Locomote was also not aware of those fines, upon discovery, it was too late to appeal to the Courts, except on consent of the Ministry of Transportation.

As well, because of the lateness of discovery, the Ministry of Transportation had no supporting records of the fines.

4. Counsel for the Applicants shall provide to the Respondent the resulting list of fines compiled at the pre-hearing. On that list, Counsel for the Applicants shall highlight those fines which apparently have been paid, accompanied by evidence of payment.
5. Counsel for the Applicants shall also highlight unpaid amounts purportedly belonging to Transport Locomote, the Quebec company, noting the Licence plates which incurred the fines, those fines apparently written off by the Court and comments respecting the Court's position on certain outstanding fines on the list.
6. Counsel for the Respondent shall provide a list of any additional outstanding fines incurred by Locomote, i.e. fines other than those already disclosed in relation to the appeal.
7. Counsel for the Respondent shall also provide to Counsel for the Applicant, supporting material wherever available, respecting all outstanding fines attributed to Locomote by the Registrar.
8. The process of Disclosure between the parties shall be completed by June 15, 2007, in order to effect timely Disclosure to the Tribunal, at least ten days prior to the hearing, in accordance with the Tribunal's Rules of Disclosure.
9. The following witnesses shall be called:

For the Applicants:
Tony Santos, Manager of Locomote and
Fred Laughlin, who appeared at the Show Cause hearing.

For the Respondent:
John Miller, Carrier Safety Rating Administrator.
10. The hearing is scheduled for two days, commencing at 9.30 a.m. on Wednesday, July 4, and Thursday, July 5, 2007.

LICENCE APPEAL TRIBUNAL

Philomen Wright, Presiding Member

RELEASED: May 2, 2007

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



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Decisions under Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

Fiscal Year 2007 - 2008

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ADLS – MISTAKEN IDENTITY

APPEAL UNDER SECTION 50.1 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM A DECISION OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 48.3(2) OF THAT ACT;

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

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

APPEARANCES: THE APPLICANT
Unrepresented

KYLE M. BIEL
Agent, representing the Respondent

DATE OF
HEARING: April 12, 2007 Toronto

REASONS FOR DECISION

A hearing was held on March 19, and April 12, 2007, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on April 13, 2007, with Reasons to follow.

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

BACKGROUND

Reason for the Appeal

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

"This is a case of mistaken identity. I am not the same individual to whom a demand for a

sample of breath or blood was made, or from whom a sample of breath or blood was taken.”

Preliminary Matters

The hearing was originally scheduled for March 19, 2007, however, prior to the commencement of the Hearing, the Representative of the Ministry informed the Tribunal that the Police Officer was not able to attend due a death in the family.

The Applicant objected to the matter being adjourned as he had his witnesses present. The Applicant argued that adjourning the matter would cost them an extra day's wages.

The Tribunal decided to set the matter over until April 12, 2007, but agreed to hear the testimony of the Applicant's witnesses.

The Respondent's Agent presented original certified copies of Ministry of Transportation documents on file, and previously forwarded to the Applicant.

All documents introduced were entered as exhibits on consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated February 22, 2007, issued by the Registrar of motor vehicles.
- b) Exhibit # 2 Notice of Appeal Form received March 2, 2007.
- c) Exhibit # 3 Applicant's first witness handwriting testimony – dated March 3, 2007 – received March 5, 2007.
- d) Exhibit # 4 Applicant's second witness handwriting testimony – dated March 8, 2007 – received March 9, 2007.

By the Respondent:

- a) Exhibit # 5 Ministry of Transportation submissions – received March 14, 2007.

ISSUE

Having established that this appeal falls within subsection 50.1(2)(a) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Is the Applicant whose licence was suspended not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was

taken?

LAW

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

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

The HTA states under Section 50.1(4):

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

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

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

FACTS

As per Notice to the Registrar, and the Notice of Appeal, the Applicant’s Driver’s Licence was suspended on February 22, 2007.

On page 1 of the Notice of Appeal the Applicant selected “*mistaken identity*”, as the reason of appeal.

Applicant’s Evidence

At the Hearing on March 19, 2007, the Applicant’s first witness testified that he had spent the day with the Applicant. Because the Applicant had been drinking, he was asked to drive the Applicant and the other employees to their assigned places.

The witness further affirmed that he left the Applicant at a plaza and that the Applicant took a cab home.

In cross-examination, the witness acknowledged that he was not with the Applicant at the time of his arrest, nor did he observe the breathalyzer test.

The Applicant's second witness testified that he saw the Applicant getting out of a cab, in front of his home, and being arrested.

In cross-examination, the witness confirmed that he had not been at the site of the breathalyzer.

At this point the hearing was adjourned.

On April 12, 2007, the Applicant testified he had not been driving at the time of his arrest. The Applicant was arrested getting out of a cab in his driveway.

The Applicant continued his testimony by providing details of the events that took place prior to, and at the time of his arrest. The Applicant admitted: "*I gave a breathalyzer*".

In cross-examination, in reply to the Respondent's Agent's questions, the Applicant confirmed that he had provided a breath sample.

Respondent's Evidence

The Respondent's Agent called Police Constable Jeff Merrigan, of the Waterloo Regional Police Services as a witness.

Constable Merrigan testified that he has been a police officer since August of 2004.

Constable Merrigan described the events that led to the Applicant being approached and subsequently being required to provide a breath sample. The constable testified that he was informed the Applicant was driving.

In the course of an investigation of an assault occurrence, Constable Merrigan waited at the Applicant's place of residence, observed him getting out of a cab and arrested him.

The Applicant provided the two breath samples requested of him.

Constable Merrigan introduced a photograph of the Applicant, stamp dated at the time of the breathalyzer, irrefutably confirming the Applicant's identity.

The Applicant opted not to cross-examine Constable Merrigan, simply admitting, "...all he said was true..."

APPLICATION OF THE LAW TO FACTS

The Applicant admits to having a fight with someone and making a mistake, fighting and drinking. The Applicant simply asked to have his licence returned.

The Respondent Agent's pointed out that the Applicant appealed under Section 50.1 (2) (a), suggesting that he is not the one and the same as the person from whom a breath sample was demanded. The Applicant has no grounds for appeal as he admitted and the officer confirmed that he was the person who provided a breath sample.

The Respondent Agent's alluded to the decision of the Divisional Court, pertaining to a similar matter and enclosed in the disclosure package. The Respondent Agent's pointed out that the Tribunal has no jurisdiction to provide relief to the Applicant.

The Applicant mentioned several issues, which are not within the Tribunal's mandate and are therefore inconsequential to these proceedings.

Although the Tribunal accepts the Applicant's statement that he was not, at the time of his arrest, driving of a motor vehicle, the Tribunal is bound by the Superior Court of Justice, Divisional Court which held that the Tribunal does not have jurisdiction to determine whether or not an applicant was driving or in care and control of a motor vehicle. The Registrar in that case took the position that, "...the only process by which [the Applicant] could properly challenge his licence suspension was by way of an application for judicial review of the suspension by the Registrar or the report to the Registrar by the police officer..." (*The Registrar of Motor Vehicles vs. Charles Huntington and the Licence Appeal Tribunal*, Court File No.: 276/07, date: 20061201).

Thus, the issue for the Tribunal is whether the Applicant is the one and the same as the individual from whom a breath sample was demanded as per Section 50.1 (2) (a).

The Tribunal finds that the Applicant is the person from whom a breath sample was demanded. This finding is corroborated by the Applicant's own admission that he provided a breath sample and the Constable's testimony.

Regulation 574 as amended, particularly Section 13, provides that the Applicant has the onus of establishing the merit of the appeal. The Tribunal finds that the Applicant has failed to do so.

DECISION

Upon the application by the Applicant to appeal the suspension order dated February 22, 2007 of the Registrar of Motor Vehicles pursuant to section 48.3 (2) of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Antoine A. Aouad, M.D.
Presiding Member

RELEASED: April 18, 2007

The 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).



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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

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Appeal
Tribunal

Tribunal
d'appel en
matière de permis



NEW RANADHAWA TRANSPORTATION INC.

Appeal from an Order of the Registrar of Motor Vehicles to
Impound and Suspend a Commercial Vehicle pursuant to s. 82.1 of
the *Highway Traffic Act* R. S. O. c. H.8

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MILAD BESHARAT, Agent, representing the Applicant, New
Ranadhawa Transportation Inc. (the "Applicant")

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles (the "Registrar")

DATE OF
HEARING: January 11, 2008

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals pursuant to the provisions of section 50.3 of the *Highway Traffic Act*, R. S. O. 1990 c. H. 8 (the "Act") from the impoundment and the suspension of the vehicle portion of the permit of its vehicle, a 1988 highway utility trailer. The facts of the matter are not in dispute and were put into evidence before the Tribunal by Officer William Pask.

Officer Pask is an enforcement officer with the Ontario Ministry of Transportation, a position he has held since 2001. He has had training and refresher courses in conducting critical defect inspections. On the evening of November 3, 2007, he was on duty at the Putnam Inspection Station on the eastbound side of Highway 401 east of London, Ontario. He observed a tractor trailer unit where there was no annual safety inspection sticker attached to the trailer. He told the driver to pull over and advised him that he would carry out a class 1 Commercial Vehicle Safety Alliance (CVSA) inspection, a North American standard inspection used in Ontario and most, if not all, jurisdictions in North America. While conducting the CVSA inspection he noted excessive travel in the brake pushrods on the trailer that led him to believe the trailer may have a critical defect. He then advised another officer on duty that he had a

suspected critical defect, and asked her to observe while he conducted the critical defect inspection.

The inspection involved accurately measuring the extension of the brake pushrods with the brakes off. He used calipers to measure the size of the brakes' chambers. They were eight and three thirty-seconds inches. From this, he determined that the brakes were clamp type 30 chambers. From other indicia, he determined that they were regular stroke and not long stroke clamp type 30 chambers. He attached calibrated pressure gauges to the air brake lines, and asked the driver to start the tractor engine to ensure there was 100 psi of pressure in the air brake system and then shut it off. The calibrated gauges and the gauge in the tractor all indicated 100 psi. He then asked the driver to apply and hold full pressure on the brake pedal. Both in-cab and calibrated air gauges indicated a pressure of 96 psi. Officer Pask measured the brake pushrods again with the brakes applied and, after the measurement, noted that the pressure still held at 96 psi on all the air gauges. To calculate pushrod travel, he simply subtracted one figure from the other. He determined that all four trailer brakes had travel in excess of the allowable two inch limit. They ranged from two and three-eighths inches to two and a half inches. Having determined that a critical defect existed, he notified the Registrar and received back an order for impoundment and suspension. He advised the driver that the vehicle was being impounded pursuant to the Registrar's order and then had a towing company come and tow the vehicle to the pound.

The regulations to the Act define critical defect and set out the protocol to be followed when conducting a critical defect test on air brakes as follows:

Air Brakes

7. (1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator¹ fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 per cent of the wheel brakes of the vehicle:
 1. A drum or rotor is cracked, broken or missing.
 2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
 3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.

¹ This is the statutory wording for "brake pedal"

4. The push rod travel out of the service brake chamber is ¼ inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

Column 2 of Schedule 1 states that the maximum allowable travel for clamp type 30 regular stroke brakes is two inches. The Tribunal is satisfied that Officer Pask followed the regulatory protocol in conducting the inspection and accepts his finding that the trailer in question had a critical defect at the time of the inspection. It follows from this finding, which was, in fact, conceded by the Agent for the Applicant, that the vehicle was properly impounded.

S. 50.3 of the Act defines this Tribunal's jurisdiction to hear and determine impoundment appeals. S. 50.3 states:

50.3 (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Parties

(2) The owner and the Registrar are the parties to an appeal under this section.

Grounds for appeal

(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 and suspend are,

(a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made; or

(b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1.

Powers of Tribunal

(5) The Tribunal may confirm or set aside the order to impound and suspend.

The Applicant chose to put no evidence before the Tribunal. There was no suggestion that the vehicle had been stolen. There was also no evidence to suggest that Officer Pask has carried out any of his duties or made any measurements incorrectly. Having said this, the Tribunal has some sympathy for the Applicant. It appears from the evidence that the trailer in question was being returned to Canada following a safety inspection in the United States. At Tab 8, Exhibit 3 is an annual inspection certificate issued in Detroit and dated the same day as Officer Pask's inspection. It appears that the US inspection station had been negligent in inspecting the trailer's brakes. Notwithstanding this evidence, there was no evidence before the Tribunal to indicate that the trailer did not have a critical defect on the evening of November 3, 2007.

ORDER

On all of the evidence, this Tribunal upholds the Registrar decision dated November 3, 2007 to impound the Applicant's trailer and to suspend the plate portion of the licence.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude,
Vice-Chair

RELEASED: January 22, 2008

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

Licence
Tribunal
Appeal

Tribunal
d'appel en
matière de permis



SUNRISE EQUIPMENT AUCTIONS INC.

APPEAL UNDER SECTION 50.3 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP. H.8 AS AMENDED, FROM AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 82.1 OF THAT ACT.

TO APPEAL AN ORDER TO SUSPEND AND IMPOUND A COMMERCIAL MOTOR VEHICLE OR TRAILER

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: JAMES R. MORGAN, Solicitor for the Applicant
PATRICK MOORE, Solicitor for the Respondent

DATE OF HEARING: May 18, 2007 London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Sunrise Equipment Auctions Inc. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS

Exhibit 1 Order to Impound and Suspend dated April 2, 2007
Exhibit 2 Notice of Appeal Form
Exhibit 3 Respondent's Exhibit Book

Exhibit 4 Appellant's Exhibit Book

PRELIMINARY MATTERS

There were no preliminary matters.

FACTS

The facts are not largely in dispute in this case.

EVIDENCE FOR THE RESPONDENT

Evidence of Brent Wild

Officer Wild is a Provincial Offences Officer for the Province of Ontario. He works in the London, Ontario, area of the South West Region of the Province. He is qualified to conduct critical defect inspections under the *Highway Traffic Act* of Ontario ("the Act") by virtue of a Critical Inspection Certificate which he has held since 2001.

On April 2, 2007, Officer Wild was on duty at the Putnam South truck inspection station, located beside the eastbound lanes of Highway 401 in the Municipality of Thames Centre. At about 4:45 p.m., the driver of the Applicant's tractor, or cab, that was pulling the trailer that is the subject of this appeal pulled into the inspection station.

The driver of the tractor showed Officer Wild a valid Commercial Vehicle Operator's Registration (CVOR) Certificate in the name of the Applicant. He also presented the Vehicle Permit for the tractor and his valid driver's licence.

As for the trailer, no licence plate was attached to it. The driver pointed out, however, that a dealer's plate was, in fact, resting on the seat of the tractor, although there was nothing obvious to Officer Wild that would link the dealer's plate to the trailer. There was no registration certificate for the trailer itself. Instead, the driver showed to Officer Wild a receipt from an auction company from which the trailer had been purchased. The receipt was dated March 31, 2007, just two days before the date on which the critical defect inspection in this matter took place.

The trailer was a single axle flatbed trailer. Its weight was 2800 kilograms, as evidenced by a copy of the weigh ticket filed at page 2 of Tab 5 of Exhibit 3. As a result, according to Officer Wild, the trailer required brakes.

Officer Wild did three inspections of the brakes on this trailer:

1. a visual inspection, with no other officer present;
2. Commercial Vehicle Safety Alliance (CVSA) inspection, performed in the company of the driver, but with no other officer present; and
3. a critical defect inspection, with a second officer present, who was to verify Officer Wild's measurements.

Officer Wild confirmed that the trailer brakes were air brakes, and not air over hydraulics. They were "S-cam" brakes and they had a clamp 30 brake chamber. These features were determinative of what measurements had to be observed in order to determine whether a critical defect existed.

First Inspection

Officer Wild performed a lane enforcement check whereby he observed the brakes while the driver made a brake application. He observed that the brakes seemed to be out of adjustment. He therefore asked the driver to park at the rear of the inspection area. Officer Wild then conducted the second inspection.

Second Inspection

This was the CVSA inspection. The driver walked alongside Officer Wild as he did a visual inspection by walking around the tractor and the trailer. The wheels were blocked, the engine was turned off, all brakes were released and the air pressure shown on the driver's air pressure gauge in the tractor was set at a pressure between 90 and 100 pounds per square inch ("psi") as required by the Regulations under the Act. Officer Wild then had to measure the distance that the push rod travelled to determine whether the distance travelled came within, or was outside, the limits set by Regulation.

To do this, Officer Wild used soapstone and marked the push rod with it at the face of the brake chamber. This was a one-axle trailer, so Officer Wild did this on both the left and right wheels. He then went under the trailer, before the brake was to be applied. He then asked the driver to make a full service brake application and also asked him to confirm what the air pressure was once they were applied. The air pressure, once the brakes were applied, was between 92 and 99 psi. Officer Wild then measured, with a Ministry issued Lufkin tape measure, the distance that the push rod travelled from the soapstone mark. He measured only to the inside edge of the soapstone line, so as to avoid having the width of the line itself affect his measurements. Officer Wild found that the distance travelled by the push rod at each of the left and right wheels was 2 ½ inches. This was farther than the distance allowed under the Regulations. Officer Wild described this as a "significant distance."

Officer Wild then recorded these measurements on his Commercial Vehicle Inspection Report (CVIR) found at page 3 of Tab 2 of Exhibit 3, under the heading, "Axle 4." Axles 1, 2 and 3, also referred to in the CVIR, refer to the front axle and the rear two axles of the tractor itself. Although one measurement on axle 2 of the tractor exceeded the

prescribed limits, out of a total of 6 wheels, this did not qualify to be recorded as a critical defect as defined in the Regulations.

In this case, there is no issue of a critical defect finding with respect to the tractor; only the trailer.

Based on these findings, Officer Wild believed the trailer had a critical defect. He then conducted his third inspection, this time with his supervisor, Officer Holdsworth.

Third Inspection

This inspection, done with Officer Holdsworth present, was the critical defect inspection. The Ministry of Transportation ("MTO") requires that a second officer be involved in this inspection, to verify the measurements.

They connected a calibrated air gauge at two points in the "red line" or emergency line that ran between the tractor and the trailer. They asked the driver to start the tractor and release the brakes. Air pressure was built up to 96 psi at the beginning of the test.

Then both Officer Wild and Officer Holdsworth went under the trailer. The wheels were still blocked. They then took what Officer Wild described as "fixed point" measurements; that is, he picked a point to measure from the face of the brake chamber to the jam nut on the push rod in a rest position. This was done on both the left and right sides.

Then, when the brakes were applied, a further measurement was taken. The distance that the push rod travels is, therefore, the difference between the distance to the fixed point when the brakes are at rest and the distance to the same point when the brakes are applied.

A different measuring instrument was also used. This time, the officers used a Starrett 25 foot digitape. A digital reading is shown on the digitape that confirms how far the tape itself is extended. Officer Wild held the tape while Officer Holdsworth verified the reading. There was no disagreement between the tape measure and the digital reading.

For the second time, the distance that the push rod travelled was measured to be 2 ½ inches. More particularly, on the left side, the distance to the fixed point while the brake was at rest was 5 inches, but 7 ½ inches when activated. Similarly, on the right side, the distances were 4 7/8 inches at rest, but 7 3/8 inches when activated.

Although the air pressure began at 96 psi, it fell to 92 psi once the brakes were applied, according to the gauge that had been set up on the emergency line. Officer Wild stated that such a reduction was normal. He was satisfied that the air pressure remained in the range of 90 to 100 psi as required by the Regulation.

The officers then signed and sent to the Registrar a "Notice to Registrar of Critical Defect Inspection", a copy of which is found at page 2 of Tab 2 of Exhibit 3. It was timed at 1715 on the 24-hour clock, which is the same as 5:15 p.m.

The Registrar then issued its first "Order to Impound and Suspend", a copy of which is found at page 1 of Tab 4 of Exhibit 3. This first Order notes the trailer to be an "Abandoned Vehicle." An Amended Order, a copy of which is found at page 2 of Tab 4 of Exhibit 3, correctly shows the owner to be the Applicant in this matter. The reason for showing the trailer to be an "abandoned vehicle" on the first Order arises from the fact that the ownership of the trailer never appeared on the Ministry's database, because, as it was subsequently ascertained, the trailer came from Tennessee, one of the States in the United States, and was sold at an auction in Ontario when the trailer's owner refused or neglected to pay the impound fees that arose when it was first impounded. It was at this auction that the Applicant's representative purchased the trailer.

Regardless, Officer Wild was satisfied about the fact, and the Applicant at no time challenged the fact, that the Applicant was the legitimate owner of this trailer at the time of this critical defect inspection. In the circumstances of this case, the fact that the first Order showed it as an "Abandoned vehicle" affects neither the reason for nor the validity of the Order in this matter.

The Ministry then sent the Order, by facsimile transmission, to Officer Wild at approximately 6:40 p.m. that same day. He attempted to serve the Order on the driver, but the driver refused to take it and sign it. The driver then improperly left the truck inspection station with both the tractor and the trailer, contrary to what Officer Wild told him and contrary to the terms of the Order to Impound and Suspend.

Eventually, with the assistance of the Ontario Provincial Police and two MTO officers who followed the driver to the Applicant's place of business, the trailer was seized and impounded by a towing service under contract with the MTO.

However, before the driver actually drove off improperly with the tractor and the trailer, the Applicant's mechanic had come to the truck inspection station and adjusted the brakes. Officer Wild did not see the adjustment being made; nor could he, therefore, note the time at which it was made. But, of significance, the critical defect finding had already been made before the mechanic arrived. Officer Wild could not be certain whether the Order to Impound and Suspend itself was received before or after the mechanic made his adjustments. Nevertheless, shortly before 7:00 p.m., and after the mechanic adjusted the brakes, Officer Wild did, in fact, re-examine the brakes by going under the trailer and by examining them for yet a fourth time, and concluded that the brakes were then properly adjusted.

On cross-examination, Officer Wild told Counsel for the Applicant that the Applicant's driver told Officer Wild that he had a dealer's plate with him in the tractor and had simply forgotten to attach it to the trailer.

This point was significant to the Applicant's case insofar as the Applicant maintained that having the dealer plate exempted the trailer from the critical defect provisions of the Act.

He further stated to Applicant's Counsel that he also told the driver that a critical defect had been detected and that he would await the receipt of an Order to Impound and Suspend. It was only after he said this to the driver that the driver called the mechanic to do the adjustment. This sequence of events is only logical, for the driver would have had no reason to call the mechanic unless and until he knew that there was a defect with the trailer's brakes.

Evidence of Gregory Holdsworth

Officer Holdsworth was the officer who assisted Officer Wild in performing the critical defect inspection. He had been an officer with the MTO for 16 years. At the time that this matter took place, his position was that of "shift leader."

However, both Counsel for the Respondent and for the Applicant informed this Tribunal, before Officer Holdsworth began his testimony, that they agreed that the measurements that were taken and on which Officer Wild already gave evidence, were not in dispute. Therefore, Officer Holdsworth was not required, in his evidence, to confirm either the process used or the measurements recorded by Officer Wild.

Instead, Officer Holdsworth was questioned on only 3 issues.

Dealer plates

Officer Holdsworth confirmed the licence number of the dealer plate that the driver had, sitting on the front seat of the tractor. The plate was registered properly to the Applicant. But, most importantly, Officer Holdsworth testified that, even if the dealer plate had been attached to the trailer, the critical defect inspection would still have been performed on the trailer's air brakes. Further, the dealer plate would apply only to the power unit; that is, to the tractor, but not to the trailer. But, since the tractor already had a valid licence plate on it, the dealer plate was not really needed. There are only two requirements for which a dealer plate permits an exemption. One is the requirement to have an annual inspection certificate attached to the vehicle under section 85(1) of the Act. The second is the requirement to have a safety standards certificate when ownership of the vehicle is to be transferred. In that case, dealers would use the dealer plate to allow them to transfer vehicles to other lots. But, there is no exemption from having a critical defect inspection done on the vehicle even with dealer plates on it.

Therefore, according to Officer Holdsworth, even if a dealer plate were attached to the trailer in question, the trailer would not have been exempt from a critical defect inspection.

Timing of mechanic's adjustment to brakes and receipt of Order to Impound and Suspend

Officer Holdsworth believed that the mechanic made the adjustment on the brakes around the time of the receipt of the Order to Impound and Suspend, but he could not be certain. For that matter, neither could any other witness who testified before this Tribunal at this hearing.

His notes, found at pages 11 to 14 of Tab 1 of Exhibit 3, indicate that the Order was received at approximately 1840 hours that day; that is, 6:40 p.m. But, regardless, the critical time was the time when the defect was found, in accordance with section 50.3(3)(b) of the Act. Once the critical defect inspection is completed, there is nothing that prevents the owner of a vehicle from having the defect adjusted. In fact, the brakes must be adjusted before the vehicle can be moved. Therefore, according to Officer Holdsworth, whether the mechanic made the adjustment before or after the Order was received at the truck inspection station is irrelevant, because the critical time is the time of the critical inspection, and that was certainly done before the mechanic arrived.

Description of trailer as "Abandoned Vehicle"

As mentioned earlier in these Reasons, the trailer was described in the original Order as an "Abandoned Vehicle" because the trailer had been registered in Tennessee, in the United States. The amended Order showed that the Applicant was, in fact, the owner. The change was made after Officer Holdsworth took the matter up with the Ministry and confirmed that the Applicant had purchased the trailer legitimately at an auction.

Regardless, and, again, as stated earlier, the fact that the original Order described the trailer as an abandoned vehicle affects neither the reason for nor the validity of the Order in this matter. The trailer's brakes were found to be unsafe, and they were unsafe regardless of who was shown as owner on the Order, and especially on the facts of this case, because the Applicant at no time argued that it was not the owner.

EVIDENCE FOR THE APPLICANT

Evidence of David Gordon Ross

Mr. Ross was the person who towed the subject trailer to the impound area after the Ontario Provincial Police and MTO officers had followed the trailer to the Applicant's place of business.

Mr. Ross confirmed that he had to impound this trailer on a previous occasion, approximately seven months before the events in this case took place.

He stated that the owner was from Tennessee, in the United States. The owner refused to return to Canada to get the trailer out of impoundment and to pay all outstanding

fees. Therefore, Mr. Ross seized it under the *Repair and Storage Lien Act* of Ontario, gave the necessary notices to the owner, and, hearing nothing from the owner, took possession of it. He took it to an auction company, where the Applicant's representative purchased it. Mr. Ross had yet to complete the outstanding payment of Goods and Services Tax to Canada Revenue Agency to make the trailer legal in Canada, but that would be done shortly.

It is of significance that Mr. Ross gave no evidence that challenged the findings of the critical defects inspection which found the brakes to be out of adjustment.

Evidence of E.M.

Mr. E.M. has been a licensed mechanic for commercial motor vehicles and trailers for 30 years. He owns his own service shop. It is his business that has done many of the repairs and inspections, and much of the maintenance on the Applicant's vehicles.

Counsel for the Applicant brought Mr. E.M. forward to give evidence to support the argument that, after the critical inspection had been done, but by the time that Officer Wild received the original Order to Impound and Suspend for the trailer, Mr. E.M. had already made the adjustment on the brakes, so that the Order should not have been made.

Mr. E.M. stated that, at about 5:15 pm. on April 2, 2007, the Applicant's driver called him and asked him to come to the truck inspection station because of a problem with the trailer's brake adjustment.

It will be recalled that 5:15 p.m. was the exact time on the Notice of Critical Defect Inspection that Officer Wild sent to the Registrar, after, of course, having already completed the critical defect inspection.

After receiving the call, Mr. E.M. drove to the truck inspection station. He said that the trip took approximately one half to three-quarters of an hour. That would have put him at the station by about 5:45 or 6:00 p.m. After arriving, Mr. E.M. talked to Officer Wild who told him where the problems were. Mr. E.M. also spoke to the driver. These discussions took about five minutes in total. He then went under the trailer, did some visual checks and then adjusted the brakes. This took about fifteen to twenty minutes at most.

This task, then, using the time estimates given by Mr. E.M., would have been completed anytime between 6:05 p.m. and 6:30 p.m. The Order, it will be recalled, was received at approximately 6:40 p.m.

After he made the adjustment, Officer Wild again inspected the brakes and approved the adjustment.

Mr. E.M. kept no written record of the times that he estimated in his evidence. Nor did he give any evidence to challenge the findings of the critical defect inspection that found the brakes to be out of adjustment. On the contrary, the fact that he had to make an adjustment in the first place confirms those findings.

Evidence of the Driver

The driver has been a shareholder and employee of the Applicant business for about thirty years. The Applicant's business involves buying and then re-selling equipment. Another representative of the Applicant actually purchased the trailer in question at an auction. It was this witness who then picked up the trailer two days later. Although he performed visual checks on the trailer before moving onto the highway, he could not check the brakes because that is a two-person task. Before driving off, he forgot to attach the dealer plate to the trailer, but had it on the seat beside him in the tractor. He had not been aware that this trailer had been impounded previously, or that there was no ownership documentation available at the time of the purchase. The driver intended to take the trailer directly to the Applicant's place of business and make it part of the Applicant's inventory for eventual sale. It was while he was moving it to the Applicant's place of business that he stopped at the truck inspection station on April 2, 2007.

The driver confirmed the evidence given by Officer Wild about presenting the necessary documentation to Officer Wild, the three brake inspections and the presentation of the Order to Impound and Suspend, so that there is no need to repeat all that evidence here.

It is significant, however, that at no time in his evidence did this driver challenge the finding of the critical defect inspection that the trailer's brakes were out of adjustment. In fact, throughout this entire proceeding, the Applicant presented no such challenging evidence from any source whatsoever.

When asked if he recalled what time it was that the mechanic, Mr. E.M., arrived at the truck inspection station, the driver estimated that it was shortly after 5:00 p.m., although he could not be certain. Not only does this vary greatly from what Mr. E.M. estimated, but it should also be noted that the driver, as well, made no notes about the events or the times in this entire sequence of events. Both the driver and Mr. E.M., in each of their testimonies, had uncertain recollections of the times that they estimated.

ANALYSIS OF EVIDENCE

From the above review of the evidence, this Tribunal can make the following findings of fact, although the facts were not significantly in dispute.

The trailer in question was a single axle flatbed trailer weighing 2800 kilograms. It was inspected by MTO officers at the Putnam South truck inspection station on the eastbound lanes of Highway 401, beginning at about 4:45 p.m. on April 2, 2007.

Officer Wild, on a first, visual, inspection in the inspection lane of the truck inspection station, suspected that the air brakes on the trailer were out of adjustment.

On a second, more detailed, CVSA inspection, Officer Wild found each of the two brakes on the trailer to be out of adjustment because the push rod travelled 2 ½ inches. He conducted this inspection while under the trailer. He used approved Ministry techniques and a Ministry-supplied measuring instrument. He also complied with the requirements of the Act and of its Regulations concerning critical defect inspections.

On a further, third, critical defect inspection, he had Officer Holdsworth with him to confirm the measurements. Again, they were under the trailer at the time of the inspection. They used approved Ministry techniques and a Ministry-supplied Starrett 25 foot digitape. They again complied with the requirements of the Act and its regulations concerning critical defect inspections. The two officers again found that each of the two brakes was out of adjustment because the push rod moved 2 ½ inches.

On both the second and third inspections, the pressure in the brake lines was between 90 and 100 psi.

A Notice to Registrar of Critical Defect Inspection was timed at 5:15 p.m. that day, and was sent to the Registrar. At about 6:40 p.m., Officer Wild received, by facsimile transmission, an Order to Impound and Suspend the trailer in question. The original Order showed the trailer as an “abandoned vehicle”, because the out-of-country owner did not appear in the Ministry’s database. Officer Holdsworth arranged to have that matter corrected, and an amended Order was received, showing the Applicant as the owner.

By about 6:30 p.m., at the latest, Mr. E.M., the mechanic whose business performed maintenance, repair and inspection services for the Applicant’s vehicles, made the necessary brake adjustments, which were subsequently approved by Officer Wild by or before 7:00 pm. that night.

Officer Wild attempted to serve the Order on the driver and to have him sign it. However, the driver refused to accept the Order, defied instructions to leave his trailer, and left the truck inspection station with his tractor and with the trailer in tow, and drove to the Applicant’s place of business. There, after having been followed by MTO officers, and with the assistance of the Ontario Provincial Police, the trailer was seized and taken away by Ross Services.

The Applicant then appealed the Order to Impound and Suspend to this Tribunal.

ISSUES

Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW

Section 50.3 of the *Highway Traffic Act* ("the Act") states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 64(5) of the Act provides as follows:

- (5) Every trailer or semi-trailer having a gross weight of 1,360 kilograms or more shall be equipped with brakes adequate to stop and to hold the vehicle.

Section 82.1 is the section of the Act that provides for the performance of critical defect inspections on commercial motor vehicles. The definition of commercial motor vehicle is found in section 82.1(1):

- 82.1 (1) In this section,
"commercial motor vehicle" has the same meaning as in subsection 16 (1);

In turn, section 16(1) provides:

- 16. (1) In this section and in sections 17 to 23.1,
"commercial motor vehicle" does not include,

- (a) a commercial motor vehicle, other than a bus, having a gross weight or registered gross weight of not more than 4,500 kilograms, an ambulance, a fire apparatus, a hearse, a casket wagon, a mobile crane, a motor home or a vehicle commonly known as a tow truck,
- (b) a commercial motor vehicle leased for no longer than thirty days by an individual for the transportation of goods kept for that individual's personal use or the gratuitous carriage of passengers,
- (c) a commercial motor vehicle operated under a permit and number plates issued under a regulation made under clause 7 (24) (g) or (h) that is not transporting passengers or goods,
- (d) a commercial motor vehicle operated under the authority of an In-Transit permit, and
- (e) a bus that is used for personal purposes without compensation;

It is noteworthy that “trailer” is not specifically excluded from the above definition for the purposes of the critical defect provisions of the Act.

In fact, not only is “trailer” not specifically excluded from the above definition, but it is also actually specifically included elsewhere as being subject to a critical defect inspection. Section 82.1(6) provides:

- (6) If the police officer or officer appointed for carrying out the provisions of this Act **finds that the commercial motor vehicle or trailer** has one or more critical defect, the vehicle shall be deemed to have been found to be in dangerous or unsafe condition under section 82, but instead of exercising the powers set out in subsections 82 (2) and (5), he or she shall forthwith,
 - (a) notify the Registrar of the findings or cause the Registrar to be notified;
 - (b) seize the number plates of the vehicle that has the critical defect or defects and remove its vehicle inspection sticker or comparable device issued by another jurisdiction; and
 - (c) detain the vehicle that has the critical defect or defects until the Registrar issues an order under subsection (7).

(Emphasis is added)

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Council may make regulations,
 - (a) prescribing what constitutes a critical defect;

Pursuant to section 82.1(37), Part II of Regulation 512/97 of the Act deals with critical defects. The sections of the Regulation relevant to the case at hand are as follows:

PART II CRITICAL DEFECTS

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
1. A drum or rotor is cracked, broken or missing.
 2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
 3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
 4. **The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.**

(Emphasis is added)

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)
12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)

16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid ...	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid ...	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

(Emphasis is added)

Bolt Type Chamber Data		
Type	Outside Diameter	
A	6 15/16" (176.21mm)	1 3/8" (34.93mm)
B	9 3/16" (233.36mm)	1 3/4" (44.45mm)

C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 1/4" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2" (50.8mm)
Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2" (38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)
50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square		

Inlet Port	6 ½" (165.1mm)	2 1/2" (63.5mm)
DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

APPLICATION OF THE LAW TO FACTS

The trailer in question, weighing 2800 kilograms, required brakes, to comply with section 64(5):

(5) Every trailer or semi-trailer having a gross weight of 1,360 kilograms or more shall be equipped with brakes adequate to stop and to hold the vehicle.

By ensuring that the vehicle engine was turned off, the park brakes were released, the brake fully applied, and that the air pressure was between 90 and 100 psi when testing for critical defects, the inspecting officers were complying with section 7(1) of Regulation 512/97, which provides:

7. (1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.

The trailer had a 30 Clamp type, S-cam braking system. Accordingly, the push rod travel on more than 50 per cent of the wheel brakes of the vehicle could not exceed ¼ inch beyond the distance prescribed in Schedule I, reproduced above in full, and referred to in section 7(2) paragraph 4 of Regulation 512/97. In other words, the distance was not to exceed 2 ¼ inches. But, in this case, in moving 2 ½ inches, not only did the push rod travel exceed that distance provided for in Schedule I, but both wheels demonstrated the same problem. In other words, more than 50 per cent of the wheel brakes were found to have a critical defect; in fact, it was both wheels, being 100 per cent of the wheel brakes, that were found to have a critical defect. This meant that the officers were correct in establishing that both brakes were out of adjustment and that, therefore, that was a critical defect as defined in section 7(2)4 that resulted in the Order to Impound and Suspend.

In appealing that Order, the only grounds for appeal are that the vehicle was stolen or there was no critical defect at the time of the inspection under section 82.1 Section 50.3(3) states:

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

- (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made; or
- (b) that the commercial motor vehicle or trailer had no critical defects **at the time of the inspection under section 82.1.**

(Emphasis is added)

In this appeal, there was no evidence whatsoever that the trailer was stolen. Nor was there any evidence presented to this Tribunal to show that there was no critical defect. Therefore, neither ground for appeal was satisfied.

Ordinarily, that would be the end of the matter. However, Counsel for the Applicant raised some novel arguments to contest the Order to Impound and Suspend. These arguments merit some response, especially since the entire testimony of one of the Respondent's own witnesses focused on those same issues.

Timing of Defect

Counsel for the Applicant argued that, because the Order to Impound and Suspend was actually received only after the mechanic adjusted the brakes, the Order should not have been made. The reasoning of Counsel was that, since the critical defect was repaired by the time the Order was received, no defect existed at the time of the receipt of the Order.

With respect, this argument must fail.

Section 50.3(3), quoted above, states that there are only two grounds for appeal from the Order made in this case. The ground that the trailer was stolen does not apply. However, section 50.3(3)(b) provides that the Applicant must show that the commercial vehicle or trailer had no critical defects at the time of the inspection under section 82.1.

Therefore, the relevant time for the second ground for appeal is at the time of the inspection under section 82.1, not at the time the Order was received. On the ordinary meaning of those words, there can be no other time referred to in that subsection. Not only is such an interpretation in accordance with the ordinary meaning principle of statutory interpretation, but such an interpretation is also in line with the general intent of the provisions of section 82.1. Section 82.1 (9) states:

- (9) The order to impound and suspend issued under this section is intended to promote compliance with the safety standards set out in and under this Act and to thereby safeguard the public and does not constitute an alternative to any proceeding or penalty arising from the same circumstances or around the same time.

The provisions in section 82.1 are there to promote compliance with safety standards and to safeguard the public. To allow the owner of a commercial motor vehicle to place an unsafe vehicle on the highway with impunity, after a critical defect is found, simply by correcting it immediately, and with no further consequences, does not "promote" (to use

the wording in subsection 9) compliance with safety standards. Such leeway might only promote the necessity of having a mechanic close by after a critical defect is found.

Nor, in doing so, would that “safeguard the public,” because those same owners could take a risk in having an unsafe vehicle on the highway, and then have it quickly repaired after failing a critical defect inspection, with no further penalty being incurred. Far from safeguarding the public, that would be putting the public at greater risk.

In this case, the evidence is clear that such a critical defect inspection was performed by no later than 5:15 p.m., for that was the time that is noted on the Notice to Registrar of Critical Defect Inspection. It is irrelevant, for the purposes of this appeal and for the purposes of the provisions of section 82.1, that the mechanic made a brake adjustment by no later than 6:30 p.m., and before the Order was actually received. There were three inspections made. The second inspection revealed a critical defect and the third confirmed it, both having been completed by or before 5:15 p.m.

It is interesting that the relevant time stated in section 50.3(3)(a) is different from that stated in section 50.3(3)(b). In section 50.3(3)(a), an Applicant must prove that the vehicle was stolen “at the time the Order was made.” However, the relevant time is specifically different in section 50.3(3)(b) for whatever reason or reasons the drafters of the legislation had in mind. There, the relevant time is “at the time of the inspection under section 82.1.” The two relevant times should not be confused as between the two permitted grounds for appeal. They are not interchangeable.

Counsel also submitted that the brake adjustment should have been permitted, and then the trailer should have been released. Counsel relied on section 82(5) of the Act.

It is true that section 82 deals with inspections of unsafe vehicles. Section 82(5), to which Counsel referred this Tribunal, provides as follows:

- (5) Where any vehicle examined or tested under clause (4) (a), or any of its equipment, is found still not to be in compliance with the requirements of this Act or the regulations, the police officer or officer making the examinations or tests may require the owner or operator of the vehicle to have the vehicle or its equipment repaired and to submit evidence to the person or office specified by the police officer or officer that the vehicle and its equipment comply with the requirements of this Act and the regulations.

Therefore, Counsel argues, once the mechanic made the repair, and once Officer Wild was satisfied that the repairs were made, the trailer should have been released.

Again, with respect, this argument cannot succeed.

Section 82 does not deal with critical defects; section 82.1 deals only with critical defects. Section 82.1, with its attendant Regulations, is complete in itself. In fact, section 82.1(6) provides that, if a critical defect is found, the inspecting officer is not to use the provisions of section 82(5). Section 82.1(6) provides as follows:

(6) If the police officer or officer appointed for carrying out the provisions of this Act finds that the commercial motor vehicle or trailer has one or more critical defect, the vehicle shall be deemed to have been found to be in dangerous or unsafe condition under section 82, **but instead of exercising the powers set out in subsections 82 (2) and (5)**, he or she shall forthwith,

- (a) notify the Registrar of the findings or cause the Registrar to be notified;
- (b) seize the number plates of the vehicle that has the critical defect or defects and remove its vehicle inspection sticker or comparable device issued by another jurisdiction; and
- (c) detain the vehicle that has the critical defect or defects until the Registrar issues an order under subsection (7).

(Emphasis is added)

For the above reasons, that argument of Counsel must also fail.

Exemption of trailer from critical defect inspections

Counsel for the Applicant pointed out that the driver had a dealer plate with him in the tractor. It was not attached to the trailer. The driver had forgotten to attach it. But, because the driver had a dealer plate, Counsel argued that the trailer was exempt from having a critical defect inspection.

Again, with respect, the Tribunal cannot accept that argument.

Counsel referred this Tribunal to Regulation 611 and Regulation 628, R.R.O. 1990. But, Regulation 611 addresses the issue of Safety Inspections and Regulation 628 addresses the issue of vehicle permits. The exemptions from the provisions of those Regulations do not at all apply to the issue of critical defect inspections. In fact, Counsel for the Applicant could not refer this Tribunal to any Regulation or Act that would specifically exempt the trailer in this case from having a critical defect inspection performed on it. On the contrary, as already referred to, section 82.1(6) specifically includes trailers as being subject to such inspections, where the introductory words to that subsection state:

(6) If the police officer or officer appointed for carrying out the provisions of this Act finds that the commercial motor vehicle **or trailer** has one or more critical defect.....

Again, looking at the ordinary meaning of those words, and in the absence of any contrary provisions, this Tribunal cannot accept that the trailer in question was exempt from the critical defect inspection that was made on it.

CONCLUSION

Having regard to the evidence before this Tribunal and to the applicable provisions of the *Highway Traffic Act* and the relevant attendant Regulations, the Applicant has not

persuaded this Tribunal that it has satisfied either ground for appeal stipulated in section 50.3(3) of the Act.

DECISION

Upon the application by Sunrise Equipment Auctions Inc. (the "Applicant") to appeal the order to impound and suspend dated April 2, 2007 of the Registrar of Motor Vehicles ("Registrar") to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle or trailer of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski,
Vice-Chair

Released: June 12, 2007

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



Licence Appeal Tribunal

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942260 ONTARIO LTD. DBA ALLANPORT TRUCK LINES AND DANIEL PERRI

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY
TRAFFIC ACT*, R.S.O. 1990, CHAP. H8 AS AMENDED

TO REVOKE A MOTOR VEHICLE INSPECTION STATION
LICENCE AND TO REVOKE A MOTOR VEHICLE INSPECTION
MECHANIC LICENCE

TRIBUNAL: HARINDER GAHIR, Vice Chair

APPEARANCES: DAVID MARYNUIK, Agent, representing 942260 Ontario Inc. doing
business as Allanport Truck Lines and Daniel Perri

MURRAY G. FORBES, Counsel, representing the Director of
Vehicle Inspection Standards

DATES OF
HEARING: January 29, 2008 Toronto

REASONS FOR THE DECISION AND ORDER

BACKGROUND

This is an Appeal by 942260 Ontario Incorporated, doing business as Allanport Truck Lines (the "Corporate Applicant"), and Daniel Perri (the "Applicant") (and together, the "Applicants"), to the Licence Appeal Tribunal (the "Tribunal"), arising out of a Notice dated September 4, 2007, issued by the Director of Vehicle Inspection Standards (the "Director"), proposing to revoke the Motor Vehicle Inspection Station (MVIS) licence of the Corporate Applicant and the mechanic registration of the Applicant as a MVIS mechanic pursuant to Subsections 91(8)(a), (c) and (e) and 93(a) and (c) of the *Highway Traffic Act* (the "Act"). The Notice was issued for the following reasons:

1. Daniel G. Perri has been convicted nine times of offences under the HTA related to his participation (sic) the MVIS program as follows:

- (a) A conviction under section 90(3)(a) of the HTA was entered on 21st June 2007 with respect to an offence that occurred on 30th March 2007;
 - (b) A conviction under section 90(3)(a) of the Act was entered on 21st June 2007 with respect to an offence that occurred on 3rd April 2007;
 - (c) A conviction under section 90(3) of the HTA was entered on 14th October 1997 with respect to an offence that occurred on 2nd May 1997;
 - (d) A conviction under section 90(3) (a) of the HTA was entered on 14th November 1995 with respect to an offence that occurred on 27th July 1995;
 - (e) A conviction under section 90(3)(a) of the HTA was entered on 9th November 1993 with respect to an offence that occurred on 1st April 1993;
 - (f) A conviction under section 74(3)(a) [section 90(3)(a) in R.S.O. 1990] of the HTA was entered on 11th June 1991 with respect to any offence that occurred on 6th April 1991;
 - (g) A conviction under section 74(3)(a) [section 90(3)(a) in R.S.O. 1990] of the HTA was entered on 22nd May 1987 with respect to an offence that occurred on 29th January 1987;
 - (h) A conviction under section 74(3)(a) [section 90(3)(a) in R.S.O. 1990] of the HTA was entered on 28th February 1986 with respect to an offence that occurred on 20th November 1985;and
 - (i) A conviction under section 74(3)(a) [section 90(3)(a) in R.S.O. 1990] of the HTA was entered on 27th April 1984 with respect to an offence that occurred on 2nd November 1983.
2. Daniel G. Perri has also been warned twice with respect to requirements under the HTA related to his participation (sic) the MVIS program on 18th February 2000 and 7th July 1994.
 3. Daniel G. Perrri is the only mechanic registered for Allanport Truck Lines.
 4. Allanport Truck Lines has been convicted twice of offences and warned once with respect to the requirements under the HTA related to its participation (sic) the MVIS Program as follows:
 - (a) A conviction under section 90(3)(a) of the Act was entered on 21st June 2007 with respect to an offence that occurred on 3rd April 2007;
 - (b) A conviction under section 90(3)(a) of the HTA was also entered on 21st June 2007 with respect to an offence that occurred on 30th March 2007;
 - (c) A warning letter was issued on 18th February 2000.

ISSUES

The issues in this case may be summarized as follows:

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

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

EVIDENCE

The Respondent called Mark Horton, Doug Ryerson and Doug Reece, all Ministry of Transportation ("MTO") Inspectors, and Larry Grimaldi, a former MTO Inspector and presently Head of Fleet Services for the Ministry of Transportation. All Respondent's witnesses hold 310A, 310S and 310T mechanics' licences and all have had dealings with the Applicants over a period of time. The Respondent also tendered documents involving conviction records, station records and inspection records pertaining to the Applicant and the station. Daniel Perri testified on behalf of the Applicants.

The Respondent's first witness, MTO Inspector Mark Horton, has been employed with the MTO as an enforcement officer since May 1997. As an enforcement officer Mr. Horton's duties include performing safety inspections of vehicles on an ongoing basis. In addition, he oversees motor vehicle inspection stations. Mr. Horton, along with another officer, has responsibility for 1100 stations.

Mr. Horton explained the significance of the regulation of the MVIS program, stating that the system relies on the station and mechanic to ensure that vehicles meet the Provincial Safety Standards. He also reviewed the documents contained in Exhibit 3. He went on to explain the spreadsheet, (Tab 3, Exhibit 3) he had prepared showing an overview of the convictions of the Applicants since 1995.

Mr. Horton testified with respect to his involvement in past investigations of the Applicants. In one incident, on May 2, 1997, the Applicants issued Safety Standard Certificate No. 6914598 for a tractor, before completing repairs. MTO staff attended the station on May 2, 1997, and found out that the tractor was still under repair. The Applicant had informed the MTO that the vehicle was under his control and would not leave the shop until the required repairs had been completed. The MTO charged the Applicant under section 90(3)(a) of the Act for issuance of a Safety Standard Certificate without proper inspection. The Applicant later pleaded guilty to the charge and was fined \$500.00.

Inspector Horton went on to testify that the MVIS licences of the Applicants had expired on December 31, 2006. The Director did not receive an application for the renewal of the licences. On January 29, 2007, Mr. Horton attended the location of the MVIS and

found out that the Applicants had sold the building about six months previously, and had moved to a new location in Niagara Falls. Mr. Horton also found out that the phone number of the Applicants was disconnected. The Applicants did not make an application to the Director regarding the change of address. Mr. Horton went on to testify that the Applicants kept issuing Safety Standard Certificates after the expiry of the Station and Mechanic Licences. Mr. Horton identified two Safety Standard Certificates, Nos. 10291749 and 10291750, that they issued on January 17, 2007 (Exhibit 3, page 40 - 50). He charged the Applicants for operating a MVIS and issuing Safety Standard Certificates without having been issued a current licence. They were later convicted of the charge.

Mr. Horton testified that although the Applicants had moved to a new location in Niagara Falls, on February 5, 2007, he issued a renewal for the year 2007 of the MVIS Licence for the old facility. Mr. Horton testified that he was being nice to the Applicants and used the old address of the Applicants so that the Applicants could continue with their business in the new facility, while the Applicant was still in the process of meeting the requirements to licence the new facility.

Mr. Horton also testified with respect to his involvement in a recent investigation of the Applicants. During a routine inspection on April 3, 2007, at Vineland Truck Inspection Station, he inspected a dump truck. The Applicants had issued an annual inspection sticker No. H186417 for this truck, three days before the Ministry inspection. The truck had travelled only 41 kilometres since the issuance of the inspection certificate. Mr. Horton identified the photographs (Exhibit 3, pages 34 to 40) showing defects in the vehicle. The MTO Inspector had found serious defects, including defective high beam headlights, an exhaust leak, broken bushings on a rear axel, a detached valve on the rear frame, and a front brake adjustment out of tolerance. The right hand front axel was also out of tolerance. Both Applicants were convicted under section 90(3)(a) of the Act for issuing an Annual Inspection Certificate to a vehicle that did not comply with Ontario Regulation 611.

Mr. Larry Grimaldi testified that on February 18, 2000, the Ministry warned the Applicant to be more careful in carrying out inspections of old vehicles. This warning was prompted due to the issuing of Safety Standard Certificate No. 9846043, which the Applicant had issued for a car on December 28, 1999. The MTO Inspector had conducted a partial inspection of this car on January 18, 2000, and found defects with the parking brakes and exhaust leakage. In the opinion of the MTO Inspector the above defects would have been present in the vehicle at the time of issuance of the Safety Standard Certificate.

MTO inspectors, Mr. Doug Ryerson and Mr. Doug Reece testified with respect to their involvement in the investigation of the Applicant with regard to an incident in which he had signed an annual inspection sticker for a truck on July 27, 1995, which he post-dated to July 29, 1995. Mr. Ryerson reviewed a Vehicle Inspection Report (Tab 12), which he prepared August 1, 1995, with respect to the issuance of Annual Safety Sticker #C370943. In his opinion, the tractor-trailer was not inspected by the Applicant

at the time of issuance of the annual safety certificate on July 27, 1995. Due to serious safety defects in the above vehicle, the Ministry had to remove the plates of the tractor-trailer. There were two convictions entered under section 90(3) (a) and 9(1) of the Act.

Applicant's Evidence

The Applicant testified that he has been a mechanic for the last 30 years and a MVIS mechanic since 1986. He explained that although he had sold the building part of the old MVIS location, he still had the authority to work out of the building as part of the verbal agreement between the purchaser of the building and himself. The Applicant admitted his conviction record but contended that his record had improved in the past as he had a conviction-free record of over ten years between 1997 and 2007.

Under cross-examination, the Applicant testified that he has his own tools at the Allanport Road facility. He further testified that he does repairs at his unlicensed facility and then takes the vehicle to the Allanport facility, which is a mile from the other facility, for the purposes of issuance of safety certificates. He testified that he does about 350 – 400 inspections per year.

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 mechanic 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 mechanic 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 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 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.

REASONS AND DECISION

The Tribunal is required to make an independent determination as to whether the criteria for depriving the Applicants of their registration have been met, showing no deference to the decision of the Registrar as contained in his Notice. The Tribunal is to determine if the past conduct of the Applicants affords reasonable grounds for the belief that they will not carry on business in accordance with law, and with integrity and honesty.

While the granting of a licence may be considered a privilege, the revocation of an existing licence has always been considered as interference with a person's right to

make a living. Therefore, the Director bears the onus of establishing the grounds for revocation, and the onus on the Director must be established by clear and cogent evidence, as held by the Divisional Court in *White v. Association of Professional Engineers of Ontario*, 2006 CanLII 17320 (ON S.C.D.C.) The Court approved the following statement of the appropriate standard of proof:

The standard of proof applied by the panel, in accordance with the Bernstein decision, was on the balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel. The panel also recognized that the more serious the allegation to be proved, the more cogent must be the evidence.

In *Bernstein and the College of Physicians and Surgeons of Ontario* (1977) 15 O.R. (2nd) 447 the Court held that the Discipline Committee of the College had taken away the license of a practitioner on evidence that was wholly unsatisfactory. The Court went on to say that administrative tribunals are:

Entitled to more guidance from the courts than the simple expression that they are entitled to act on the balance of probabilities.

Similarly, Reid J speaking for the court in *Coates v Ontario (Registrar of Motor Vehicles Dealers and Salesmen)* (Ont. Div. Ct.) 65O.R. (2nd) 526 described the burden as follows:

The message is clear and has been consistently adopted by this court. Nothing short of clear and convincing evidence will justify an administrative tribunal in revoking a license to practice medicine or to gain a livelihood in business.

The Tribunal also must keep in mind that the Act and the Regulations are designed to achieve the legislative objective of ensuring that people in Ontario drive safe vehicles. This objective is achieved, in part, by licensing motor vehicle inspection stations and mechanics, and the requirement that these licensees adhere to the provisions relating to vehicle safety before safety standard certificates are issued. The Applicant, a licenced operator and mechanic, deviated significantly from the responsibilities imposed upon him under the Act and Regulations on several occasions.

The Tribunal finds that the Corporate Applicant, together with its predecessor 918933 Ontario Limited dba Thorold Truck & Equipment, and the Applicant have been licensed as an MVIS and as a mechanic for the last 24 years. During the registration period, the Applicant was convicted nine times between November 1983 and May 1997. The Applicant's conviction record remained clean for around 10 years between June 1997 and February 2007. However, the Director did issue the Applicant a warning letter in February 2000, for faulty inspection of a car. Recently, there were convictions registered in 2007, arising out of the Applicants' operation of an MVIS while failing to renew the licence, and another conviction under section 90(3)(a) of the Act for a faulty inspection.

However, in analysing the past conduct of the Applicants, the issue of Applicant's moving the MVIS to the new location without getting approval of the Director does not indicate that this was done to avoid detection of illegal acts, but simply that the Applicant was not able to fulfil the administrative functions of a licence. This view seems to have been confirmed by the Director as he renewed the licence of the old MVIS knowing that the Applicants had moved to a new location. This shows that the Director, until this time, did not have issues with the conduct of the Applicants. The Tribunal notes that the flurry of convictions against the Applicants until May 1997, and convictions in June 2007 for operating an MVIS from an unlicensed facility and issuing safety certificates without having a valid MVIS and mechanic registration, did not trigger a proposal to revoke, notwithstanding that most of the convictions up to May 1997, related directly to improper inspections that resulted unsafe vehicles using the Ontario roads. Between the periods May 1997 to June 2007, there has been only one conviction where it was shown that the Applicants carried out a negligent inspection. The Tribunal noted that the Applicant, during his testimony, readily admitted his past mistakes and did not try to make any excuses.

The Tribunal concludes that the Applicant learned from his past mistakes and achieved a ten-year conviction free record and thereafter, one conviction for a faulty inspection. Although, section 93 of the Act gives the Director the power to revoke a licence for a single violation, the Tribunal finds that the evidence is lacking to properly conclude that the Applicants' past conduct affords reasonable grounds for belief that the Applicants will not carry out their obligations in accordance with the law and with honesty and integrity.

ORDER

The Tribunal therefore orders the Director to not to carry out his Proposal to revoke the Motor Vehicle Inspection Station licence of 942260 Ontario Ltd. Dba Allanport Truck Lines and the motor vehicle inspection station mechanic registration of Daniel Perri.

LICENCE APPEAL TRIBUNAL

Harinder Gahir,
Vice-Chair

RELEASED: March 20, 2008

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



CONSENT ORDER

1546831 ONTARIO INC. DBA CREATIVE COLLISION REPAIRS

Appeal under section 95 of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended from a Proposal of the Director of Vehicle Inspection Standards to refuse to issue a Motor Vehicle Inspection Station Licence

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: TIMOTHY A. PINETTA, Agent, appearing on behalf of the Applicant, 1564831 Ontario Inc. (the "Applicant")

MURRAY FORBES, Counsel appearing on behalf of the Director of Vehicles Inspection Standards (the "Director")

DATE OF
PRE-HEARING: January 28, 2008 Toronto

CONSENT ORDER

Upon application to the Tribunal at the conclusion of the pre-hearing of this matter by the Applicant and the Director for the issuance of a consent order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R. S. O. 1990 chapter S.22;

The Tribunal orders:

1. The Director shall not carry out his proposal but shall issue a Motor Vehicle Inspection Station Licence to the Applicant.
2. The issuance of the Motor Vehicle Inspection Station Licence to the Applicant is subject to the limitation that Daniel Perri, also known as Dan Perri, shall not have any interest or role whatsoever in the ownership or management of the Applicant, either as shareholder, director or officer. Further, Daniel Perri shall not be employed by the Applicant as a Motor Vehicle Inspection Station Licensed Mechanic.

3. In addition to any site inspection the Director may conduct at the Applicant's premises, the Applicant shall provide to the Director any and all documents the Director may reasonably request to satisfy the Director that Daniel Perri is not a shareholder, director or officer of the Applicant.
4. The proceedings before this Tribunal are now concluded and disposed of without a hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: January 30, 2008

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



PRE-HEARING

942260 ONTARIO INC. dba ALLANPORT TRUCK LINES
and DANIEL G. PERRI – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE DIRECTOR OF
VEHICLE INSPECTION STANDARDS UNDER THE
HIGHWAY TRAFFIC ACT, R.S.O. 1990, CHAPTER H.8, AS
AMENDED

TO REVOKE MOTOR VEHICLE INSPECTION STATION
LICENCE OF 942260 ONTARIO INCORPORATED DBA AS
ALLANPORT TRUCK LINES #23-40706, AND TO REVOKE
DANIEL G. PERRI'S REGISTRATION AS A MOTOR
VEHICLE INSPECTION MECHANIC WHOSE
APPLICATION BEARS TRADE CERTIFICATE NO.
310S&T-086297

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: DAVID MARYNUIK, Agent, representing the Applicants

MURRAY FORBES, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: November 28, 2007 Toronto

ORDER

A pre-hearing was held in this matter on November 28, 2007, before this Tribunal in the presence of David Marynuik, Agent, representing 942260 Ontario Inc., dba Allanport Truck Lines and Daniel G. Perri (referred to as the Applicants) and of Murray Forbes, counsel, representing the Director, of Vehicle Inspection Standards (the Director);

While the Parties agreed that the facts contained in the Respondent's Book of Documents, at Tab 3, were not in dispute, there was no resolution of the issues between the Parties.

The parties were made aware of their obligations for full and timely disclosure under the Rules of Practice and that both parties shall fully comply with the requirements of disclosure of documents and things as set forth in Rule 6 of the Tribunal's Rules of Practice and, in this case, as set out above.

In the absence of a settlement being reached by the Parties prior to the hearing, the Tribunal Orders that the hearing will commence at the offices of the Licence Appeal Tribunal on January 29, 2008, at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: December 20, 2007

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



COUSIN EDY GARAGE INC. AND BUTROS TANNOUS

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS

TO REVOKE REGISTRATION

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: Applicants self-represented by EDDY AOUN, principal of Cousin
Edy Garage Inc.

PATRICK MOORE, Counsel for the Director

DATE OF
HEARING: 29 and 30, October 2007

Ottawa

Decision and Reasons

Background

The present appeal is brought under section 95(2) of the *Highway Traffic Act* ("the Act") from a decision of the Director of Vehicle Inspection Standards ("the Director") to revoke the licence of Cousin Edy Garage Inc. as a licensed Vehicle Inspection Station and Butros Tannous' licence as a Motor Vehicle Inspection Mechanic. That decision was contained in a Notice dated April 2, 2007.

The Applicant Cousin Edy Garage Inc. has been licensed since April 26, 2004.

The Applicant Butros Tannous was first registered as a Motor Vehicle Inspection Mechanic on May 5, 1998. He has held various such registrations at different Motor Vehicle Inspection Stations from 1998 to the present. It is Mr. Tannous' current registration with Motor Vehicle Inspection Station 42-47178 (Cousin Edy Garage Inc.) that is at issue in this matter. He has been registered with Cousin Edy Garage Inc. since April 26, 2004.

The Applicants were not represented by counsel, though they were aware of their right to be represented, if they so wished. In fact, this hearing was initially scheduled to commence on September 10, 2007. However, the Applicants, on that date, requested an adjournment of the hearing in order to retain counsel to represent them, their previous counsel being no longer retained by them. This request was opposed by counsel for the Director. Nevertheless, this being the only request for an adjournment in these proceedings and in the interests of giving the Applicants time to retain and instruct new counsel and in order to give new counsel sufficient time to prepare, the hearing was adjourned to October 29 and 30, 2007, peremptory on the Applicants. It was explained to the Applicants that it was their responsibility to retain and instruct counsel in a timely manner and to ensure that the retained counsel would be available on the scheduled hearing dates. The Applicants chose not to be represented by counsel at the hearing, which was certainly their right. Mr. Eddy Aoun stated that he would represent both Cousin Edy Garage Inc. and Mr. Butros Tannous.

The Director was represented by its counsel, Mr. Patrick Moore.

All parties attended at the hearing, and each called witnesses in support of their case.

Issues

The grounds upon which the Director based the proposed revocations were the following, as further described in the Notice dated April 2, 2007 ("the Notice"):

- a. That Applicant Garage did fail to comply with the Act and regulations or made false statements in respect of five safety standards certificates;
- b. That Applicant Garage did fail to comply with the Act and regulations as noted during the Ministry's audit that commenced in September 2004; and
- c. That the Applicant Butros Tannous did not comply with the Act and regulations and made false statements in respect of nine safety standards certificates.

In a Notice of Further and Other Particulars dated July 3, 2007 and in a Second Notice of Further and Other Particulars dated September 21, 2007, the Director added further grounds for revocation, namely that the Applicants did not comply with the Act and regulations and made false statements in respect of three additional safety standard certificates.

It is the position of the Respondent that the Tribunal should order the Director to proceed with the revocations.

It is the position of the Applicants that the revocations were not merited under the circumstances.

Evidence

The Respondent filed an Exhibit Book, a Supplementary Exhibit Book, and a Second Supplementary Exhibit Book. The Respondent also called three witnesses, two officers for the Ministry of Transportation and the owner of one of the cars specified in the Notice.

The Applicants did not file any documentary evidence. They did, however, rely on the oral testimony of Butros Tannous and Eddy Aoun, the principal of Cousin Edy Garage Inc.

Exhibits

The following documents were filed as Exhibits at the hearing:

Exhibit A - Notice of the Ministry of Transportation, dated April 2, 2007

Exhibit B - Appeal of the Applicants, dated May 14, 2007

Exhibit C - Director's Exhibit Book

Exhibit D - Director's Supplementary Exhibit Book

Exhibit E - Director's Second Supplementary Exhibit Book

Testimony of Mr. A.P.

Mr. AP testified that he brought a Pontiac Celebrity to a Garage for a safety check, as he was about to buy the car from his father. After taking it across the street for an emissions test, he brought it back to the Garage, where it was lifted onto a hoist and the tires taken off. Mr. AP bought four new tires for the car and had a safety check done. No other work was done on the car, and a safety certificate was given to him by a garage employee. It was Mr. A.P.'s evidence that he was present at this garage for about 4 hours, and that the car was on a hoist and did not leave the garage at any time. He stated that his father was also present at the garage; however, his father could not remember details of that day because he was asleep in a chair in the waiting room much of the time. Mr. AP purchased the car from his father after receiving the safety certificate. The safety certificate on its face was issued by Cousin Edy Garage Inc. and signed by Butrous Tannous as the mechanic.

Mr. A.P. also testified that the car gave him problems in the week after the safety check and eventually would not start and had to be towed. It was towed to another Garage, where Mr. A.P. was told that he should not have the car repaired as it was "finished". Thereafter, Mr. A.P. contacted the Ministry of Transportation in respect of the problems with his car and he provided a written statement dated December 20, 2006, a copy of which was filed as Exhibit C, Tab 12, p. 119.

Mr. A.P. was asked whether he had dealt with either of the two men sitting across the table in the hearing room (Mr. Aoun and Mr. Tannous). He replied that he had never seen either of them.

Testimony of Officer Marc Joseph Stang

Officer Stang is an officer for the Ministry of Transportation and works with the Motor Vehicle Inspection Program ("the Program") in Ottawa. He is a vehicle inspector and deals with licensed Motor Vehicle Inspection Stations. He has also been a licensed mechanic since 1992.

Officer Stang testified about his knowledge of Butros Tannous and Eddy Aoun which predates the registration of Cousin Edy Garage Inc. under the Program. Butros Tannous was a registered mechanic and Eddy Aoun was the manager for <name deleted> Auto Body Inc. in 2002, at the time of an investigation by the Ministry into a complaint filed by one "NC". Officer Stang was the inspector and gave evidence on the details of the complaint, his inspection of the vehicle and his investigation file, a copy of which was included under Tab 5 of Ex. "C". This complaint eventually led to a conviction being entered against Butros Tannous, as the mechanic, under s. 90(3)(a) of the Act, for having issued a safety certificate to a vehicle which was found to not be compliant with the safety standards. A conviction was also entered against the station. In November 2003, a complaint was filed by one "PB" to the Ministry and investigated by Officer Stang. This complaint too led to a conviction against Butros Tannous and against <name deleted> Auto Body Inc., this time under s. 99(2) of the Act. A copy of the Ministry file in respect of this conviction was included under Tab 7 of Ex. "C". During the investigation into this complaint, Officer Stang visited <name deleted> Auto Body Inc. and was attended to by Eddy Aoun and Charles Aoun. Both were asked for work orders relating to certificates that were issued by this station and none were made available, either when requested or thereafter. It is noted that Eddy Aoun objected to evidence being given in respect of the above matters, on the grounds that they had "nothing to do with [him]".

Officer Stang then gave evidence about investigations in 2004 that arose as a result of a Ministry audit rather than an individual's complaint. At this time, Cousin Edy Garage Inc. was recently licensed under the Program, with Eddy Aoun as the Licensee, and Butros Tannous as the registered mechanic. The Ministry had noticed an excessive number of safety certificates having been issued by the Applicants, and Officer Stang ran off copies of all the certificates in the previous two weeks. He chose three vehicles and found only one on the road. That vehicle was inspected by Officer Stang and a copy of the investigation file was included under Tab 8 of Ex. "C". Officer Stang gave detailed evidence of the defects found on the car, which caused him to draw the conclusion that the car had not been inspected at all, even though a safety certificate bearing the signatures of Butros Tannous and Eddy Aoun had been issued in respect of this vehicle. During the course of this investigation, Officer Stang attended at Cousin Edy Garage Inc. and dealt with Eddy Aoun, as he was the owner of the station. Officer Stang requested the work orders for the last three certificates issued. Mr. Aoun could not make the work orders available. This matter resulted in convictions against both Applicants.

The Ministry audit also led Officer Stang to review recent books of certificates issued by the Applicants. Each book includes 20 certificates, and Officer Stang testified that documentation for each vehicle for which a certificate is issued must be kept onsite at the station for a period of at least six months. The documents to be kept would include a copy of the certificate and the work order relating to the inspection of that vehicle. A request was made for the documentation relating to numerous books of certificates. No work orders or other documentation were made available by Cousin Edy Garage Inc. and Mr. Aoun's explanation to Officer Stang was that everything was out with the bookkeeper. A detailed review by Officer Stang of these books of certificates revealed problems on the face of some of the certificates such as mismatched signatures, missing signatures and certificates issued by a station that was not Cousin Edy Garage Inc. Officer Stang testified that he showed the mismatched signatures to Butros Tannous and that Mr. Tannous was able to confirm which were his and which were not. By way of illustration of the prevalence of problems relating to signatures, some books had one certificate which purported to be signed by Butros Tannous but the signature was not his. Other books had two, three, four or six certificates with falsified signatures. In one book of certificates, every certificate had a falsified signature. When asked why he inquired about the signatures, Officer Stang explained that he suspected that certificates were being issued for vehicles that were not inspected at all. This suspicion arose initially because whenever the Ministry made an unannounced visit to Cousin Edy Garage Inc., Mr. Tannous was not present, and there were no other registered mechanics for the garage. Officer Stang estimated that in order to issue the number of safety certificates that the Applicants did, there would have to be a mechanic working on safety checks for five to six hours a day, yet Mr. Tannous was not ever at the garage when Officer Stang or another Ministry representative attended at the garage.

Officer Stang gave evidence in respect of the documents under Tab 13 of Ex "C", which were warning letters to Cousin Edy Garage Inc. for failure to comply with the regulations in respect of the record keeping. (These warning letters related to the investigation described in the previous paragraph.) The nature of the non-compliance was no work orders being kept on the premises and problems on the face of the certificates (falsified or missing signatures), as detailed in the preceding paragraph. Each warning letter related to one book of certificates and, therefore, twenty vehicles. Forty-five warning letters to Cousin Edy Garage Inc. were included in Tab 13, which would have covered 900 certificates.

Neither Mr. Aoun nor Mr. Tannous had questions to ask Officer Stang.

Testimony of Officer Graeme Cook

Officer Cook is an officer for the Ministry of Transportation and works with the Program in Ottawa. He is a vehicle inspection officer and deals with licensed Motor Vehicle Inspection Stations. He has been qualified as an automotive mechanic since 1989.

Officer Cook's role in the matters relating to Cousin Edy Garage Inc. and Butros Tannous includes conducting a file review and preparing a summary of the history of each Applicant with the Program, in addition to investigations in which he took part personally. He explained that while Butros Tannous has been registered as a mechanic with three different stations within the Program, at the present date only his registration with Cousin Edy Garage Inc. continues. It is this registration that the Director proposes to revoke.

Officer Cook described each of the investigations in which he was personally involved, namely, the complaints that are set out in the documentation filed as Exhibits C6, C9, C10, C11, C12, D3, D4, D5, D6, D7, E2, E3, E4 and E5. He testified in detail about the nature of each complaint, his inspection of the eight vehicles in question, and his conclusions. In each case, it was Officer Cook's conclusion that either Butros Tannous or Cousin Edy Garage Inc. (or both) had issued a safety certificate for a car which did not meet the requirements at the time of the inspection.

Counsel for the Director asked Officer Cook, for each one of the vehicles, whether any of the issues that the Officer noted could have been acceptable at the time of certification and Officer Cook was able to answer which problems might have occurred after the certification and which would have existed at the time of the certification. In respect of each complaint, at least one defect in the vehicle, in the opinion of Officer Cook, existed at the time of the certification, which defect should have precluded certification. Officer Cook was able to describe each of the defects in detail, often with the aid of photographs he had taken, and to explain his opinion on whether the defect existed at the time of the inspection.

In cross-examination by Mr. Eddy Aoun, Officer Cook was asked detailed questions about a number of the cars that the Officer had inspected. In particular, Mr. Aoun challenged Officer Cook's conclusion that certain defects noted existed at the time of the certification. In a few instances, where Mr. Aoun asked whether there was a "fresh break", in other words, whether the defect only happened after the certification, Officer Cook answered "It is possible". In other instances, Officer Cook answered that he did not see evidence of it being a fresh break. Officer Cook also answered a few of Mr. Aoun's questions by stating "I look at a vehicle and determine whether the defect was present at the time of the safety inspection."

When asked by Mr. Aoun "how long is a safety good for?", Officer Cook replied that for the purposes of transfer, the safety certification is useable for 36 days. Mr. Aoun asked whether he was responsible for defects in the car after the safety check, and Officer Cook replied "No, you are responsible for certifying the safety of the vehicle. If there is a safety defect on the day of the inspection, and that violation is found by the Ministry more than 36 days afterwards, then you are responsible and in violation of the Act."

Mr. Butros Tannous also asked Officer Cook questions in cross-examination. These questions related to whether the Officer had seen instances of a ball-joint or bushing moving out of place by rough driving, bad road conditions or going over bumps or potholes. Officer Cook responded that this could occur, but it would need to be pretty severe and other signs of damage would also be present.

Evidence of Butros Tannous

Mr. Tannous gave his evidence essentially in the form of submissions, which the Tribunal allowed, as he was self-represented. He stated that the documents filed in Exhibits "D" and "E" should not be considered in this proceeding, since neither he nor Cousin Edy Garage Inc. had been charged in relation to any of these vehicles. He also stated any activity or complaints when he was a registered mechanic at any station other than Cousin Edy Garage Inc. should not be considered. Mr. Tannous also testified that with respect to the three convictions while with Cousin Edy Garage Inc., he had agreed to plead guilty and pay a fine because the Crown made it clear that it would be seeking a fine of \$15,000 per vehicle if the matter proceeded to trial, and he simply could not afford to pay \$45,000.

In cross-examination by counsel for the Director, Mr. Tannous was asked to confirm that at the time of the last three convictions, he already had five previous convictions. Mr. Tannous replied "I don't really know." With respect to the last three convictions, Mr. Tannous confirmed that he understood that he had the opportunity to have a trial in Court and that pleading guilty meant admitting to the violations; however, Mr. Tannous testified that he did not want to challenge the charges at a trial because he does not believe in the justice system and he does not believe that a judge should be judging him because they do not understand mechanics. In addition, Mr. Tannous stated that he did not know that paying fines would result in the revocation of his registration. When Mr. Moore showed him the warning letters filed as Exhibits "C5", p.38, "C7", p.58, and "C8", p.65, in particular, the second sentence of the second paragraph which reads "Please understand that failure to comply with the requirements of the program could result in the revocation of your registration as an inspection mechanic or the revocation of the license authorizing the operation of a Motor Vehicle Inspection Station", Mr. Tannous agreed that these letters did warn him that failure to comply could result in the revocation of his license.

Evidence of Eddy Aoun

Mr. Aoun first stated that he did not have evidence to call but then, in submissions, began to give testimony. While this was irregular and objected to by Counsel for the Director, the Tribunal allowed Mr. Aoun to give his evidence out of the usual order and Mr. Moore to cross-examine him thereafter.

Mr. Aoun testified that when he first applied for his license, he was not told that he had to keep invoices, and that when the Officers asked for them, they were at the bookkeeper's during tax time. He stated that the Officers were not serious about the matter because they did not ask again. When asked questions about this, Mr. Aoun agreed that he did receive a manual with his license but did not read it, although he read some parts of it after the complaints.

With respect to Mr. A.P., Mr. Aoun stated that his car did "come to my garage" and that Mr. AP "was sleeping beside his father" and that is why he did not know that his car was checked at Cousin Edy Garage Inc. When questioned about further details, Mr. Aoun stated that "an employee of <name deleted>, a French guy, brought it to my shop, on the same day as the safety". On cross-examination, Mr. Aoun admitted that he had sold safety certificates to other garages to issue but that he never gave them signed certificates. In any case, Mr. AP's car was brought to his garage and he had a work order for it but did not bring it to the hearing. Mr. Aoun also stated that he had heard Mr. A.P.'s testimony on the previous day, but he "did not pay attention to it".

With respect to vehicle inspections, Mr. Aoun made somewhat contradictory statements. On the one hand, he testified that there is no point in covering up problems with cars, because the more problems there are, the more money he makes on repairs. On the other hand, Mr. Aoun also stated that people can take their cars to other garages to get a safety certificate, so he cannot be too hard on safety checks, as people will just take their cars elsewhere.

Mr. Aoun also testified that he should be allowed to make some mistakes and that three mistakes in 15 years of experience in the field was very good. Mr. Aoun challenged the existence of six complaints against the garage and stated that two or three should be excluded because there were no convictions.

As to Mr. Tannous' signatures having been falsified on some certificates, Mr. Aoun stated that the signatures were, in fact, Mr. Tannous', that Mr. Tannous had hurt his hand and was signing with his other hand, and that is why the signatures did not look like his.

In cross-examination, Mr. Aoun stated that he was the floor manager at <name deleted> and Mr. Tannous' supervisor there. At Cousin Edy Garage Inc., Mr. Aoun supervises Mr. Tannous and likely did at the time of the convictions against Mr. Tannous. Mr. Aoun also stated that he knows better than mechanics and that he double-checks everything at the garage.

In conclusion, Mr. Aoun stated that he would "pay more attention" in the future. Mr. Aoun stated that he previously thought that unless something was found within 36 days of the safety, he was not responsible. Now that he is being told by the Ministry through this case, that for \$50, he has to warranty the car for 6 months, he "will be more strict".

The Law

Section 91(8) permits the Director to revoke or refuse to renew a motor vehicle inspection license in certain situations. Section 93 permits the Director to revoke the registration of a motor vehicle inspection mechanic in certain situations.

The Director relies on sections 91(8)(a) and (e) of the Act with respect to Cousin Edy Garage Inc. and sections 93(a) and (c) with respect to Mr. Tannous.

Decision and Order

This Tribunal heard many hours of testimony, most of which was uncontroverted. There were, however, a few issues where the testimony of Mr. A.P., Officer Stang or Officer Cook was challenged by the questions or testimony of Eddy Aoun. The issues where evidence was contradictory fell into the following categories: (1) whether defects in vehicles inspected occurred only after the date of the safety certificate, (2) whether mismatched signatures of Butros Tannous were his, and (3) whether Mr. A.P.'s car was brought to Cousin Edy Garage Inc. for a safety check.

With respect to whether defects in vehicles occurred only after the date of the safety certificate, each of Officer Stang and Officer Cook were asked and clearly answered which defects, in their opinion, existed at the time of the safety check. They each stated that some were or "possibly" were created only after the safety certificate. Moreover, each of the Officers had made notes at the time of the inspections and Officer Cook had taken photographs as well. Mr. Aoun, on the other hand, stated that each safety certificate was properly issued and all defects occurred after the safety certificate; however, Mr. Aoun did not have any work orders relating to any of the vehicles or notes on what was observed at the time of the safety check at his garage. As a result, the Tribunal preferred the evidence of Officer Stang and Officer Cook on this issue.

On the matter of Mr. Tannous' signatures on a large number of safety certificates being or not being his, Officer Stang testified and noted in his investigation reports that he had asked Mr. Tannous about them and Mr. Tannous had stated that the signatures were not his. Mr. Aoun testified that the signatures were those of Mr. Tannous but that they looked different because Mr. Tannous had hurt his hand and was signing with his other hand. When asked by the Tribunal how it is that Mr. Tannous had not told the Officer or the Tribunal about a hurt hand affecting his own signature, Mr. Aoun's evidence was "he forgot". This Tribunal does not find this evidence on the part of Mr. Aoun credible.

This Tribunal came to a similar conclusion with respect to Mr. A.P.'s car. Mr. A.P. testified, on the first day of the hearing, that his car did not leave the Garage on the date of the safety certification, that it was not brought to Cousin Edy Garage Inc., and that he had never seen Mr. Aoun nor Mr. Butrous before. It is noted that the safety certification for Mr. A.P.'s car came from Cousin Edy Garage Inc. and was signed by Butros

Tannous and Eddy Aoun. On the second day of the hearing, towards the end of the day, Mr. Aoun stated that Mr. A.P.'s car was brought to his garage where a full safety inspection was conducted and that Mr. A.P. did not know about it, because he was asleep at the Garage where the safety inspection was done. Mr. Aoun stated that he has a work order for that car but did not bring it to the hearing. Mr. Aoun explained that he did not ask Mr. A.P. questions on the preceding day because he "did not pay attention" to Mr. A.P.'s evidence. This aspect of Mr. Aoun's evidence was not credible.

Overall, the evidence presented during the hearing demonstrates that the licensee, Cousin Edy Garage Inc., has numerous convictions for contraventions of safety standards and licensing conditions set out in the Act. The evidence also demonstrates that the mechanic, Butros Tannous, has numerous convictions under the Act.

Further, this Tribunal has heard and considered the testimony of all five witnesses and finds that each of the grounds set out in the Notice dated April 2, 2007 has been made out by the Director. The further grounds relied upon by the Director, as set out in the Notice of Further Particulars dated July 3, 2007, and in the Second Notice of Further Particulars dated September 21, 2007, were also made out.

As the Applicants pointed out, the allegations of contravention in both sets of Further Particulars have not led to charges or convictions against the Applicants. However, the Act refers to conduct which "does not comply with this act or the regulations" and does not require the conduct to have resulted in a charge or a conviction. Non-compliance with the Act or the Regulations is what is required in order for the Director to propose to revoke a license or a registration, and numerous examples of non-compliance have been proved. Further, non-compliance could, technically, be one violation of the Act or the Regulations. Here, there are many dozens of acts of non-compliance on the part of Cousin Edy Garage Inc. and more than a dozen on the part of Butros Tannous.

The evidence also shows that despite ongoing convictions, investigations and warnings, the Applicants' violations continued. It was demonstrated during the hearing that even after the commencement of this proceeding by way of the Director's Notice, in April 2007, three further violations have occurred.

This Tribunal accepts that public safety is the rationale behind the legislation. The Director has a responsibility to the public under the Program and in the licensing and registering of individuals to perform inspections and provide safety certificates. It is clear to this Tribunal that the facts here establish that the particulars set out in the Notice by the Director and the past conducts give reasonable grounds for the belief that the Applicants will not bear their share of the responsibility to the public under the Program.

The Applicants' non-compliance with the Act and its regulations has been repeated and egregious.

For all of the above reasons, the Applicants' Appeal is denied, and the Tribunal directs the Director to carry out the Proposal to revoke Cousin Edy Garage Inc.'s license and Butros Tannous' registration.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: December 21, 2007

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



PRE-HEARING

FAHMI KREEM AND FAHMI KREEM DBA AUTO INSPECTION – PRE-HEARING

**APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS**

**TO REFUSE REGISTRATION AS A MOTOR VEHICLE
INSPECTION STATION AND TO REFUSE REGISTRATION AS A
MECHANIC**

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: FAHMI KREEM, appearing on behalf of the Applicants

MURRAY FORBES, Counsel, appearing on behalf of the
Respondent

**DATE OF
PRE-HEARING:** December 5, 2007

Toronto

ORDER

A pre-hearing was held on December 5, 2007, before the Licence Appeal Tribunal (the "Tribunal") in the presence of Fahmi Kreem, representing himself and Fahmi Kreem dba Auto Inspection (the "Applicant"), and Murray Forbes, Counsel representing the Director of Motor Vehicle Inspection Standards (the "Respondent");

The Tribunal Orders that:

1. Since the Applicant no longer owns or operates the motor vehicle inspection station, the inspection station is not registered;
2. The Applicant cannot be registered to a station that is not a registered motor vehicle inspection station;
3. The appeals on both refusals are hereby abandoned; and

4. The hearing scheduled to commence on January 23, 2007, at the Tribunal Chambers is hereby cancelled and this matter is closed.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

RELEASED: December 13, 2007

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



LITTLE CITY AUTO SERVICE INC. and
VINCENT CACHIA

Appeal From a Notice of Proposal of the Director of Vehicle
Inspection Standards to Revoke a Motor Vehicle Inspection Station
Licence and to Revoke a Motor Vehicle Inspection Mechanic
Licence

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JUSTIN JAKUBIAK, Counsel, representing the Applicants

MURRAY FORBES, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING: October 29 & 30, 2007 Toronto

REASONS FOR DECISION AND ORDER

The two Applicants in this matter appeal from a Notice issued by the Director of Vehicle Inspection Standards on May 25, 2007¹ proposing to revoke the Motor Vehicle Inspection Station registration of the corporate Applicant, Little City Auto Service Inc. ("Little City") and the Motor Vehicle Inspection Station Mechanic registration of the personal Applicant, Vincent Cachia ("Cachia"). The Notice sets out a number of convictions as grounds for revocation. There are four older convictions, one in 1999 and one in 2002 for making false statements in safety standards certificates. Little City was convicted on two counts in November 2001, for issuing safety standards certificates while its registration had lapsed. Little City was convicted more recently, in March 2006, of issuing an annual inspection certificate but failing to attach the annual inspection sticker to a vehicle. Three other charges for failing to attach an annual inspection sticker are pending against both Applicants.² The evidence led by the Director also established that Cachia had two convictions in the July 1988, for making false statements in safety certificates.³

¹ Ex 1

² Two of these incidents are set out in Ex 1 and the details of the third incident are set out in Ex 9.

³ Ex 4 Tab 9 page 55

The Tribunal heard evidence from four enforcement officers who had had dealings with the Applicants or who had discovered missing annual inspection stickers. Each of the four officers who testified held mechanics' licences for vehicles of less than 9000 kg without air brakes and vehicles in excess of 9000 kg with air brakes. They had all worked as mechanics prior to joining the Ministry and continued to apply their training and knowledge on a daily basis in their current positions as enforcement officers. Their evidence was given in a thoroughly professional manner without hyperbole. It provided the Tribunal with valuable background information to fill out the substance behind the bare factual allegations set out in the Notice. Of the four officers, Officer Dodwell has had the longest history of and most direct dealings with the Applicants. It was his concern that triggered the Director's actions.

Officer Dodwell's concerns are set out in a letter dated April 18, 2007, to Paula Anderson, Enforcement Coordinator.⁴ Oral testimony flushed out the content of the letter. His concerns address the conviction and charges pending record set out above and add to them the fact that, in the first three and a half months of 2007, the Applicants had issued 320 annual inspection certificates and 320 safety standards certificates. In Officer Dodwell's view the total number of inspections is extremely high and probably impossible for a one-man operation to achieve. He testified that, from his experience working as a mechanic, it takes approximately an hour to complete a safety inspection and about an hour and a half to complete an annual inspection on a commercial vehicle. This number was generally confirmed by the testimony of the other officers although it was suggested that the time could be reduced somewhat if the vehicles to be inspected were prepared by helpers. The helpers could remove wheels and covers to make the inspection easier. With this type of help available, a safety inspection might take forty-five to fifty minutes and an annual inspection might be completed in about an hour and a quarter.

Officer Dodwell has attended at the Applicant's premises approximately 20 times over the years. It was his testimony that he has never seen a commercial vehicle being serviced at the Applicants' premises. He has found the premises to be messy, so much so that only one bay with a hoist can be used, the other hoist area being blocked by old parts and tools. Photographs taken by him show that the front door of the operative bay is not high enough to admit a tractor, trailer, or commercial truck⁵. On a number of occasions he has attended in the middle of the day and found no one at the premises. It is his conclusion, a fact that was confirmed in Cachia's testimony, that commercial vehicles are being serviced outside. Given the reality of Ontario winters, where the Applicants forced to work outside because of lack of indoor facilities, Officer Dodwell does not believe that the Applicants could carry out as many inspections as they purport to have done given the total number of certificates issued in January, February, March and April of 2007. He removed the certificate books and carried out an analysis of the certificates issued on a day-by-day basis.⁶ His analysis indicated that, for example, on

⁴ Ex 4 Tab 2 Page 5

⁵ Ex 4 Tab 12 Pages 65 and 66

⁶ The results of this analysis are set out at Ex 4 Tab 11, pages 62 and 63. The actual certificates and related documentation are contained in four large binders, Ex 5, 6, 7 and 8.

March 17, 2007 the Applicants issued 10 annual inspection certificates and two safety certificates. Officer Dodwell was of the view that this would involve a seventeen-hour day if each annual takes one and a half hours and each safety takes an hour. On April 30, the Applicant issued 15 each of annual inspection certificates and safety standards inspection certificates translating into a thirty-seven and a half hour day.

On one inspection, Officer Dodwell found a book of annual certificates with five certificates completed and issued. The other five certificates had been signed by Cachia yet were left blank so they did not relate to any specific vehicle. In Officer Dodwell's words, this action is like issuing a blank cheque. Even if the original intention is honorable, these certificates could fall into the wrong hands and be issued for use with respect to unsafe vehicles. Cachia was present at the time and Officer Dodwell discussed the signed blank certificates with him. Cachia did not deny pre-signing the certificates. He testified that it was his practice to sign certificates in blank for vehicles he was inspecting and then, once a satisfactory inspection was completed, he would have his spouse, who helped with the office work, fill in the vehicle particulars. The alternative is for the certificate to be smudged from Cachia's dirty hands or for Cachia to be constantly washing the oil and dirt from his hands. Since Officer Dodwell expressed his concerns, Cachia endures the hand washing.

In giving testimony on behalf of the Applicants, Vincent Cachia confirmed a great deal of Officer Dodwell's testimony. On one point he differed significantly. Where Officer Dodwell had stated his belief that a commercial vehicle is too large to get into the Applicants' premises, Cachia stated that his rear bay entrance is, in fact, high enough to permit a tractor unit entry. Notwithstanding that fact, he did confirm that he conducts commercial vehicle inspections outside in both summer and winter. He pulls the vehicles up to the bay door and works on them there.

According to Cachia's testimony, he has undergone a recent change in his business. Until a couple of years ago he did carry out safety inspections but not in the numbers he presently does. With respect to the convictions in 2001 arising out of his expired licence, it was his testimony that he found out that his licence had expired only when he had run out of certificate books and applied for new ones. He was advised that he could not be issued new books because his licence was suspended. It is of note that the impugned safety certificates are dated in August 2001, whereas his licence had expired on December 31, 2000, indicating there was not a high demand for certificates at that time. A couple of years ago he started focusing on the issuance of annual and safety certificates. A number of garages refer their inspections to him. He pointed out that they he did not carry out repairs on referred vehicles. If he finds a defect in need of repair, the vehicle is sent back to the referring garage for repair. It is then returned to him for a final inspection. He stated that on the final inspection he simply inspects the defective area and does not inspect the whole vehicle again. Thus, if the defect is a broken taillight, Cachia will ensure the taillight has been repaired and is working and then issue the inspection certificate. This type of follow-up inspection can take as little as five or ten minutes. It may take longer depending on the repair to be inspected.

The business the Applicants operate will open seven days per week as necessary. Cachia will attend when there is work and stay until the work is completed. Sometimes he has a great deal of work, sometimes less. He testified that he might attend at the premises at 7:00 a.m. and work until 11:00 p.m. He may not arrive at the garage until 3:00 p.m. or so and work until 2:00 a.m. He has three helpers who prepare vehicles for inspection, two of whom are his stepsons. All three are mechanically minded although not qualified mechanics. They come each evening, when there is work, to prepare vehicles for inspection. A great deal of his commercial vehicle inspection business is carried out in the evening. In this way, Cachia stated that each full safety standards inspection takes approximately forty-five minutes and each full annual safety inspection takes about an hour.

A review of the analysis prepared by Officer Dodwell indicates that there were days with few annual inspections and days with few safety inspections as well as days when there were many.⁷ In explaining the days where there were many inspections, Cachia stated that on those days he issued certificates for a number of vehicles that had been returned from the referring garage for re-inspection after repairs had been carried out. As stated above, the re-inspections may not take long. On cross-examination, he was pushed to explain why he had high numbers of inspections on successive days if many of the issued certificates related to inspections carried out the day before and returned by the referring garage. Cachia had no specific explanation for this phenomenon. He simply reasserted that on days with high numbers, he was finalizing inspections carried out earlier. He specifically denied selling certificates without conducting the relevant inspections.

Of the four recent incidents where commercial vehicles had been found without inspection certificates being attached, Cachia explained how it had come about. When commercial vehicles are brought in for annual inspection, it is common practice for the driver to go to a restaurant across the road for lunch or supper. Cachia often carries out two inspections before completing the paperwork. As stated above, his hands are dirty so he waits until he has completed two inspections before washing them and completing paperwork. On a number of occasions the driver has returned from the restaurant and asked one of his helpers if the vehicle is ready. The helper, being aware that the inspection has been completed, has informed the driver that it is ready. The driver has then driven the truck away without waiting for the paperwork. Cachia stated that the operator has refused to return the vehicle to his shop just to affix the annual inspection sticker, usually because the vehicle has been in and out the repair garage or inspection garage several times. The operator has undertaken to affix the sticker and Cachia has sent it to the operator. The operators in these cases have not affixed the sticker as they had promised. Cachia admitted that he was aware that it was his responsibility to affix the sticker but trusted the operators. He testified that he has changed his procedure and will not now issue an annual inspection certificate without the vehicle being in his presence so he can affix the sticker.

⁷ Ex 4 Tab 11 pages 62 and 63

Of the evidence as a whole, the tension between the evidence put forward by the Director and the Applicants' evidence is more apparent than real. At the heart of the Director's evidence is the underlying suggestion that the Applicants are not, in fact, carrying out the inspections for which they are issuing certificates. This position is based on the evidence of the enforcement officers, especially Officer Dodwell, that a safety standards inspection takes approximately one hour and an annual safety inspection takes approximately an hour and a half, although both of these times may be reduced with the aid of helpers. The Applicants issued approximately 640 certificates in the first 4 months of 2007. While the total number of certificates issued appears high, the Applicants' evidence was that the garage is open seven days a week as necessary to complete the inspections. It was also Cachia evidence that for the past two years he has focused on safety inspections such that they constitute the bulk of his business. The Applicants do not carry out repairs on inspected vehicles. Over the time frame analyzed by Officer Dodwell, the Applicants averaged five inspections per day. Seen in that light, the total number of inspections is not excessive, especially for a garage which focuses on inspections and, even at the high end of one and a half hours per day for each inspection, translates into a seven and a half hour working day. Officer Dodwell's analysis suggests that the Applicants generally did not issue certificates on Sundays although there are some exceptions. Even allowing for Sundays, the average inspection rate of six vehicles per day is not excessive. What would appear unique about the Applicants is that they focus on safety inspections. This fact makes their numbers appear excessive.

The Tribunal accepts the Applicants' evidence that on days where there appear to be a high number of inspections, many of the certificates related to the completion of inspections on vehicles returned from repair. The Director urges on the Tribunal the position that it is in breach of the regulations to simply inspect the repair and issue a certificate if the vehicle has left the Applicants' premises. It is the Director's position that the issuance of the certificate represents a snap shot of the condition of the vehicle at the moment the inspection is completed and not a representation of the condition of the vehicle a day or two earlier when the bulk of the inspection was carried out. While citing Regulation 611 under the Highway Traffic Act, the Director drew no specific section to the attention of the Tribunal in support of this position. The Tribunal notes that an annual inspection certificate is valid for in excess of one year. It certifies that the areas set out in the regulation have been inspected and found to conform with standards within the last twelve months.⁸ The Tribunal finds that the Director's position is a counsel of perfection. Safety cannot be materially impacted when a vehicle is certified safe, with no re-inspection required for a year, simply because the inspection process itself extended over a two or three day period.

⁸ It is worthy of note that an inspection conducted on the first day of a month is actually valid for thirteen months

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:

- (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

- (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,
 - (e) 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;
 - (f) any inspection authorized by the licence is incompetently performed;
 - (g) 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;

- (h) there is a breach of a condition of the licence;
- (i) the licensee does not comply with this Act or the regulations;
- (j) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
- (f) 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
 - (g) 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;
 - (c) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
 - (h) 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.

The statutory test then, applicable to both Applicants, is whether the Tribunal is satisfied that the past conduct of the Applicants affords reasonable grounds for belief that they will not act carry out their obligations as a motor vehicle inspection station and mechanic in accordance with the law and with honesty and integrity. It is trite law that the Director bears the onus of establishing grounds for denial. Where the issue is revocation, the onus on the Director must be established by clear and cogent evidence.

The Act is designed to protect the Ontario public by ensuring that vehicles operating on our highways meet a certain minimum standard. The inspection requirement for non-commercial vehicles is triggered by a transfer of title. The impact of the requirement is that non-commercial vehicles may remain uninspected for many years. Larger commercial vehicles are subject to an annual inspection regime backed up by on-road inspections and facilities audits. Responsibility for annual inspections is placed squarely on the shoulders of motor vehicles inspection stations and the mechanics registered to work in them. Ontario invests them the public trust to ensure vehicles operating on the highway are safe. Breach of that trust may afford the reasonable grounds required by the statute for a revocation or refusal to renew a registration, especially where the breaches show a pattern of total disregard for the regulations, negligence, willful blindness or just plain dishonesty.

The Applicants have a rather lengthy involvement with the enforcement provisions of the Act. In 1988, 1999 and 2001, there were charges for failure to properly inspect. There were convictions again in 2002 arising out of the Applicants' failure to renew their registrations. The Tribunal notes that the flurry of charges between 1999 and 2002 did not result in a proposal to revoke, notwithstanding that most them related directly to improper inspections that resulted in unsafe vehicles using the highways of the Province. The Applicant was charged, carried out repairs to the defective vehicles and was permitted to carry on his business. There have been no further incidents since that time where it has been shown that the Applicants have carried out negligent inspections. In making this statement, the Tribunal is cognizant of the fact that one vehicle was found to have a leaky brake cylinder when inspected but no evidence was put before the Tribunal to suggest that it was unlikely for such a leak to develop after the inspection but before the vehicle was stopped. It would appear that the Applicants' past conduct with respect to the earlier series of problems indicates that they have a propensity to learn from errors and correct erroneous behaviour.

Absent evidence that the vehicles that were missing stickers were mechanically unsafe or defective, the current spate of four incidents is of a different nature to the earlier charges. On the evidence it appears that Cachia was trying to accommodate his customers, albeit improperly. His actions had the potential for abuse since an

unscrupulous operator could affix an annual inspection sticker to an unsafe vehicle to which it did not relate. Cachia appears not to have considered that possibility in reposing his trust in the vehicle operators to affix the stickers. His actions are a grave breach of the regulations but, at the same time, they represent behaviour that is easily remedied. Given Cachia's improved performance after his difficulties in the 1999 to 2002 period, the Tribunal is satisfied that his past behaviour establishes that he is likely to act in the future with integrity and honesty and in accordance with the law.

In arriving at this determination the Tribunal takes into account of the fact that the number of missing stickers represents a very low percentage of the total number of inspections carried out by the Applicants, slightly more than one half of a percent. The Tribunal also accepts that Cachia was not motivated by any improper motive. It was urged on the Tribunal on behalf of the Director that the large number of certificates issued, when considered in conjunction with these four incidents, is evidence that the Applicants were selling certificates without inspecting the vehicles. The Tribunal finds no evidence in support of this position nor is it a compelling inference from the evidence.

ORDER

On all of the evidence, this Tribunal finds that the Director does not have reasonable grounds for the belief that the Applicants will not operate with integrity and honesty and in accordance with law. Accordingly the Tribunal orders the Director not to carry out the provisions of his Notice dated May 25, 2007 to revoke the registration of the Applicants as an MVIS or an MVIS mechanic, as applicable.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude,
Vice-Chair

RELEASED: December 12, 2007

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

SEBASTIAN BALDYGA dba UNDERGROUND GARAZ

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

AND IN THE MATTER OF an Application by
Sebastian Baldyga and Underground Garaz for
a hearing before the Licence Appeal Tribunal
pursuant to Section 95 of the *Highway Traffic Act*
appealing the Notice of the Director of Vehicle
Inspection Standards dated December
December 11, 2006;

AND IN THE MATTER OF Motor Vehicle
Inspection Station Licence Number 57478 in the
name of Sebastian Baldyga dba Underground
Garaz;

AND IN THE MATTER OF the registration of
Motor Vehicle Inspection Mechanic, Adam
Zurawski holding Trade Certificate Number
310B-396079.

PANEL MEMBERS: ANDREW DIAMOND, Vice-Chair

APPEARANCES: MURRAY FORBES
Counsel for the Director of Vehicle Inspection Standards

MACIEJ (MATT) MILCZARCZYK, Counsel Representing the
Applicants

DATE OF HEARING: July 27, 2007

Toronto

DECISION AND REASONS

INTRODUCTION

As set out by the Ontario Divisional Court in *Brenner v. Ontario Registrar of Motor Vehicle Dealers and Salesmen* [1983] O.J. No. 1017 and more recently in *Registrar Motor Vehicles Dealers Act v. Bilal Ahamad Khan* [2007] 385/05

The Tribunal's task [is] to determine if the past conduct of the [applicant] affords "reasonable grounds" for belief that he would not carry on business in accordance with the law and with integrity and honesty.

It is an uncontroverted fact that the Applicant, Adam Zurawski (Zurawski), while holding an inspection station licence, was convicted for failing to keep the proper books and records required of a licensee. In fact, not only was he convicted, he was given a second chance and was convicted on a number of counts, after having been given a second chance. In short the Director of Vehicle Inspection Standards takes the position that Zurawski's past conduct, which resulted in convictions on multiple counts, "affords reasonable grounds for the belief that Zurawski would not carry out his new business in accordance with the law".

In contrast counsel for the Applicants argues that there has been a material change in circumstances such that the past conduct of Zurawski is not indicative of how the business will be run going forward. The Applicants argue that Zurawski is an excellent mechanic, but a poor record keeper. Under the proposed new regime, he would not operate the inspection station, but would merely be the licensed mechanic. The Applicant Sebastian Baldyga would hold the licence for the inspection station and he would, in effect, act as a surety that the work was done in accordance to the Act and Regulations.

BACKGROUND

In order to understand the position of each of the parties it is necessary to understand the regulatory regime in which the Applicants propose to work.

The licences in question deal with the inspection and certification of cars that had previously been written off and determined to be not roadworthy. In Ontario since 2003, there has been a mandatory branding program for cars that have been in significant accidents. When a car is written off due to accident, it is branded as "salvage". A car branded as salvage may not be registered for use. However, salvage vehicles may be rebuilt, and if they meet the set criteria for safety and are brought back to within set tolerances of the manufacturer original specifications, they can be rebranded as "rebuilt". Rebuilt cars can be licensed for use by consumers.

In order for a car that has been branded as salvage to be rebranded as rebuilt, it must be inspected and certified by a licensed inspection station employing a mechanic with the necessary inspection licence. In this case the applicant Baldyga has applied for an

inspection station licence and Zurawski has applied for a licence as a mechanic to conduct the inspections for the inspection station to be owned by Baldyga.

The purpose of the branding and inspection process is two fold: the first is to ensure that rebuilt cars meet manufacturer specifications and are safe to be placed back on the road. In order to do this the mechanic must inspect and measure the vehicle to ensure that all welds are of appropriate quality and that the frame is within the manufacturers standards.

The second part of the inspection regime is designed to protect consumers from fraud. The evidence of Alan Gibson, an Enforcement Officer with the Mandatory Branding Unit of the Ministry of Transportation, was that the business of rebuilding cars has been rife with issues of integrity. Specifically, the Vehicle Identification Numbers (VINs) from written off cars have been known to be switched with those of stolen cars. In other words someone would buy a written off (salvage) car and then steal another identical car that was in good working order. The VIN of the stolen car would then be replaced with the VIN of the salvage car and the stolen car would then be sold as rebuilt. The second and related area of fraud with respect to rebuilt cars is that stolen cars are disassembled and the parts are then used to rebuild the salvage cars which are then sold to consumers with parts from the stolen car.

Under the regulatory regime it is the responsibility of the inspection station and its mechanic, not only to inspect the rebuilt car, but also to ensure that the car and the parts are legitimate. This is done by the mechanic's inspecting photographs of the damaged car, as well as the repaired car to insure that they are the same car and that the damage was repaired. The mechanic may also inspect the invoices for the parts used to repair the car to ensure that they are from legitimate sources. Once those inspections have been completed the inspection station is obliged to provide the supporting documentation to the Ministry.

The Director's Grounds for Revocation

The Director's Proposal states the following:

Take notice that pursuant to clauses 92(4) and (b) of the *Highway Traffic Act* ("the Act"), the Director of Vehicle Inspection Standards ("the Director") refuses to register Adam Zurawski as a motor vehicle inspection mechanic ("MVIS") at the proposed station on the following grounds:

1. Mr. Zurawski was the licensee of motor vehicle inspection station #31-46744 from November 4, 2003. In relation to this station licence, Mr. Zurawski repeatedly violated the requirement to send in the documents and information required to the Director within seven days as required by s.10.1 of Regulation 601. 138 violations occurred that resulted in either warnings being filed or charges being laid. On February 28, 2005, Mr. Zurawski was convicted of 10 offences under s. 99(1) of the Act with respect to these violations.
2. On or around July 4, 2004, Mr. Zurawski abandoned the licensed premises without notice to the Ministry. 52 charges were laid in respect to his continued operation from an unlicensed location. On February 22, 2005, Mr. Zurawski was convicted of 10

violations under s. 90(3) (a) of the Act.

3. On March 4, 2005, Mr. Zurawski was issued MVIS licence #31-47943. This licence expired at the end of 2005. During the term of the licence, Mr. Zurawski violated s. 10.1 of Regulation 601 on 76 occasions. Those violations resulted in 52 warnings being filed and 62 charges being laid. On May 5, 2006, Mr. Zurawski was convicted of 49 offences.

And further take notice that pursuant to clauses 91(3)(b) and (c) of the Act, the Director proposed to refuse the Application of Sebastian Baldyga dba Underground Garaz on the grounds that the only mechanic proposed for registration at the MVIS station is Adam Zurawski. As set out above in this Notice he is not eligible for registration. A licence will not be granted to an Applicant without an eligible mechanic.

FACTS

In short there is no allegation that any cars inspected by Zurawski were stolen or had stolen parts. Nor is there any allegation that the cars inspected by him were unsafe or did not meet the appropriate standards. The allegations, and convictions against Zurawski are for failing to keep the proper records and remit the copies of the necessary documents to the Ministry.

Zurawski is a licensed mechanic who used to work in a shop owned by his father. His father's shop was a licensed inspection station and Zurawski was the mechanic licensed to conduct those inspections. Zurawski, also operated his own inspection station and held the license both for the station itself and as a mechanic. The charges and convictions against Zurawski arise from his operating his own shops. The reason for this, he says, is that while he is a good mechanic he is not a good administrator. This evidence was confirmed by the testimony of his sister who works as the administrative person in their father's shop. She described how, even before Zurawski would inspect a car, she would ensure that they had all of the necessary documentation. She would then provide the documents to her brother for him to conduct the inspection, and then once the inspection was completed, she would take back the documents and send them to the Ministry. It must be noted that the ministry's evidence is that despite these checks and balances, the father's station still received a number of warnings from the Ministry; however, no charges were ever laid.

Zurawski testified that when he went out on his own he did not have any administrative support, and that his shop became very busy, and he simply fell behind on the paper work. However, he testified that he still has all of the missing paper work that he failed to file with the Ministry.

There was a secondary issue of Zurawski moving locations without advising the Ministry. Again there is no indication that this was done to in anyway avoid detection of illicit acts, but simply once again Zurawski not being able to fulfil the administrative functions of a

licensee, including advising the Ministry of a move. This view seems to be confirmed by the Ministry as they permitted Zurawski to continue to operate at the new location once discovered.

Baldyga operates a garage that to date primarily does frame straightening. Straightening is a necessary element of rebuilding most, if not all, salvaged cars. Baldyga is a licensed mechanic and sees being able to provide his customers with both straightening and inspection as a good business opportunity. It is his intention to have Zurawski simply work as an employee. Baldyga also employs an administrative assistant who would assist in doing the paperwork, and Baldyga himself would ensure that the paperwork was done properly. Baldyga testified that he is aware of Zurawski's charges and the substantial penalties that he could face, as the holder of an inspection station licence, if the work is not done properly. Baldyga also testified that he is well aware of the quality of Zurawski's work and has full confidence in him.

Officer Gibson testified that Baldyga has no previous history with the Ministry and that his garage has been inspected and found to be suitable for an inspection station. The officer candidly testified that there no reason to suggest that Baldyga could not operate an inspection station, though Officer Gibson believed that a different mechanic would be necessary.

DECISION

If this application was simply that of Zurawski wishing to have a third chance to operate an inspection station, I would agree with the Ministry that his past conduct would afford reasonable grounds for a belief that the inspection station will not be operated in accordance with the law. However, those are not the facts. Mr. Baldyga struck me as a serious man who fully understood both the regulatory requirements and the potential personal liability if those regulations were not complied with. He also appreciated the need for and has in place the necessary administrative support. It is his inspection station and his risk. No evidence suggested that Zurawski is not a good inspection mechanic provided that he has the appropriate administrative support. The application before me has all that. As a result the past conduct of Zurawski is not, in my mind, sufficient to afford reasonable grounds for belief that the Applicants would not carry on business in accordance with the law and with integrity and honesty. Zurawski and Baldyga's evidence satisfies me that they both realize the problems with Zurawski's past conduct and have the necessary recourses that were previously missing. Having said that I believe that it appropriate and necessary that Zurawski complete paying the fines levied against him while previously licensed before a new licence and a mechanic be issued to him.

The application is hereby granted on the terms set out above.

LICENCE APPEAL TRIBUNAL

Andrew M. Diamond, Vice-Chair

RELEASED: October 31, 2007

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



PRE-HEARING

LITTLE CITY AUTO SERVICE INC. AND VINCENT CACHIA – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE DIRECTOR OF
VEHICLE INSPECTION STANDARDS UNDER THE HIGHWAY
TRAFFIC ACT, R.S.O. 1990, CHAPTER H.8, AS AMENDED

TO REVOKE THE MOTOR VEHICLE INSPECTION STATION
LICENCE OF LITTLE CITY AUTO SERVICE INC. AND THE
MECHANIC'S REGISTRATION OF VINCENT CACHIA

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: MICHAEL B. FRALEIGH, Counsel and David Levangie, Student-at-law, appeared on behalf of the Applicants

PATRICK MOORE, Counsel, appeared on behalf of the Director

DATE OF
PRE-HEARING: July 13, 2007

Toronto

ORDER

This pre-hearing arises out of an appeal by Little City Auto Service Inc. and Vincent Cachia from a proposal by the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station Licence and the Mechanic's Registration, respectively, of the Applicants.

No agreements or settlements were reached during the pre-hearing. There was a general discussion of the issues and the disclosure expectations of the parties. The parties were informed of their disclosure requirements under Rule 6 of the Tribunal's Rules of Practice.

Accordingly, the Tribunal orders that the hearing in this matter shall commence on **October 29, 2007** at 9:30 AM at the offices of the Licence Appeal Tribunal and shall continue, if necessary on **October 30 and October 31, 2007**.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: July 17, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

UNITY-A-AUTOMOTIVE INC. – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE DIRECTOR OF
VEHICLE INSPECTION STANDARDS UNDER THE HIGHWAY
TRAFFIC ACT, R.S.O. 1990, CHAPTER H.8, AS AMENDED

TO REVOKE THE MOTOR VEHICLE INSPECTION STATION
LICENCES OF UNITY-A-AUTOMOTIVE INC.

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: MICHAEL B. FRALEIGH, Counsel and David Levangie, Student-at-law, appeared on behalf of the Applicant

PATRICK MOORE, Counsel, appeared on behalf of the Director

DATE OF
PRE-HEARING: July 13, 2007

Toronto

ORDER

This pre-hearing arises out of an appeal by Unity-A-Automotive Inc. from a proposal by the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station Licences of the Applicant.

No agreements or settlements were reached during the pre-hearing. There was a general discussion of the issues and the disclosure expectations of the parties. The parties were informed of their disclosure requirements under Rule 6 of the Tribunal's Rules of Practice.

Accordingly, the Tribunal orders that the hearing in this matter shall commence on December 11, 2007, at 9:30 a.m. at the offices of the Licence Appeal Tribunal and shall continue, if necessary on December 12, 13, 17 and 18, 2007.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: July 24, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

COUSIN EDY GARAGE INC. and BUTROS TANNOUS – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE DIRECTOR VEHICLE
INSPECTION STANDARDS UNDER THE HIGHWAY TRAFFIC ACT

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

PARTIES: RICHARD J. BOSADA, counsel representing the Applicants,
Cousin Edy Garage Inc. and Butros Tannous

PATRICK MOORE, counsel, appearing on behalf of the
Respondent

DATE OF
PRE-HEARING: June 29, 2007

Toronto

ORDER

A pre-hearing was held in this matter on June 29, 2007, before this Tribunal by telephone with Richard J. Bosada, counsel, representing Cousin Edy Garage Inc. and Butros Tannous (referred to as the “Applicants”) and in the presence of Patrick Moore, counsel, representing the Director, of Vehicle Inspection Standards (the “Director”);

The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicants and the Director.

2. The issues as indicated in the Notice Of Proposal to Revoke the Motor Vehicle Inspection Station ("MVIS") Licence of Cousin Edy Garage Inc. and to revoke the MVIS mechanic's registration of Butros Tannous dated April 2, 2007, have not been resolved and the Parties were advised that in the event the matters are settled prior to the hearing, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Party that the matters have been resolved and a hearing on these matters will not be required.
3. The Parties will exchange Books of Documents including documents related to the allegations and evidence to contradict the allegations as required by Rule 6 of the Rules of Practice of this Tribunal by not later than August 31, 2007.
4. By no later than 30 days prior to September 10, 2007, the Parties shall advise each other of the full names and qualifications of the expert witnesses, as well as, the full names of the witnesses they propose to call to testify at the hearing.
5. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at The Gillespie Recording Centre, 130 Slater St. Suite 200, Ottawa, Ontario, at 9:30 a.m. on Monday, September 10, 2007 and continue on Tuesday September 11, 2007.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

Released: July 10, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1331159 ONTARIO INC. O/A ZEPHYR PEAT HARVESTING
AND STEVE E. BLACKTOPP

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS

TO REFUSE A MOTOR VEHICLE INSPECTION STATION
LICENCE AND TO REFUSE A MOTOR VEHICLE INSPECTION
MECHANIC LICENCE

TRIBUNAL: HARINDER GAHIR, Vice-Chair

APPEARANCES: ANDREW WRAY, Counsel, representing 1331159 Ontario Inc.
carrying on business as Zephyr Peat Land Harvesting and Steve
Blacktopp.

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

DATES OF
HEARING:

May 11 and 15, 2007

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal by 1331159 Ontario Inc. o/a as Zephyr Peat and Land Harvesting (the "Station") and Steve Blacktopp ("the Applicant") (collectively the "Applicants") to the Licence Appeal Tribunal (the "Tribunal"), arising out of a Notice dated October 17, 2006, issued by the Director of Vehicle Inspection Standards (the "Director"), refusing to issue a Motor Vehicle Inspection Station licence and refusing the registration of Steve E. Blacktopp as a Motor Vehicle Inspection Station Mechanic pursuant to Subsections 91(8)(a), (c) and (e) and 93(a) and (c) of the *Highway Traffic Act*, for the following reasons, as stipulated in the Notice:

1. Bruce Blacktop and Gail Blacktop were officers and directors of Mount Albert Container Services Ltd. ("Mount Albert Container"). Mount Albert Container was the holder of a licence for an MVIS station at 19524 Centre Street, Mount Albert, Ontario. Mount Albert Container moved its garage operation to the Applicant's address

approximately two or three years ago. Mount Albert Container continued to issue safety standard and annual inspection certificates without applying for or receiving an MVIS licence for the new premises contrary to section 90(3)(a) and 91(1) of the Act.

2. On August 14, 2006, Mount Albert Container made a false statement in safety standard certificate #2699012 contrary to section 99(2) of the Act.
3. On August 14 Mount Albert Container issued annual inspection certificate H1363995 in respect of a vehicle not inspected or found compliant with the regulations contrary to section 90(3) of the Act.
4. On August 14, 2006, Mount Albert Container created a false work order with respect to annual inspection certificate H1363995.
5. Safety Standard Certificate #2699012 and Annual H1363995 were used as part of a transaction where the Applicant had a trailer owned by it put into a fit status on Ministry's vehicle registration system when the Applicant knew the trailer was not in a fit condition.
6. On April 18, 1995 Mount Albert Container Services Ltd. Was convicted of an offence under section 91(1) of the Act committed on January 5, 1995.

The Director relied, in his decision, on the flowing further grounds:

1. Steven E. Blacktop was an MVIS mechanic at Mount Albert Container, which operated in contravention of the Act as described above.
2. Steven E. Blacktop was directly involved in the contraventions noted in paragraphs 2,3,4 and 5 in relation to Mount Albert Container.

ISSUES

The issue, as agreed by the parties, during pre-hearing held on March 26, 2007, is:

- Are there sufficient grounds to warrant the action taken by the Director of Vehicle Inspection Standards, as shown in the Notice of Refusal sent to the Applicant and dated October 17, 2006.

EVIDENCE

The Respondent called two inspectors for the Ministry of Transportation ("MTO") who were involved in the investigation of the Applicants. The Respondent also submitted documents involving conviction records, station records and inspection records pertaining to the Applicant and the Station.

Evidence of Rick Moore

The Respondent's first witness was MTO inspector Rick Moore. Inspector Moore has been employed with the Ministry of Transportation as an enforcement officer for the last

six years. He has been licensed as a 310S automotive mechanic as well as 310T truck mechanic.

Inspector Moore was on duty at Wasi South Scale, North Bay, on August 14, 2006. A routine inspection of a truck and trailer belonging to the Applicant triggered investigation of the operations of the Applicant's garage. The above tractor-trailer was stopped for inspection on the scale after Inspector Moore noticed two suspension springs of the trailer sticking out of the spring assembly. He completed a level one inspection which he started at around 10:45 am and finished around 2 p.m. There were seven OOS (Out of Service) mechanical problems, which included the Air Line having audible leak on drive shaft. Inspector Moore explained that the leak affects the whole braking system. He stressed that, normally, when the driver puts his foot on the brake the air pressure has to be maintained between ninety and one hundred, but in this situation, every time he applied brakes it dropped to sixty. The safety issue with this vehicle was that it compromised the braking system.

Another problem under code 10172 involving the tractor was its failed tractor protection system. Inspector Moore also explained the significance of this system as it protects the vehicle when there is loss of air pressure in the braking system. The system was not working.

There also were issues with the trailer. The push rods of brake adjustments were out of required proportion. The leaf springs of the rear suspension were sliding out, these could have got off on a highway and posed serious risk to the other vehicles.

Inspector Moore referenced to page fifteen of the Exhibit 3, which contains pictures of two worn out tires. He had taken these pictures with his camera on the date of inspection. A lot of tire tread was missing out from these tires. He also referred to page fourteen of the same exhibit showing broken suspension springs. He noticed rust on both sides of springs, which, in his opinion, would be broken for some time.

He stressed that any one of the service defects would put the vehicle out of service.

The Inspector removed the trailer plates. He could also have removed the tractor plates as well, as he put it, but he was sympathetic to the owner. Moreover, he knew that the truck was not going any where without the trailer. He explained that the purpose of removing plates was to ensure that the vehicle had serious problems corrected before the vehicle goes on to the road. The trailer was put on "unfit status" in the MTO's system. As part of the legislative requirements, there has to be another safety and annual inspection certificate to bring the vehicle on the road. Inspector Moore went on to testify that, while he was taking the plate off, the driver of the truck told him that the new tires and the plates are on the way. This statement surprised the inspector as, at this point, no repairs were done, and the new plates cannot be issued without the new annual inspection and safety of the trailer. Inspector Moore alleged that the Applicant issued an annual inspection certificate and safety certificate, without doing any repairs and inspection of the vehicle at a Motor Vehicle Inspection Station. He referred the

Tribunal to page twenty-nine of Exhibit 3, which is the MTO record pertaining to the issuance of new plates. The record shows that the new plates were issued at 3.24 p.m. on August 14, 2006.

He testified that there was no safety request conducted at the time the safety certificate was issued and no repairs were done. When he left the scale around 6 p.m. at the end of his shift, the trailer was jacked up for repairs of the springs. The mechanics had removed the spring assembly and send it to North Bay for repairs. During his shift, he did not see any mechanic, particularly from the Applicant's Station, who had issued the safety certificate. He laid charges against the Station for failing to maintain vehicle under section 107(3) of the *Highway Traffic Act*.

The other charge, which he had issued, was with respect to a missing log. This charge was later dismissed.

Testimony of Gord Sadler

Mr. Sadler has been employed with the MTO in the enforcement for over ten years. He is a vehicle inspector and investigator and he has 310S and 310 T licence for over thirty two years.

Based on the issues raised in the testimony of Inspector Moore and also contained in the proposal, it was Mr. Sadler's feeling that it is not in the MTO's best interest to allow this Station to come back in the inspection system.

The MTO had assigned Mr. Sadler the file of Mount Albert Container with respect to the above matter. On September 7, 2006, he went to the MVIS at 19524 Centre Street, Mount Albert, Ontario, which is the address registered with the Director. He found out that the garage was no longer in operation and the building was vacant. He spoke with someone at a residential home in front of the garage, and was informed by this resident that the garage has moved approximately two and a half to three years ago to another location in Durham Region. Mr. Sadler went to the new location, where he saw a fully equipped station, mechanics and required tools. It appeared to be a properly operational shop. He testified that there is a procedure to follow in order to relocate a garage, as the licence is very specific to a location. The MTO checks that the zoning is proper, that qualified mechanics are registered to the site and that the required tools are there. The change of location without approval is questionable as the MTO randomly inspects the stations, and without proper changes in the MTO records, the MTO would not be able to inspect the garage.

Inspector Sadler informed the Applicant that this was not a licensed location and therefore he should not issue certificates. He terminated the location and acquired the unused safety certificates along with annual certificates. Inspector Sadler referred the Tribunal to pages thirty-two to forty nine, which were the certificates issued from the new location. He laid eighteen charges under s. 91(1) for the offence and there were

convictions registered for all charges. Pages fifty-five and fifty-seven show two separate charges against the Applicant under s. 99(2) of the Act.

With respect to the Applicant's issuing of safety certificate to the trailer, on August 14, 2006, he testified that the Applicant could not have issued safety and annual inspection certificate as the scale was not a MVIS. He suggested that, in this kind of situation, the trailer had to be towed to a closest MVIS.

This Station can certify its own fleet.

Inspector Sadler referred the Tribunal to page sixty-nine of Exhibit 3, which is a summary of the commercial operator (CVOR) record, for a period of about two years. The Station's OOS rate was 71.43% whereas the industry average is 35.3%.

Inspector Sadler also referred the Tribunal to page seventy-one of the same exhibit, showing that the same trailer was again inspected on September 14, 2006, and another OOS defect was found. He stated that the MTO would have major concerns with respect to allowing the Applicant to inspect its own fleet. It will be to the advantage of the Station and the public at large if the Station had independent inspections of its vehicles.

He agreed that the Station may not have had the intent to conceal anything from the MTO by changing the location, but the Station must have been well aware of the requirements. He agreed that the new location was an upgraded facility. He also agreed that no other safety issues had arisen except the above mentioned.

Testimony of Steve Blacktopp

Mr. Blacktopp has been a mechanic for the last twenty-three years and has 310T and 310S licences and class "A" driver's endorsement. Throughout his career, he has been working in fleet operations. Presently, he is Fleet Manager with the Station and takes care of the Station's trucks. The Station has nine trucks and eleven trailers, which are used for transportation of bark and other products.

The Station grew from two to twelve trucks, and therefore it had to move to a better facility. The Station hired an additional licensed mechanic apart from Mr. Blacktopp and his relative. He stressed that the new facility is an upgraded facility. He testified that the reason they did not change the address with the Ministry was because the Station still has the same mailing address. Moreover, due to the excitement of moving, it never occurred to him or other family members to change the address with the MTO.

The Applicant clarified that on August 14, 2006, he thought that he would go to the scale and fix the trailer and thereafter put the new plate on the trailer to bring it back to his own garage. He thought that there was no other option available to him as the trailer was fully loaded with 63,000 pounds of cargo. He could not have off loaded the load nor could he have towed the trailer to his garage in this kind of situation. Mr. Blacktopp also

explained about the different OOS defects on the trailer by saying that the weight of the grease on the air hose pushed the hose to the axel. As a result, the air hose got worn out. The driver of the truck was not careful, or driving properly, or he would have easily detected the loose springs if he had walked around the trailer. Due to his conduct, the Station had fired him since that date.

The Applicant claimed that before he put the new plate on the trailer, it was safe as all the repairs were completed. He was regretful for the incident of getting the plate before the repairs were completed. He claimed that in normal business, people respect the Station for the quality of work they do.

In cross-examination, the Applicant agreed that he made a false statement by signing the false safety certificate. He stated that he had issued it in order to get a new plate for the trailer. He also agreed that now he knows that the trailer has to be in a licensed MVIS and repairs completed before a safety certificate can be issued. He also agreed that at the time of signing the safety certificate, the trailer did not meet the prescribed standards. He claimed that he usually inspects each unit every week.

With respect to the moving of the garage to a new location, the Applicant testified that it was his understanding that the licence belonged to the Station, and that the Station still had the licence and that they had hung the licence on the wall. He further clarified that the Station still keeps its records on the previous address. He agreed that one of his trailers was put on OOS three times in three consecutive months.

Testimony of the Applicant's father

The Applicant's father has been licensed as a heavy-duty mechanic for the last forty years. He worked for many years with Toronto Subway and at other different places. In 1981 he started his own Station in which nine family members currently work apart from other employees.

He testified that if the Station had to send its vehicles out of the facility for annual safety inspection, it would cost about \$300 to \$500 per unit including down time and wages of the employees apart from lost revenues. The Station does the safety on weekends, thereby the down time, wages of employees and revenues are not costing the Station. He claimed that the Station never had any problems with the MTO apart from the recent issues, which resulted in this appeal. He stressed that the new building is in strict compliance with the MTO standards and was accepted by the office of the Director. He was frustrated that the bad roads play a big role in breakdown of his vehicles.

LAW

The *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 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. R.S.O. 1990, c. H.8, s. 91 (1).

(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. R.S.O. 1990, c. H.8, s. 91 (2).

(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.

(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;

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).

(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.

(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

(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.

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.

(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 evidence of the parties has established that Mount Albert Container was the holder of a licence for an MVIS station in Mount Albert, Ontario, which was a license to inspect its own fleet and for issuing annual inspection certificates and safety standard certificates. The Director had revoked the licence of the Station on September 7, 2007, due to the following reasons:

1. Failure of the Station to notify the Director of its change of location and continue to issue safety and annual inspection certificates from the new location without getting the approval of the Director;
2. On August 14, 2006, Mount Albert Container made a false statement in safety standards certificate No. 2699012 and annual inspection certificate H1363995, without inspecting the vehicle, and getting a new plate for the trailer on the basis of the above false certificates.

Instead of filing an appeal against the revocation, the Applicants choose to apply for a new licence under the name of 1331159 Ontario Inc. o/a Zephyr Peat Land Harvesting.

The new Station has the same officers and directors. The Director refused the new application on the grounds that the past conduct of the Station's officers and directors affords reasonable grounds for belief that the Applicant is not competent and will not act in accordance with the law and with honesty and integrity.

The evidence has shown that the Applicants, in signing the above safety standards certificate and annual inspection certificate for the Applicant's trailer, which has been shown to have numerous and serious safety defects at the time of issuance, made a false statement on these certificates. Furthermore, the veracity of the testimony of the MTO inspectors has been well supported by photographic evidence. These defects were of a very serious nature, and include defects in braking and control systems, as well as vehicle structural integrity.

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 licensees adhere to the provisions relating to vehicle safety before safety standard certificates are issued. The Applicants, licensed operator and mechanic, significantly deviated from the responsibilities imposed upon them under the Act and Regulations.

The Tribunal appreciates the fact that the safety of the public was never put in jeopardy as a result of the above violations; however the non-compliance with the Act and Regulations, always has potential of defeating the intent of the scheme.

91. (3) Subject to section 95, the Director may refuse to issue a motor vehicle inspection station licence where, in his or her opinion,

- (a) the past conduct of the applicant or, where the applicant is a corporation, 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

The Tribunal concludes that the Applicant has been indifferent to his obligations under the Act as both a Motor Vehicle Inspection Station operator and as a Motor Vehicle Inspection Station mechanic. His past conduct had, on occasion, the potential of compromising public safety. The important principle in matters of this nature is the promotion and the safeguard of the integrity and honesty of MVIS mechanics and stations. In view of its past conduct, to permit the Applicants to become licensed MVIS and mechanic would send a wrong message to the public at large. The Applicant should be required to redeem himself before he would be considered for registration. Had the

matter came before this Tribunal one year from today, the Tribunal may have been more sympathetic to the Applicant.

ORDER

The Tribunal therefore orders the Director to carry out his Notice to refuse the Motor Vehicle Inspection Station licence of 1331159 Ontario Inc. o/a Zephyr Peat Land Harvesting and to refuse the motor vehicle inspection station mechanic registration of Steve E. Blacktopp.

LICENCE APPEAL TRIBUNAL

Harinder Gahir
Vice-Chair

RELEASED: June 26, 2007

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



RAY TEK MOTORS INC. AND REYMOND BETNOVIN

APPEAL FROM A NOTICE PURSUANT TO CLAUSES 91(3)(A) AND (C) AND 92(4)(A) AND (B) OF THE *HIGHWAY TRAFFIC ACT* ISSUED BY THE DIRECTOR OF VEHICLE INSPECTIONS STANDARDS PROPOSING TO REFUSE THE ISSUE OF A MOTOR VEHICLE INSPECTION STATION LICENCE TO RAY TEK MOTORS INC. AND TO REFUSE TO REGISTER REYMOND BETNOVIN AS A MOTOR VEHICLE INSPECTION STATION MECHANIC

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DANNY KAZUO MORTON, counsel, appearing on behalf of Ray Tek Motors Inc. and Reymond Betnovin

PATRICK S. MOORE, counsel, appearing on behalf of the Director of Vehicle Inspection Standards

DATES OF
HEARING:

February 14, 2007
May 8, 2007

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is a hearing that arises out of a written Notice of Proposal dated October 11, 2006, issued by the Director of Vehicle Inspection Standards (the "Director") under the *Highway Traffic Act* (the "Act") to refuse the issue of a motor vehicle inspection station licence to Ray Tek Motors Inc. and to refuse to register Reymond Betnovin as a motor vehicle inspection station mechanic ("Ray Tek" and "Betnovin", respectively).

The Director bases his proposal under clause 91(3)(a) and (c) of the Act as well as clause 92(4)(a) and (b) insofar as Ray Tek and Betnovin, respectively, are concerned.

In support of his proposal, the Director states as follows:

1. Mr. Betnovin exercises de facto control and management over Ray Tek Motors Inc.
2. Mr. Betnovin has been convicted three times of offences under the Act related to his participation the MVIS program as follows:

- (a) A conviction under section 8(4)(c) of Regulation 611 was entered on November 30, 2004 with respect to an offence that occurred on April 30, 2004.
 - (b) A conviction under section 99(2) of the Act was entered on November 20, 2004 with respect to an offence that occurred on April 30, 2004.
 - (c) A conviction under section 99(2) of the Act was entered on March 23, 2006 with respect to an offence that occurred on February 1, 2004.
3. Mr. Betnovin failed to keep the required records and to produce them upon demand of a Ministry inspector on April 29, 2004 as stated in POA certificate of offence #68787460.
 4. When questioned on July 11, 2006 by Ministry inspector Glen Dodwell, Mr. Betnovin gave false information by stating that he did not have a record of offences as a mechanic.
 5. Mr. Betnovin is the only mechanic proposed for registration by the applicant licensee. I will not issue a licence to a licensee that does not have a mechanic eligible for registration.

(Exhibit 3, Tab 2)

Ray Tek and Betnovin (jointly referred to as the “Applicants”) filed an appeal to the proposal which appeal states as follows:

1. The Applicant, Raymond Betnovin did not receive notice for his hearing in which a conviction was entered under section 99(2) of the Highway Traffic Act on March 23, 2006 with respect to an offence that allegedly occurred on February 1, 2004.
2. Raymond Betnovin moved from his former residence located at [address deleted] to his current address of [address deleted].
3. Raymond Betnovin became aware of the charges and conviction in April 2006. In response the Applicant filed a Notice of Appeal under Section 116 of the *Provincial Offences Act* with the Ontario Court of Justice, located at 50 Eagle St. West, Newmarket, Ontario, on the grounds listed in paragraph 3.

4. The Applicant was fined \$3125.00 for the Conviction under section 8(4)(c) of Regulation 611 and Conviction under section 99(2) of the *Highway Traffic Act*, for an alleged offence that occurred on April 30, 2006.
5. The above mentioned offences allegedly occurred when Raymond Betnovin operated a Petro Canada, Ontario Inc. # 1430289, located at [address deleted]. The Applicants, Raymond Betnovin and [name deleted], sold this business and moved to a new location opening Ray Tek Motors Inc. at [address deleted].
6. Prior to signing a lease at this new property, purchasing new equipment, and making other capital investments in order to start his new business, Raymond Betnovin spoke with Paul Robinson, an Enforcement Officer for the City of York, located at 1st Floor, 50 Bloomington Road West, Aurora, Ontario, to ensure that his licence was in good standing and he would be able to renew his licence at the new location. Raymond Betnovin was advised by Paul Robinson that his licence was in good standing and he would not have any impediments in securing a new licence for his new business.
7. Relying on the information provided by Paul Robinson, the Applicants Raymond Betnovin and [name deleted], entered into a 10 year lease at a rate of \$4000.00 plus GST per month, and has spent approximately \$150,000.00 purchasing new tools and equipment, renovating the new location, and on other expenses related to starting this new business.
8. Approximately 80-90% of the expected business at Ray Tek Motor Inc. would be from providing safety inspections of vehicle. Without a licence Ray Tek Motors Inc. will be forced into bankruptcy.
9. The applicants performed all possible due diligence inquiring into the status of his licence. Paul Robinson, an Enforcement Officer for the City of York, advised the applicant that he would be able to secure a licence at the new location. Reasonably relying on this information the applicant has invested a large amount of money.
10. It would be unduly harsh and contrary to the principles of fundamental justice to deprive the applicant of a motor vehicle inspection station licence and registration as a motor vehicle inspection station.
11. On July 11, 2006 when Minister inspector Glen Dodwell asked Raymond Betnovin if he had a record, the Applicant mistakenly believed that he was referring to a criminal record and answered no.

12. There are no alleged offences against the Applicants since April 30, 2004. Raymond Betnovin has demonstrated that he is competent and will act in accordance with honesty and integrity as required by the act.
13. AND any other reasons that counsel for the Applicants submits and this Honourable Tribunal accepts upon a hearing.

(Exhibit 2)

THE EVIDENCE

The evidence presented at the hearing by the Director consisted of the testimony of Glen Dodwell, Gordon Sadler and Paul Robinson, as well as documentary evidence. The evidence presented by the Applicants consisted of the testimony of Betnovin.

The Testimony of Glen Dodwell

Dodwell testified that he is an inspector with the Ministry of Transportation ("MTO") in Toronto. Dodwell went on to state that there are some 1700 Motor Vehicle Inspection Stations ("MVIS") in the City of Toronto, and he has overall authority, and responsibility to oversee over one-half of them. A MVIS licence entitles the licensee to issue vehicle safety certificates, and Dodwell attends at MVIS to ensure they meet the requirements under the Act. He then referred to his curriculum vitae (Exhibit 3, tab 3), confirmed the correctness of what is stated therein, that he is a licensed motor mechanic, and has been with MTO since January 2001.

He went on to refer to the application of Ray Tek and Betnovin for a MVIS licence and mechanic's licence, respectively (Exhibit 3, Tab 1). He visited the garage where he spoke with Betnovin and also spoke with Betnovin's fiancée. Betnovin required registration as a motor vehicle inspection mechanic and would be employed as such by Ray Tek. He was to be the only mechanic to work at Ray Tek (the "station"). At that meeting, Betnovin was supplied with a manual of information from MTO outlining the tools required by the station, documentation required by and for use by the station, and full information regarding regulations 601 and 611 under the Act that dealt with documentation and safety inspections. After discussing with Betnovin his proposed role in the operation of the station and with his fiancée, in regard to her proposed role as President of the station, he was shown the station. Betnovin showed Dodwell his mechanic's licence and Dodwell enquired of Betnovin regarding his dealings with MTO. While holding Betnovin's application and indicating to it, Dodwell asked Betnovin if he had any charges or convictions. Betnovin answered that he did not have any. Dodwell indicated to the Tribunal that he was interested in ascertaining any charges or convictions under the Act, particularly sections 92 and 93 of the Act. Betnovin also told Dodwell that he had a valid driver's licence and Dodwell took away with him the application completed by Betnovin and his fiancée. On returning to his office, he made certain enquiries and as a result thereof, addressed a letter to MTO recommending that the applications be refused. His letter stated as follows:

I received an application for an MVIS, # 42494, by Ray Tek Motors INC. The President is [name deleted] and the mechanic applying is Raymond Betnovin, Technician # 310s-361823. As part of my interview with the mechanic, I asked him if he had even been charged before or had any complaints from the Ministry. He replied that he had received a complaint before, but no charges. I followed up back at my office and found he has 3 recent convictions and a warning letter from York Enforcement. I followed up with Gord Sadler, who had dealt with this mechanic. He recommended that this was not someone that should be in the programme and I have to agree with Mr. Sadler. I have ordered the details of the convictions from York and at this time I cannot include them, but I will follow up with them for the legal department. I feel this mechanic will not act accordingly with the regulations and being related to the applying licensee, I will ask you to turn down the application for MVIS.

(Exhibit 3, Tab 6, page 13)

He also obtained a printout from MTO's computer system regarding three convictions registered against Betnovin which are as follows:

Enforcement History for Mechanic: 4 records			
Effective Date	Transaction Type	Transaction Description	Record Date
2004-02-01	Conviction	CONV. DATE : 2006-03-23 CODE : 99(2) STAN. TYPE: MVIS COURT LOCATION: RICHMOND H	2006-04-05
2004-04-30	Conviction	CONV. DATE : 2004-11-30 CODE: 99(1) COURT LOCATION: RICHMOND HI	2004-12-07
2004-04-30	Conviction	CONV. DATE : 2004-11-30 CODE: 8(4)(c) COURT LOCATION: RICHMOND HI	2004-12-07
2004-22-22	Warning Letter		2005-01-01

(Exhibit 3, Tab 6, page 14)

Dodwell explained that the conviction of November 30, 2004, related to contravening section 8(4)(c) of Regulation 611 to the Act, which deals with annual inspection requirements concerning commercial vehicles and the obligations of the station mechanic who conducts such inspections, to remove or cover over old inspection certificates when affixing the new certificate on the vehicle.

Having observed the convictions registered against Betnovin, he contacted inspector Gordon Sadler who had previously dealt with Betnovin and discussed the latter's past conduct. Having obtained information regarding Betnovin, Dodwell wrote his letter to MTO, recommending it refuse registration as he felt the past conduct of Betnovin reflected a lack of honesty and integrity. Subsequently, Dodwell served the Director's proposal to refuse on Betnovin and his fiancée.

In cross-examination, Dodwell stated he specifically asked Betnovin if he had been charged or convicted regarding his mechanic's licence.

Betnovin contacted Dodwell subsequent to Dodwell taking Betnovin's application for registration and enquired regarding the state of his application. Dodwell then raised the question of Betnovin's convictions and he asked Betnovin why he had not disclosed such convictions. Betnovin replied that he did not know he had convictions and Dodwell reiterated that he was "100% sure" that Betnovin knew that Dodwell was asking regarding convictions and charges relating to his mechanic's licence. Dodwell further stated that the three convictions and warning letter to Betnovin justified, in his opinion, a refusal to grant registration, more particularly as they reflected "a pattern" of conduct. Dodwell also spoke with MTO inspector, Paul Robinson, concerning Betnovin and suggested to the latter that he speak with Robinson regarding the charges and convictions.

The Testimony of Gordon Sadler

Sadler testified that he is an inspector with MTO and is a licensed mechanic of some 32 years, having worked for MTO for the past 10 years. He referred to and confirmed the contents of his curriculum vitae (Exhibit 3, Tab 3). He stated that in the course of his duties with MTO, he had dealt with Betnovin in the past.

Sadler went on to state that the previous application by Betnovin for an inspection station mechanic licence of October 2001, was duly received and he then attended at the inspection station where Betnovin would be the licensed mechanic. The latter's registration was granted on November 2001, and was subsequently terminated on September 9, 2005, the reason being the station premises had been vacated (Exhibit 3, Tab 8, page 19). Betnovin had been the sole mechanic at that station. That station operated in Richmond Hill under a corporate number namely 1430289 Ontario Inc.

On September 10, 2002, Sadler attended at that station to ascertain that it was in compliance with the Act. On inspection, Sadler cautioned Betnovin on a safety related issue regarding the station's premises and discussed with Betnovin an NSF cheque given by the station for purchases of safety standard certificates from MTO. This issue was later found to have been resolved.

Subsequently, Sadler again attended at the station on April 6, 2004, to conduct an inspection for audit purposes, and to ascertain that there was compliance with MTO's standards. In his various dealings with Betnovin, Sadler came to the conclusion that the former was in control of the station, managed it and was in charge.

Sadler went on to state that he became concerned regarding the number or quantity of safety standard certificates that the station was purchasing from MTO in that from January 16, 2003, to March 22, 2004, it had purchased some seventy books of certificates, each book containing twenty blank certificates. In fact, a total of 1580 certificates had been purchased which was "high for a one man operation" as was the case with Betnovin's operation. Betnovin was ordering and purchasing increasingly larger number of certificates and in a three-month period in 2004, ordered and purchased 580 certificates. He stated that if a mechanic worked six days per week, at eight hours per day, such mechanic would be only able to do eight inspections per day.

Besides the safety inspections that Betnovin had to do, there were other aspects of the station he would be required to attend to, all of which made it impossible “to do that number of certificates in the period”.

Sadler also stated that in his continuing investigation, he had occasion to investigate a 1987 Chev pick-up truck which had been taken out of service when it was found by an inspector to have defects justifying its removal from the road (Exhibit 3, Tab 9, pages 21 through to 24). The photographs relating to the vehicle are included in this exhibit. Pursuant to the inspector’s findings, Sadler attended at Betnovin’s station which station had recently certified that vehicle. Sadler spoke with Betnovin who was the mechanic who had certified the vehicle recently. Sadler found during his investigation that “not all certificates indicate work order numbers, nor the work orders on site correspond to safety certificates”. Betnovin was unable to account for the 1987 Chev vehicle, that he had certified, being found to have numerous safety related defects. Betnovin was cautioned by Sadler in his audit report (Exhibit 3, Tab 9, page 26). Betnovin was found by Sadler to have performed that vehicle’s annual inspection for a safety standard certificate and failed to affix the annual inspection certificate to the vehicle in violation of the Act (Exhibit 3, Tab 9, pages 27 and 28). Betnovin was accordingly charged and subsequently convicted under section 99(2) of the Act in respect of that offence that occurred on February 1, 2004. The defects found on this vehicle, subsequent to it being certified by Betnovin, were, according to Sadler, serious in nature and affected its steering system, its braking system and its exhaust system. Betnovin was requested to produce documentation regarding various vehicles including this Chev vehicle. Sadler did receive some records, but Betnovin was not able to produce other records that were required to be kept on the licensed premises for a period of one year. Sadler warned Betnovin that he was in violation of the Act by failing to keep records on the premises, that the safety certificates issued by him did not correspond to work orders, nor could many work orders be produced to Sadler as he requested. In short, he could not check or cross-reference safety certificates issued by Betnovin with work orders that were not available for inspection. The latter was cautioned again to maintain and keep records on the premises and that charges were being laid.

Sadler went on to state that on the four occasions he was at the premises of the station, he was told by Betnovin that he did not have the documents Sadler wished to see and inspect, and that these documents were with the accountant. When Betnovin was shown by Sadler the photographs of the Chev’s defects (Exhibit 3, Tab 9, page 24), Betnovin showed surprise, appeared to be concerned, but could not account for the defects shown.

The Testimony of Paul Robinson

Robinson testified that he is a motor vehicle inspection station inspector with some 10 years experience as a motor mechanic.

He had dealings with Betnovin and was involved in the investigation of a 1997 Ford commercial vehicle. The details of his involvement are recorded at Exhibit 3, Tab 10, pages 31 through 39.

Pursuant to his investigation, charges were laid against Betnovin. The charges laid were that Betnovin:

- unlawfully failed to keep a vehicle inspection record in accordance with Ontario Regulation #601 section 10(d) a record of vehicle inspection bearing serial [number deleted]
- on or about the 30th, day of April, 2004, failed to affix the current annual inspection sticker promptly upon completion of the inspection of a commercial motor vehicle bearing serial [number deleted], contrary to clause 8(4)(c) of Ontario Regulation 611 pursuant to section 99 of the Highway Traffic Act

(Exhibit 3, Tab 10, pages 38 and 39)

A conviction was entered against Betnovin pursuant to those charges (Exhibit 3, Tab 8, page 17).

Insofar as the 1997 Ford commercial vehicle was concerned, it was ordered out of service by an inspector for a number of defects found on the vehicle (Exhibit 3, Tab 10, page 31 and 32).

The aforesaid documents concerning the 1997 Ford were sent to Robinson to enable him to investigate the safety standard certificate affixed to that Ford vehicle. Robinson attended at the Ray Tek inspection station that had issued the certificate and spoke with Betnovin regarding that certificate and the work order that preceded its issue. On the first occasion that Robinson spoke with Betnovin on August 3, 2004, as well as on repeat visits on August 10, 2004, August 12, 2004, and August 24, 2004, he asked to see the certificate issued and the corresponding work order. On each occasion, he was advised by Betnovin that these documents were not available. He cautioned the latter regarding his obligations to maintain and retain these documents on the premises and to provide them for inspection and informed him charges were pending.

Robinson went on to state that the officer who placed the Ford vehicle out of service had sent him a photograph he had taken of the stickers found affixed to the vehicle when he had stopped the vehicle (Exhibit 3, Tab 11, page 47). This photograph shows three stickers, one of which bearing number 14115265 was placed thereon by Betnovin. Following receipt of this photograph, Robinson called at the station and spoke with Betnovin who had issued the certificate. Robinson requested Betnovin to produce to him the work order that corresponded to the certificate he had issued. He attended at the station on October 5, 2004, as well as on October 8, 2004, and on October 19, 2004, and on each occasion, he spoke with Betnovin and asked to see the documents requested and on each occasion, he was told that they were not available for production (Exhibit 3, Tab 11, page 48).

In reference to paragraph 6 of the Applicant's notice of appeal, Robinson stated that he did speak with Betnovin when the latter informed him that he was "going to Toronto" but denied telling Betnovin that his licence was in good standing or that he would "get his licence". Nothing of that sort was discussed with Betnovin.

The Testimony of Reymond Betnovin

Betnovin testified that he received his licence to issue safety standard certificates in 1999. He went on to testify that he dealt with three vehicles insofar as the issuance of safety standard certificates was concerned.

Insofar as the 1987 Chev vehicle was concerned, he stated as follows:

A friend of his who had a garage in Markham, Ontario, brought Betnovin the ownership papers relating to this vehicle. Betnovin was asked by his friend "to write a safety certificate" for the vehicle as "it had already been checked by two other mechanics". Betnovin went on to state that "I was foolish enough to trust him" and "wrote him a safety certificate". He stated that he knew at that time it was a violation the Act. He wrote the certificate for his friend as he was told by this friend that the vehicle "was in 100% shape" and because the friend did not have the time to bring the vehicle to Betnovin.

Insofar as the 1997 Ford vehicle was concerned, he stated as follows:

The same friend came to him with "the same story" as relates to the 1987 Chev vehicle and told Betnovin "the same stuff". Betnovin stated he issued the safety standard certificate in regard to this vehicle (Exhibit 3, Tab 10, page 34) as he was assured by his friend that the vehicle was in "perfect condition".

Betnovin went on to state that Sadler had visited him at the service station on April 29, 2004, and told him "to stop doing this", after which he was very careful in issuing certificates. He went on to state that in the course of his business, he was doing "re-inspections" for used car dealers who have no mechanics to write safety certificates.

Insofar as the 1992 Ford vehicle was concerned, he stated as follows:

The same situation took place as described above when his friend brought this vehicle to Betnovin's premises with the request he issue a safety certificate. He did so without seeing the vehicle or inspecting it.

Insofar as the convictions under the Act are concerned, Betnovin conceded that he was convicted as alleged. However, in relation to one conviction, he stated that he only learned of same some time after his conviction as he was never advised to appear in court. However, on appearing at the appeal which he filed, he agreed to pay a fine of \$3,200.00 respecting the conviction, which he is presently continuing to pay by way of installments.

Insofar as record keeping was concerned, Betnovin stated he was not organized and fell behind with his paperwork. He has made efforts to improve his record keeping and has arranged for an accountant to attend to bringing records up to date.

He went on to state that he called Robinson in July 2005, when he informed Robinson that he was signing a lease for the station's proposed premises and wanted to make

sure he was not “flagged” because of his past problems. He was assured by Robinson that all was in order and it would be “O.K.” if he went ahead and opened his business.

He further stated that when, in July 2006, Dodwell attended upon him and enquired regarding any charges or convictions, he thought Dodwell was referring to criminal charges or convictions and accordingly told Dodwell he has none. Betnovin went on to state that his business cannot survive without his being able to do safety standard inspections and issue certificates following the inspections. Since his convictions, he has had no trouble with the Ministry.

He went on to state that he realizes that he “played with people’s safety, but did not do so for the money”. He remembers that Sadler interviewed him on April 29, 2004, and warned him to keep proper documentation. He conceded that on the day after Sadler issued his warning on April 29, 2004, he failed to affix the current annual inspection sticker on a vehicle promptly and thereby was subsequently charged and convicted under clause 8(4)(c) of Regulation 611 pursuant to section 99 of the *Highway Traffic Act*.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal:

1. Ray Tek and Betnovin were registered under the Act as a motor vehicle inspection station and a motor vehicle inspection mechanic, respectively.
2. The aforesaid registrations were effective from November 2001 until September 2005, when both registrations were terminated.
3. At all material times, Betnovin has been the controlling mind of and managed Ray Tek.
4. Betnovin was charged and convicted under the Act as follows:
 - (i) Under section 8(4)(c) of Regulation 611 to the Act entered on November 30, 2004, in respect of an offence that occurred on April 30, 2004.
 - (ii) Under section 99(2) of the Act entered on November 30, 2004, in regard to an offence that occurred on April 30, 2004.
 - (iii) Under section 99(2) of the Act entered on March 30, 2006, in regard to an offence that occurred on February 1, 2004.
5. When Betnovin was interviewed by Inspector Dodwell in July 2006, regarding his present application for registration under the Act, he falsely advised Dodwell that he had no convictions registered against him when, in truth and fact, he had convictions as stated in paragraph 4 hereof.

6. During the period that he and Ray Tek were registered under the Act, Betnovin consistently and repeatedly failed without reasonable or lawful excuse, to produce for inspection to Ministry officials, when requested to do so, relevant records regarding work orders or records relating to safety standard certificates issued and signed by Betnovin in regard to certain 1997 Ford.
7. Betnovin signed and issued safety standard certificates in respect of certain 1997 Ford vehicle, certain 1987 Chevrolet vehicle and certain 1992 Ford vehicle without having inspected those vehicles and without satisfying himself that such vehicles comply with the inspection requirements and performance standards prescribed under the regulations under the Act.

LAW

The *Highway Traffic Act* states as follows:

91. (3) Subject to section 95, the Director may refuse to issue a motor vehicle inspection station licence where, in his or her opinion,

(a) the past conduct of the applicant or, where the applicant is a corporation, 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;

92. (4) Subject to section 95, the Director may refuse to register a motor vehicle inspection mechanic where, in his or her opinion,

(a) the past conduct of the mechanic affords reasonable grounds for belief that the mechanic will not act as a motor vehicle inspection mechanic in accordance with the law and with honesty and integrity; or

(b) the mechanic is not competent to act as a motor vehicle inspection mechanic.

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
- (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.
90. (2) No person other than a licensee, a motor vehicle inspection mechanic or a person authorized in writing by the licensee shall affix a vehicle inspection sticker to a vehicle.
- (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.

Regulation 611 to the Highway Traffic Act states:

8. (4) If a commercial vehicle has been inspected in accordance with the inspection requirements and complies with the performance standards set out in Schedules 1 and 2, the licensee of the station in which the vehicle was inspected, a person authorized in writing by the licensee or the motor vehicle inspection mechanic who inspected the vehicle shall promptly,
- (c) remove or cover any annual inspection sticker relating to a previous inspection and affix the current annual inspection sticker

DECISION

The onus falls upon the Director to prove his case on the balance of probabilities. The Tribunal is required to make an independent decision as to whether the criteria for

depriving Ray Tek and Betnovin of their registrations have been proven, showing no deference to the decision of the Director. The issue is whether or not, on the evidence, established on the balance of probabilities, the past conduct of Ray Tek and Betnovin affords reasonable grounds to believe that they will not act in accordance with the law and with honesty and integrity.

Based on the evidence adduced at the hearing, the following is the decision of the Tribunal.

The Tribunal finds that Betnovin is the controlling mind of Ray Tek. While Betnovin is not an officer of Ray Tek, the evidence discloses that his fiancée holds the office of President, but has a position elsewhere as a designer, although she does occasionally work at Ray Tek. Betnovin is in full time attendance at Ray Tek, manages all aspects of its business and affairs and makes all the decisions that govern the affairs of Ray Tek. The Tribunal finds that although he is not an officer or director of Ray Tek, he is, de facto, an officer and director as envisaged by section 91(3)(a) of the Act.

The Tribunal finds further that Betnovin's past conduct, both as controlling mind of Ray Tek's and as a motor vehicle inspection mechanic, was not in accordance with law and with honesty and integrity. The Tribunal bases this finding on the following facts:

1. Betnovin has three separate convictions against him under the Act as have been more fully referred to in his decision. Betnovin admits to these convictions.
2. The convictions are recent in time and are clearly industry related.
3. The convictions speak as to Betnovin's lack of honesty and integrity and to his failure to act in accordance with law.
4. Betnovin issued not one false safety certificate but three false certificates. In each instance, he conceded that he certified vehicles as complying with safety standards whereas he did not inspect or even see the vehicles. Having been entrusted with ensuring the safety of vehicles using public roads, his actions are those of a person clearly unsuited to certifying vehicles as being in compliance with the Act and regulations.
5. Betnovin, when asked by Dodwell whether he had charges or convictions, informed Dodwell he had none. His excuse for giving a false answer was that he believed Dodwell was enquiring in regard to criminal charges, convictions or record of which he contends he has none. He did not, so he says, understand that Dodwell was referring to the convictions under the Act.

The Tribunal does not accept Betnovin's explanation and has no hesitation in accepting Dodwell's version of events. Further, the Tribunal finds that Betnovin knew reference was being made by Dodwell to convictions under the Act, particularly when Betnovin's application documents were being displayed by Dodwell when the latter asked the question and spoke with Betnovin in regard to his application for registration.

The Tribunal notes that the testimony of Ministry inspectors Robinson, Dodwell and Sadler were in no manner disturbed on cross-examination and finds that the testimony of Betnovin, where it stands in contradiction to the testimony of Dodwell, is rejected as fanciful and without an aura of truth and reasonableness.

6. Betnovin persistently and consistently failed to furnish required records of Ray Tek to Ministry inspectors. Specific documents and records were at different and varying times requested of Betnovin. The patience, persistence and perseverance of the inspectors was considerable. No co-operation was received from Betnovin. The result was that a considerable number of vital records were never disclosed to the Ministry and it was unable to inspect documents to which they were entitled and which should have been kept on the premises of Ray Tek.

All the above leads the Tribunal to find that Betnovin is ungovernable and not deserving of registration. As he has been found to be the controlling mind of Ray Tek, the Tribunal's comments, observations and findings regarding the actions of Betnovin equally apply to it Ray Tek itself.

ORDER:

Accordingly, the Tribunal pursuant to the authority vested in it by section 95(4) of the *Highway Traffic Act*, directs the Director to carry out his proposal to refuse the issue of a motor vehicle inspection station licence to Ray Tek Motors Inc. and to refuse to register Reymond Betnovin as a motor Vehicle Inspection Station Mechanic.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: May 18, 2007

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

PRE-HEARING

SEBASTIAN BALDYGA dba UNDERGROUND GARAZ and
ADAM ZURAWSKI

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

AND IN THE MATTER of the Refusal by the
Director of Vehicle Inspection Standards ("the
Director") of Application Number #57478 for a
Motor Vehicle Inspection Station Licence by
SEBASTIAN BALDYGA dba UNDERGROUND
GARAZ, Dated December 11, 2006;

AND IN THE MATTER OF the Refusal by the
Director of Application Number T.C. # 310B-
396079 to register ADAM ZURAWSKI as a
Motor Vehicle Inspection Mechanic, (MVIS)
at UNDERGROUND GARAZ,
dated December 11, 2006.

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: MACIEJ (MATT) MILCZARCZYK, Counsel for the Applicants

PATRICK MOORE, Counsel
Representative for the Director of Vehicle Inspection Standards

DATE OF
HEARING: March 23, 2007

Electronic Hearing

ORDER

Following attendances on March 23, 2007, at a pre-hearing held by teleconference, the Tribunal makes the following Order respecting the hearing scheduled for Tuesday June 5, 2007, at 9.30 a.m.

1) The Parties to the hearing are:

- (a) Sebastian Baldyga,
- (b) Sebastian Baldyga dba Underground Garaz,
- (c) Adam Zurawski, and
- (d) The Director of Vehicle Inspection Standards.

2) The Issues of Appeal to be heard at the hearing, have been narrowed as follows:

1. Establishment of the relationship between Adam Zurawski and Sebastian Baldyga dba Underground Garaz.
2. Evidence respecting the following violations and charges shown in the Notice to the Applicants, from the Director, Vehicle Inspection Standards, dated December 11, 2006:

138 violations as shown in paragraph 1,
52 charges as shown in paragraph 2, and
78 violations as shown in paragraph 3, and

The effect of those violations in relation to the conduct of Adam Zurawski as a mechanic and the refusal to issue a licence to Underground Garaz

3. Does the refusal of the MVIS registration of Adam Zurawski as a Motor Vehicle Inspection Mechanic at Underground Garaz, fall within the HTA?

3) Counsel for the Respondent shall provide a list of the 138 violations and the 52 charges to the Applicants by April 20, 2007, with the process of Disclosure between the parties to be completed by May 4, 2007, in order to effect timely Disclosure to the Tribunal, ten days prior to the hearing, of any additional evidence being relied on by the parties. The latter Disclosure shall include any Agreed Statement of Fact, respecting the violations and charges.

4) The following witnesses shall be called:

For the Applicants: Sebastian Baldyga and Adam Zurawski.
Zbigniew Zurawski of Zbyszko Autobody, where Adam Zurawski was formerly registered as a mechanic, may also be called as a witness for the Applicants.

For the Respondent: Alan Gibson, Officer in the Ministry of Transportation.

- 5) The hearing previously scheduled for Monday May 7, 2007, is cancelled and is now scheduled for Tuesday June 5, 2007, commencing at 9.30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

PHILOMEN WRIGHT
Presiding Member

RELEASED: April 17, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BEST DEAL MOTORS COLLISION CENTRE INC.
and GREGORY RABKIN

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS

TO REVOKE A MOTOR VEHICLE INSPECTION STATION
LICENCE AND TO REVOKE A MOTOR VEHICLE INSPECTION
MECHANIC LICENCE

TRIBUNAL: HARINDER GAHIR, Vice Chair

APPEARANCES: RON SHULMAN, Counsel, representing Best Deal Motors Collision
Centre Inc. and Gregory Rabkin

MURRAY FORBES, Counsel, representing the Director of Vehicle
Inspection Standards

DATES OF
HEARING: February 20 and 21, 2007

Toronto

REASONS FOR THE DECISION AND ORDER

BACKGROUND

This is an appeal by Gregory Rabkin o/a Best Deal Motor Collision Centre Inc ("the Applicant") to the Licence Appeal Tribunal (the "Tribunal"), arising out of a Notice dated September 12, 2006, issued by the Director of Vehicle Inspection Standards (the "Director"), proposing to revoke a Motor Vehicle Inspection Station licence and revoke the registration of Gregory Rabkin as a Motor Vehicle Inspection Station mechanic pursuant to Subsections 91(8)(a), (c) and (e) and 93(a) and (c) of the *Highway Traffic Act*, for the following reasons, as stipulated in the Notice:

1. The Licensee issued Annual Inspection Certificates # 1354783 – H1354790 without the vehicle having been inspected by an MVIS mechanic, contrary to section 90(3) (a) of the Act.

2. The Licensee issued Safety Standards Certificates 8654611 and 8654612 without the vehicle having been inspected by an MVIS mechanic, contrary to section 90(3)(a) of the Act.
3. The Licensee issued the following Annual Inspection Certificates without affixing the annual inspection sticker as required by section 8 of Regulations 611:
 - a) #H692585 dated April 22, 2005;
 - b) #H1354772 dated April 27, 2006;
 - c) #H1354846 dated June 16, 2006.
4. The Licensee failed to keep copies of work orders, annual inspection certificates or safety standards certificates on the premises and to produce said documents on June 1, 2006 to an MVIS inspector contrary to section 10 of Regulation 601. On August 30, 2006, he failed to keep and produce copies of work orders.
5. The Licensee and the Mechanic made false statements in Safety Standards Certificates or issued certificates not in accordance with the Act and Regulations as evidenced by the following convictions:
 - a) Conviction entered on December 12, 2002 under s. 99(2) of the Act for offence committed May 14, 2002;
 - b) Conviction entered on June 8, 2000 for false statement under s. 99(2) of the Act for offence committed on March 15, 1999;
 - c) Conviction entered on March 13, 1991 under section 74(3) of the Act for offence committed on November 19, 1990;
 - d) Conviction entered on November 21, 1990 under section 74(3)(a) of the Act for offence committed on August 13, 1990;
 - e) Conviction entered on September 13, 1989 under section 74(3)(a) of the Act for offence committed on June 20, 1988; and
 - f) Conviction entered on February 3, 1986 under section 74(3)(a) of the Act for offence committed on September 5, 1985.

ISSUES:

The issues in this case may be summarized as follows:

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

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

EVIDENCE

The Respondent called two inspectors for the Ministry of Transportation who were involved in the investigation of the Applicant. The Respondent also tendered documents involving conviction records, station records and inspection records pertaining to the Applicant and the station.

The Respondent's first witness, MTO inspector Glen Dodwell, has been employed with the Ministry of Transportation as an enforcement officer since January 2001. He has been licensed as a 310S automotive mechanic as well as 310T truck mechanic since 1980.

Mr. Dodwell received a complaint with respect to issuing an annual safety sticker No. H692585, without affixing it to the vehicle. The Applicant had handed over the sticker to the customer instead of affixing it to the vehicle. The complainant took the sticker and sent it to the Ministry. Mr. Dodwell attended the Station on May 18, 2005, to investigate this offence. Mr. Rabkin informed Mr. Dodwell that he wrote out the inspection sticker and signed it after completing the inspection, and left his office to talk to another customer. When he came back the sticker was gone and the customer had left the money on his desk. Mr. Dodwell charged the Applicant, who was later convicted for this offence.

In a similar situation Mr. Dodwell received a report from the Halton Office of the Ministry pertaining to an incident of not affixing the Annual Safety Sticker to the vehicle. The sticker #H1354772 was in the possession of the owner of the vehicle and was not affixed to it. Mr. Dodwell attended the Station on June 6, 2006, to investigate this incident. At this time, he met with <name deleted>, who is a relative of the Applicant. He was managing the station in the absence of the Applicant, who was on vacation in Germany, from May 20, 2006, to June 6, 2006. Mr. Dodwell inspected the station copy of the annual certificate. <Name deleted> could not comment on the certificate, as it was the Applicant who looked after these certificates. Mr. Dodwell, during this visit, could not inspect one book of Safety Standard Certificates #8654601 – 8654620 and annual certificates #H1354791 – H1354800, as <name deleted> could not locate them. Mr. Dodwell mentioned that the safekeeping of the certificates is the duty of the licensee. Mr. Dodwell testified that further investigation of the missing book of Annual Inspection Certificates revealed that those certificates were issued during the absence of the Applicant. Copies of the above Annual Certificates were submitted in evidence at Tab 10 of Exhibit 4. These Certificates were dated between May 20, 2006, and May 29 2006. Copies of two Safety Standard Certificates in question were also introduced in evidence at Tab 11 of the Exhibit 4. Certificate #8654611 was dated May 31, 2006; however Certificate No. 8654612 was issued on June 7, 2006, the day after Mr. Rabkin returned to the country. Mr. Dodwell was of the opinion that the signatures on both these certificates were identical but did not match the signatures of Mr. Rabkin on previous Safety Certificates.

Mr. Dodwell attended the Station again on June 30, 2006, after Mr. Rabkin was back from vacation, to serve the summons for previous offences and to investigate further the matter of missing certificates. Mr. Dodwell walked into the office of the garage and found out that Mr. Rabkin was handing out an Annual Safety Certificate No. H1354846 (page 45 of Exhibit 4) to a customer along with the work order. The inspection date on the sticker was June 16, 2006, but it was handed out on June 30, 2006. Mr. Rabkin felt bad about the incident. Mr. Dodwell asked Mr. Rabkin who signed the annual certificates while he was away. Mr. Rabkin replied that it was his mechanic who had issued those certificates.

In cross-examination Mr. Dodwell agreed that there was no complaint with respect to Annual Inspection Certificates Nos. H1354783 – H1354790, but the violation was revealed during an audit. He mentioned that it was important that the authorized mechanic inspects the vehicles. He confirmed that Mr. Rabkin was never charged with respect to this violation. He mentioned that it would be very hard to lay charges without having the vehicles reinspected. He agreed that there was not sufficient evidence for conviction. He further stated that he could have charged Mr. Rabkin for this violation, but he gave him a break by going to the route of revoking his licence. He mentioned that he showed the signatures to Mr. Rabkin. Mr. Dodwell also confirmed that he did not ever give warning to Mr. Rabkin that, due to his violations, his licence might be revoked. He also agreed that the facility operated from 1999 to 2005 without any convictions. He confirmed that the stickers in question, and which were handed to customers, did not end up on the wrong vehicles but insisted that there was a possibility of this happening in the given situation.

Mr. Dodwell agreed that the Department never issued any warnings to this garage or ever suggested any corrective measures. However, he considered the charges and convictions to be warnings for the drastic step of making a proposal. He stated that the garage and the mechanic were charged in the past and did continue making mistakes. He mentioned that at the time of issuing a licence to a mechanic the Ministry gives the mechanic a bound binder of circulars, bulletins, changes, manuals, the *Highway Traffic Act* and relevant portions of Regulation 601.

Evidence of Robert Grabar

Robert Grabar testified and provided relevant information with respect to his involvement in the investigation of the issuance of Safety Standard Certificate No. 3099500, which the garage issued on May 14, 2002. Mr. Grabar has Class 310S and 310T mechanic licences. He has been employed with the Ministry of Transportation for the last 9 years. Mr. Grabar completed his field inspection report of this vehicle on May 29 2005, on the complaint of the new owner of the vehicle. This inspection was performed 15 days after the certification of the vehicle and after the car had travelled a distance of 316 kilometres after the certification. The limited inspection revealed various defects in the vehicle, including:

At calliper – ...internal bulge is soft.

Left rear flex hose numerous cracks along surface, largest crack leaking out brake fluid.

Left front flex hose bulge @ guide bracket and bulge at section approx. 3" from inlet...
 Right front flex hose cracking C guide bracket area (multiple cracks)
 Leak from fuel line fitting @ right front floor area.
 Exhaust leakage from multiples cracks....

The Ministry produced 7 photographs to show the above defects. The Tribunal marked these photographs as exhibits 5 to 11. Most of the above defects were due to aging of the vehicle. The vehicle was not considered to be compliant with Regulation 611 and, therefore, the plates were removed and vehicle was placed in "unfit" status. Mr. Grabar felt that these defects were present at the time of issuance of Safety Standard Certificate, and could not have occurred between issuance of the Certificate and the limited inspection by the Ministry.

In cross-examination Mr. Grabar admitted that after this incident the Ministry did not provide any recommendations or corrective action plan to the garage in order to avoid such mistakes in the future. He stated that the Ministry sometimes issues warnings after such incidents and sometimes charges the mechanic or the garage, or both, and sometime makes a proposal to revoke the licence. He agreed that the Ministry did not provide any type of warning to the Garage or the Mechanic before making a proposal to revoke the licence.

Applicant's Evidence

The Applicant's evidence included oral testimony of the Applicant, his relative, <name deleted> and his customer, Customer A.

Mr. Rabkin has a 310A and 310S mechanic licences, which he obtained in 1982. He has been operating the garage since 1988 and a significant part of his business is safety inspection of motor vehicles. He agreed that lot of checks have to be completed before certifying a vehicle and understood that it is the lives of the person driving and people around which are at stake as a result of the inspection. He stated the importance of signing safety certificates and, therefore, said he will not allow anyone else to sign the inspection certificates on his behalf. He stated that his signatures on different certificates in question might not match as he signs differently at different times.

Mr. Rabkin stated that he himself signed the safety certificates H1354783 to H1354790. These certificates were dated within the period May 20, 2006, to May 29, 2006, the period when he was away on vacation. He stated that he does not always check the calendar and makes mistakes on putting the dates on certificates. He mentioned that he has a personal recollection of inspecting the vehicles for which the above certificates were issued. He explained the specifics of the work done on some of these vehicles.

Mr. Rabkin explained the circumstances when he was seen handing the Safety Certificate and work order to a customer on June 30, 2006. He stated that he got nervous when the inspector attended his office and, in error, handed the sticker and work order to the customer. He stated that he understands his duty to put the certificate on the vehicle after completing the annual certificate. He also mentioned that a few

times customers demanded that they be allowed to clean the previous sticker off themselves to make sure the surface is clean, and he might have handed stickers to them. He agreed that it was a possibility that some of them might have left the garage without affixing the stickers.

He stressed that he had paid the fine for the previous convictions after pleading guilty and, hence, those incidents should have been over. He stated that he was under the impression that since he had paid the previous fines his record was clean. He insisted that at no point did any officer give him any warning for improper conduct or ever make any recommendations to make any changes to the operation of his business. He stated that after the conviction for not placing the Safety Stickers on vehicles he is very particular to make sure that the stickers are affixed on the vehicles and, to avoid any violations, he does not leave paperwork on the table. He is now very careful when putting dates on the paperwork. In order to streamline the working of his garage he has assigned his relative to take care of the paperwork, including taking care of work orders and invoicing.

During cross-examination Mr Rabkin admitted that he is the only licensed mechanic registered with the garage. His wife is the sole director of Best Deal although he is controlling mind of the company. He stated that his staff includes a helper, a body man, and his wife and a relative, who assist him in different aspects of the operation of the business.

Evidence of <Name Deleted>

<Name deleted> stated that he is a body person in the garage. He has been associated with the business since he was 18, although he took off four years and was later an on-and-off associate with the business. He has been associated with the business on a regular basis for the last three years. He is now the office manager of the garage. His duties include looking after administrative aspects of the business. He mentioned that the Applicant deals with the technical aspects of the business, and the Applicant's wife and he take care of the customers. He claimed that there were no inspection certificates issued while the Applicant was away on vacation from May 20 to June 6, 2006. He mentioned that he makes sure that any vehicle that gets an annual safety check completed has its safety sticker affixed to the vehicle before the vehicle leaves the garage.

Evidence of <Customer A>

Customer A owns a used car lot and has been in the business for past 12 years. He sells between 10 to 15 cars per month and, for the last four years, he has been getting the safety certifications for these vehicles from the Applicant's garage. Customer A testified that safety certificate No. 8654611 dated May 31, 2006, (page 62 of Exhibit 4) belongs to one of his vehicles, which he claimed was inspected by the Applicant before he had left for his vacation.

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 mechanic 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 mechanic 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 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 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 both were 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 Director has shown that the Applicant, in signing SSC No. 3099500A-024, on May 14, 2002, for the 1989 Audi, which has been shown to have numerous and serious safety defects at the time of issuance, made a false statement on the SSC issued. In this case, the vehicle for which safety a standard certificate was issued was taken off the road as being an unsafe vehicle. Furthermore, the veracity of the testimony of the MTO inspectors has been well supported by photographic evidence. These defects were of a very serious nature, and include defects in braking and control systems, as well as vehicle structural integrity. In the Tribunal's opinion, these defects constitute an immediate safety hazard to both the vehicle owner, and to the motoring public. This gives the Director the necessary grounds for the revocation of the Applicants' MVIS Licences under sections 91(8)(a) and 93(a) and (c) of the *Highway Traffic Act*.

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 on several occasions.

The Applicant did not dispute the grounds laid down in the Notice of Revocation, except for issuing of safety certificates while he was away, in Germany, for vacation. He

testified that all the vehicles in question were inspected within a period of few days of his leaving for vacation on May 20, 2006. Although the Applicant provided details of the repairs completed in the vehicles, which are in question, the Tribunal finds that it is highly unlikely that all the certificates were then dated for days the Applicant was on vacation. Therefore, it is more likely than not that those certificates were issued while the Applicant was away on vacation. Moreover, the Applicant was aware of the case he had to prove. If the certificates in question were indeed issued before he left on vacation, as claimed by the Applicant, he could have submitted invoices, work orders, and payment receipts to the MTO Officer, or to the Tribunal, to prove that the vehicles in question were inspected while he was at the station. In the absence of this evidence, the Tribunal is not persuaded that the Applicant himself inspected the vehicles and that the dates shown on the certificates were in error.

The Applicant admitted to handing over Annual Safety Certificates to customers at different times, for which he was convicted three times.

Subsection 91(6) of the Act provides that the operation of a Motor Vehicle Inspection Station be under the charge and control of the licensee. The licensee 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 May 20 to June 6, 2006. The Applicant admitted that he left no person in charge of his station who had authority to issue safety standard certificates. The Tribunal finds that Certificate NOs 1354783 – H1354790 and Safety Certificates No. 1354783 and 8654612 were issued while the Applicant was on vacation. This means that vehicles were certified as safe without the necessary review by a licensed mechanic.

The Tribunal concludes that the Applicant has been indifferent to his obligations under the Act as both a Motor Vehicle Inspection Station operator and as a Motor Vehicle Inspection Station 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 Best Deal Motor Collision Centre Inc. and to revoke the motor vehicle inspection station mechanic registration of Gregory Rabkin.

LICENCE APPEAL TRIBUNAL

Harinder Gahir,
Vice-Chair

RELEASED: April 25, 2007

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



AUTO COLLISION AND MORE INC. AND THONG V NGUYEN

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES: SHANE VAN ENGEN, Counsel, Auto Collision and More Inc., the
Applicant

PATRICK MOORE, Counsel, Director Vehicle Inspection
Standards, the Respondent

DATE: April 11 and 18, 2006, May 17 and 24, 2006, June 12, 2006,
August 22 and 24, 2006, and October 6 and 31, 2006

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant Auto Collision and More Inc. (the "Licensee") is a Motor Vehicle Inspection Station ("MVIS") licensed under the *Highway Traffic Act* R.S.O. 1990, chapter H.8 as amended (the "HTA"). The Applicant Thong V. Nguyen is a Motor Vehicle Inspection Station Mechanic (the "Mechanic") licensed under the Act. By Notices of Proposal dated January 24, 2006, the Director of Motor Vehicle Inspection Standards (the "Director") informed the Applicants that their licences were to be revoked. The Notices as required informed the Applicants of their right of appeal to the Tribunal. They exercised that right by filing a Notice of Appeal.

ISSUES:

The Licensee is licensed under the HTA as an MVIS, a location at which inspections may be carried out on structural work done to repaired and rebuilt vehicles, and to issue Structural Inspection Certificates (SICs). The Applicant Thong V. Nguyen (the "Mechanic") is licensed under the HTA as a MVIS mechanic and as such is a person permitted to carry out structural inspections.

The Director takes the position that by the authority granted to him under the HTA he has sufficient grounds upon which to revoke the licence and registration of the Applicants. He has enumerated those grounds in the Notice of Proposal:

1. The Licensee issued a Structural Inspection Certificate on a Chrysler Neon that did not comply with the prescribed standards under the HTA and the Licensee and the Mechanic falsely certified in the SIC that the vehicle in fact met the standards.
2. The Licensee and Mechanic did not comply with the HTA and regulations as evidenced by 10 convictions were entered for contravening Section 10.1 (1) of Regulation 601 for failure to forward required documents to the Ministry.
3. That the Licensee failed to forward complete documentation to the Ministry with regard to 84 SICs issued between 2002 and 2005.
4. That the Licensee failed to forward the required documentation with respect to 32 SICs issued during the period from April 2003 to 2005.
5. The Licensee and Mechanic issued a SIC for a 1999 Chevrolet Cavalier which they knew was not based upon roadworthiness standards required by the HTA.

It was the position of the Applicants that:

- a) the evidence before the Tribunal lacked the weight, clarity and consistency required for the imposition of the ultimate sanction available to the Director, namely revocation,
- b) The Mechanic whose first language was not English did not fully understand the requirements imposed upon him as a license holder, and
- c) The Registrar did not prove to the required onus the elements of the counts in the Notice of Proposal

EVIDENCE

Type Six Motor Vehicle Inspection Stations:

In the course of the evidence, the Tribunal was informed that these stations are required by statute where structural repairs have been carried out on a damaged vehicle to ensure its roadworthiness prior to resale. Repaired Vehicles must have an accompanying SIC endorsing roadworthiness. SICs are issued by licensed Motor Vehicle Inspection Stations (MVIS). The actual inspection also has to be carried out by a mechanic licensed under the HTA to do these inspections. The Licensee, like any Type 6 licensee, purchases blank certificates, ten per booklet, at a fee from the Ministry of Transportation (the "Ministry"). These are filled out upon completion of the structural

inspection and go with the vehicle. The fees charged are in the range of \$150.00 per inspection. Each inspection can take between two to three hours. A licensee can carry out both repairs and inspections. The licensee upon completion of an inspection has, since April 2003, been required to submit to the Ministry, within seven days of the issuance of the SIC, documentary evidence supporting the work done. Included is a record of parts used, structural measurements taken, photos of damage and work done. Prior to April 2003, submission of the paperwork behind the inspection to the Ministry was not mandatory. Type 6 inspections are intended to provide the assurance that the vehicle's underlying structure or chassis has been returned to square and plumb. There can be but minor variance allowed (3mm) between factory new specifications and the measurements taken by the MVIS. The factory new specifications are available on printouts from the manufacturer. The MVIS measurements must be compared to and conform to these printouts. The manufacturer's spec sheets indicate all relevant points of measurement and the distances between them. The sheets include wheelbase required dimensions as well as those for other sections, passenger compartment, trunk, engine compartment, doors etc. It is the responsibility of the licensee to prevent cars from entering the marketplace, should the measurements of the vehicle not conform to within 3mms of the manufacturer's specs.

The Ministry's case involved both specific examples of inspections carried out by the Applicant and evidence that the Ministry asserted was indicative of an ongoing disregard by the Applicants of their responsibility to submit proper documentation subsequent to inspections within the prescribed seven days. Convictions for such offences were also entered.

Mr. Dan Ventura testified to give an account of the Ministry's position regarding the issuance of the Director's Notices of Proposal. He is the Mandatory Vehicle Branding Administrator at the Ministry. He has been a licensed automotive mechanic since 1977. His responsibility at the Ministry is to oversee the MVIS's and individuals holding licenses to issue vehicle SICs. He must ensure proper records are submitted regarding vehicles requiring certificates and the actual inspection of those vehicles to ensure compliance with the regulations. There is another level of inspection which ensures the operation of the non structural aspects of the vehicle (lights, doors, wipers etc). This inspection is not a concern of the present inquiry.

The Mandatory Vehicle Branding Program was instituted through legislation to ensure that post accident vehicles are properly repaired and rendered roadworthy prior to resale and entry onto the highways under the HTA. Underwriters of post accident vehicles are required to notify the Registrar of Motor Vehicles of their determination as to the whether the subject vehicle is repairable or is salvage. The vehicle permit holder is also notified. The insurer's claims people come to their branding conclusion based upon an appraisal by an adjuster who makes a determination of the cost of repair to the vehicle which is, in turn, compared to the insurer's obligation to indemnify to the assumed market value, sometimes referred to as the blue book value. A record of the adjuster's assessment is kept. Upon receipt of the information from the insurer the Registrar places the classification of irreparable or salvage as the case may be in the vehicle permit records. If the classification placed upon the vehicle is "salvage", the

Registrar may reclassify it as rebuilt if the criteria for reclassifying it as such are met. If the vehicle is classified as "irreparable", no such reclassification is permitted. Generally, if the repair costs exceed the amount realizable post repair the vehicle is determined to be a total loss and is so "Branded". If the Insurer says the vehicle is repairable, it is branded as salvage.

In the usual course such salvage vehicles are sold at auction yards where licensed dealers bid on them. These purchases are based upon the economics of the cost of putting the vehicle back to roadworthy condition and what price can be attained upon resale. Obviously if the cost of repairs exceeded the available resale value of the vehicle, there would be no point to the exercise on the part of the rebuilder. The HTA interposes Type 6 licensees between the rebuilder and ultimate purchasers in order to ensure that the rebuilder doesn't fall prey to the obvious temptation to economize on repairs to increase his resale profit. The documents, including those generated by insurers as part of their appraisal system, must be submitted to the Ministry within seven days of the issuance of the SIC.

1999 CAVALIER PARTICULAR # 5

This car was purchased in February 2006 at an agreed price of \$5,800.00 by Witness A, called by the Respondent. The car was certified and had been sold as roadworthy. Defects were soon discovered and Witness A called the Ministry. Mr. Ventura was dispatched and he confirmed the defects. Included in the defects shown to him were holes and protruding screws. A refund was demanded and received.

Mr. Ventura's Vehicle Investigation Report dated March 2, 2006, indicates that he was called into the case on the basis of a complaint from the Durham Regional Police to the effect that the car in question did not meet minimum standards of roadworthiness. He concluded from his initial assessment that, indeed, the standards were not met and he removed the plates. On the presumption that the car had been rebuilt after an accident, he looked into how a vehicle in this state could have received the necessary Structural Inspection Certificate (SIC).

Mr. Ventura traced the structural work to the Licensee through Structural Inspection Certificate 1091957. The date on the Certificate indicated the final inspection being completed and signed off by the Licensee on January 3, 2006. The Rebuilt Vehicle Parts Audit Form, indicating the scope of the work done and parts used, indicated the owner (purchaser of the salvage) and the rebuilder. The document also indicated repairs to the hood, right and left quarter panels, and partial frame rail right and left. Both the rear bumper cover and the trunk lid were checked off as being replaced with used parts from a supplier noted as "Mikes". The actual structural work done on the vehicle must also be indicated on the form, including what vehicle assemblies were dealt with either by repair or replacement and whether these were noted on the insurance appraisal. The Licensee listed the rear end panel assembly, the right and left rear sub frame assemblies and the trunk floor pan assembly. Mr. Ventura stressed that Type 6 licensees are not obliged to carry out structural inspections when presented with a vehicle.

On this point Mr. Ventura testified that Type 6 licensees will have in hand the appraisal report with photographs submitted to the underwriters. As stated, the report along with the repair estimate is the opinion of the agents of the underwriters as to whether the car is any longer a viable economic asset to them. It is this report along with the repair estimate that leads the insurer to make the decision whether or not to "brand" the car as salvage. In this case there was an estimate carried out December 10, 2005 at a local garage which came in at \$7,991.00 parts and labour at an hourly shop rate of \$48.00 sheet metal and \$65.00 mechanical; an amount within \$9,00.00 of the top going rate of \$8,000.00 for an undamaged 1999 Cavalier. Obviously in the present case it was the decision of the insurer to let the car go as "salvage". As explained, this would be the logical decision of the party insuring the car. Another party may believe that the vehicle can be rendered roadworthy for less than the insurer's estimate and still be sold at a profit. The going rate at the auction for salvage was approximated in testimony as in the order of 25% of the assumed commercial value paid out under the policy of insurance, or somewhere around \$3000.00 in the present case. So somewhere between \$3,000.00 salvage price and the \$8,000.00 assumed resale value lies the area of the rebuilder's profit. This calculation assumes the repairs receive the required SIC from a Type 6 licensee. Without the SIC, the cost of repairs is for naught.

From appraisal photographs, Mr. Ventura concluded that the car was most likely pushed into something and that the denting to the rear was indicative of new impact. Structurally the photos corresponded with the required work stated in the insurance appraisal. There was obvious damage to the rear floor panel, side rail, rear body panel and rear body panel. Specifically through the introduced photos he demonstrated that the trunk did not line up, that there was stress on the right quarter panel, that the rear had been shifted downwards, that impact had buckled the floor (the floor being considered a structural item), and that there was damage to the side rail.

Mr. Ventura checked the VIN and assured himself that the car written off by the insurer and that shown as inspected on the Licensee's certificate were one and the same. Then using the appraisal photos, those submitted with the required audit and the insurer's estimate as evidence of the damage, Mr. Ventura commenced his own investigation into whether the condition of the vehicle when he encountered it was or could have been inspected and cleared as roadworthy within the regulations. Of primary interest to the Ministry in these situations is whether any structural damage has been corrected. As this means straightening the metal frame, the investigator must be assured that the frame has been "jigged" back into its original chassis control points to within 3 mm of the manufacturer's specified figures.

The Ministry as regulator relies upon the issued SICs as evidence of roadworthiness. The system makes the MVIS licensees the gatekeepers of the safety of the vehicle which re enter the marketplace through the Ministry's "branding" program.

Mr. Ventura's investigation on the soundness of the frame, including a series of measurements, revealed misalignments from the chassis control points significantly beyond the 3mm allowed tolerance. Mr. Ventura described the apparatus known as a

frame bench upon which alignment measurements are taken, where the inspector is able to establish horizontal and vertical reference points or datums from which misalignments, if any, can be measured. The alignment data submitted by the Licensee to the Ministry as a necessary part of the audit declared that the alignment was within specifications. No vehicle can be considered roadworthy if its underlying structure or frame is misaligned.

Mr. Ventura also pointed out the use of body filler to cover repaired areas. This, he stated, was an unacceptable practice. In his opinion, this practice is to disguise incomplete or neglected repairs and a licensee must not grant an SIC to such vehicles.

The Applicant in his capacity as a licensed Mechanic confirmed that he did an inspection on the Cavalier in accordance with his license authority on January 3, 2006. As stated, his charge for a structural inspection is \$150.00. The vehicle was brought in by the owner who told the Mechanic that he was an expert repairer. He first put the car on his frame alignment bench to make a general inspection and checked the vehicle's documentation including the VIN plate but only the plate on the door. He checked the VIN as he had previously had occasion to have a vehicle come in with a mismatch between the paperwork and the affixed VIN, meaning to him possible theft. He took measurements similar to these described by Mr. Ventura, and passed the car as meeting roadworthy specifications. When doing the chassis point alignment measurements on a frame, his practice is to cross reference figures he observes with the manufacturer's sheet and circle those within tolerances.

On the question of the body filler over or in lieu of repairs, the Mechanic stated that he would never have certified a vehicle with that amount of filler. The pictures and information from the appraisers as opposed to those of Mr Ventura do not show the spots where filler was applied.

On cross-examination, the repair estimate from the insurers was compared with his own submitted to the Ministry. His was \$160.00 and the insurer's was \$7,991.00. He stated that in his experience insurance estimates are always high. He maintained that the car as described by the Ministry does not match that which came through his door for inspection. The only explanation was that the car as examined suffered intervening damage or that it was a different car with switched VIN plates.

Mr. Ventura was asked about the rivets affixing the VIN plate to the car. The object of the inquiry was to determine whether or not the rivets may have been turned and if so whether this could lead to a conclusion of a changed VIN plate. If the plate had been changed, the vehicle may not be that which the Mechanic had inspected, assuming of course, the same colour and damage. Mr. Ventura stated that he did not observe any indication that the VIN plate had been disturbed. He was also queried as to whether or not, after the vehicle left the premises of the Licensee, parts such as doors, tires and bumpers could be replaced. While he stated they could be, he had never heard of the practice in circumstances such as the present. It was his belief that the Cavalier described before the Tribunal was the same as that inspected by the Applicant. It was the same colour, it had dual exhausts and spoilers and had suffered the same damages

as that which showed up in front of the insurer's appraisers. He concluded by posing to the Tribunal the unlikelihood of the Mechanic's assertion, given the market value of the car versus the expense it would have taken to alter its identity. What steps might be worthwhile for a BMW with very high resale value would not be worthwhile for a 1999 Cavalier. He also concluded that the damage as reported to the insurers so resembled that which he examined that he did not accept the theory of intervening damage.

He confirmed that he inspected the Cavalier on January 3, 2006 for a fee of \$150.00. He stated that he checked the VIN but only on the door. VINs are located at other areas on any vehicle, including a spot known only to the manufacturer who will reveal it only to authorities according to the Ministry. The Mechanic's answer was intended to create doubt that the car dealt with by Mr. Ventura could not be identified with requisite certainty as the car in question before the Tribunal. However, its colour, dual exhausts, fog lamps, spoiler and other similarities to the one designated by the insurer were pointed out. The Tribunal accepts the Ministry's contention that the car before the Tribunal was that certified by the Licensee. This assessment was bolstered by the obvious fact that there is so little residual value in a car of this make and year that tampering with VINs would not be worth the risk to any auto theft ring or individual.

The invoice for repair parts for the Cavalier put forth by the Licensee for \$160.00 was compared to that from the insurer's, amounting to almost \$8,000.00. Again the Mechanic stated that insurer's estimates are always high. He was shown the chassis point measurement sheet and confirmed that the numbers circled by him represented measurements within specification indicating no damage to the frame. Mr. Ventura testified that chassis point measurements were significantly at odds from specifications. The Tribunal was left with very strong evidence that the car had not changed identities between the time of the inspection by the Licensee and Mr. Ventura's involvement.

CHRYSLER NEON PARTICULAR # 1

Witness B was the owner of the subject 2001 Neon. He stated that he answered an ad in a magazine and purchased the vehicle in 2005 from an individual selling through a third party at an agreed price of \$6,700. He was told by the vendor that the vehicle had not been in an accident. The question of a Safety Inspection Certificate was never addressed. Soon after picking the vehicle up he noticed several things wrong and tried for redress from the vendor who could not be located. He stated the vehicle was driven little while in his possession. He arranged to have it inspected and it was adjudged to be unsafe. He was told that repairs would approximate \$10,000.00. He complained to York Region Police and that complaint made its way to Mr. Ventura at the Ministry's Mandatory Branding Unit.

Mr. Ventura carried out a preliminary inspection on August 10, 2005 and determined the following:

- the lower tie bar and lower bar brace method of assembly was not acceptable or in line with manufacturer's requirements

- the bottom re-bar fasteners were missing and the holes in the re-bar did not line up with those in the bottom of the front side rails
- repairs to the left side rail and side rail reinforcement were very poor
- the trunk lid and bumper cover fit was poor
- damage to the rear structure was quite evident. The trunk floor was buckled and the left rear side rail appeared swayed to the left

He concluded that the damage was consistent with that which was sustained as a result of an accident to the vehicle on October 23, 2003 and that there was no evidence of intervening damage between that date and the date of his inspection. The vehicle in his opinion did not meet minimum safety standards as it was poorly repaired and its structural integrity was severely compromised. It was deemed not roadworthy and the plates were removed.

The Licensee came into this picture because the Mechanic's signature was on the Structural Inspection Certificate (SIC) Numbered 1078455 approving the vehicle as roadworthy. Mr. Ventura verified that the VIN on the Neon matched that on the SIC issued for the vehicle by the Licensee January 27, 2005. The vehicle, despite the vendor's statement to the contrary, had been in an accident and was appraised on behalf of the Insurer.

At this point the Ministry, through its Branding Unit's preliminary investigation, had accomplished the task of removing an unsafe car from the road and confirmed that it had not been properly repaired prior to being sold as roadworthy. As explained, this represents a break down in the branding system for which the Ministry is responsible. The Ministry is under the obligation to discover how a vehicle went from "salvage" to certified roadworthy despite the regulatory system.

To this end Mr. Ventura first reviewed the appraiser's photographs and repair estimates which must accompany the vehicle. He then verified his initial investigation of the extent of accident damage with a series of his own photographs. Finally he reviewed the work done by the Mechanic in certifying the vehicle as structurally sound prior to the issuance of the SIC and compared it to his own investigation and the insurer's appraisal.

The appraiser's post accident photos were referenced to show a frontal impact and another at the left rear. The trunk lid was sprung. The insurance appraisal indicated parts (\$5,210.00) and labour (\$3,936.00) plus taxes and incidentals totalling \$10,719.00, which subtracting the \$500.00 deductible, left a figure of \$10,219.00. This amount meant a total loss to the underwriters. Once accepted by the underwriters, this total loss figure destined the vehicle to the auction yard branded as required under the HTA as "salvage", and then to the vendor whose name appears as owner on the SIC issued by the Licensee.

A review of the rebuild file kept as required by the Licensee showed a figure for parts invoiced at \$652.00 in contrast to the \$5,210.00 on the insurance appraisal. The Parts Audit portion of the file shows a hood, a front bumper and a fender replaced and repair to the both side rails. The Structural Assembly portion shows repairs to the radiator support assembly. The documentation also included alignment and chassis point measurement records.

Mr. Ventura set about to verify whether what was recorded as having been carried out by the Mechanic prior to the issuance of the SIC was in fact done up to the expected standards of a licensee or indeed at all. To this end he took his own measurements of the chassis points and alignments and photographed the areas of recorded repair. As to the chassis points his measurements were beyond the acceptable limits imposed by the manufacturer. His conclusion on this point was that the measurements noted by the Mechanic, if taken at all, were either taken improperly or ignored. If measurements were taken and showed deviation from specifications, then the time and expense of correcting them was necessary prior to the issuance of the SIC, with the concomitant diminution on the net profit on the rebuild.

He concluded from his examination of the front bumper and side rails that the safety of the car had been compromised. Those parts lacked fasteners and were kinked. The side rail had blue markings from excessive heat. Any weaknesses remaining after repairs on these structural items results in a reduction in crashworthiness.

Mr. Ventura, in answer to a claim that the Neon in question was a different car, pointed to the fact that the damage was the same as recorded by the insurance appraisers and its features were identical.

The Mechanic was qualified, as shown by a certificate, to operate a measuring platform known as an E Z Liner Frame Bench. He stated that prior to 2004 he had certified cars even though the wheels were not within alignment. He confirmed that he had received the subject Neon to have the frame straightened. He did not do the body work but did replace the hood and left fender and repaired the radiator support. He straightened the frame without the use of heat. He asserted that the car was in alignment when it left his shop and was not as described by Mr. Ventura. He did not make it a practice to mark down the actual frame measurements taken.

When confronted by the large differential between his estimates for required work and that of the insurer's appraisers, he stated that appraisers always come in high. He took the position that the damage set out in the testimony of Mr. Ventura did not coincide with that which he encountered, even after being shown the front end photos taken by him upon receipt of the car and those taken by Mr. Ventura during his investigation. Accordingly, in his mind he was correct in issuing the SIC. For example, unlike the insurer's finding that there was rear end damage, he disagreed and accordingly opted not to take rear chassis points measurements.

The Mechanic swore that there were radiator supports present when the car arrived despite the fact that they can not be seen in the appraiser's photos. He claims that, as

stated in the Structural Assembly Audit, he repaired them. His point was that the vehicle must have been in an accident subsequent to his inspection. He has no control over the fate of a car after it leaves his shop. The car had travelled thousands of kilometres since the date of the SIC and had had owners. He stated that the extent of the damage uncovered by Mr. Ventura is itself evidence that there must have been intervening causation.

PARTICULAR #2

Mr. Alan Gibson was called to give evidence of the Licensee's qualification as an MVIS, its record of compliance with the Ministry and of the convictions under the HTA. He reiterated the Ministry's requirement that, as at the spring of 2003, Type 6 licensees submit the rebuild documentation surrounding SICs issued out of their MVIS. He then reviewed the licensing of the Licensee. Mr Gibson stressed that the submitted documentation was the only way to perform an audit function on the inspection system. The information required included the parts that were replaced, with VIN included, a record of alignment work done, a record of chassis point measurements with manufacturer's references, two photos on a frame bench and the file from the insurer's appraisers. This is passive data, to a large extent, as the car can be registered once the SIC is issued. Its usefulness comes into bold relief once the car is reported as having defects and those defects are exposed as being ones that should have been detected by an MVIS. As well VINs can be cross referenced to stolen vehicles. But if data is submitted, for example measurements, that is attested as being accurate, the Ministry (and the owner) is at the mercy of the honesty of the licensee. The regulators overseeing any such system based upon such reliance take very seriously any such breach of the trust, particularly when public safety is involved. Between April 2003 and 2006 the Applicant issued some 1,000 SICs.

Counsel for the Director introduced evidence of convictions, some 10 in all, registered against the Applicant for breaches of the HTA, for failure to forward required documents to the Ministry indicating work done. In many instances the submitted paperwork was incomplete.

In cases of delinquent filing, the Ministry invokes a warning letter system, consisting of notification of the filing delinquency followed by an investigation. The warning letters sent to the Licensee were introduced.

Mr. Gibson was cross examined on the possibility that the 30 odd SICs introduced in direct examination were lacking required documentation because it had been lost by the Ministry. As well, he was questioned as to whether adequate notice to licensees had gone out regarding the commencement of the April 2003 additional requirement to file. Mr. Gibson responded that while some of the Ministry's review of the Applicant's paperwork showed inconsistencies, the point remained that these did not rebut the overall unreliability. As well, there was a policy introduced to purge submitted paperwork after two years. He did say, in reply, that he did not believe any of the 30 odd examples of files introduced to show inadequate filing had been purged. The purging policy was not in effect in 2005 when he did his review. He insisted that from a regulator's point of

view the inadequacies indicated a continuing pattern of either disregard or incompetence. In either case the Licensee's actions did not conform to the objective of the legislation, namely road safety. Some oversights particularly bothered the Ministry. One was the method, or lack thereof, involving the recording of chassis point measurements required to be within 3 mm of manufacture's specs. Each car is designed to fit upon a chassis within limits of its designed symmetry in three dimensions. A car must be square between all four wheels or the axles in rotation would be in a sense fighting each other. Similarly the suspension of the car in its vertical axis must be equally referenced to one horizontal datum, lest the resulting list reduce operator control. The Mechanic's habit of intermittently circling spec sheets to indicate measurements was considered inadequate, although actually circling measurements was permissible within the Regulations. The Ministry wanted actual and notated figures from actual measurements. Mr. Gibson reminded the Tribunal that once the SIC is granted and the car has entered the stream of commerce there is no practical regulatory intervention available until there is a complaint from a purchaser. As well, Mr. Gibson reminded the Tribunal that a rebuilt car may be capable of operation but may not be as safe in the crashworthy sense as it should be, if the chassis repair does not reconnect all of the points meant to absorb impact.

He also stated that the Licensee's MVIS was not the worst he had seen and that training was available. This would of course go to future files, that is, if the license was not revoked. He repeated that he did not believe any of the incomplete files introduced had been purged at the Ministry such that their incompleteness could not be ascribed to the Applicants.

The Mechanic confirmed the scope of his license from repair to inspection. He also described his equipment and his course qualifying him to use it. His first language is not English and through an interpreter he described his experience and work habits. His operation is located in Hamilton and is engaged in inspections and some rebuilds. He and his brother who helps him in the shop are both licensed for the work they perform. His wife helps him with administration.

He described the steps he takes when a car is brought to his shop for a structural inspection. He stated that in the case of a rebuild he checks the car's paperwork including the insurance appraisals and its VIN. He then drives the vehicle onto the frame bench to take the photos required by the Ministry. He can then hoist the car to look for damage. He may not expend the amount as listed in the insurance appraiser's estimate, but he asserts that roadworthiness is the criterion, not perfect restoration.

He disputed the evidence of Mr. Ventura and insisted that his testimony could not be linked factually to the state of the cars as they came to his MVIS.

The Mechanic stated that when it came to recording chassis point measurements, he noted actual measurements if they were outside of specs. If within, he said he circled the spec numbers indicating the vehicle was within the manufacturer's tolerances. He was shown examples of improperly filled out documents and letters from the MTO pointing out these deficiencies. He was directed to the convictions registered against

him for deficiencies. His answers appeared to display an understanding of the requirements but a lack of concern as to their necessity. One answer in particular was noteworthy, namely that prior to 2004 he certified cars under his license, even though the wheels were not within specified alignment. He added that presently he is aware that this practice is unsatisfactory.

The Mechanic stated that the Neon was brought to him by a third party and he "pulled it", that is worked on the frame. He emphasized that he did not do any body work. He replaced the hood and left fender. The third party supplied the parts. In payment the Mechanic received certain materials from the third party and subtracted this from the cost of his work. His viewing of the car told him there was no damage to the rear other than the bumper. He did not suspect damage underneath. He took no measurements at the rear. When he was directed to the invoiced amount for parts of \$652.00, he stated that it was not a low amount, even though the insurance estimate was in the neighbourhood of \$5,000.00

He was shown the pictures of the front rebar taken by Mr. Ventura and those from the insurance file to show the similarity. He maintained that the damage as described by Mr. Ventura was different from the damage he encountered. To the Tribunal, the pictures showed identical rebars. He maintained this position of the intervening damage between the car as he saw it and as it was inspected by Mr. Ventura, even when shown the side rail damage. The same answers were forthcoming on the subject of radiator supports. He swore there were supports, even though they can not be seen in the photos he submitted.

THE LAW:

The Highway Traffic Act:

Section 89 The Minister shall appoint an officer of the Ministry to be the Director of Vehicle Inspections Standards for purposes of sections 88 to 100

Section 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a license issued by the Director under the Act and the Director may issue a license for the motor vehicle inspection station subject to the conditions that the Director may specify in the license

(2) Subject to section (3) any person who applies in accordance with this Act and the regulations for a license to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and pays the prescribed fee is entitled to be issued the license

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

- (a) any person has made a false statement in the application for the license or for the 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 license is incompetently performed;
- (e) there is a breach of the license

Section 93(a), (b) and (c)

The Director may revoke the registration of a motor vehicle inspection station 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

Section 199.1

In this section,

"irreparable" means, with respect to a vehicle, a vehicle that meets the prescribed criteria for classification as irreparable

"rebuilt" means with respect to a vehicle, a vehicle that meets the prescribed criteria for classification as rebuilt

"salvage" means with respect to a vehicle, a vehicle that meets the prescribed criteria for classification as salvage

Regulation 601

Section 10.1(1)

APPLICATION OF LAW TO FACTS:

It was the Director's responsibility to the Tribunal to establish that revocation of the Applicants' licences was within the purview of his authority under the HTA. The Director has made his decision to revoke on the basis of an investigation by his field personnel and he has enumerated those findings in the Notice of Proposal. It was submitted by counsel for the Applicants that, in line with the reasoning behind the law as expressed in the Act, no one should have a license revoked without a hearing and there should be an enhanced burden of proof imposed upon the regulator at such a hearing due to the severity of the consequences of an adverse result. The Tribunal reviewed his submissions.

Simply put, the task of oversight tribunals is to insure that the intent of the governing legislation is carried out and that persons affected are adjudged in accordance with established legal process and appropriate standards of proof.

The question of the necessity of these tribunals imposing upon the licensing body an onus beyond the normal civil onus has been raised where an adverse finding amounts

to the loss of livelihood or professional career or reputation. The courts have wrestled with this question of sufficiency of proof in these cases without wanting to create a new standard outside of the traditional civil burden. Many such cases have arisen through appeals from the findings of professional disciplinary boards.

The Divisional Court in White v. Association of Professional Engineers of Ontario, 2006 CanLII 17320 (ON S.C.D.C.) recently approved the following statement of the appropriate standard of proof at s. 54

The standard of proof applied by the panel, in accordance with the Bernstein decision, was on the balance of probabilities with the qualification that the proof must be clear and convincing and based upon cogent evidence accepted by the panel. The panel also recognized that the more serious the allegation to be proved, the more cogent must be the evidence.

In Bernstein and the College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2nd) 447 the court held that the discipline committee of the College had taken away the license of a practitioner on evidence that was wholly unsatisfactory. The Court went on to say that administrative tribunals are

Entitled to more guidance from the courts than the simple expression that they are entitled to act on the balance of probabilities.

Reid J speaking for the court in Coates v Ontario (Registrar of Motor Vehicles Dealers and Salesmen) (Ont. Div. Ct.) 65 O.R. (2nd) 526 described the burden as follows:

The message is clear and has been consistently adopted by this court. Nothing short of clear and convincing evidence will justify an administrative tribunal in revoking a license to practice medicine or to gain a livelihood in business.

The court's rationale behind this insistence is the principle stated on page seven of Coates:

While the grant or refusal of a license may be regulated as a matter of privilege, rather than a right, the revocation of an existing license has always been regarded as an interference with a right, not a privilege.

The Tribunal was directed by counsel for the Licensee to Stetler v. Ontario Flue-Cured Tobacco Growers Marketing Board (2005) 76 O.R. 3rd 321. In that case the administrative tribunal had rendered a decision resulting in the loss of livelihood based upon a concurrent finding requiring a strict onus. The Divisional Court appeared to focus upon the intent of the legislation establishing the regulatory framework. Again as in most cases the statute entitles parties to earn a livelihood in the particular industry under review but under the strictures of the regulatory regime. In Stetler, the court confirmed that the standard articulated in Bernstein is an evidentiary standard that speaks to the quality of evidence required.

In the instant case, the Tribunal is faced with evidence of slackness in filing and completing post inspection forms. It has the obligation to weigh that fact against its

effect upon future road safety. The potential for negative consequences was clear in the case of the Neon and the Cavalier.

The Tribunal in the present case, on the issues and sufficiency of the evidence finds that the evidence, though technically complex, was presented competently and professionally. There was little hearsay, most of the testimony coming from documents and direct observation. There was, as well, a balance between the evidence required on the side of legislative intent (public safety) and the consequences of the revocation of the Licensee's right to a livelihood.

The Director's case that the licences should be revoked rested on:

- the state of the Cavalier and Neon that bore SICs issued by the Applicant through his MVIS
- the lack of compliance with the Ministry's filing requirements
- the convictions under the HTA recorded against the Applicant

The Tribunal in assessing the evidence could not avoid noting the issue of economic motivation. While it can not be determinative, motive is useful for putting evidence in context. Breaching or "skating close" to required regulations in the area under review normally has an economic motivation. In the circumstances of automobile rebuilds the calculation is obvious. If the car branded as "salvage" can pass the requisite inspections, be issued a SIC and be thereby rendered roadworthy through a rebuild, there may be a motivation for undertaking the repair. The decision depends upon whether, subsequent to the repair, the car can be sold for a profit, net the cost of parts and labour to render it so roadworthy.

Here in the case of the Cavalier and Neon the appraisers reported to the underwriters that the cost of parts and labour exceeded the "blue book" or assumed market price for like models of their vintage. If the "branded" vehicle enters the world of rebuild, the difference between what is in the insurer's appraisal estimate and the amount the rebuilder is willing to incur to render it roadworthy becomes apparent.

In order to make a profit, the rebuilder must buy the salvage (i.e. become the registered owner) repair it at a cost obviously below the insurance appraisal, have it inspected (receive an SIC), then sell it. Reference to the evidence would yield the following example: if the insured or assumed market value was \$10,000.00 and the usual price paid for salvage ran to 25% of that value then the cost of rebuild (parts and labour) could not exceed \$7,500.00 for the rebuild to make economic sense. Conversely the less the cost of the repairs above the \$2,500.00 salvage price and assuming the same sale price the greater the return to the rebuilder. All of this assumes the ability to get an MVIS such as the Licensee to issue an SIC without which the car can not receive registration and is not legally saleable.

To prevent fraud and keep unsafe cars off of the road, the legislature has interposed the inspection regime under review to assure the buyer that roadworthiness standards have been met. Additionally as part of the scheme the Ministry imposed, as at the spring of 2003, a form of workplace audit upon the MVIS's under license in the form of a documentary record of work done leading to the issuance of SICs. It was not questioned that this additional burden was within the delegated authority of the Ministry under the Act to further regulate its licensing scheme. The Licensee's breaches of this requirement although diminished in number to some degree by counsel's cross examination nevertheless in the opinion of the Tribunal represent a significant breach of the duties owed by the Licensee to the Ministry and to the traveling public.

The Mechanic's answers to questions involving the methodology of recording chassis measurements were unsatisfactory to the Tribunal, as they went to the very heart of the regime, namely, above all other considerations that vehicles are not returned to the road misaligned from their specified dimensions.

The Licensee's and Mechanic's defence was the potential for intervening cause and consequent failure to be the issue with respect to the Neon and the Cavalier. From the issuance of an SIC there will be a span of time and use of the vehicle prior to its coming under Ministry scrutiny via filed complaint. A review of the evidence surrounding the Cavalier and the Neon reveals a more reasonable inference to be drawn in favour of the damage as testified to being in existence upon the issuance of the SIC by the Licensee than the contrary. The evidence on these two vehicles went directly to the issue of the necessity of scrupulous adherence to the regulations by licensees and the danger to the travelling public in the absence thereof.

In this matter the Tribunal finds that the evidence of convictions and tape and incomplete filings, while narrowed by valiant cross-examination, remains significant. An extrapolation of bad paperwork to dangerous vehicles on the road is one that would be problematic but for the clear evidence of the failures in the case of the Neon and the Cavalier. In addition the Tribunal did note a number of unrecorded or improperly recorded chassis point measurements, even in the filed paperwork on other vehicles. The danger of unsafe cars on the road on evidence as is present in this case tips the balance in favour of protection of the public even with the significant impacts on the Licensee and Mechanic.

It was clear that the Applicants did not live up to their part of the regulatory bargain. When one is granted a license, one is deemed to know one's responsibilities under the scheme. No regulator can police every licensee every day. There has to be a trust between the two for any scheme to work. In the present case that trust is absolutely vital in that road safety is involved. The only audit function available to the Ministry is a review of submitted documents, the truthfulness of which can not be checked as the car is already on the road. In effect as the regulator is limited in his ability to safeguard the public interest; that responsibility falls upon the licensee. Breaches of that trust particularly in the face of warning letters must be dealt with severely.

DECISION

The Tribunal by the authority vested in it orders that the Director carry out the decision in the Notice of Proposal.

COSTS

The Tribunal thanks both counsel for their submissions as to costs. Costs may be awarded by the Tribunal but they do not follow the event as in normal civil proceedings. The Tribunal is bound by the provisions of Rule 14. The submissions canvassed areas of concern by counsel, particularly timeliness of disclosure. None of these rose to the level as required by the Rule. There was also mentioned the delay required to acquire the services of a translator once the Mechanic had taken the stand and it became apparent that counsel for the Ministry could not follow what he was saying. As in other cases where the first language of a witness is not one of the two official languages, there is an effort made to struggle through without the intercession of an interpreter. Often counsel becomes used to the accented English of his client during preparation and labours under the assumption that the Tribunal and opposing counsel will be able to achieve the same level of understanding. The Tribunal does not see grounds for awarding costs for this outcome in the present case.

It is also the case that there are not at tribunals the pre hearing procedures available under the civil rules. The result is that there are instances of the matter to be heard being in some disarray at the outset. Counsel should be reminded that one of the basic purposes behind the establishment of quasi judicial tribunals is to get to the hearing stage quickly. The trade off in complicated or document laden cases before Tribunals can be some measure of confusion.

The Tribunal does not find grounds upon which to order costs in this matter.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: April 27, 2007

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

PRE-HEARING

1331159 ONTARIO INC dba ZEPHYR PEAT LAND HARVESTING and
STEVEN BLACKTOPP

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

AND IN THE MATTER of the Refusal of
Application Number #60405 for a Motor Vehicle
Inspection Station (MVIS) Licence to 1331159
ONTARIO INC dba ZEPHYR PEAT LAND
HARVESTING, Dated October 17, 2006;

AND IN THE MATTER OF the Refusal to
register STEVEN E. BLACKTOPP as a Motor
Vehicle Inspection (MVIS) Mechanic, dated
October 17, 2006.

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: STEVEN E. BLACKTOPP and BRUCE BLACKTOPP, Applicants

ANDREW WRAY, Counsel for the Applicants,

PATRICK S. MOORE, Counsel, Representative for the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: March 26, 2007

Toronto

ORDER

Following attendances at a pre-hearing held on March 26, 2007, the Tribunal makes the following Order:

1) The Parties to the hearing are:

(a) Steven E. Blacktopp;

(b) 1331159 Ontario Inc. dba Zephyr Peat Land Harvesting, and

(c) The Director of Vehicle Inspection Standards

- 2) It is agreed by the Parties that the issues of the Appeal to be heard at the hearing are narrowed as follows:
- a) Are there sufficient grounds to warrant the action taken by the Director of Vehicle Inspection Standards, as shown in the Notice of Refusal sent to the Applicants and dated October 17, 2006.
- 3) The process of Disclosure between the Parties shall be completed by May 1, 2007, in order to effect timely Disclosure to the Tribunal, ten days prior to the hearing.
- 4) The following witnesses shall be called:

For the Applicants:

- Either Bruce Blacktopp or Gail Blacktopp, officers and directors of 1331159 Ontario Inc. dba Zephyr Peat Land Harvesting and of Mount Albert Container Services Ltd and
- Steven E. Blacktopp, who was an MVIS mechanic at Mount Albert Container Services Ltd.

For the Respondent:

- Officer Rick Moore, who carried out the truck inspection and Gord Sadler, person responsible for the truck inspection station in North Bay.
- 5) The hearing is scheduled for two days, commencing at 9:30 a.m. on Friday, May 11, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue, if necessary on Tuesday, May 15, 2007, at 9:30 a.m. at the Tribunal's aforesaid Chambers.

LICENCE APPEAL TRIBUNAL

Philomen Wright
Presiding Member

RELEASED: April 10, 2007

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



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Decisions under Highway Traffic Act

Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

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[October](#) >>

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[January](#) >>

[February](#) >>

[March](#) >>

>> [MVIA-EXHP - Exceptional Hardship](#)



>> [MVIA-STLN - Stolen](#)



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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 AOUAD M.D.
Presiding member

APPEARANCES: RUSSELL MCKNIGHT
Representative for the Registrar of Motor Vehicles

APPLICANT, unrepresented

DATE OF HEARING: April 23, 2007 Teleconference

REASONS FOR DECISION

A hearing was held on March 23, 2007, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1994 Oldsmobile Regency, (the “vehicle”)
Date of Appeal:	March 30, 2007

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 23, 2007, and proceeded as an electronic (Teleconference) hearing.

The Respondent filed original certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent’s submissions.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

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.

The Tribunal reviewed the Applicants written submission, filed with the Tribunal, detailing the circumstances of the use of the vehicle, family issues including family health issues, and her work and school attendance schedule. The Applicant described the importance of

the vehicle to her.

At the hearing the Applicant reiterated her comments in the Notice of Appeal.

According to the Applicant, the lack of a vehicle has kept her from attending school and from applying to jobs. The Applicant has made attempts to use other vehicles but has encountered several difficulties.

In cross-examination, the Applicant confirmed that she is not currently employed as her job placement ended on March 30, 2007. She was hoping to find another placement, but since she has no car, she has not sought another placement.

At one point the Applicant was looking into moving in with her future mother-in-law, as she is closer to the school, but because of the family situation, moving has not been possible.

The Applicant has also attempted to borrow cars, but has found that for one reason or another things have not worked out. One of the cars the Applicant was considering borrowing is in need of repairs and the owners cannot afford to have it fixed. Taxis are much too expensive. The fact that the Applicant lives on a reservation makes it harder and more costly to get a cab especially since she has to cross the border to get to school.

At this time the Applicant has no income.

The Applicant has missed every class since the impoundment. Her professors understand, but her grades take absences into consideration, and therefore there is nothing they can do to help her.

The Applicant did have use of another vehicle, which was used for her boyfriend to get to work and to allow the Applicant to "keep appointments".

The nearest hospital is 20 minutes away. In the event of an emergency, there is ambulance service on the reservation. Since there is only one ambulance, if it is on call, people have to wait. The Applicant stated in case of an emergency that it is easier to drive to the hospital than to wait for an ambulance.

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 blood/alcohol content in excess of .08 under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life.

The Respondent did not call any witnesses.

LAW

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1

may, upon paying the prescribed fee, appeal the order to the Tribunal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS

In closing the Applicant thanked the Tribunal for taking her statements into consideration.

The Respondent's Agent closed by emphasizing that the Applicant gave permission to the driver to take the vehicle. He stated that the Applicant has also testified that she has access to other vehicles to run errands, for example "...to pay bills, to get her common law partner to work on occasion..." Although 911 services are not available in the area, the Applicant has stated there is an ambulance service available. The Applicant is not working and therefore there is no financial loss that can be established. With respect to schooling, the Applicant has had sporadic use of a vehicle and it is not clear why she chose not to use it to attend school, at least part-time.

In rebuttal, the Applicant stated that there is no public transportation available and that taxis are beyond her means, as she has no money.

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) 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.

Although there is no 911 service there is an ambulance service on the island. Therefore, the Tribunal finds that there are no health and safety issues, which could be considered.

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 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 modes of transportation. The Respondent's Agent pointed out and the Applicant confirmed, that there are other vehicles at the Applicant's disposal, albeit for limited use. 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's placement terminated on March 30, 2007. The Applicant may be prevented from getting another placement, but she did not establish that she has incurred losses other than the cost of the impoundment.

Although the Applicant has been found to have the use of alternate vehicles, since she has no income and may need the vehicle to seek placement, the Tribunal considered whether the loss is upon a person other than the driver of the motor vehicle and not a result of that driver's loss.

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

- (d) the impact of the loss,
 - i) will be upon a person other than the person whose driving while his or her driver's license 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).

The Applicant was not the driver of the vehicle at the time of impoundment. Nonetheless, as per the Applicant's written submissions, she "...allowed ...to use the vehicle in order to attend work...". Thus the Tribunal is unable to consider O. Reg. 632/98, Subsection 22(3)(d)(i)(ii).

After assessing the evidence presented, although the Tribunal finds that there is no doubt that the Applicant has been inconvenienced by the loss of the vehicle, she 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 30, 2007

The 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



MVIA-STLN – Stolen

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: MARY SPENCER, Member

APPEARANCES: IAIN DONNELL, Counsel for the Applicant

LYNDA DUNBAR, representing the Registrar of Motor Vehicles

DATE OF
HEARING: April 17, 2007 Toronto – By Teleconference

ORDER

On April 17, 2007, a hearing was commenced in the above-noted matter, by teleconference, before the Licence Appeal Tribunal (the “Tribunal”).

At the onset of the hearing, Counsel for the Applicant indicated he wished to amend the grounds on which the appeal was filed to include the ground of exceptional hardship in accordance with section 50(2)(3)(d) of the *Highway Traffic Act* (“the Act”). The Registrar’s Representative advised this ground was not available to the Applicant in accordance with section 50(2)(4) of the Act because the Applicant’s vehicle had been previously impounded in July, 2006. Counsel for the Applicant then requested and was granted a recess in order to confer with his client. On recommencement of the hearing, Counsel for the Applicant advised the Tribunal that the Applicant wished to withdraw the appeal and the hearing was ended.

Accordingly, the Tribunal orders:

1. The Applicant having withdrawn the Appeal, all proceedings related to this matter are concluded.

LICENCE APPEAL TRIBUNAL

Mary Spencer, Presiding Member

Released: April 25, 2007

The 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).



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: NIVES MONTANO, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

THE APPLICANT’S SON, the suspended driver at the time the vehicle was impounded, acting as the Applicant’s Translator

LYNDA DUNBAR, Agent, representing the Registrar of Motor Vehicles

DATE OF
HEARING: April 5, 2007

Toronto

REASONS FOR DECISION

A teleconference hearing was held on April 5, 2007, 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: Chevrolet T4 (the “vehicle”)
Date of Appeal: March 15, 2007

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 5, 2007, and proceeded as an oral hearing.

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

The Respondent submitted a set of original certified documents, copies of which had previously been filed with the Tribunal. She also asked the Applicant’s son whether he was going to be a witness for his mother at today’s hearing or whether he was strictly going to be translating for her. The Applicant’s son chose to only translate for his mother.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE

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

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the 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 appeal states:

I [name deleted] owner of vehicle chev blazer 1992. plate number [number deleted]. I would like to appeal the impoundment on the grounds the loss of the vehicle will result in hardship. Due to the fact that my husband does not drive and need the vehicle to do day to day basics such as; shopping, going to doctor' appointments and personal activities. (Sic.)

Both the Applicant and her son were sworn in before giving testimony.

The Applicant and her husband live alone. They are seniors and on a fixed income. The Applicant is in good health, but her husband is diabetic and is losing his eyesight. The Applicant was the driver in her household. She has been driving for over thirty years. Her husband cannot drive.

The Applicant's son, the suspended driver at the time the vehicle was impounded, resides in a community about 15 minutes away from his parents' home. He advised the Tribunal that he had borrowed his mother's vehicle a while ago and, at that time, had made duplicate keys of said vehicle. On the evening the vehicle was impounded, the Applicant testified that she was not aware that her son had taken her vehicle. He had not asked her permission to borrow it. She does not know how he came to have a duplicate set of keys in his possession. She advised the Tribunal that she had left her vehicle in her driveway.

According to the Notice to Registrar and the Applicant's statement, the suspended driver was pulled over by police on the street outside the Applicant's home. A neighbour came to notify the Applicant that her vehicle was being 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 (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the 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 November 6, 2007.

LAW

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria that the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant, in this case, has argued that the impoundment will result in hardship as described in section 22(2). In order for her

appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

With respect to reasonable options available to the Applicant regarding an alternative vehicle, the following evidence was provided by the Applicant.

The Applicant has four adult children all of whom have their own vehicles. They reside in neighbouring communities. They are aware that their mother's vehicle has been impounded, but according to the Applicant, none of her children have assisted her and her husband during the impoundment period.

The Applicant has relied on the kindness of a neighbour to take her shopping and has, at least, on one occasion, taken a taxi. She resides in an area where she can also access public transit.

The Applicant conceded that she owns a second vehicle, a 2000 Lincoln Navigator. She advised the Tribunal that her grandson drives this vehicle. He is a funeral director for a prominent funeral home in Brampton. The Applicant has not considered asking her grandson to return this vehicle to her until the impounded vehicle is released.

The Tribunal, although sympathetic, finds that the Applicant has alternatives to the impounded vehicle and has managed to date.

The Applicant's husband has missed two medical follow-up appointments, which can be rescheduled. The Applicant resides in an area that is 911 accessible, and a hospital is nearby in the event of an emergency.

Evidence was heard that the Applicant may incur some financial strain as a result of the loss of the vehicle. Since the conditions in subsection 22(3) have not been met, the Tribunal, although understanding the Applicant's financial situation, is not permitted to consider this factor in arriving at its decision.

The Tribunal wishes to point out to the Applicant that, should she be so inclined, she may pursue compensation from her son, the suspended driver, as is stated in section 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.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as required under section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano,
Member

RELEASED: April 18, 2007

The 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).



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: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

PATRICK OLIVER DIXON, Agent for the Applicant

DATE OF HEARING: March 21, 2007 Toronto

REASONS FOR DECISION

A hearing was held on March 21, 2007, 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: 2007 Honda UEX, (the “vehicle”)
Date of Appeal: March 8, 2007

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 21, 2007 and proceeded as an oral hearing.

The Respondent filed original certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent’s submissions.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters in dispute between the parties.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I am a 67 year old widowed female. On the day of the incident, I had to go to Toronto City Hall

to do business. I was accompanied by four (4) family members, my granddaughter and her child, my son and his wife. Inside the building I gave the keys to my grand-daughter to go and move the car if it was not OK. While in the City Hall doing my business a police officer came with my son <name of Applicant's son deleted>, asking verifications of family membership. <name of Applicant's son deleted> left to go outside as requested by officer. Officer later told me <name of Applicant's son deleted> was driving vehicle and made an illegal u turn. The officer told me the car is OK where it was then. The car was later pounded, requiring me to make this appeal. During the interim period I was enquiring around about this procedure, the appeal.

My reason for apply to the TRIBUNAL is because of the extreme hardship myself shall bear. This is also hardship in my son <name of Applicant's son deleted> who has been in a motor vehicle accident recently, and I am his official guardian, also my grand sons, two. Further my position is I am partially handicapped. I have to go to physiotherapy and other doctors appointment frequently, more than normal. Not having a regular transportation endangers my health and safety. Plus please take into consideration I have to take my grandchildren to the doctors and other places as required. One of my grandsons have to be transported to school daily, where we are in a new subdivision, no school bus. This inconvenience has created hardship economically, financially and socially. This also bears hardship on his educational opportunity, and on me financially.

My alternatives are limited. My alternatives are very costly. The loss is very significant immediately and ongoing. The loss is to myself my sick son <name of Applicant's son deleted> and my two grandsons. The loss is in no way affecting <name of Applicant's son deleted>.

Furthermore I did not knowingly willingly or unwillingly contravene the Law. However I ask your positive consideration.

Thank you

At the hearing the Applicant reiterated the comments in the Notice of Appeal.

In response to questions from her Agent, the Applicant confirmed that she asked her granddaughter to move the car for her. She did not give the keys to her son.

In cross-examination, the Applicant clarified that her son remained in the car, while they went into City Hall. The Applicant is aware that her son has lost his licence for driving while impaired. The Applicant testified: "that is why I didn't give him the key, I left the keys in the car". The keys were left in the ignition, but the granddaughter was supposed to drive the car.

The Applicant's Agent called the Applicant's granddaughter as the first witness. The witness initially testified that she gave her uncle the car keys and asked him to park the car, but later admitted that the keys had been left in the ignition.

The witness did not know nor think to ask if her uncle had a licence.

In cross-examination, the witness testified that she had seen her uncle drive a couple of years ago.

The Applicant's Agent called the Applicant's daughter-in-law as a second witness. The witness confirmed that it was the Applicant's granddaughter who was asked to move the car.

The Applicant's Agent called the Applicant's son as a third witness. The witness admitted blame for the incident, feels "greatly ashamed", and "deeply apologizes".

After the closing remarks the Applicant was allowed to take the stand again, in order to testify with respect to exceptional hardship.

The Applicant stated that she really misses the car. Her son was in an accident, and therapy is needed.

In cross-examination, the Applicant confirmed that she has not missed any appointments. Also there are taxi services in the area.

The Applicant does have other cars registered to her name, but one is in need of repair; the other, although it is registered in her name, belongs to her son.

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 blood/alcohol content in excess of .08 under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension for life.

The Respondent did not call any witnesses.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

In closing, the Applicant's Agent asked the Tribunal to take into consideration that the Applicant is a disabled grandmother and great grandmother. The vehicle is needed to take the children to school. While the Applicant did not give the keys to her son, she may have erred in allowing him access to the keys. This situation is causing financial and social hardship.

In her closing remarks, the Respondent's Agent pointed out that the Applicant did not offer any evidence to corroborate the grounds of exceptional hardship. Evidence presented was directed to establish due diligence. The Applicant lives in the City of Brampton where public transit is available.

The Respondent's Agent asked the Tribunal to confirm the decision of the Registrar.

In rebuttal, the Applicant's Agent argued that hardship exists because the Applicant lives in an area in Brampton where there are no roads for public transportation and health and

safety are endangered.

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 mentioned.

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”.

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) 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.”

The Applicant confirmed that no appointments had been missed. Therefore, the Tribunal finds that there are no health and safety issues which could be considered.

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 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 modes of transportation. As the Respondent's Agent pointed out and the Applicant confirmed, there are other vehicles registered in the Applicant's name. 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 did not establish that she has incurred losses other than the cost of the impoundment.

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 2, 2007

The 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



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: PHILOMEN WRIGHT
Presiding Member

APPEARANCES: LYNDA G. DUNBAR
Representative for the Registrar of Motor Vehicles

APPLICANT
Unrepresented

DATE OF HEARING: March 26, 2007 *by teleconference*

REASONS FOR DECISION

A hearing was held on March 26, 2007, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	The Applicant
Motor Vehicle:	1995, Chevrolet, Astra (the “vehicle”)
Date of Appeal:	March 7, 2007

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.

There were no preliminary matters in dispute between the parties.

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:

Exceptional hardship - I have extremely Important Medical appointments that I travel to, 5 kids school/appointment 2 jobs (one job wich I have already lost due to no vehicle. My main provider is gone and it's up to me to look after my family my financial situation is very low and will also now depend on assistance in order to make it. Without my vehicle it has been extremely hard as we live out of town and it's a long difficult walk with 5 kids on a main highway. My health has not been good and I need to attend my scheduled appointments my kids depend on me. Without my vehicle this has cost me Exceptional Hardship.

The Applicant’s evidence is that the suspended driver is her husband who is mentally ill

and on medication. The Applicant testified that she is aware that the suspended driver is suspended for life.

The Applicant testified that her statement in her Notice of Appeal, that she was driving the vehicle at the time of impoundment, is an error. In fact, two days before the impoundment, she had undergone three surgical procedures, tubal ligation, colonoscopy and a scope of the stomach.

The Applicant testified that she was very ill, and was not aware that the suspended driver had taken her vehicle for the first time during the four years he has lived with her off and on. She further testified that she had not given the keys to the suspended driver.

The Applicant testified that prior to the impoundment, she held two jobs, both requiring the use of her vehicle. Because of the impoundment of her vehicle, she had resigned from one of her two jobs, as she could not attend every weekend, as required. She had spoken to the manager who indicated that he could not hold the position open for her. As a result, the Applicant had lost wages of approximately \$150.00 for the eight hours of work and reimbursement for travel to the place of employment.

Respecting her second job, the Applicant testified that she is required to work part-time, five nights per week. She had stopped work there the day after the impoundment. However, she had explained the circumstances to her manager and he was willing to hold the position open for her.

The Applicant reiterated that she had lost the financial contribution of her main provider, her husband, the suspended driver, who is incarcerated at present, for at least one year. However, her nineteen-year-old son had returned home to live, and was contributing financially.

The Applicant testified that because of the impoundment, she had missed at least three medical appointments. She is required to see the doctor on a regular basis for anxiety and for an ulcer, recently diagnosed as a kidney ailment.

Further, while the children had obtained required counselling, she had not made appointments in relation to the latter, because she had no means of getting them there. She had also not been able to attend appointments at her children's school, related to her children's counselling. However, the children are transported to school by bus.

The Applicant testified that in order to get into town, she has to walk for one hour on the highway. There is no bus service where she lives and cab fare is expensive at a cost of thirty dollars per day. She has no family or friends or co-workers who could assist her. Her mother-in-law had promised to loan her a vehicle but this had not materialized. Further, while her son continues to work, his vehicle needs repair.

The Applicant testified that she is not willing to request assistance from the person who

assists her son with transportation to his job. That person cannot assist her and in any event, she cannot rely on others and was not willing to ask others for help, because it is her responsibility to remedy her situation.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the driver;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of ability impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until June 10, 2008.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

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

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

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

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

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

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

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

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

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

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

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

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or

circumstance; severe toil or suffering; extreme privation.

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The basis of the Applicant's appeal is "exceptional hardship", pursuant to section 50, 2 (3) (d) of the Act.

However, based on consideration of the evidence and submissions, the Tribunal finds that exceptional hardship has not been established, on a balance of probabilities.

In this regard, the Tribunal finds that the test in relation to the cumulative effect of the criteria set out in subsections 22(3) and 22(4) has not been met in order to satisfy the Tribunal that exceptional hardship has been demonstrated.

The Tribunal finds that the Applicant has not demonstrated that she has explored every reasonable alternative means of transport to the impounded vehicle.

The Tribunal finds that it is unclear whether the impoundment of the vehicle is the reason for the Applicant's resignation from her weekend job and her inability to attend her second position, all of which has resulted in her loss of income. In this regard, the tribunal notes the Applicant's testimony, in the context of discussing her health problems, that she still works but has lost an extreme amount of work time and therefore, wages.

Nevertheless, the Tribunal finds that the Applicant has sought a remedy for her financial situation in that she has applied for social assistance. The Applicant also testified that her nineteen-year-old son has returned to live at home and is contributing \$150.00 per week. In the Tribunal's view, the latter is another source of financial relief, which probably replaces the wages lost through the Applicant's resignation from her weekend job.

The Applicant expressed her unwillingness to inconvenience others and to be self-reliant. However, while the Tribunal acknowledges the difficult situation the Applicant faces due to the impoundment, the Tribunal cannot find that the Applicant probably faces extreme hardship, if the Applicant does not explore every reasonable avenue of relief probably available to her.

As a result, the Tribunal finds that the Applicant may wish to approach the person who assists her son to get to work, for assistance in her own lack of transportation. As well, the Applicant may also wish to follow up on her mother-in-law's offer of a loan of a vehicle as a means of transport to her work, to her medical appointments and those of her children. Where a medical emergency may arise, the Applicant may wish to utilize the emergency services available to her at "911".

The Applicant testified that she cannot rent a car because she does not possess a credit card. Her evidence is that her financial history has precluded her in the past from obtaining a credit card, which she requires in order to rent a car. However, the Tribunal finds that the Applicant, who remains gainfully employed through the co-operation of her employer, may wish to again explore obtaining a credit card, perhaps jointly with her son who is also employed, as an aid in remedying the lack of transportation.

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

Philomen Wright
Presiding Member

RELEASED: April 4, 2007

The 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



EXHP-DUDI – Exceptional Hardship, Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE “ACT”), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

APPLICANT
Unrepresented

DATE OF HEARING: March 22, 2007 Toronto – By Teleconference

REASONS FOR DECISION

A hearing was held on March 22, 2007, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND:

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

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	1989 Jeep XJJ (the "vehicle")
Date of Appeal:	February 28, 2007

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 March 22, 2007 and proceeded as an electronic 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.

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.

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

First of all I'd Like to inform you that my License was suspended on Dec 13, 06. On the night in question (Feb 17/07) I was in a bar on Lakeshore Blvd and two (2) officers walked in and asked who owned the 89, Jeep parked outside, I told them I did and they asked to step outside with them, which I did. They did not ask me if I was driving or who was, they just ask to see my driver's licence and I told them they were suspended. They immediately charged me with driving under suspension, impounded my Jeep for 45 days, and let me go. My girlfriend, Diane Davis, was driving that night. (A copy of her driver's licence is attached) Recently Diane's car has been having problems and she has been driving my Jeep. Luckily we both work within minutes of each other. I start some mornings at 4:00 a.m and she starts at 5:00am, so she gets me to work and goes on to hers. (Transit does not run in Mississauga that early, therefore its vital to have a vehicle). So for now her brother has been getting us back and forth to work.

Enclosing I thank you for taking the time to review this appeal.

The officers involved with this Applicant's vehicle impoundment were summonsed by the Representative of the Registrar of Motor Vehicles to appear at today's hearing. Officer Fielding was unable to attend as he was in court providing evidence on a criminal matter. P.C. Drapack was present.

Before commencing with the Applicant's testimony, the Representative for the Registrar of Motor Vehicles indicated that P.C. Drapack was going to be excluded during the course of the Applicant's testimony. P.C. Drapack left the room and waited outside in the Tribunal's waiting area.

The hearing proceeded and the Applicant was affirmed before giving testimony.

The Applicant currently holds two jobs loading trucks for different employers. He resides with his girlfriend who is employed full-time as a floral auctioneer and works a second job on weekends. The Applicant's girlfriend has a 20-year-old daughter who also lives with them. She works full-time as a salesperson at a fitness equipment store.

The Applicant testified that on the night the vehicle was impounded, his girlfriend was driving the vehicle. They left home at 6 p.m. that evening and went to a bar where they stayed for about two hours. His girlfriend then proceeded to drive them to another bar in downtown Toronto. The Applicant further stated that he stayed at this bar with his girlfriend and at no point in time did he leave.

The Applicant stated that, later that evening while he was leaning on the bar of this establishment, he observed two police officers enter and ask who the vehicle they described, which was parked outside, belonged to. The Applicant advised the police officers they had described his vehicle and the Applicant was asked, by the police, to step outside on the sidewalk. The Applicant was asked for identification, such as a birth certificate or social insurance number. He was then handcuffed and charged with driving while disqualified.

The Applicant admitted during the course of this hearing that he was quite intoxicated, but the police officers did not charge him for being impaired.

The Tribunal asked the Applicant if his girlfriend had come out of the bar to look for him or to inquire why he was being questioned by police. The Applicant advised the Tribunal that his girlfriend, at no point in time, came out to look for him. He stated that she had consumed a significant amount of alcoholic beverages and in his opinion, she did not want to deal with the police and left the issue for him to deal with.

Evidence for the Registrar

A summary of the Registrar's evidence follows (Exhibits 3 and 4).

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail/Refuse to provide breath or blood sample under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until September 27, 2007.

Evidence of P.C. Ryan Joseph Drapack

P.C. Drapack was sworn in before giving testimony. He has been with the Toronto Police for the past seven years and was previously a conservation officer in Manitoba for three

years.

He was allowed to rely on his notes regarding the night in question.

He and his partner were in a marked car in uniform capacity on routine duty. It was a clear evening and the road was well lit. They were traveling 20 km per hour along Lakeshore Boulevard. In the rear-view mirror, they observed a vehicle approaching from behind at a high rate of speed that then stopped abruptly. The sole occupant driving the vehicle was a white male. Both vehicles continued to travel about 1,000 metres but the vehicle traveling behind the police car made no attempt to pass it. P.C. Drapack's partner obtained the vehicle's licence plate information when the vehicle pulled over to park. During this time, they received information from the Canadian Police Information Centre (CPIC) that the owner of the vehicle was a suspended driver describing him to be 5'11" tall and 211 lbs. with a facial scar.

The suspected suspended driver got out of his vehicle and walked about 15-20 feet in front of the police car. The police used their speaker and asked the occupant to stop and proceed towards the police car. The suspected suspended driver ignored the request and entered a bar.

The police proceeded to follow the suspected suspended driver into the bar where they found him standing in an open area, alone, and looking towards the door as they entered. The suspected suspended driver left the bar at the request of the police.

Once outside, the driver was asked to identify himself a number of times. He refused. The description of the suspended driver provided by CPIC was the same as the driver standing before them. The driver confirmed his name to police once some identification was retrieved from the man's wallet. He was identified as the Applicant in this hearing.

The police officers were aware of the strong odour of alcohol and asked the driver to provide a breath sample in which he also refused.

In P.C. Drapack's opinion, the driver answered all their questions and was coherent. At no point in time did anyone come out of the bar while the police were interrogating the Applicant to inquire about him.

The driver was charged with failing to provide an insurance slip; producing a false insurance slip; and driving while under suspension. The vehicle was impounded for 45 days.

Cross-examination by Applicant

The Applicant had no questions for P.C. Drapack and provided no comments.

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:

Appeal – Exceptional Hardship

The first issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for his appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Tribunal may consider the criteria set out in clause (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).

These criteria are cumulative. That is, all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d).

- (a) “no alternative to the impounded motor vehicle is available”.

The Applicant testified that: (i) his girlfriend owns a vehicle; (ii) his girlfriend's brother, during the impoundment period, has also “been getting us back and forth to work”; (iii) the Applicant has also relied on a co-worker to occasionally drive him home at night; and (iv) public transit is available to him on those days that he starts work later in the afternoons. Therefore there are reasonable options and alternatives to the impounded vehicle available to the Applicant.

- (b) “the loss will be immediate, significant and lasting”.

The Applicant testified that: (i) his employer is not aware of the situation; (ii) since his girlfriend “starts at 5:00 a.m., so she gets me to work and goes on to hers”; (iii) neither the Applicant nor his girlfriend have missed any days from work due to the impoundment; (iv) they do not have any medical issues within the household and have not missed any medical appointments; and (v) the Applicant's residence is 911 accessible and a hospital is within their community in the event of an emergency.

- (c) “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”; and

- (d) “...other than the person...under suspension...”

The Applicant's licence was under suspension due to a conviction for an offence under the Criminal Code of Canada. P.C. Drapack identified the Applicant as the suspended driver the night the vehicle was impounded through the description provided by CPIC. The Applicant also confirmed his identity once identification was retrieved by the police from his wallet. The Tribunal is of the view that the Applicant was the driver at the time the vehicle was impounded and wrongfully had care and control of it. Therefore, as a disqualified driver he should not be driving any vehicle under any circumstance. The return of a vehicle to a suspended driver would jeopardize the safety of everyone. The Tribunal must uphold the law.

The impact of the loss which the Applicant has submitted to the Tribunal is on the Applicant. Section 22(3)(d) of the Regulations excludes this impact from the Tribunal's consideration under section 50.2(3) of the Act.

The Tribunal finds that the Applicant does not meet the requirements under section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98.

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due

diligence in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was performed, which is required under this section of the Act.

In the Applicant's Owner's Position (Exhibit #1), the Applicant wrote "my girlfriend, <name deleted>, was driving that night". The Applicant testified that he was not the driver of the vehicle at the time of the incident. The testimony of P.C. Drapack contradicts that of the Applicant and he positively identified the Applicant as the person driving the vehicle. As mentioned above, the Applicant confirmed his identity once identification was retrieved by the police from the Applicant's wallet. He was not mistakenly identified.

The onus of proof is on the Applicant to establish otherwise. The Applicant provided no evidence or affidavits by any witnesses, especially that of his girlfriend who was allegedly with him that evening and who might have corroborated his testimony.

The Tribunal therefore has no credible evidence that the Applicant's girlfriend was driver at the time the vehicle was impounded. Therefore there is no basis for this ground of appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: April 3, 2007

The 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
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EXHP-DUDI – Exceptional Hardship, Due Diligence

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE “ACT”), FROM THE ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT.

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

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: LYNDA DUNBAR
Representative for the Registrar of Motor Vehicles

APPLICANT
Represented by his brother, who was the Applicant's translator

DATE OF HEARING: March 22, 2007 Toronto – By Teleconference

REASONS FOR DECISION

A hearing was held on March 22, 2007, 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:	2007 Honda UDV (the “vehicle”)
Date of Appeal:	February 26, 2007

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 March 22, 2007 and proceeded as an electronic 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.

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.

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

I am writing you today to ask for an appeal in regards to my vehicle that is currently impounded. I own this car and I lent it to my daughter solely for the purpose of transportation to work and to come home. I had no idea that she would be letting her boyfriend drive her car. Also I had no prior knowledge that his licence is/was under suspension and I have never given him my permission to drive my car. With out the vehicle I have to rely on others in my family for transportation. This is extremely inconvenient for everyone, my family and I all have clean driving records and are responsible persons. I would really just like to get my vehicle back for my own use as soon as possible.

Since there was no authorization on file with regard to an Agent representing the Applicant, the Tribunal asked the Applicant to confirm that he is allowing his brother to speak on his behalf at today's hearing. The Applicant confirmed the foregoing. The Applicant and his brother were both affirmed before giving testimony.

The Applicant is a farmer who grows oriental vegetables during the months of March to November each year. He sells his wares to the Toronto markets. He employs approximately 10 foreign workers during the course of the growing season. He is unemployed during the months of December through to February.

The Applicant is married and has 3 children. His 20-year-old daughter lives with her boyfriend, the suspended driver at the time the vehicle was impounded.

The Applicant leased the vehicle solely for his daughter so that she had a means of getting to and from work. On the day the vehicle was impounded, the Applicant's daughter allowed her boyfriend to drive her to work. On the way to work, the suspended driver had a minor accident in which the impounded vehicle bumped another vehicle. Shortly thereafter, the Applicant's daughter was informed that her boyfriend was a suspended driver and that the vehicle would be impounded for 45 days.

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 Ability Impaired under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until March 8, 2008.

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:

Appeal – Exceptional Hardship

The first issue to be considered in this appeal is whether the Tribunal should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the ground of "exceptional hardship" under subsection 50.2 (3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardship as described in subsection 22(2). In order for his appeal to be considered under subsection 22(2), the Applicant must have demonstrated that all of subsection 22(3) has been met. Furthermore, subsection 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle. Subsection 22(3) requires the owner to demonstrate that there is no alternative to the impounded motor vehicle.

The Applicant's Agent testified that there are other vehicles within the household. The Applicant's wife drives a mini-van and the Applicant drives a pick-up truck which he uses around the farm. The Tribunal also heard testimony from the Applicant's Agent indicating that he and his sister have lent their vehicles to the Applicant and his family. Therefore there are reasonable options and alternatives to the impounded vehicle available to the

Applicant. Since there are alternatives to the impounded motor vehicle, the Tribunal cannot consider clauses 22(2) (b) financial, (c) loss of employment or (d) loss of education.

The evidence put forth at today's hearing indicates that the loss will not be immediate, significant and lasting since:

- (i) there are alternatives to the impounded vehicle as well as immediate family members who have helped during the impoundment period;
- (ii) there are no medical issues within the Applicant's family; and
- (iii) there is no threat to the employment of the Applicant's wife as her employer is her brother-in-law who has assisted throughout the course of this hearing;

The Applicant is quite upset at the vehicle having been in an accident and ultimately being impounded. He is of the view that his daughter was to have sole care and control of the vehicle. He must now bear the significant financial burden of continuing the lease payments as well as repairing the vehicle when it is released from the impound.

The Applicant may pursue compensation from the suspended driver as is stated in subsection 55.1(21) of the HTA:

The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order.

Therefore, although quite inconvenient, there is no serious impact of the loss of the impounded vehicle to the Applicant.

Accordingly, after considering the criteria set out in subsections 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds that the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the driver at the time the vehicle was impounded, in respect of which the order was made was not then under suspension. Subsection 50.2(3)(c) of the Act is quite specific in that the owner of the vehicle must exercise due diligence and the onus of proof is on the Applicant to establish that due diligence was exercised.

In the Applicant's Notice of Appeal (Exhibit #1) contained in the Owner's Position, the Applicant wrote "I had no idea that she would be letting her boyfriend drive the car. Also I had no prior knowledge that his license is/was under suspension and I have never given

him permission to drive my car.”

The leased vehicle is solely registered to the Applicant. Through his Agent, the Applicant testified that he did not request his daughter or her boyfriend to produce a driver's licence nor did he take any measures to ensure that they held a valid driver's licence. There was no evidence heard that would confirm that the Applicant's actions were anything but passive in nature.

Due diligence requires that the Applicant and/or its agents to take further steps to verify the validity of the driver's licence. This can be accomplished by contacting the Ontario Ministry of Transportation with the driver's name and driver's licence number at 1-900-565-6555 for automated service, or obtaining a driver's abstract of a licence at a local MTO Driver Vehicle Licence Issuing Office, or Service Ontario Kiosk at a local mall, or accessing the MTO website at www.mto.gov.on.ca.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: April 3, 2007

The 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).



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Fiscal Year 2007 - 2008

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[July](#) >>

>> [MICHAEL GEORGE STOCKFISH](#)



[August](#) >>

>> [STEPHEN CRANNEY](#)



[September](#) >>

>> [SOHIEL AZARIAN O/A SPEED LINE AUTO SALES AND SERVICES](#)



[October](#) >>

>> [ADEBALM AUTO MART INC. and JAMES BAYO LAWSON](#)



[November](#) >>

>> [ASAD ANDY MALIK](#)



[December](#) >>

[January](#) >>

[February](#) >>

[March](#) >>

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SHAKERI, IMAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT* R. S. O. 1990
CHAPTER M. 42 AS AMENDED

PROPOSAL TO REFUSE REGISTRATION

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: IMAN SHAKERI, Applicant, Unrepresented

AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: April 13, 2007 Toronto

ORDER

On April 13, 2007 a hearing was scheduled in the above-noted matter before the Licence Appeal Tribunal (the "Tribunal").

At the commencement of the hearing, Mr. Shakeri, the Applicant, requested an adjournment of this hearing for an unspecified date in the future. He advised the Tribunal and Counsel for the Registrar that he was currently unemployed and did not have the financial resources to retain counsel to represent him. The Tribunal advised Mr. Shakeri that it was not in a position to grant an adjournment at this late date, given that three witnesses were summoned and were present at the hearing.

Once the adjournment was not granted, Mr. Shakeri advised that he wished to withdraw his appeal.

Counsel for the Registrar conceded to his withdrawal with the following proviso agreed to by Mr. Shakeri.

Accordingly, the Parties have agreed and this Tribunal orders that:

1. Mr. Shakeri shall not apply for registration as a motor vehicle dealer or salesperson, whether in his own name or as an officer, director or shareholder of a business under the *Motor Vehicle Dealers Act* for a period of three (3) years effective as of today's date; and
2. The Tribunal will keep confidential all documents filed in this appeal by either Party, including the Respondent's Books of Documents.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Released: April 24, 2007

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



GHOLAM SHIPANJEH and TOP CONDITION USED CARS INC.

APPEAL UNDER SECTION 7 OF THE *MOTOR VEHICLE DEALERS ACT* R. S. O. 1990 CHAPTER M. 42 AS AMENDED FROM A NOTICE OF PROPOSAL TO REVOKE, DATED NOVEMBER 22, 2006.

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: GHOLAM SHIPANJEH appearing on his own behalf and as agent for Top Condition Used Cars

A. MICHAEL ROTHE, Counsel, appearing on behalf of the Registrar, *MOTOR VEHICLE DEALERS ACT*

DATE OF
PREHEARING: April 12, 2006 Toronto

ORDER

Following attendances on April 12, 2007, at a hearing at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, Gholam Shipanjeh appearing on his own behalf and as agent for Top Condition Used Cars, and A. Michael Rothe, Counsel, appearing on behalf of the Registrar, *Motor Vehicle Dealers Act*;

ON CONSENT of the parties the matter is adjourned to be heard on May 22, 2007 at the Tribunal's Chambers, 12th Floor, 1 St. Clair Avenue West, Toronto, Ontario commencing at 9:30 a.m., such adjournment to be peremptory on all parties.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: April 25, 2007



SAFEENA MALIK AND SHERWAY MOTORS WHOLESALE LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT* TO REFUSE THE
REGISTRATIONS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: DAVID POMER, Counsel, representing the Applicants

A. MICHAEL ROTHE, Counsel, appeared on behalf of the Registrar
under the *Motor Vehicle Dealers Act*

DATE

OF HEARING: April 16, 2007

Toronto

CONSENT ORDER

On the commencement of the hearing in this matter in Toronto on April 16, 2007 and the joint application of the Applicants and Counsel for the Registrar under the *Motor Vehicle Dealers Act* for issuance of a consent order of the Tribunal pursuant to a written settlement arrived at between the Applicants and the Registrar;

And having reviewed the written settlement signed by the Applicants and Mary Jane South, the Deputy Registrar under the *Motor Vehicle Dealers Act*, as to the disposition of these proceedings which has been filed with this Tribunal and identified as Schedule "A" in the proceedings;

NOW THEREFORE, upon the consent of the Parties, this Tribunal orders that the proceedings in this matter are disposed of on the basis of the said agreement.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: April 24, 2007

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



MOTION

MICHAEL GEORGE STOCKFISH

APPEAL FROM A PROPOSAL BY THE REGISTRAR, *MOTOR
VEHICLE DEALERS ACT*

TO SUSPEND REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: ANTHONY E. BAK, Counsel, representing the Applicant, assisted
by C. MANN, Articling Student

A. MICHAEL ROTHE, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
MOTION: March 14, 2007

Toronto

ORDER

At the outset of a hearing before the Licence Appeal Tribunal (the "Tribunal"), the Applicant, Michael George Stockfish, brought a motion requesting an order staying the hearing on the grounds that the Tribunal has no jurisdiction to proceed. The Applicant also requests an order quashing the Proposal dated September 14, 2004 (the "Original Proposal") and an order declaring the Proposal dated November 2, 2006 (the "Current Proposal") an abuse of process.

Facts

The facts are not in dispute and may be summarised as follows. On September 14, 2004, the Registrar of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 and Regulations, as amended (the "Act"), issued the Original Proposal proposing to revoke the registration of Mr. Stockfish on the grounds that he had retained the services of an unregistered salesperson. The Original Proposal was appealed to the Tribunal and, by order released March 24, 2005, the Tribunal directed the Registrar to refrain from carrying out the Original Proposal and attached terms and conditions to Mr. Stockfish's registration. The relevant terms and conditions include a requirement that Mr. Stockfish, for a period of seven years, not become or remain a shareholder, an officer,

director, treasurer, secretary, president or partner in a motor vehicle dealership without the Registrar's written consent.

Mr. Stockfish appealed this decision to the Divisional Court. Among the grounds for the appeal was the sworn assertion by Mr. Stockfish that divesting himself of shares in his family's motor vehicle dealerships would have "catastrophic consequences" for him and his family. The family owned a number of dealerships and had an estate plan in place regarding them. The liability which would result from the disposition of Mr. Stockfish's shares could have been as high as one million dollars. Further, any disposition of the shares would have resulted in the abandonment of the family's estate plan and the loss of any benefit that might have accrued from it. The Divisional Court, on March 10, 2006, allowed the appeal in part. The Court found that the Tribunal had acted within its jurisdiction but the conditions imposed were excessively harsh. The Court stated, "*We would further alter the conditions imposed by reducing the period of time in all conditions from 7 years to one (1) year from today's date.*" The Tribunal Order as varied by the Divisional Court shall be referred to as the "Divisional Court Order".

Mr. Stockfish sought leave to appeal the Divisional Court Order and the Registrar agreed to postpone the operation of the order until the motion for leave was heard. On July 7, 2006, the motion was denied. On July 25, 2006, Mr. Rothe, counsel for the Registrar, wrote to Mr. Bak, counsel for Mr. Stockfish. The letter refers to earlier conversations in which Mr. Rothe had suggested that Mr. Stockfish open negotiations with the Registrar about some alternate way of complying with the Divisional Court Order that would not involve selling Mr. Stockfish's shares, or at least would minimize the tax consequences of a sale. However, in the absence of such negotiations, Mr. Rothe advised that the Registrar would be seeking evidence of strict compliance with the Divisional Court Order. On August 28, 2006, Mr. Bak wrote to Mr. Rothe attaching a letter from Mr. Donald W. Wood, the corporate solicitor for the Stockfish family dealerships, in which Mr. Wood expresses the opinion that Mr. Stockfish is not in violation of any of the conditions of the Divisional Court Order. Mr. Bak, in the covering letter, states that Mr. Stockfish does not personally own any shares in an automobile dealership and no longer functions in a managerial position in any motor vehicle dealer.

By letter dated September 22, 2006, Mr. Rothe advised Mr. Bak that his letter was not sufficient evidence of Mr. Stockfish's compliance with the Divisional Court Order. The Registrar required a sworn affidavit from Mr. Stockfish confirming that he was in compliance with each of the conditions of the Divisional Court Order. The affidavit was also to include a statement of what steps Mr. Stockfish had taken to bring himself into compliance and copies of all relevant documents. The Registrar would then review the affidavit and would advise Mr. Bak if the affidavit was sufficient or whether further confirmation was required.

By letter dated October 19, 2006, Mr. Bak submitted an affidavit of Mr. Donald Wood which attests that Mr. Stockfish is not now a shareholder, director, officer, executive, owner or partner in, or employed in a managerial position by, any of the family-owned motor vehicle dealerships. The affidavit acknowledges that Mr. Stockfish does hold

shares in a family-run investment corporation which holds some shares in a family dealership. To the best of Mr. Wood's knowledge and belief, Mr. Stockfish is in compliance with the Divisional Court Order.

By letter dated October 20, 2006, Mr. Rothe advised that this affidavit was not sufficient evidence of compliance. Mr. Rothe re-iterated the Registrar's position that what is required is an affidavit sworn by Mr. Stockfish stating that he is in compliance with the Divisional Court Order, detailing what steps he has taken to bring himself into compliance and supplying supporting documentation. Mr. Stockfish did not supply the requested documentation and on November 2, 2006, the Registrar issued the Current Proposal which proposes to suspend the registration of Mr. Stockfish under the Act until Mr. Stockfish supplies the necessary evidence of his compliance with the Divisional Court Order. The Registrar is of the opinion that Mr. Stockfish is in violation of subsection 13(11) of Regulation 801 to the Act and therefore is in breach of Section 5 of the Act.

On November 16, 2006, Mr. Stockfish appealed the Current Proposal to the Tribunal.

Law and Argument

Mr. Bak advanced three arguments in support of his contention that the Tribunal lacks jurisdiction to hear this matter. First, Mr. Bak contends that the Divisional Court Order is not a modification of the Tribunal's decision because only the Tribunal can modify its decisions. Rather it is what Mr. Bak refers to as an "Order *de Novo*". He concedes that he has no authority for this position. However, if the Tribunal accepts this view, then what follows, in Mr. Bak's argument, is that, under Rule 60.05 of *The Rules of Civil Procedure*, the only way the Registrar can enforce the Divisional Court Order is by way of a contempt order and only the Divisional Court has the jurisdiction to hear a contempt motion regarding orders it has issued. Mr. Bak has no authority to support his position that *The Rules of Civil Procedure* apply to the actions of the Registrar under the Act but he argues that the Registrar, in requesting a specific form of evidence of compliance from Mr. Stockfish, is in fact seeking to demonstrate that Mr. Stockfish is in contempt.

Mr. Bak's second argument is that the Registrar has no authority to enforce a decision of the Divisional Court and therefore the Tribunal has no jurisdiction to hear an appeal from an attempted enforcement. This argument, too, is based on Rule 60.05 of *The Rules of Civil Procedure*.

Mr. Bak's third argument regarding jurisdiction is that the Divisional Court Order is now moot. It, in effect, expired on March 10, 2007, as the time period of compliance was for one year from the date of the issuance of the order. As Mr. Bak put it, his client has now "served his sentence" and no further enforcement actions may be brought. The Registrar is therefore out of time in bringing this proposal.

Mr. Bak then addressed the question of whether the Registrar is correct in proceeding under Subsection 13(11) of Regulation 801 of the Act to request confirmation of compliance. Section 13 of Regulation 801 is headed "Terms and Conditions of Registration" and Subsection 11 reads:

The Registrar may require further information or material to be submitted by any applicant or any registrant within a specified time limit and may require verification by affidavit or otherwise of any information or material then or previously submitted.

Mr. Bak argues first that Subsection 13(11) cannot be read in isolation but must be read with Section 7 of the Act which sets out the procedure the Registrar must follow if he proposes to refuse or revoke registration. Mr. Bak concludes from his reading of these provisions that the Registrar has no authority to impose terms and conditions on a registration except upon registration or renewal, and therefore has no authority to enforce compliance with these terms and conditions.

Secondly, Mr. Bak argues that there is nothing in the original Tribunal Order or in the Divisional Court Order that obliges Mr. Stockfish to provide proof of his compliance to the Registrar. Finally, Mr. Bak argues that even if Subsection 13(11) can be read in isolation, the Registrar cannot dictate who has to provide the affidavit. In this case, in Mr. Bak's submission, Mr. Wood is in the best position to attest to the facts.

Mr. Bak also submitted that the Registrar is fishing for evidence of non-compliance and that no affidavit sworn by Mr. Stockfish will be sufficient to satisfy the Registrar. He notes that the Registrar did not seek to cross-examine Mr. Stockfish on the affidavit he swore in support of the appeal to the Divisional Court. Neither has the Registrar asked to cross-examine Mr. Wood on his affidavit. Mr. Bak argues that Mr. Wood is in the best position to satisfy the Registrar that Mr. Stockfish does not own shares in the family's motor vehicle dealerships. Therefore, this proceeding is an abuse of process.

Mr. Rothe argues that the onus is on Mr. Stockfish to demonstrate that the Tribunal does not have jurisdiction and that Mr. Stockfish has not met this onus. On the plain reading of the Divisional Court Order, the Divisional Court was amending the decision of the Tribunal, not superseding it. Among other indications, it is not possible to understand the Divisional Court Order without reference to the Tribunal's Order. Regarding the Registrar's authority to enforce terms and conditions, Mr. Rothe referred to Subsection 5(2) of the Act which states:

A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Concerning the timing of the request for information, Mr. Rothe argued that the year of enforcement ought to run from July 7, 2006, because of the agreement between the parties that the Registrar would not seek to enforce the Divisional Court Order pending Mr. Stockfish's seeking leave to appeal. However, regardless of the time frame of the

Divisional Court Order, Mr. Rothe argued that the test for continued registration is contained in Subsection 5(1), paragraph (b) of the Act which reads:

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 law and with integrity and honesty .

What the Registrar is now attempting to do, and what he has sought to do since July, 2006, is to confirm that Mr. Stockfish is in compliance with the Divisional Court Order. The Registrar requested the information within the year-long term of the conditions imposed by the Divisional Court Order, and seeks now to enforce the request by suspending Mr. Stockfish's registration until he provides adequate evidence of compliance.

Mr. Wood's affidavit is not adequate to the Registrar's purposes for several reasons. First, Mr. Wood is not the applicant and therefore is not subject to the Act. If it subsequently appears that there is a problem with the affidavit, there is a wall between Mr. Stockfish and the affidavit itself. Therefore, there is no consequence to Mr. Stockfish under the Act if his family's solicitor was in error in statements sworn to in the affidavit. Nor is Mr. Wood in the best position to affirm Mr. Stockfish's current or past managerial positions or his ownership in non-family owned companies. The Registrar specifically requested a statement of the steps taken to bring Mr. Stockfish into compliance with the Divisional Court Order and this has not been provided. Nor has the Registrar been provided with any supporting documentation, as requested.

Decision

A plain reading of the Divisional Court Order makes it clear that the Divisional Court is varying the order of the Tribunal. As Mr. Rothe notes, it is not possible to understand the Divisional Court Order without reference to the Tribunal's order. As well, the Divisional Court Order refers to "altering" the conditions of the Tribunal's decision and not to superseding that decision. Therefore, it is not necessary to consider Mr. Bak's argument that the only way to enforce the Divisional Court Order is by a contempt of court motion.

The Registrar is not expressly given authority to ensure that terms and conditions imposed by the Tribunal and, by extension, the Divisional Court, are complied with. What the Registrar has is a broad authority under Sections 5, 6 and 7 of the Act to withhold or remove registration, including a registration subject to terms and conditions. In light of this broad authority, it was neither necessary nor appropriate for either the Tribunal or the Divisional Court to grant the Registrar authority to enforce the terms and conditions imposed by the Divisional Court Order.

The Registrar does not have authority under the Act to impose terms and conditions but, under Subsection 5 (2) of the Act, the applicant may consent to terms and conditions or they may be imposed by the Tribunal. Where terms and conditions do exist, the Registrar has a number of means to verify that they are complied with. The least intrusive of these is a request for information under Subsection 13(11) of Regulation 801 of the Act. Based on the statement of facts, the Registrar's actions in requesting an affidavit from Mr. Stockfish and requesting that the affidavit include a statement of the actions taken by Mr. Stockfish to bring himself into compliance with the Divisional Court Order are reasonable and do not constitute an abuse of process. Whether Mr. Stockfish is being reasonable in declining to provide the requested information in the form requested by the Registrar and whether the Registrar is justified in proposing a suspension of Mr. Stockfish's registration are properly the subject of a hearing before the Tribunal. If Mr. Stockfish wishes to submit evidence to support the submission that the Registrar is not acting in good faith in requesting the information, then he may do this at the hearing.

Mr. Stockfish has also requested an order quashing the Original Proposal. This is beyond the Tribunal's jurisdiction, being *res judicata*.

Accordingly, this Tribunal orders that:

1. The Motion by Mr. Stockfish is denied.
2. The Hearing in this matter will proceed on Friday, June 8, 2007, at the offices of the Tribunal, commencing at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: April 19, 2007

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



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

STEPHEN CRANNEY

IN THE MATTER OF
STEPHEN CRANNEY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 8, 2007

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

STEPHEN CRANNEY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Stephen Cranney, 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

Lynda Tanaka,
Acting Chair

RELEASED: April 4, 2007

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

SCHEDULE 'A'

TO: The Registrar, *Motor Vehicle Dealers Act*
Ontario Motor Vehicle Industry Council
789 Don Mills Road, Suite 800
Toronto, ON M3C 1T5

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Stephen Cranney

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Stephen Cranney (hereinafter referred to as the "Applicant") and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant agrees not to be an officer, director, owner, partner, manager or have direct or indirect control of a dealership.
2. The Applicant shall not be a final signatory on bills of sale.
3. The Applicant shall provide the Registrar with a copy of his discharge from bankruptcy within 10 days of receiving the discharge.
4. The Applicant agrees not to be involved in the process of buying, selling or leasing of motor vehicles without the benefit of registration.
5. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
6. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
7. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
8. The Applicant confirms that the particulars and circumstances of his conviction(s)/charge(s) are substantially as disclosed to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
11. The Applicant will provide a copy of this Order to his employer forthwith.
12. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of April, 2007

(Signature)
Stephen Cranney

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*



SOHIEL AZARIAN O/A SPEED LINE AUTO SALES AND SERVICES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: SOHIEL AZARIAN, Applicant, appearing in person

AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: March 28, 2007 Toronto

ORDER

Following attendances on March 28, 2007, at a hearing of Sohiel Azarian o/a Speed Line Auto Sales And Services, representing himself (the "Applicant"), and Aviva Harari, Counsel, representing the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on June 4, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The hearing in the matter on March 28, 2007, was adjourned on the following conditions:
 - (a) OMVIC shall put an administrative hold on Sohiel Azarian o/a Speed Line Auto Sales dealer registration, and all of the dealer's transactions shall be reviewed by OMVIC;
 - (b) Any transfer of vehicles into or out of the dealership's name shall be done through the Ministry of Transportation office in Scarborough Ontario, at St. Clair Avenue East and Kingston Road. The Ministry will contact OMVIC to obtain an override to allow for the transfer of vehicles. OMVIC will require that the dealer forward supporting documentation prior to allowing the transfer. Such documentation may include copies of all relevant bills of sale, safety standards certificates, drive clean tests, any inspections conducted pursuant to branding legislation in Ontario and any import documentation;

- (c) Any vehicles purchased or sold by the dealer at a wholesale auction, and where the auction affects the transfer of the vehicle, said transfer may take place at any Ministry of Transportation office. The dealer shall forward all documentation related to the transaction to OMVIC;
 - (d) The dealer shall comply with the *Motor Vehicle Dealers Act*, the *Highway Traffic Act* and all relevant legislation and shall comply with the OMVIC Code of Ethics and Standards of Business Practice;
 - (e) The Applicant shall forward to the Tribunal and to OMVIC copies of all proceedings related to the appeal of his criminal conviction, including copies of any motion material to extend the time for filing the appeal;
 - (f) The Applicant shall advise the Tribunal and OMVIC of the status of the motion to extend the appeal period referred to above and shall, within 3 days of the court making its order with respect to the motion, advise the Tribunal and OMVIC of the disposition of the motion;
 - (g) If OMVIC has any concerns with respect to the dealer's compliance with the conditions of the adjournment, OMVIC may apply to Tribunal for a variation of the conditions of the adjournment;
2. These conditions apply to the dealer until the Tribunal's final decision is released.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

Released: April 4, 2007

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



ADEBALM AUTO MART INC. and JAMES BAYO LAWSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SHANE M. WATSON, Vice-Chair

APPEARANCES: No one appearing for Adebalm Auto Mart Inc. and James Bayo
Lawson

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 2, 2007

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Applicants appeal a Notice of Proposal dated August 10, 2006, issued by the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") to refuse the registration of Adebalm Auto Mart Inc. and James B. Lawson (the "Applicants") under the Act.

The particulars upon which the Registrar relies are stated in the Proposal (Exhibit 4, Tab 1) as follows:

- 1) Adebalm Auto Mart Inc. (the "Dealer") is an Ontario corporation that applied for registration as a motor vehicle dealer on or about November 22, 2005.
- 2) James Bayo Lawson ("Lawson") applied for registration as a motor vehicle salesperson on or about November 22, 2005.
- 3) Lawson is an officer and director of the Dealer.

- 4) On the Individual Application for registration, dated November 22, 2005, question 6 of Section E 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."

Lawson answered "No".

- 5) A credit check revealed that Lawson filed for bankruptcy in 1999.
- 6) Lawson failed to meet the conditions to be discharged.
- 7) On or about July 6, 2006, Lawson re-applied for registration as a motor vehicle salesperson. He proposes to work for Joseph Olatunde o/a JK & F Motors.
- 8) Lawson remains an undischarged bankrupt.
- 9) As an undischarged bankrupt Lawson cannot hold the position of a director of a corporation in accordance with the *Ontario Business Corporations Act*.

A Notice of Further and Other Particulars was issued by the Registrar on September 27, 2006, (Exhibit 4, Tab 2), and contained the following:

"It is further alleged as follows:

1. James B. Lawson has bought and sold motor vehicles for export without the benefit of registration."

By written Notice of Appeal, the Applicants, in terms of section 7(2) of the Act, informed the Tribunal that they required a hearing regarding their appeal of the Registrar's proposal.

It is the Registrar's position that the Applicants are disentitled to registration under section 5(1)(b) of the Act, as the past conduct of Lawson gives reasonable grounds to believe that he will not carry on business in accordance with the law and with integrity and honesty.

The Applicants, Lawson and the Dealer, did not appear in person, or by counsel or agent, despite being duly served and notified according to the Licence Appeal Tribunal's Rules of Practice and the *Statutory Powers Procedure Act*.

Lawson did state in the Notice of Appeal that persons who have declared bankruptcy are not necessarily precluded from registration. Lawson further stated:

I referred to the case of Brenner v. Ontario (Register of Motor Vehicle Dealers and Salesperson) [1993] O.R. No. 1017. And Berni V. OMVIC [2006] and some other case with the Tribunal that the appeal has been granted.

(sic)

Lawson further states in the Notice that his past conduct does not make him a bad businessman, and that he has been buying cars from dealers and shipping cars to Nigeria and the Benin Republic for more than two years. He further states that, his "bankruptcy of 1999 does not affords reasonable grounds for beliefs that I will not carry on Business in accordance with Law and with integrity and honesty. (sic)" Lawson also states that the refusal to grant him a salesperson's license is a violation of section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

No notice of constitutional question was served in accordance with the Rules of Practice.

The Applicants did not appear. Also, no one appeared to represent them, and no documentary or sworn evidence was provided by them.

EVIDENCE:

At the commencement of the hearing it was noted that the Notice of Proposal to Refuse Registration dated August 10, 2006 was entered as Exhibit 1, the Notice of Appeal dated August 15, 2006 as Exhibit 2, and the Notice of Further and Other Particulars dated September 27, 2006 as Exhibit 3.

The Respondent's Book of Documents was marked as Exhibit 4.

The Registrar called three witnesses. Their oral testimony is summarized as follows:

Thai Gengatharan

The witness is an employee of the Ontario Motor Vehicle Industry Council, Registrar's Office, and was a registration team leader. She reviewed the application of the Dealer and Lawson, set out in Tab 5 of Exhibit 4. As a result of her review, she made a request for further information that is set out in Tab 7. This request was made on January 30, 2006, and Lawson responded in his letter of February 20, 2006, also set out in Tab 7 of Exhibit 4.

Lawson's explanation did not provide any supporting documents with respect to the bankruptcy. The only document that the witness had was a consumer report which she requested from Equifax which seems to be dated March 13, 2006, and which confirmed the assignment of bankruptcy filed in November of 1999. The witness referred the matter to her colleague, who was the next witness to testify.

Marcela Sepulveda

The witness also works in Registration Services for the Registrar and was involved in a further review of the file to obtain additional information.

As a result of a request for further financial information, Lawson responded with the materials set out in Tab 8 of Exhibit 4, which indicated that he was engaged in investing in cars for export to Nigeria.

The witness testified that she called Lawson, and he returned her telephone call on March 31, 2006. Her recollection of the conversation is set out at Tab 9 of Exhibit 4. She explained to Lawson that he could obtain his bankruptcy files, and what the trustee had informed her about how to get these files. In a further telephone conversation of July 6, 2006, the witness had informed Lawson that she had received the bankruptcy documents from the trustee, and that the bankrupt remained undischarged. She informed him that the letter to him from the Trustee in Bankruptcy from December 18, 2000, indicates that a conditional discharge is not the same as a discharge from bankruptcy, and that he could not be an officer or director of the dealership. The witness's recollection of the conversation is set out in Tab 10 of Exhibit 4.

The witness also testified that Tab 11 contained her correspondence with the Trustee in Bankruptcy and, particularly, the correspondence to Lawson entitled "Conditional Order of Discharge" which is set out at page 81 of Exhibit 4. It contains the paragraph:

Please note that your bankruptcy remains in effect until such time as you finalize your payments into the estate, complete your second counseling session and provide us with your completed income and expense budget sheet as noted above.

This information seems to contradict the information provided by Lawson in his letter of February 20, 2006, and his letter of June 5, 2006, set out at Tabs 13 and 12 of Exhibit 4 respectively.

On July 6, 2006, Lawson applied to be registered as a Salesperson for JK & F Motors. This application set is out in Tab 14 of Exhibit 4, and with this application, Lawson filed the material that he had received from the Trustee in Bankruptcy.

On the application being appealed, there was no mention of his previous application for registration. The witness then testified that she discussed the matter with management for their review.

Mary Jane South

The final witness called by the Registrar was Mary Jane South who identified herself as the Deputy Registrar and said she was responsible for overseeing registrations.

The witness referred the Tribunal to Tabs 1 and 2 of Exhibit 4. The witness also referred the Tribunal to pages 15 and 16 of Exhibit 4, showing that Lawson was a director and officer of the Dealer. The witness' first concern was the non-disclosure of Lawson's bankruptcy situation, as well as his purchase of vehicles without registration. This led the witness to believe that he would not carry on business in accordance with the law and with integrity and honesty. Furthermore, he would not be financially responsible in the conduct of business. The Dealer's registration would fail on the basis that Lawson was its principal registrant and no other application was made by any of its officers or directors. The witness concluded that the Registrar's position would be maintained.

FACTS FOUND PROVEN:

- 1) The Applicant Lawson signed on his behalf, and on behalf of the Dealer, the Application for Registration under the *Motor Vehicle Dealers Act* that appears on Tab 5 of Exhibit 4.
- 2) On question 6 of section E of that Application, Lawson answered untruthfully. Lawson did not take any steps since 1999 to effect his discharge in bankruptcy and remains an undischarged bankrupt.
- 3) Lawson bought and sold vehicles for export without benefit of registration.
- 4) The Dealer did not apply with any person other than Lawson, as the person who would have effective control over the day to day operations of the dealership as set out in Section B of the Application. Also, Lawson appears as a director of the corporation under Section C.
- 5) Information provided by the Companies Branch set out in Tab 4 of Exhibit 4 shows Lawson as a Director of the Dealer. Lawson, as an undischarged bankrupt cannot hold a position of Director of the Dealer pursuant to the Ontario *Business Corporations Act*.

ISSUE:

The issue before this Tribunal is whether or not the past conduct of Lawson affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act, which states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

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

...

The Registrar has the onus of proof to satisfy the Tribunal that the registration of the Applicant should be refused.

For the Tribunal to carry out its responsibilities pursuant to the Act, it must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant, and consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971-1989)*, page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Due to the particular facts in that case, Southey J. sent the matter back for a rehearing, however, he added in the third last paragraph of the decision:

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

This does not establish a rule that the Registrar's conclusions must be shown to be wrong in concluding that there was reason to doubt that the registrant (or in this case the proposed registrants) would not carry on business appropriately but, as set out in *Registrar, Motor Vehicle Dealers Act and Shine Car Sales and Omar Hassan Rahim*, 2003 CanLII 11437 by Lane J., it imposes a duty on this Tribunal to review the evidence presented and reach its own conclusion, based on this review. As set out in *Savcho Zahariev o/a Janex v. Registrar, Motor Vehicle Dealers Act*, at 2005 CanLII 44815, a decision of the Divisional Court, the proper test is for the Tribunal "to make an independent decision as to whether the criteria for depriving the Applicant of his license has been proven, showing no deference to the initial decision of the Registrar" (paragraph 7).

APPLICATION OF LAW TO FACTS:

Lawson and the Dealer did not appear before this Tribunal although the record shows that when the matter was scheduled for hearing on November 22, 2006, an adjournment was requested by the Applicants, and was consented to by the Respondent.

The Applicants did not appear on February 2, 2007, although given the required notice.

As a result of the non-appearance of the Applicants, or their representatives, the evidence put forward by the Respondent is uncontradicted. That evidence indicates a past bankruptcy with no efforts made to obtain a full discharge.

While bankruptcy by itself is not a bar to registration, the failure to take any steps to fulfill the conditions necessary for discharge does raise the issue that the Applicant Lawson may not be financially responsible and may not carry on business in accordance with the law and with integrity and honesty.

In addition to the past conduct, which by itself might be explained if the Applicant Lawson had given evidence or provided some documentary proof of his position, the Applicant Lawson was clearly not truthful in his response to question 6, regarding his bankruptcy record. The Applicant Dealer is also bound by this answer. It has been repeatedly found by this Tribunal that the need for an Applicant to complete the application form completely and truthfully is a vital part of the application process, and an Applicant's failure to do so is reason to refuse registration.

There is also the serious issue of Lawson buying and selling cars without benefit of registration. Such conduct is contrary to the intention and objectives of the Act. For this reason alone it would be reasonable to refuse registration.

DECISION:

Accordingly, pursuant to the authority vested in it by s.7 (4) of the Motor Vehicle dealer Act, the Tribunal directs the Registrar to carry out the Notice of Proposal dated August 10, 2006, to refuse the registration of the Applicants.

COSTS:

The Respondent made a request for costs in the amount of \$1,200.00, which I have considered in light of the prior request for an adjournment and the Applicants not attending the hearing on February 2, 2007. I note that notice that the Registrar would request costs was given, as required, in the Notice of Proposal (Exhibit 1), and hereby order the Applicants to pay the sum of \$800.00 in costs to the Respondent.

LICENCE APPEAL TRIBUNAL

Shane M. Watson,
Vice-Chair

Released: April 12, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ASAD ANDY MALIK

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: NIVES MONTANO, presiding Member

APPEARANCES: ASAD ANDY MALIK, Applicant, appeared on his own behalf

A. MICHAEL ROTHE, Counsel, represented the Registrar under
the *Motor Vehicle Dealers Act*

DATE OF
HEARING: February 15, 2007 Toronto

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 June 15, 2006, proposed to refuse the registration of Asad Andy Malik (the "Applicant"), as a salesperson under the Act.

In support of his proposal the Registrar furnished the following reasons and particulars.

REASONS

The Registrar bases his Proposal to refuse the Applicant's registration under section 6.(1) of the Act, which reads as follows:

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.

The Registrar further bases his Proposal to refuse under section 5.(1)(b):

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;

PARTICULARS

The Registrar relied on the following reasons.

The reasons for this proposal are:

1. Asad Andy Malik (hereinafter referred to as the "Applicant"), was first registered as a motor vehicle salesperson from on or about February 4, 1997 to on or about February 4, 1999.
2. The Applicant submitted an application for registration as a motor vehicle salesperson on or about January 9, 2006. He proposes to work for 1083153 Ontario Ltd. o/a Erin Mills Mazda (1994).
3. 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 copy of the Assignment in Bankruptcy or proof of discharge, and provide explanation of circumstances leading to bankruptcy."

The Applicant answered, "Yes".

4. The Applicant made an assignment in Bankruptcy on or about June 27, 1997. The Bankruptcy was discharged on or about May 13, 1998.
5. 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, "Yes".

6. A criminal record search found that the Applicant engaged in past conduct which led to the following convictions:

February 21, 2002	Fraud Over \$5,000.00
	Conspiracy to Commit and Indictable Offence
	Possession of Property Obtained by Crime (x3)
	Use of Credit Card (x2)
	Possession of Credit Card
	Possession of Counterfeit Money
	Fraud Under \$5,000.00
	Seek or Obtain a Scheduled Substance

In brief, the Registrar takes the position that the Applicant's past criminal conduct as referenced above provides reasonable grounds for belief that he will not carry on business in accordance with the law and with honesty and integrity and should therefore not be licensed as an automobile salesperson.

Counsel for the Registrar advised the Tribunal that he was not going to pursue any of the bankruptcy issues at this hearing as outlined in the Registrar's proposal.

EXHIBITS:

Exhibit 1	Notice of Proposal to Refuse Registration dated June 15, 2006, issued by the Registrar, <i>Motor Vehicle Dealers Act</i> .
Exhibit 2	Notice of Appeal form received at the Tribunal June 28, 2006, filed by the Applicant.
Exhibit 3	Respondent Book of Documents Volumes 1 and 2.

FACTS FOUND PROVEN:

The Tribunal finds that the following facts were proven during the hearing of this matter:

1. The Applicant advised the Tribunal that he received Volume 1, but he did not receive Volume 2 of the Respondent's Book of Documents (part of Exhibit 3) prior to today's hearing. Counsel for the Registrar advised the Tribunal that he sent the Book of Documents by way of Express Post and the tracking information indicated that the package was delivered but the Applicant did not accept its delivery. A card was left at the Applicant's address and the package remained with Canada Post and was not picked up.
2. The Applicant's past conduct resulted in numerous criminal convictions culminating in a three-month investigation by the OPP and RCMP which included wire tapes and numerous interviews of accused victims and co-accused and the ultimate conviction of the Applicant in February 2002.
3. The Applicant was further charged and convicted in December, 2001, of fraudulently submitting an unemployment insurance claim application while in custody.
4. The Applicant, by his own admission, supplied incomplete and inaccurate application information to the Registrar.
5. The Registrar's evidence supports the conclusion that the Applicant submitted

incomplete and inaccurate application information.

THE EVIDENCE:

The two witnesses for the Registrar and the Applicant were all sworn in before giving testimony.

Testimony of Detective Constable Richard Schell

This witness has been with the Ontario Provincial Police, Orillia Detachment, for the past 25 years. He is currently working on criminal investigation cases.

With reference to the Crown Brief Synopsis located in Volume 2, Tab 1, Exhibit 3, this witness was in the Anti-Rackets Unit within the OPP which investigates crimes from auto theft to fraudulent documents. His forte is health fraud and he is an expert on identity theft.

Counsel for the Registrar asked this witness to review and provide a brief explanation of the contents found in Volume 2, Tabs 1-6, Exhibit 3.

In summary, members of the RCMP were conducting an investigation originally focussed on three primary targets in organized crime. As a result, the investigating officer within the RCMP asked this witness to be assigned to the identity theft cases and was on secondment to the RCMP for approximately one year.

From September 3, 2001, to November 1, 2001, the RCMP was granted an authorization to conduct wire taps of communications between certain individuals in organized crime. During this timeframe, the police became aware that the Applicant was involved in identity theft and credit card fraud. The initial investigation branched off and the Applicant subsequently became part of a separate investigation since numerous crimes were being committed. The Applicant knew someone in an organization, international in scope, and as a result of recorded conversations of their telephone lines, he and others were identified as a crime group. The Applicant was associated and involved with co-conspirators who used stolen credit card information to purchase goods for business and resold the stolen merchandise for cash. Credit card data was placed on stolen or blank credit cards by means of a "skimmer".

Upon execution of a search warrant of the Applicant's residence, a laptop computer located on the floor of the Applicant's bedroom was later found to contain the program to "skim" and program credit card data to the magnetic strips. Numerous items of identification belonging to other persons (i.e., credit cards, personal credit application forms; birth certificates; driver's licences), a forged Canadian citizenship card and a U.S. social security card as well as counterfeit money were also found. The Applicant was responsible for collecting the information, finalizing the process of making a hard copy of a credit card and sales after the fact. The Applicant was identified by the witness and the

RCMP as “the ring leader”.

On November 1, 2001, the Applicant and a co-accused were arrested in a parking lot by members of the RCMP and OPP who found two credit cards on the centre console and two credit cards under the passenger’s seat.

The Applicant was released from jail on December 18, 2001. On December 31, 2001, he was arrested again and charged with fraud because it was alleged he had been collecting unemployment insurance benefits from Human Resources Canada while he was incarcerated.

During the course of the wire tapped conversations, the witness heard a phone conversation between the Applicant and his girlfriend in which he was bragging that he had more credit card data which originated from the tragedy and disaster of the World Trade Centre. This information was passed on to the U.S. authorities.

This witness laid the original charges and the Applicant was arrested on November 7, 2001. The Applicant entered into an agreement with the Crown Attorney pleading guilty to specific charges and, without a trial, was convicted on February 21, 2002, of ten Criminal Code violations`.

Testimony of Carey Smith

Mr. Smith holds the position of Director of Investigations for OMVIC. His duties include overseeing any investigations into offences committed by people within the industry. He also performs background investigations into applications and dealers applying for registration.

Prior to his tenure with OMVIC, he was a police officer for twenty-six years with the Halton Regional Police force.

His professional experience includes work as a fraud investigator and dealing with complicated fraud schemes. In 1997, Mr. Smith was the officer in charge of a joint forces operation comprised of the OPP, RCMP and Revenue Canada that investigated organized crime activities within the car industry, apparently the biggest automotive/tax fraud in the history of Canada.

OMVIC was created in 1997 as a public not-for-profit corporation to administer the Ontario *Motor Vehicle Dealers Act*. The Act is intended to give consumers a level of confidence in their dealings with the car industry. It is ultimately designed as a public protection statute.

Counsel for the Registrar asked this witness to review and explain Volume 1 of the Respondent’s Book of Documents (Exhibit 3), essentially tabs 1, 3, 6, and 7.

Tab 1, Exhibit 3, is the Notice of Proposal to Refuse the Registration dated June 15, 2006, which outlined the grounds for refusal being the Applicant's past conduct in criminal activity and convictions.

Tab 3, Exhibit 3, is the Applicant's Application for Registration under the *Motor Vehicle Dealers Act* originally received by OMVIC January 9, 2006, in which the original application was received incomplete and undated, together with a copy of the Applicant's driver's licence, a copy of page 2 and 3 of his Canadian passport, a copy of his citizenship card and a two-page handwritten letter outlining the circumstances surrounding his criminal convictions.

On page two of the said application, the Applicant failed to provide the reasons he left three places of employment. Referring to questions 8 and 9 on page 3 of the original application, these questions require the Applicant to detail his criminal record and any pending charges. These questions were left blank.

There is a warning at the bottom of the section that incomplete or false disclosure will result in disqualification and is also an offence under the Act. OMVIC relies on the information submitted when assessing an application for registration. In this instance, the Applicant did not provide enough details. OMVIC requested more information, some of which, but not all, was received by fax on January 17, 2006 and is included under the aforementioned Tab 3, Exhibit 3.

When asked to submit more information about the convictions, the Applicant faxed his application and cover sheet dated January 17, 2006 addressed to "Maria" at OMVIC at Tab 6, Exhibit #3. The Applicant's handwritten note on the fax cover sheet reads as follows:

Maria regarding my criminal record I have very long explanation please call me when you get my record and I'll discuss with you and I have applied for pardon in Brampton court as well. Thanks.

On April 24 2006, three months after the Applicant filed his initial application for registration, he faxed his criminal record, an explanation regarding his convictions and a document outlining the Fine Order/Victim Surcharge relating to his convictions.

The position of the Registrar is that this Applicant was convicted for fraud. He was not a juvenile at the time. The fraud was not an inadvertent act and it was not isolated. It was premeditated and sophisticated. He victimized his employer and its customers. He committed a serious breach of trust by having access to people's personal credit card information and he abused that position of trust by stealing that information and using his position of trust to perpetuate a criminal act. As mentioned above in the first witness testimony, the Applicant capitalized on the victims of the World Trade Centre disaster.

In this witness' opinion, the car industry is highly sought after by organized criminal groups

who carry out fraudulent acts. There is potential for money laundering since large bank balances are not suspicious and are not scrutinized. The propensity to steal information is assisted because personal, financial and credit information would also be at their fingertips. Since OMVIC is a public protection organization, it is trying to keep criminal groups out of the industry.

This witness maintains his position to refuse the registration of this Applicant's application.

Evidence of Asad Andy Malik

In his opening remarks, the Applicant indicated that he was not in a position to say that he was innocent, but he did say: *"not guilty of all this". "This was a one time incident in my life. I have changed completely and have become very spiritual. I was wrong, I made a mistake. It's been seven years. I have suffered a lot. It has affected me emotionally, psychologically. I paid the price and I have been in good conduct. I have not done anything bad or wrong in seven years. It has completely changed my life"*.

The Applicant advised the Tribunal that he was remorseful and apologetic for his past conduct, but then he refused to accept responsibility for his past convictions and contradicted and denied the level of his participation in the crimes which he committed. There were a number of inconsistencies which were addressed by Counsel for the Registrar during the Applicant's cross-examination. They are as follows:

1. Inaccuracies and omissions contained in the original application:
 - a. The Applicant indicated that he was a first-time registrant, whereas Counsel for the Registrar as well Mr. Smith advised that the Applicant was previously registered as a motor vehicle salesperson from February 4, 1997, to February 4, 1999. The Applicant allegedly was unaware of his previous registration. Neither the Registrar nor Mr. Smith provided the Tribunal with proof in this regard.
 - b. It was further revealed by the Applicant that the dates of employment listed on the application were inaccurate.
 - c. The Applicant failed to provide full and complete disclosure regarding his criminal convictions. Full disclosure was made three months after the original application for registration was filed with OMVIC.
 - d. In Volume 1, Tab 3, Exhibit 3, the Applicant provided a handwritten letter addressed to "To Whom it May Concern" in which he writes that he was framed by way of retaliation by his ex-girlfriend's father, who allegedly was a police officer at the time of his arrest. The excerpt reads as follows:

"I was living with my exgirlfriend at that time who's father was in police who charged me with lots of unfair charges at that time..."

“...my exgirlfriend was aware of the use but her dad who happened to be a cop wanted to put me in big trouble”.

The first witness for the Registrar admitted under oath that he was not the Applicant's ex-girlfriend's father. DC Schell was the sole OPP officer involved in the joint force investigation and was the lead investigator. It was the information he had collected which lead to the Applicant's arrest. In his testimony, DC Schell advised the Tribunal that he does not have any daughters.

The Applicant admitted under oath that he had met his ex-girlfriend's father once before being arrested. He confirmed that the ex-girlfriend's father was not DC Schell. The ex-girlfriend's father was not present at the time of the arrest, nor was he in court at anytime. The Applicant therefore admitted that his statement was not accurate.

With reference to the his ex-girlfriend, the Applicant indicated at this hearing that her name was Name #1; however, he provided a statement to DC Schell and Detective Sargeant Bowen on November 7, 2001, that his ex-girlfriend's name was Name #2.

2. The Applicant challenged Counsel for the Registrar by arguing that only one laptop computer was found in his bedroom during the execution of the search warrant. According to the Crown Brief Synopsis (Vol. 2, Tab 1, Exhibit 3), DC Schell listed the seized printer, scanner and two laptop computers with their serial numbers. On page 20 of the Applicant's statement (Vol. 2, Tab 3, Exhibit 3), the Applicant stated

“I bought it like, one computer I bought it like about two weeks ago, another one I bought it, like, about two and a half months ago”.

He further re-iterated his statement on page 29 (Vol. 2, Tab 3, Exhibit 3),

“...I bought two laptops from my cousin, thirty seven hundred dollars (\$3,700.00)”.

3. During the course of this hearing, the Applicant kept indicating that his past convictions happened seven years ago. He was charged on November 2001, convicted of his crimes on February, 2002 and released from probation in February 2003. He has not had any convictions since his release from probation, being 4 years ago.

The Tribunal concludes, based on one of the Applicant's final comments, that the Applicant did not expect that his past conduct would be called into question and magnified as it has at today's hearing, saying *“I didn't realize it was going to be that intense”*.

The Applicant failed to provide any evidence to respond to the effect of these consistencies and that would allow this Tribunal to consider his application favourably.

THE LAW:

Sections 5(1)(a)(b) of *The Motor Vehicle Dealers Act* (the “Act”), states as follows;

5(1) An applicant is entitled to registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

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

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 LAW TO FACTS:

The test the Tribunal should apply to the facts it has found is the test outlined by the Divisional Court in the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)*[1983] O.R. No. 1017, which reads 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 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 case of *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales 40 M.V.R. (4th) 86* the Divisional Court added that:

Brenner must be read carefully. It does not establish a rule that the Registrar must be shown to be wrong in having concluded that there was reason to doubt that the registrant would carry on business inappropriately. The Tribunal approaches the matter uninhibited in any way by the Registrar’s view. (emphasis added)

The Applicant failed to provide any evidence that would rebut the facts proven in the evidence of DC Schell and Mr. Smith. The only issue before the Tribunal is whether the Applicant could carry on business in accordance with the law and with honesty and integrity.

The Applicant participated in criminal conduct including fraud involving use of credit cards, large sums of money and personal financial information, acts which constituted a breach of trust.

His conduct in inaccurately completing the application to the Registrar and then making contradictory and inconsistent statements indicates he is unlikely to abide by the restrictions of a regulated industry designed to protect the public.

The conduct of the Applicant at today's hearing does not convince the Tribunal that it would be in the public's best interest to grant the application for registration to the Applicant. Although he was apologetic with regard to his past conduct, he was not in agreement with his past convictions which he pleaded guilty to. This Tribunal is of the opinion that the Applicant is not fully aware of the impact and seriousness of his past criminal convictions. He was not expecting the Registrar nor OMVIC to fully investigate his background.

The Applicant was released from probation in February 2003. He was unemployed and/or performing odd jobs until he was hired as an employee in the Parts/Customer Service department at Erin Mills Mazda in September 2005. The Applicant has been on sick leave from his current employer since October 2006.

The Tribunal is in agreement with Mr. Smith that the car industry is found to be quite lucrative by crime groups to carry out fraudulent acts and criminal activity. The common goal is to protect the public against such activity.

The Tribunal finds that section 5(1)(b) of the Act applies, and that 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 since he has only been back in the workforce for one year since his release from probation in February 2003.

DECISION:

Therefore by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to refuse the Applicant's registration as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Nives Montano, Member

Released: April 3, 2007

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



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[March](#)

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ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter O.31

GRAZYNE HLUCH -ADJ-Adjournment

IN THE MATTER OF a CLAIM by
GRAZYNE HLUCH

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)

GRAZYNE HLUCH

Applicant

-and-

TARION WARRANTY CORPORATION

Respondent

-and-

FRAM BUILDERS (DURHAM) CORP.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed and a time and place for a hearing in the above matter
on June 6, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to
commence at 9:30 a.m., on Wednesday the 13th day of June, 2007, at the Tribunal's
Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Acting Chair

RELEASED: April 16, 2007



PRE-HEARING

PENELOPE PORTER

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

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: PENELOPE PORTER, the Applicant

GENA ARGITIS, Counsel, representing Tarion Warranty
Corporation, the Respondent

DATE OF
PRE-HEARING: April 13, 2007

By Teleconference

ORDER

A pre-hearing was held in this matter on April 13, 2007, by teleconference, before the Licence Appeal Tribunal, in the presence of the Applicant, Penelope Porter, and Gena Argitis, Counsel, representing Tarion Warranty Corporation (the "Respondent");

The Respondent indicated that items numbered 1 and 3 of its Notice of Proposal dated January 24, 2007, have been resolved, and that the resolution of the sole remaining item, number 2, the provision of security, is pending.

The Respondent indicated it has received a cheque from the Applicant representing the required security and will withdraw the Notice of Proposal to Revoke Registration once the cheque has been deposited and cleared.

The Tribunal makes the following Order respecting the hearing of this matter:

1. The Parties to this matter are the Applicant, Penelope Porter, and the Respondent, Tarion Warranty Corporation.

2. The Respondent will notify the Tribunal as soon as practicable if the Notice of Proposal is withdrawn.
3. If the hearing proceeds, it will commence at 10:00 a.m., on Tuesday, June 5, 2007, at the Frontenac Reporting Services, 308 Wellington Street, Kingston, Ontario.
4. The Parties shall fully comply with Rule 6 of the Tribunal's Rules of Practice regarding disclosure.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

RELEASED: April 18, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

ROSE ST. CROIX and ROBERT THIBEAU

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: No-one appeared on behalf of the Applicant

ANDREW MCKENNA, Counsel, representing Tarion Warranty
Corporation

TERRY GRANT, Agent for 1278804 Ontario Incorporated, the
Added Party

DATE OF

PRE-HEARING: April 12, 2007

Teleconference

ORDER

A pre-hearing was held on April 12, 2007, at a pre-hearing before the Licence Appeal Tribunal (the "Tribunal") in the presence of Andrew McKenna, Counsel for Tarion Warranty Corporation ("Tarion"), Robert Fisher, Tarion Field Claims Representative and Terry Grant, appearing for 1278804 Ontario Incorporated, the Added Party ("Added Party"). No one appeared for the Applicants.

The Tribunal heard from Mr. McKenna that he had been in contact with Mr. Jacques Ménard, Counsel for the Applicants, and learned that Mr. Ménard had attempted to submit a request for an adjournment to the Tribunal, but had been unable to successfully deliver a facsimile notice. Mr. McKenna provided dates which were

agreeable to the Parties, and said that he did not object to an adjournment of the pre-hearing and requested the hearing date of June 4, 2007, be maintained;

Therefore, the Tribunal orders that:

upon consent of the Parties, the pre-hearing is adjourned, peremptory to the Applicants, to commence at 9:30 a.m., on Tuesday, May 1, 2007, by teleconference.

LICENCE APPEAL TRIBUNAL

Simon Dann
Presiding Member

RELEASED: April 26, 2007

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



PRE-HEARING

ENGLISH LANE HOMES INC.

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

REFUSAL OF APPLICATION FOR BUILDER REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

PARTIES: CLARA GREEN, Agent, appeared on behalf of
The Applicant

CAROL STREET, Counsel, appeared on behalf of Tarion Warranty
Corporation

DATE OF
PRE-HEARING: April 10, 2007 Toronto – ORHT

ORDER

A pre-hearing was held in this matter on April 10, 2007, in Toronto, before this Tribunal in the presence of the Parties listed above. The Tribunal makes the following Order:

1. The Parties to the hearing are the Applicant and Tarion.
2. The issues are the chargeable conciliations and the debt as set out in the Notice of Proposal to Refuse Registration dated January 12, 2007.
3. There was resolution to two out of the ten chargeable conciliations, namely enrolment number 1274075 and number 1220277. The remaining eight enrolment numbers were not resolved. Also, item number two, outstanding debt, was not resolved.

4. Should an expert be retained, the Applicant agreed to co-ordinate attendance at the residence in question, with the homeowner and a representative from Tarion, at an agreed upon date and time in order for the expert to view the concern and provide an expert report for use at the hearing.
5. The Parties were made aware of Rule 6 of the Tribunal's Rules of Practice, and the following dates were established, Any expert report is to be sent to the opposing party by July 9, 2007, and the responses from the Parties to each other by July 19, 2007. In addition, the exchange of all evidence to be used at the hearing shall be done on or before August 10, 2007.
6. By no later than August 10, 2007, the Parties shall advise each other of the full names of the witnesses they propose to call to testify at the hearing, and such advice shall also contain a brief synopsis of the proposed testimony of each witness. The Applicant intends to call up to eight witnesses including the expert. The Respondent intends to call up to ten witnesses.
7. The hearing scheduled for July 9 to 13, 2007, is adjourned and is rescheduled for August 21, 2007, commencing at 9:30 a.m., and continuing, if necessary, to August 24, 2007, at the Tribunal Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

Released: April 18, 2007

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



PRE-HEARING

ACHAC ALI NAJARALI and SHAMIM NAJARALI

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

TO DISALLOW A CLAIM

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

PARTIES: ACHAC ALI NAJARALI, Applicant, appeared for himself and also
on behalf of Shamim Najarali

ALISON BURTON, Counsel appeared on behalf of
Tarion Warranty Corporation

2022297 ONTARIO LIMITED, Added Party

DATE OF
PRE-HEARING: April 2, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on April; 2, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, with the Parties' representatives, with the exception of the Added Party, which did not appear and was not represented.

Counsel for Tarion submitted that the Added Party cannot be located, and was unwilling and unable to be a part of the proceeding.

The Applicants and the Respondent have settled all issues and complaints pertaining to the home, as described in the following:

- a) The Warranty Assessment Report of Tarion Warranty Corporation, dated November 9, 2006, and a second Warranty Assessment Report of Tarion Warranty Corporation, dated January 22, 2007, which included all first and second year claims;
- b) The Decision letter of Tarion Warranty Corporation dated January 10, 2007;

The Applicants have entered into a Settlement and Release Agreement, dated April 2, 2007, in the standard form of the Respondent and as deemed acceptable by the solicitor for the Respondent;

Therefore, on consent of the parties present, and in accordance with the Minutes of Settlement, filed on April 2, 2007, this Tribunal Orders that the Applicants' appeal be, and the same is, hereby withdrawn and these proceedings are concluded. The hearing, previously scheduled for Thursday May 24, 2007, is therefore cancelled.

LICENCE APPEAL TRIBUNAL

Philomen Wright
Presiding Member

Released: April 16, 2007

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



PRE-HEARING

MAREK HAGNER and MARLENA HAGNER

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

TO DISALLOW A CLAIM

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

PARTIES: MAREK HAGNER, Applicant, appeared on behalf of and
represented himself and MARLENA HAGNER

NEIL ABBOTT, Counsel and
CHAD FORESHEW, Field Manager, appeared on behalf of
Tarion Warranty Corporation

MIKE SNOWDEN, Service Representative, appeared on behalf of
Tormina Ajax Inc., Added Party

DATE OF
PRE-HEARING: April 11, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on April 11, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, in the presence of the Parties' representatives. Joseph Kennedy, Counsel for Tarion Warranty Corporation, was also present as an observer.

The Applicants and the Respondent have settled all issues and complaints pertaining to the home, as described in the Decision Letter of Tarion Warranty Corporation dated January 2, 2007.

The Applicants have entered into a Settlement and Release Agreement, dated April 11, 2007, on a form of the Respondent and deemed acceptable by the solicitor for the Respondent.

Respecting claims numbered 8 and 9 in the Decision Letter, in relation to materials utilized by the builder in effecting repairs, the Applicants may wish to pursue a course of action with the Town of Ajax.

Therefore, on consent of the parties present, and in accordance with the Minutes of Settlement, filed on April 11, 2007, this Tribunal Orders that the Applicants' appeal is hereby withdrawn and these proceedings are concluded. The hearing, previously scheduled for Thursday May 24, 2007, and Friday May 25, 2007, commencing at 9.30 a.m., at the Tribunal's Chambers is therefore cancelled.

LICENCE APPEAL TRIBUNAL

Philomen Wright,
Presiding Member

Released: April 25, 2007

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

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Tribunal
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PRE-HEARING

DONALD and RENEE FOWKES

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

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: DONALD FOWKES, representing himself and Renee Fowkes, the
Applicants

NEIL ABBOTT, Counsel, representing Tarion Warranty
Corporation, the Respondent

JENNIFER PAVAO, representing 1068499 Ontario Ltd., the
Added Party

DATE OF
PRE-HEARING: April 13, 2007

by teleconference

ORDER

A pre-hearing was held in this matter, by teleconference, on April 13, 2007 before the Licence Appeal Tribunal in the presence of Donald Fowkes, representing the Applicants; Neil Abbott, Counsel, representing Tarion Warranty Corporation, ("the Respondent") and Jennifer Pavao, representing 1068499 Ontario Ltd., ("the Added Party").

The Tribunal makes the following Order respecting the hearing of this matter;

1. The Parties to this matter are the Applicants, Donald and Renee Fowkes, Tarion Warranty Corporation and 1068499 Ontario Ltd.
2. The two items to be addressed at the hearing are set out in the Respondent's decision letter dated January 5, 2007, and numbered 1, water penetration in the master bedroom; and 2, water penetration in the basement.

3. All parties agree to the fact that there is water penetration in the master bedroom and basement. The issue to be addressed at the hearing is whether or not the items are warranted. No resolution of the issue was reached. If the issue should be resolved before the scheduled hearing date, the Applicant will notify the Tribunal in writing to withdraw his Appeal.
4. The Applicant indicated he intends to retain counsel to represent him at the hearing. The Applicant will provide contact information to all Parties as expeditiously as possible.
5. The Applicants shall fully comply with Rule 6 of the Tribunal's Rules of Practice regarding disclosure including Rule 6.4 relating to expert witnesses.
6. The hearing is scheduled to commence at 10:00 a.m. on May 28, 2007 at Holiday Inn Select, 1855 Huron Church Road, Windsor, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Member

RELEASED: April 19, 2007

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

Licence
Appeal
Tribunal

Tribunal
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PRE-HEARING

KAREN BUCCI

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

TO DISALLOW A CLAIM

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

PARTIES: KAREN BUCCI, Applicant, did not appear and was represented by
ROCCO BUCCI

DANIELLE PECK, Counsel, and
JACQUIE De'ATH, Claim Service Representative,
appeared on behalf of Tarion Warranty Corporation

M. CHAMBERS, Counsel, and
MIKE SEMENTILLI, appeared on behalf of the Added Party,
Silverland Homes and Developments Inc.

DATE OF
PRE-HEARING: April 13, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on April 13, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, in the presence of the Parties' representatives.

The Applicant and the Respondent have settled all issues and complaints pertaining to the home, as described in the Decision Letter of Tarion Warranty Corporation, dated December 20, 2006, respecting a Claim for deposit refund by the Applicant.

The Applicant has entered into a Settlement and Release Agreement, dated April 11, 2007, deemed acceptable by the solicitor for the Respondent.

Therefore, on consent of the parties present, and in accordance with the Minutes of Settlement, filed on April 11, 2007, this Tribunal Orders that the Applicants' appeal is hereby withdrawn and these proceedings are concluded. The hearing, previously scheduled for Friday, May 11, 2007, is therefore cancelled.

LICENCE APPEAL TRIBUNAL

Philomen Wright
Presiding Member

Released: April 25, 2007

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



MOTION

WENTWORTH CONDOMINIUM CORPORATION No. 336

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

TO DISALLOW CLAIMS

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: TIM FORSYTH, Agent, representing the Applicant

JOEL OLIPHANT, counsel, represented Tarion Warranty

DATE OF
HEARING: March 20, 2007 Electronic

ADJOURNMENT ORDER

The Applicant brought a motion for an extension of time to file its appeal. Tim Forsyth, as agent, appearing on behalf of the Applicant, attended by phone and Joel Oliphant, counsel, appearing on behalf of Tarion Warranty Corporation ("Tarion"), attended in person.

The motion was brought pursuant to the provisions of section 7 of the *Licence Appeal Tribunal Act* (hereinafter the "Act") which gives the Tribunal discretion to extend statutory time limits 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,
 1. extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 2. give the directions that it considers proper as a result of extending the time.

The particular time limit in issue in this motion is a fifteen day time limit set out in section 16(2) of the *Ontario New Home Warranty Plan Act* (hereinafter the "ONHWPA").

The Tribunal was hampered in this matter by the total lack of evidence put forward by the Applicant. There were no affidavits in the record and Mr. Forsyth, as agent, did not put forward any *viva voce* evidence. Given his attendance by telephone, *viva voce* evidence would have presented some logistical problems. He did provide an explanation of the events to which no great exception was taken by Mr. Oliphant on behalf of Tarion. Indeed, Mr. Oliphant was most accommodating and agreed to admit the facts as set out in the Tarion Decision Letter and the timetable as set out by Mr. Forsyth.

The overall facts are not really in dispute. Mr. Forsyth stated that the Applicant has been involved in a dispute with Tarion for a protracted period of time. At issue is the right of the Applicant to bring a claim for a major structural defect where the supporting structure of the Applicant's foundations is seen to be cracked. What makes this situation unique is that the Applicant does not own its foundations. The Applicant is the second phase of a condominium development that includes Wentworth Condominium Corporation 293 (hereinafter "WCC 293"). WCC 293 was the first phase of the development and consisted of the conversion of an already existing structure, a high school, and the construction of an underground garage with access to WCC 293. It is not disputed that the description and declarations of WCC 293 clearly define the underground garage as part of the common elements of that corporation. Tarion has taken the position that WCC 293 is not entitled to warranty coverage because it is a conversion and not new construction. This position includes the garage, notwithstanding that the garage was newly constructed, as it is attached to WCC 293.

The second phase of the development involved constructing the Applicant on top of the garage and using the garage as the foundation structure for the Applicant. There is no issue that the Applicant is new construction and entitled to the statutory warranty coverage. At some point cracks were observed in the garage roof around supporting columns. There is apparently water penetration. Engineering studies have been conducted but none has specifically stated that there is a major structural defect. The last report known to Tarion states that there should be a further study to determine if there is a major structural defect. The Applicant and WCC 293 appear to have agreed to undertake that further study but failed to provide a copy of the results to Tarion. Tarion made a number of requests for a copy of the study and, not having been provided a copy, issued a decision letter dated November 20, 2006, denying the Applicant's claim.

Mr. Forsyth stated that the Applicant received the Decision Letter on November 29, 2006 and put it on the agenda for the next meeting of the Applicant's board on December 21, 2006. He stated that the purpose of board approval was not to

decide whether to appeal or not but to approve the expenditure of the \$100.00 appeal fee. In Mr. Forsyth's submission, the Applicant always intended to appeal. As soon as the board approved the expenditure the Applicant forwarded the Notice of Appeal and filing fee which were received by the Tribunal on January 2, 2007. He acknowledges that the fifteen day appeal period expired on December 14, 2007, but states that the Applicant was misled by this Tribunal's brochure "*Appealing Your Denial of Claim*" setting out appeal rights and procedures. At page 11 of the brochure it states that material in support of the appeal "should" be filed within fifteen days. He stated that he did not interpret this wording as mandatory but felt that the Applicant would not lose rights if it filed its appeal outside the fifteen-day period. When the Tribunal referred him to page 2 of the brochure wherein it states that appeals "must" be filed within the fifteen-day period he stated that he did not read that section.

Mr. Forsyth candidly informed the Tribunal that the Applicant currently does not have evidence that the cracks are indicative of a major structural defect. He stated that the appeal to this Tribunal is motivated by the fact that the Applicant finds itself without recourse. Tarion is taking the position that the Applicant has no standing to advance a claim because it does not own the garage. He states that the garage structure is an integral part of the Applicant's supporting structure and it is left defenseless if it cannot assert a major structural defect warranty claim for failure of that structure.

In dealing with the exercise of the discretion granted by Section 7 of the Act, other decisions of this Tribunal have applied a four-part test that is persuasive in this case. It is set out in a decision of the Tribunal released on February 7, 2006, *Kenneth and Wretha Demone*, as follows:

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

It can be seen immediately that the four parts of the test are determined from the evidence on the motion. In the absence of evidence, there is no basis upon which this Tribunal can conclude that the test is met. That fact in itself is sufficient to dispose of the motion. Notwithstanding the lack of evidence there

are some agreed facts so the Tribunal will apply the four-part test to the known facts.

Tarion admits the facts set out in the Decision Letter. On their face those facts set out a long history of dealing between Tarion and the Applicant. It must be noted, however, that the Decision Letter itself was issued because the Applicant had not pursued its claim for major structural defect by providing an engineering report. The letter can provide no guidance with respect to the Applicant's intent during the crucial period between November 29, when the letter was received and December 21, when the board met. Mr. Forsyth, for the Applicant, asserts that there was always an intention to appeal but a board meeting was necessary to approve the expenditure. Mr. Forsyth also stated on a number of occasions that the Applicant is a small condominium corporation of 32 homeowners. There is no explanation why the matter had to be scheduled to the next scheduled board meeting. There is no explanation why an extraordinary board meeting could not have been called within the time limit.

The answer to the failure to call an extraordinary board meeting may be found in the Applicant's assertion that it was misled by the wording of brochure. The Tribunal has difficulty accepting the proposition that the Applicant decided to read only one page of a multi-page document, the page that now best serves its interests. If accepted, this submission would suggest that, in reviewing its appeal rights, the Applicant's representatives chose to ignore those sections of the brochure that define those appeal rights and concentrate their search narrowly. This particular submission strikes the Tribunal as an *developed after the fact* justification. Notwithstanding that fact, there are factual assertions of an ongoing intention to appeal, that, if accepted, would satisfy the first part of the test.

The second part of the test addresses response time. It is not applicable to this matter as the Applicant did not discover it was late in its filing until after it had filed its appeal. On the factual assertions, the Tribunal finds that the appeal was filed with dispatch as soon as the board approved the expenditure.

The third part of the test was conceded by Tarion. Tarion does not assert that it is prejudiced in any manner by an order permitting the Applicant to proceed with its appeal. Given the relatively short time delay, the Tribunal would need clear and cogent evidence of any prejudice asserted by Tarion, evidence which is missing from the record.

The fourth part of the test causes the Applicant some difficulty. It is clear that the issue to be addressed is a substantial one. The Applicant is concerned about the integrity of the foundations of some of its units. Does it have a reasonable chance of success? This test is often called the *prima facie* case test. It does not require the issues to be decided but it does require the Tribunal to be satisfied that there is a case to answer. In this motion the Applicant must

overcome the issue of non-ownership and establish that there is evidence of a major structural defect which, if accepted, would lead to success.

The warranties administered by Tarion are statutory rights set out in the ONHWPA. Is there a reasonable argument, based on the provisions of the ONHWPA, for the proposition that an owner may seek warranty coverage for damage to property it does not own? It must be pointed out that at this stage of the proceeding that the Tribunal is not required to decide the issue. It is simply required to determine that the proposition is not without legal merit. In the opinion of the Tribunal, such an argument may be made and is not doomed to fail. The ONHWPA warranty is set out in section 13. It states:

- 13.** (1) Every vendor of a home warrants to the owner,
- (b) that the home is free of major structural defects as defined by the regulations;

The term “home” is a defined term under the ONHWPA as follows:

1. In this Act,

“home” means,

- (c) a condominium dwelling unit, including the common elements,

and includes any structure or appurtenance used in conjunction therewith.
 (“logement”) [emphasis added]

It is not disputed that the garage owned by WCC 293 provides the foundation structure for at least some of the Applicant’s units. By virtue of the definition and the warranty provisions it would appear that the proposition that warranty coverage can extend to the non-owned garage structure is not devoid of merit and, in a full hearing, it may well succeed.

The insurmountable difficulty faced by this Applicant is the total lack of evidence that there is, in fact, a major structural defect. It is admitted that such evidence currently does not exist. One concern expressed by the Applicant is that the current water seepage may cause a major structural defect at some point in the future. This Tribunal cannot deal with possible future events. The major structural defect is a seven-year warranty such that the defect must occur within the seven-year warranty period. The warranty cannot be extended by an assertion that the current situation is such that a defect may develop at some ill-defined time after the expiration of the warranty. If conditions which may lead to a defect exist that are not covered by the statutory warranty, their repair becomes a matter of maintenance and not a matter of inherent defect. The Applicant had to put forward some evidence that there is presently a major structural defect to succeed on this motion. It failed to do so and must lose. The major structural defect warranty lasts for seven years. The Applicant’s warranty expires in

December 2008. Tarion has advised the Tribunal that it is open to the Applicant to advance a claim of major structural defect at any time before the end of the warranty period and that the current Decision Letter and appeal are without prejudice to the Applicant's rights to do so.

ORDER

The Tribunal finds that the Applicant has failed to satisfy the provisions of section 7 of the Act by failing showing that there are reasonable grounds to extend the time period. Accordingly the Applicant's motion is dismissed.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: April 24, 2007

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

Licence
Appeal
Tribunal

Tribunal
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PRE-HEARING

HENIA DONENFELD

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

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: HARRY DONENFELD and JASON WANG, counsel, representing the
Applicant

GENA ARGITIS, counsel, and KEVIN BRODIE representing Tarion
Warranty Corporation, the Respondent

DATE OF
PRE-HEARING: March 28, 2007

Toronto

ORDER

A Pre-hearing was held on March 28, 2007, before the Licence Appeal Tribunal in the presence of Harry Donenfeld and Jason Wong, counsel, representing the Applicant, Henia Donenfeld, and Gena Argitis, counsel, and Kevin Brodie, representing Tarion Warranty Corporation (the "Respondent");

The Tribunal makes the following Order respecting the hearing of this matter:

1. The Parties to this matter are the Applicant, Henia Donenfeld, and the Respondent, Tarion Warranty Corporation.
2. The matters to be considered in the hearing are set out in the Respondent's notice of proposal to revoke registration dated November 23, 2006, and numbered 1 through 4, with the exception of item 1(b) relating to failure to provide security, which the Respondent withdraws.

3. With regard to item 2(a) the Respondent, by April 5, 2007, will provide the Applicant with a revised invoice and particulars relating to reference number 29939 on Schedule A to the November 23, 2006, notice of proposal to invoke registration.
4. The Respondent indicated its intent to issue a supplementary notice of intent to revoke the Applicant's registration.
5. The Respondent will present testimony and evidence from up to 6 witnesses.
6. The Applicant will present testimony and evidence from up to 3 witnesses who may include expert witnesses related to the particulars of item 2(a).
7. The Parties shall fully comply with Rule 6 of the Tribunal's Rules of Practice regarding disclosure including Rule 6.4 relating to expert witnesses.
8. The hearing scheduled for May 14, 15 and 16, 2007 is adjourned with the consent of all parties to commence on June 25, 2007 at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Ave. West, Toronto, and will continue on June 26 and 27, 2007.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Member

RELEASED: April 23, 2007

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

Licence
Appeal
Tribunal

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PRE-HEARING

SUSAN and KARL JENSEN

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, Presiding Member

APPEARANCES: SUSAN JENSEN, Applicant

KARL JENSEN, Applicant

DAVID HABIB, Counsel for the Applicant

MARIO GRAVEL, Counsel representing Tarion Warranty Corporation

JAN ROT, Tamarack Developments Corporation (Added Party)

DATE OF
PRE-HEARING: March 19, 2007

OTTAWA

A pre-hearing was held on March 19, 2007, in Ottawa before this Tribunal, attended by Susan and Karl Jensen (Applicants), David Habib (Counsel for the Applicant), Mario Gravel (Counsel for Tarion) and Jan Rot, Tamarack Developments Corporation (Added Party);

PRELIMINARIES

The following documents were added to the file:

1. A copy of a March 9, 2007 letter from David Habib, Counsel for the Applicant, to Mario Gravel, Counsel for Tarion Warranty Corporation,
2. A March 16, 2007 letter from Mario Gravel to David Habib, and
3. A March 16, 2007 letter from David Habib to Mario Gravel.

Counsel for the Applicants also presented a Book of Documents.

The particular issue for today's pre-hearing related to the foundation of the home. Mr. Gravel will request that Tarion consider sharing all of the details of the objective analysis of the core samples provided in the order below to the Applicants. It is expected that the core samples will be tested for compression and chloride. The Applicants may choose (at their own costs) to test the concrete mix of core samples. Mr. Gravel will also ask Tarion to consider paying \$150 towards the cost of the Applicants' engineer. The Applicants made all parties aware of the possibility that they may withdraw access to the property if the sharing of the analysis of the concrete or the sharing of engineering costs is not approved in advance of the scheduled work date.

NOW THEREFORE the Tribunal orders that

1. The Parties to the appeal are the Applicant, Tarion and the Added Party.
2. It is agreed by all Parties that the hearing scheduled for April 23 and 24, 2007 is adjourned.
3. The Parties agree that the new pre-hearing date will be June 25, 2007 at 9:30 a.m. at Gillespie Court Services, Ottawa, Ontario.
4. The Parties agree that the new hearing date will be August 13 and 14 2007 at 9:30 a.m. at Gillespie Court Services, Ottawa, Ontario.
5. Tarion will arrange for five core samples to be taken from the foundation. This work will be attempted in late April following the spring thaw.
6. Counsel for Tarion and the Applicant will exchange information on the timing of the work and the process/locations for the removal of the core samples.
7. Counsel for the Applicant will receive at least 10 (ten) days notice of the planned work.

8. Counsel for the Applicant will arrange to have an engineer hired by the Applicants to be in attendance during the removal of core samples.
9. All Parties were reminded of the Rules of Disclosure and the Rules pertaining to 'Expert Witnesses' as set in the LAT Rules of Practice.

LICENCE APPEAL TRIBUNAL

Jim Kennelly, Presiding Member

Released: April 16, 2007

The 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

DEJAN DELIC AND BRIAN MACDONALD-ADJ-Adjournment

IN THE MATTER OF a CLAIM by
DEJAN DELIC AND BRIAN MACDONALD

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)

DEJAN DELIC AND BRIAN MACDONALD

Applicants

-and-

TARION WARRANTY CORPORATION

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on April 10 and 11, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal Chambers, 1 St. Clair Avenue, 12th Floor, Toronto, Ontario, at 9:30 a.m., on July 24 and 25, 2007.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

Released: April 23, 2007

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



SONIA AND PAUL BOLT

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

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: PAUL BOLT, appearing on his own behalf and on behalf of
Sonia Bolt

JOEL OLIPHANT, Counsel, representing Tarion Warranty
Corporation

DAVID RAINSBERRY, Counsel, representing Fletchcreek
Homes Ltd., the Added Party

DATE OF
HEARING: March 15, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This appeal is pursuant to section 16 of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990 c. O.31, as amended, (the "Act"), which grants to homeowners the right to claim from Fletchcreek Homes Ltd., the Added Party (hereinafter the "Added Party"), and Tarion Warranty Corporation (hereinafter "Tarion") for certain defects in construction as defined in the Act and regulations passed pursuant to the Act. Tarion issued a Decision Letter dated October 5, 2005, denying coverage. The single issue between the parties concerns noises coming from the heating system. In the Applicants' Conciliation Request Form the problem is identified as "furnace makes loud noise." It appears from the evidence that it is, in fact, the heating ducts that are responsible for the noise. The Tribunal is satisfied that the use of the term "furnace" in the complaint to describe the problem is broad enough to encompass sounds

emanating from the heating system at large. Inspections of the home by the Added Party and Tarion certainly proceeded on the basis that the noise emanated from the ductwork such that neither of them is prejudiced by this interpretation.

EVIDENCE

The Tribunal heard evidence from Mr. Bolt and from Richard Johnston, a Tarion inspector.

Mr. Bolt testified that, shortly after taking possession of the house during the winter of 2003, he was watching an action movie late at night. He heard a loud bang from the basement. He stated that the noise was even louder than the sound from the action movie he was watching. He described the noise as a loud and irregular bang of differing pitches. During the course of the movie he would hear the noise fifteen to twenty times. He discussed the matter with his wife and they agreed that it was not normal to hear this type of noise. He called in the Added Party who attended and said nothing untoward could be found. He noted that the noise did not occur during the summer months when the air conditioning was running. It occurred only when the heating was on.

Mr. Bolt contacted the local municipality who sent a gas fitter to carry out an inspection. The gas fitter heard the noises. No defect was found in the gas supply or the furnace during this inspection. The municipality did not issue an order to comply to the Added Party. Mr. Bolt also contacted the Added Party. An employee of the Added Party, attended and heard a noise. He felt it might be a furnace problem so a furnace contractor attended. The furnace contractor heard the noise but stated that it was a normal result of the operation of the heating system. Mr. Bolt has doubts that a noise loud enough to wake him up at night and to scare his children is normal.

All told, there have been approximately ten inspections of the Applicants' home. Mr. Bolt testified that the Added Party has attended six or seven times to address this problem. Tarion has attended twice and the municipality has attended once. Not all inspectors heard the noise but, of those that did, none found the noise anything other than a normal part of the operation of the heating system. None of the inspections found the noise to be excessive. In Mr. Bolt's view, these results flow from the fact that no inspector has stayed in the house for more than thirty minutes. With respect to the report of an inspection by a contractor retained by the Added Party, the Watson Group, which did not hear any untoward noise or note any deficiencies in the heating system, Mr. Bolt denies that the contractor stayed in his home for one and a quarter hours as is stated in the report. He stated the stay was a half hour at most.¹ He also stated that the Watson inspection was carried out during the day. He feels it is necessary for someone to spend a night in the house to determine the full extent of the problem.

¹ The Watson Group Report is found at Ex 4, Tab 5

Mr. Bolt testified that, initially, he did not feel a need to retain an expert witness to look into the problem because, in his view, this problem was the Added Party's responsibility under the warranty. He stated that he had intended to retain an expert witness for this hearing but did not get around to doing so. He has not used instrumentation to measure noise levels or carried out any form of noise testing. He stated he measured noise levels "only with my ear."

Mr. Bolt testified that in his opinion the noise is the same as it was in 2003, when he first heard it but it is less bothersome. He feels he is now turning a deaf ear to it because he has become inured. Notwithstanding that fact, Mr. Bolt wants the noise dampened.

The Tarion inspector who prepared the Conciliation Report and was responsible for denying warranty coverage for this complaint is Richard Johnston. Mr. Johnston apprenticed as a carpenter. He has seven and a half years experience as a building inspector for the City of Prince Rupert in British Columbia. He has a Provincial and Inter-Provincial Level 1 Building Officials Certificate issued by British Columbia. He is a qualified heating and plumbing inspector as well as a certified septic system inspector. Mr. Johnston has been a Tarion Field Claims Representative for the last nineteen years. Prior to joining Tarion, Mr. Johnston estimates that he had inspected approximately one thousand furnace systems. He has conducted another five hundred furnace inspections since joining Tarion.

Mr. Johnston attended at the Applicants' home on three occasions and recalls that he spent, in total, approximately six hours in the house. In cross-examination, he recalled specific visits more clearly and the estimate of time spent increased to ten hours. He found no defect with the furnace. To explore the noise problem he increased the temperature and let the furnace run. On one occasion, when he was in the entrance hallway, he heard a very slight noise from expansion of the metal in the ducting. He had to have his attention drawn to the noise by Mr. Bolt.

Mr. Johnston inspected the furnace and determined that it was installed in accordance with the Ontario Building Code (hereinafter the "OBC"). He felt that the noise that he heard resulted from expansion of heating duct joints or hangers. These can be tight or loose and make noise as they expand or contract during the heating cycle. Mr. Johnston stated that this type of noise is normal in properly installed heating systems. Warrantable problems arise when "oil canning" is present. "Oil canning" results when a section of the ducting deforms. It can be prevented by crimping the ducting to make it stiffer. Mr. Johnston found no evidence of "oil canning" in the Applicants' home. He determined that the noise was very slight and was the result of normal operation, a determination that was formally published in the decision letter.

In cross-examination the Applicant questioned Mr. Johnston on his various visits, particularly the fact that he had attended three times. Mr. Johnston stated that he had attended with Bob Coburn in and around April 7, 2006. Mr. Coburn attended because there had been a problem between the Applicant and an earlier Tarion Field Service Representative. There was some confusion about the time, so Mr. Johnston was at the

home for approximately two hours. During that time he sat at the kitchen table with Mr. Bolt and discussed the issues. Mr. Johnston attended again on April 13, 2006. He recalls that he arrived at 10:00 a.m. and left some five and a half hours later after reviewing some 89 items from the conciliation request form. At one point during that inspection Mr. Johnston advised Mr. Bolt that he would leave because Mr. Bolt had become enraged. He denied that Mr. Bolt's expressiveness, as he described it, during the inspection had left him with any bad feelings against the Applicant. During the inspection he examined the layout of the duct system, attachments and joints. He checked the running of the system and noted that the furnace was turning on and off. He could find no concerns with the heating system. He is of the opinion that heating systems make some noise in about 95% of homes.

THE STATUTE LAW:

The Act sets out the first year warranties applicable to new homes as follows:

Warranties

13. (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

Exclusions

- (2) A warranty under subsection (1) does not apply in respect of,
- (g) alterations, deletions or additions made by the owner;

Term of warranty under subs.(1)

- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed

Application of warranties

- (6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Compensation

14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
- (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

A homeowner is entitled to three warranties: a warranty that the home is constructed in a workmanlike manner and is free from defects in material, is fit for habitation and is constructed in accordance with the Ontario Building Code; a warranty that the home is free from major structural defects, and such other warranties as may be subscribed by regulation. In the event of a dispute between Tarion and a homeowner, the Act sets out a right of appeal to this Tribunal as follows:

Notice of decision under s. 14

16. (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

Notice requiring hearing

- (2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

Powers of Tribunal

- (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Parties

- (4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

DISCUSSION

For the Applicants to succeed before this Tribunal they must lead evidence that the heating system is not constructed in a workmanlike manner, has warrantable defects in materials or does not comply with the OBC. It would also be open to them to lead evidence that the noises emanating from the heating system are so excessive that the home is not fit for habitation. The Applicants have advanced no such evidence. The

Tribunal is satisfied that noise emanates from the heating system during the winter. It is significant that the noise is only noticeable at night when other ambient noise is at a minimum. The Applicant stated that the noise occurs on an irregular basis but will occur about fifteen to twenty times during the course of watching a movie. There is no explanation of why such a frequent noise is not heard during the half hour Mr. Bolt states each inspector was in the house. Indeed it should have occurred, on average, about five times in a half hour period. No inspector heard significant noise. The facts indicate that the noise is not so excessive as to render the home not fit for habitation. Accordingly, the Tribunal finds that the Applicants' home is fit for habitation.

With respect to breaches of the OBC, there have been approximately ten inspections conducted by the Added Party or heating contractors hired by the Added Party, the municipality and Tarion. These inspections have determined that the heating system is operating in accordance with normal parameters, is not defective and meets the OBC standards. The Applicants have had three years to seek expert evidence to contradict these findings. On the Notice of Appeal the Applicants indicate that they will be calling one expert witness. In evidence, Mr. Bolt stated that he intended to call an expert but did not get around to retaining one before the hearing. In the absence of evidence to contradict the results of ten inspections, there is no basis upon which this Tribunal can conclude that the heating system is defective in any warrantable manner under the Act.

DECISION:

Having carefully considered all of the evidence and, pursuant to the authority set out in section 16 (3) of the Act, the Tribunal dismisses the appeal and orders Tarion to deny the Applicants' claim for warranty with respect to defects and excessive noise in their heating system.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: April 20, 2007

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



ADVANTAGE DEVELOPMENTS PLUS LTD.

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

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROBERT HAIGHT, agent appeared on behalf of Advantage
Developments Plus Ltd. on March 1, 2007 and JAMES MCGRATH,
counsel, appeared on April 25, 2007.

CAROL STREET, counsel, appearing on behalf of the Registrar
under the *Ontario New Home Warranties Plan Act*

DATES OF
HEARING: March 1, 2007 and April 25, 2007 Toronto

CONSENT ORDER

WHEREAS, during the course of the hearing, the Parties' respective counsel advised the Tribunal that the Applicant, Advantage Developments Plus Ltd., had withdrawn its appeal;

NOW THEREFORE by consent of the Parties, the Tribunal orders that the proceedings in this matter are disposed of and concluded.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: April 30, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MARIA CHONA C. AND MANOLO BAYANI

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, Vice-Chair

PARTIES: MARIA CHONA C. AND MANOLO BAYANI, Applicants,
Unrepresented

JOEL OLIPHANT, Counsel, and RIKA TOKUE, Agent, both
representing Tarion Warranty Corporation

DATE OF
HEARING: February 22, 2007 Toronto

ORDER

The hearing of this appeal was scheduled to be heard by the Tribunal on the 22nd and 23rd days of February, 2007.

The Applicant failed to attend at the commencement of the hearing on the 22nd day of February, 2007, and was called four times outside the hearing room without response on the 22nd day of February, 2007.

THEREFORE the Tribunal hereby orders that the appeal brought by the Applicant herein be dismissed without costs.

LICENCE APPEAL TRIBUNAL

Irvin H. Sherman, Vice-Chair

Released: April 24, 2007

The 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

CHRISTINE A. BALLARD AND JOHN AND VIOLET SIMPSON - ADJ – Adjournment

IN THE MATTER OF the CLAIMS by
CHRISTINE A. BALLARD AND JOHN AND VIOLET SIMPSON

AND IN THE MATTER OF the DECISIONS 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 THE CLAIMS

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

CHRISTINE A. BALLARD AND JOHN AND VIOLET SIMPSON
Applicants

-and-

TARION WARRANTY CORPORATION
Respondent

-and-

FERNBROOK HOMES (HAMPSTEAD) LIMITED
Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on April 30, 2007 and May 1, 2, 3 and 4, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties*.

ALSO, TAKE NOTICE that, a pre-hearing shall be held on Monday, April 30, 2007, to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

Released: April 25, 2007



ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter O.31

JENNIFER BARKIN -ADJ-Adjournment

IN THE MATTER OF a CLAIM by
JENNIFER BARKIN

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)

JENNIFER BARKIN

Applicant

-and-

TARION WARRANTY CORPORATION

Respondent

-and-

ASPEN RIDGE (ASPEN HILLS) LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed and a time and place for a hearing in the above matter
on May 3, and 4, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to
commence at 9:30 a.m., on Thursday and Friday the 28th and 29th days of June, 2007, at
the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Acting Chair

RELEASED: April 30, 2007

RIVA'S EMPORIUM LTD. O/A ARIE KENIGSVAIN

AN APPEAL FROM A DECISION OF TARION TO REFUSE
AN APPLICATION FOR REGISTRATION UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: WILLIAM MCINTOSH, Panel Member

APPEARANCES: GREGORY GRYGUC, Counsel for the Applicant

CAROL STREET, Counsel for Tarion Warranty Corporation

DATE: November 8, 9, 2005, January 3, 4, 2006, May 9,10,11,
August 14,15, and November 2, 2006

DECISION AND REASONS

BACKGROUND

This hearing is before the Tribunal by way of an Appeal from a Notice of Proposal and Supplementary Notice of Proposal dated May, 24 and April 25, 2006, respectively issued by the Registrar under the Ontario New Home Warranties Plan Act R.S.O. 1990 c. 31 as amended ("the Act") to refuse the registration of the Applicant under an application dated March 18, 2005, as a builder under the Act.

ISSUES

Tarion relies upon section 7 of the Act to found its case for refusing the Applicant's registration as a builder, specifically:

- The Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings as a builder. Tarion relies upon proof of failures by the Applicant to abide by reporting and filing requirements under the Act.
- The Applicant cannot be relied upon to carry on business lawfully and honestly. Tarion relies upon evidence of instances constructing homes not

enrolled under the Act and while the Applicant was not properly registered under the Act and a failure to indemnify Tarion for a payment made under the compensation fund to an owner who had a claim against the Applicant under the Act.

The Applicant takes the position that the grounds stated in the Notice of Proposal to refuse the Applicant's application for registration are not sustainable on the evidence. The Applicant further states that the Registrar's real purpose behind the refusal is to force the Applicant to indemnify Tarion for an amount it paid from the fund to an owner, without having to establish the legal right to that recovery. As such, the Applicant argues, the use of the refusal of registration is abusive and against the spirit of the Act. Tarion is depriving an Applicant otherwise entitled to be registered of a livelihood.

EVIDENCE

Tarion called their staff investigators to establish the grounds behind the refusal to approve the Applicant's registration to carry on business as a builder under the Act. The investigators put into evidence the facts surrounding what the Registrar considered to be breaches of the Applicant's obligations as a builder, both as a registrant under the Act and otherwise. These breaches included:

- construction of homes for sale while not registered as a builder under the Act,
- failure to enroll homes under the Act prior to construction,
- deceiving the regulator by giving false information to municipal authorities for the purposes of acquiring building permits, and
- a failure to live up to filing requirements.

As well evidence was given regarding failure of the Applicant to indemnify Tarion in the amount of \$40,000.00, the sum paid out of the compensation fund to satisfy the claim of an owner who had contracted with the Applicant for construction of a home.

The Applicant's corporate name is Riva's Emporium and its sole shareholder is Arie Kenigsvain. Throughout the hearing both were referred to interchangeably as the Applicant. In these reasons they are jointly referred to as the Applicant, as is the corporate entity, and Arie Kenigsvain is specifically referred to as "Kenigsvain" where appropriate.

Evidence was given regarding the history of the Applicant as a registrant under the Act. Kenigsvain became the sole shareholder and held the controlling interest in the Applicant as at April 1997, as the corporate entity under which he was to carry on business as a builder. Tarion was informed of this corporate situation in a hand written note addressed to a "Mr. Reid" dated August 12, 1999. The

Applicant also controlled a company incorporated under 1320239 Ontario Ltd., which owned properties in both Toronto and Coburg.

Prior to 2005, Kenigsvain's registration history as a builder with Tarion for some 15 years has been essentially unblemished with regard to claims by owners against the compensation fund for warrantable claims. He was registered by Tarion's records from 1994 until 1998 under number 24037, from November 22, 1998 to September 22, 2000 under 27703, from August 20, 2001, to August 20, 2003 under 31806 and finally from September 16, 2003, to September 16, 2004, under 33812. It was under this final registration that Property A, which was to become contentious, was commenced. Prior to the current March 18, 2005 application, Kenigsvain had always been considered a qualified candidate and was never refused registration. After March 18, 2005, the Applicant's registration was refused. The question became why the recent registration was refused in light of this history.

The question centers on the grounds available to the Registrar under section 7 of the Act, which must be satisfied to support the legitimacy of Tarion's refusal set out in the Notice of Proposal before the Tribunal.

Mr. Kenneth Brodie testified to explain Tarion's position regarding the refusal of registration. Mr. Brodie is and has been for five years the Manager of Underwriting for Tarion, with seven people reporting to him. He personally dealt with the failure of the Applicant to meet the filing requirements imposed by Tarion leading to the Notice of Proposal. His name does not appear on correspondence produced in evidence dealing with prior registrations of the Applicant.

In his evidence he dealt with the regulatory framework whereby Tarion can ask, within reason, for the financial status of any applicant. The rationale was straightforward: any responsible regulator wants assurance that the registrants under its scheme are solvent and show no history of insolvency or financial instability. The purpose of the registration is to assure the purchasers of new homes that the builders in the industry are financially sound. The Applicant's position is that the converse is also implied, that is, it would not be within the legislative ambit of the regulator to demand evidence of financial security bearing little relationship to this stated aim of registrant's ability to answer obligations. Any such demands would be outside of the legislative intent and would border upon regulatory abuse or caprice.

Mr. Brodie testified that he had not looked at the past financial information of the Applicant's prior registrations. Mr. Brodie became involved after the demands by Tarion that the Applicant make Tarion whole for the claim with respect to Property A. The first time he looked at the Applicant's file was April and May, 2005, some period after the application date of March 18.

Tarion's response to the March 18 application was contained in a letter dated March 24. In it Tarion requested that Riva Kenigsvain complete an indemnity form, and that the Applicant provide September 30, 2004 financials for Riva's Emporium and the recent tax bills and assessment for real estate investments. In response the Applicant forwarded a Net Worth Statement indicating in excess of \$1,000,000, received by Tarion March 21, 2005. None of the other requested documents were forwarded. The statement was rejected. For a previous registration, the Applicant had submitted a statement dated September 10, 2003 showing a net worth of slightly less than \$1,000,000 which had been accepted. On March 30, 2005, Tarion sent a letter of demand for the Property A claim, to be paid by April 13. On April 13 Tarion sent a Final Notice demanding documentation by April 27.

Mr. Brodie stated that past registrations would have been based upon a review of those submitted financials. On the issues of financial documents such as corporate statements or statements of net worth, Mr. Brodie stated the obvious, that as they are produced at a point in time, they are valid as at that point in time. They can never serve as a guarantee of a future state of financial health. They are, as he stated, a "snapshot". The inference to be drawn by the Tribunal, according to counsel, is that, by extension, if the statements do not alter significantly year to year, they should be regarded as a more reliable indicator of financial health than otherwise. That is, it should be the history of the registrant that should govern registration. The further extension sought was that if such information was accepted in the past by the same regulator it would be incumbent upon that regulator in front of any adjudicator to show a difference in acceptance criteria, especially where there is an absence of advisories to registrants of a change in criteria.

Net Worth

On the Net Worth Statement received March 21 in support of the application for registration, under the title "Consideration" is listed a principal residence at a value of almost \$1,000,000. Mr. Bodie stated that as there was no indemnity from Riva Kenigsvain, the owner, it could not be taken into account as an asset. Also listed were two properties owned by 1320239 Ontario Ltd. ("the 1320239 properties"), a company controlled by Kenigsvain, located in two different municipalities, each with a value of in excess of \$500,000. Liabilities were also listed, which, together with mortgages, were in an amount less than the value of either of the two properties owned by 1320239 Ontario Ltd and less than the value of the principal residence. No financial statements for 1320239 Ontario Ltd. were produced for 2005; however, they were produced for the September 2003 or prior registration of the Applicant. The Applicant assumed that these non current financials would be in his builder's file with the Registrar. There are no assets in the Applicant Riva's Emporium, whose financial statements show only an amount of \$130,000.00 owing to Kenigsvain, its sole shareholder. Income to the Applicant Riva's Emporium is from construction, not from real estate

investments. The 1320239 properties were also listed on the Net Worth Statement in support of the Applicant's September 2003 registration with their remaining mortgages.

The Applicant does not appear to have filed the requested financial information in support of the application for registration under review until subsequent to the pre-hearing.

It was the opinion of Mr. Brodie that there was conflicting information in the financial statements of 1320239 Ontario Ltd., thereby nullifying the 1320239 properties' value as supporting assets. He was given the August 31, 2004 statements for 1320239 Ontario Ltd. showing assets of almost \$700,000 and retained earnings of \$25,000.00. Mr. Brodie says he required year-end not interim statements which he did receive on November 16, 2005.

Abstracts of title were provided on the 1320239 properties under cover of December 16, 2005. These show transfers of one parcel to the Applicant corporation in August 2000, and a charge to a Luxembourg bank and subsequently to another entity in February 2005, in the same amount as the charge. There was evidence of discharge of the mortgages in writing, including a letter of August 10, 2004, from the financial institution holding the mortgages that they had been discharged as at June 2004. Mr. Brodie held fast to his opinion that he could not conclude, on the basis of the financial information provided, what equity Mr. Kenigisvain had. Mr. Brodie did not meet with the Applicant, although meetings according to the Applicant were arranged and attempted by him.

On cross-examination, counsel for the Applicant took issue with Tarion's insistence on the extent of financial and other information required on the 2005 application when the same essential information had been accepted for all previous registrations without this degree of scrutiny. He submitted that Tarion had invited a renewal prior to the expiration of the September 2003, one-year term. All this was asked in light of Mr. Brodie's statement that all financial reports are but a snapshot of a moment in time of any ongoing enterprise. Counsel urged that the approach to be taken, in light of Mr. Brodie's testimony, should have been to allow the Applicant's registration to be granted conditional upon a condition that there be production of all financial information "required". He argued that there are insufficient grounds on past history for an outright refusal. When questioned as to his personal involvement in this registration and the coincident demand for payment of the Property A claim, Mr. Brodie replied that the Property A claim was but one issue involved in the application review. Counsel pointed to the Tarion letter of March 30, demanding payment of the Property A claim, referencing the March 24 letter which asked for only the financial statements and the other normal registration precursors.

On July 1, 2004, Tarion wrote the Applicant informing him that his registration 33812 under which he was building the Property A home was to run out on its

anniversary date of September 16, 2004. An application form was enclosed along with instructions to submit current financial and net worth statements. There was a caution to the effect that if he allowed his registration to lapse he would have to re-apply for registration and pay a higher fee. The September 2003 registration had the condition attached that 4 homes could be built, including a property at another location ("Property B"). The registration was confirmed by letter of September 21, 2003. There was no mention of financial statements.

Counsel for the Applicant drew attention to the degree of scrutiny imposed on the present application by the head of the department, as compared to the level of scrutiny used on applications in the past, which seemed to be virtually pro forma in light of the Applicant's past record. The inference sought to be drawn was that if past financial conditions for registration had been satisfied by information that remains essentially unchanged, the refusal of registration this time by Tarion can not be on the basis of financial information, and must be attributed to some other factor, namely a form of debt collection.

Property A Claim

The owner of Property A ("the owner") was called to establish that the Applicant failed to fulfill its contractual obligation to complete the home and to establish the validity of her resultant claim against Tarion.

Construction of the home was commenced under the Applicant's registration number 33812. The validity of the claim was essential to justify Tarion's payment to the owner of the maximum under the Act of \$40,000.00 and thereby Tarion's right to claim over for that amount from the Applicant. By letter of February 22, 2005, Tarion advised the owner that the claim for reimbursement had been established pursuant to section 14(1)(a) of the Act and was accepted to the maximum amount payable of \$40,000.00. The owner did not appeal this finding, as was her right.

On February 23, 2005, the Applicant was informed that Tarion had paid the owner's claim and that he was to be invoiced for the \$40,000.00 amount owing. The letter put the matter as a debt owing, not as an indemnity. The Applicant was out of the country at this time. Upon his return the Applicant applied for a registration on March 18, as a builder, his prior registration having lapsed in September of 2004. The Applicant's renewal application of March 18, 2005, was refused and one of the grounds was the Applicant's failure to pay Tarion the Property A claim amount. The Applicant insisted that he was told by Tarion that if he paid the Property A claim he would be reinstated. He took the position that the claim should not have been paid and in any event the amount was excessive.

The owner in her evidence reviewed the circumstances of the home construction from her viewpoint. The Tribunal assumed her to be an educated person since

she signed her correspondence "PhD MBA". The owner reviewed the history of the home from the initial agreement in August 2003, until its termination in July 2005. She had owned the land since 2003, and decided to demolish the existing house and build a new one. She saw other homes built by the Applicant and decided to hire his company, in effect the Applicant personally, for the project. Originally the Applicant had plans from which to proceed which mirrored the house viewed by the owner. Accordingly a contract for the construction of a home of approximately 3,000 square feet at \$115.00 per square foot was entered into dated 10 August 2003. The completion date was agreed at six months after commencement save intervening factors such as owner's actions. Any amount over the agreed \$115.00 per square foot was to be taken out of the builder's fee. The owner retained her own architect and his plans were shown to the Applicant; the new architect provided a survey. According to the owner the Applicant agreed to build per the plans and commenced work. It was her understanding that the survey would be her responsibility and the Municipal permits would be that of the Applicant. Further it was her understanding of the construction contract that the Applicant would be the manager of the project and he would select and pay the sub trades. A deposit cheque dated August 13, 2003, for \$20,000.00 was provided.

At the end of November the building permit was obtained and construction started towards the end of the year, the basement being dug in January. In fact the owner paid for the permit and was to be reimbursed by the Applicant. A cheque for \$296.00 was entered as an exhibit in this hearing. As well, the owner paid the City of Mississauga \$2,919.00, which was to be taken into account on future payments.

The contract proceeded with changes made along the way with regard to window type, stonework, roofing and others. It was the understanding of the Tribunal that problems between the expectations of the parties to the contract were to say the least at odds. Accusations went back and forth regarding timeliness or completeness of payments and changes in materials. The Tribunal listening to the evidence and comparing it with the many other cases that have come before it could not avoid the conclusion that the relationship was degenerating rapidly. The owner by June 25, contemplated having the house completed by another contractor, a Mr. R. This change in contractor was in fact made on August 17.

An amendment to the original contract was entered into and signed July 20, 2003. Leading up to this amendment were accusations back and forth about the non-payment of trades for work done. The stucco contractor for example remained unpaid, as the quality of his work was disputed by the owner.

On August 13, 2003, the owner wrote to Bob Thorburn at Tarion, in which she refers to a prior telephone conversation regarding a complaint against the Applicant and her desire to seek redress under the Act. A meeting was arranged at the site between all parties for August 20. Two representatives of Tarion

showed up along with the Applicant and the owner. Mr. Johnson a senior Tarion field representative accompanied a Mr. Meronyk who appeared to be under his supervision.

Investigation of Property A Claim

Both Mr. Meronyk and Mr. Johnson testified. Mr. Johnson stated that he was there in support of Mr. Meronyk as Mr. Meronyk was new to his position. Mr. Meronyk stated he had worked for many years in the construction industry prior to his employment with Tarion. Mr. Johnson took no notes nor was he involved with the file afterwards. Mr. Johnson did say that the purpose of the visit was to verify the status of completion. Mr. Meronyk, as part of the response to the complaint, took a series of photographs to back up assertions that were made as to the amount of work done and by inference the amount remaining to be done. The amount of remaining work, however, was not their concern.

The owner told the Tarion representatives at the meeting that the Applicant was going to be fired; the owner was told to hold off making that decision. The owners had a letter of dismissal in hand and gave it to the Applicant during the meeting. Mr. Johnson stated that when the owner handed the Applicant his letter of dismissal, the Applicant seemed surprised. The Applicant was under the impression the meeting was for a Tarion conciliation to get the project on the rails. Mr. Johnson stated that the Applicant said he wanted to continue the job.

On cross-examination, Mr. Johnson stated that in fact he was not certified as an estimator and that, while the file was Mr. Meronyk's, he did opine that the house was 45% complete and that an estimate of value of work to date of \$125,000.00 was all right with him. As at the time of the meeting, August 20, 2004, the estimate as to the value of work done was \$100,000.00. This estimate was refined by Tarion staff talking to people in the industry concerning a 3,100 square foot house of this kind. Roughly, the calculations for the estimate are: foundation, \$15,000.00; framing without roof, \$8.00 sq/ft; and framing with trusses \$10.00 sq/ft.

Twenty five per cent was added to the estimate to reflect the smaller company size of the Applicant as contractor. For example, the foundation for a typical suburban tract house would be the \$15,000.00 mentioned above and in this case a more realistic figure would be \$25,000.00. Here there had to be on-site cutting for the framing, as opposed to the pre-cut jobs in tract homes. With the additional 25%, the estimate came in at \$31,000.00 plus \$9,000.00, or a total cost of \$40,000.00 for framing. Windows came in at \$10,000.00, shingling at \$3,000.00, stone and stucco at \$20,000.0 (owners paid for stone), and \$9,000.00 for heating and electrical. Tarion's estimated figure, taking into account the skill element of the labor involved over tract homes and the fact of direct payment by owners of some items came in at approximately \$120,000.00. Later, following the application of some software from Home Depot by Mr. Meronyk, the Tribunal

notes his estimate for value of work done at \$122,000.00; that is, as the figure to be taken into account opposite the amount proven to have been paid by the owner. The necessity for this calculation is found in section 14(2) of the Act.

It was stressed throughout the testimony of both Mr. Meronyk and Mr. Johnson that they were there to determine the stage of construction and estimate the value, not to discuss defects. Neither had any negative comments about the construction. Mr. Johnson noted that the plumbing, heating and electrical had been started but were not complete.

Neither gave any impression about the house not being completed. Obviously once the Applicant had been fired, the contract with the owner was at an end and the potential for a claim by the owner existed. Mr. Meronyk stated that in his opinion a contractor should be given an opportunity to complete; however he did not impart this to the owner. The Applicant at all times wanted to continue. On the matter of the necessity of TYBEC material beneath the stucco, something that had become an issue between the parties, Mr. Meronyk drew no conclusions. No expert testimony was lead to satisfy the Tribunal on the subject, one way or another.

Claims Process for Property A

By letter of October, 2004, the owner advised Tarion of her intent to claim, listing as the grounds:

- House not built according to plans
- Framing had to be corrected
- The stucco was incorrectly installed
- Trades refused to do work despite payment
- The home was not completed by May 2004

This was formalized by the submission of a formal claim to Tarion dated October 29, 2004.

The owner's claim went through the usual channels and on the forms required. The claim wound up on the desk of Michael Skinner, a claims specialist. Mr. Skinner was called to testify as to the generation of the Property A loss claim. He has been employed at Tarion for two years as a claims service representative. He dealt with the owner's loss claim under the supervision of Mr. John Reid. The information from the owner came in on November 12. He worked on the claim from December 25, after receiving the claim forms. The decision to pay the Property A claim had to have been based upon his decision that the claim was justified under section 14(1)(a).

This conclusion that there was a failure to substantially complete the home was based upon criteria set forth in the Construction Lien Act R.S.O.1990 c. C. 30 as

amended. For there to be a claim, the amount paid under the incomplete contract must exceed the value of the work and materials provided. In his Decision Letter of February 20, 2005, to the owner approving the claim, Mr. Skinner set out the criteria for a successful claim under the Act. He granted the maximum allowable of \$40,000.00. Release forms were forwarded to the owner. He did not contact the Applicant after the Decision Letter, although the letter was forwarded. The Applicant did not receive the Decision Letter. As stated the Applicant was out of the country, a fact of which Mr. Skinner was unaware. Mr. Skinner arrived at the conclusion as to the amounts through invoices provided and the inspection by Mr. Meronyk. He decided that the Applicant had ceased work and had abandoned the project. Had the owner decided to contest their claim they would have launched an appeal to the Tribunal and Mr. Skinner's conclusion based upon his investigation would have been subjected to a hearing de novo with rights of cross-examination and the right to call evidence conflicting with his analysis. At such a hearing the Applicant in the usual case would have been joined as a party, also with full rights to a hearing. An unchallenged claim affords no ability to the Applicant to challenge either the basis of or amount of a claim for which indemnity is to be claimed from him. In any event Mr. Skinner sent a letter to the applicant demanding payment of the \$40,000.00 awarded to the owner to be forwarded to Tarion.

On cross-examination Mr. Skinner stated, as did Mr. Meronyk, that Tarion attempts to conciliate, if possible. As well, he stated that he was unaware of the fact that the owner had terminated the construction contract by firing the Applicant. There was nothing in the file passed to him to that effect. He appeared to be unaware of the fact that the owner had in fact hired a replacement contractor. He was aware that changes had been made to the contract during its currency, but not their extent or the details. Documents speaking to the July 20 contract amendment between the parties were new to him. He had not received them from the owner.

Mr. Skinner took into account the payments under the contract from the owner made directly to the trades and to the Applicant, factored in the value of the work done, to arrive at an amount outstanding. In the Decision Letter he calculated that the value of the work provided by the Applicant was \$100,000.00, which fell short of the amount paid by the owner to the Applicant by \$45,000.00. Mr. Skinner explained in some detail Tarion's parameters on which payments are taken into account. For example, for an amount to be included in a claim there must be proof of payment, meaning he had to see the back of or clearance stamp on any cheque.

A spreadsheet was introduced setting out the amounts which could be taken into account in assessing the claim, that is, those amounts capable of being shown as paid. That figure amounted to \$145,000.00. From this amount was subtracted Mr. Meronyk's assessment of the value of work done to arrive at the figure of \$45,000.00 or \$5,000.00 above the \$40,000.00 allowable under the Act. Mr.

Meronyk's total for the value of work done was adjusted upwards to \$122,000.00 based upon a software package from Home Depot. The readjusted amount as the claim becomes \$35,000.00. That is the asserted difference between the value of the work and the amount paid. As the Tribunal read the spread sheet and heard the evidence, the amount paid (proven) totaled \$145,000.00. When Mr. Meronyk's estimated of work done of \$122,000.00 is subtracted, a figure of \$23,000.00 was established. Counsel for the Applicant proffered a figure of \$13,000.00 and so it went.

At the end of the day, the Tribunal was left with a very sketchy evidentiary basis for the amount claimed as being a debt owing from the Applicant to Tarion. There was evidence of overruns due to changes, upgrades on the fly regarding stone work and windows and more, all melded into an estimate from a non-specialist using a Home Depot software package, trying to differentiate between a suburban tract home and a custom home. The limited participation of the Applicant in the process did not help. By any measure it was not established with any precision what the amount should have been.

Indemnity Agreement

The agreement is dated September 5, 2003, and bears the signatures of a representative of Tarion and that of the Applicant. Kenigsvain, the sole shareholder and director of the Applicant Riva's, signed as Indemnitor for the Applicant. Tarion's predecessor Ontario New Home Warranty Program is the Indemnitee, at least by any reasonable construction of the agreement. It is an agreement that for practical purposes is unilateral in that without it there is no registration under the Act and no right to build new homes for sale in Ontario. In return for its rights under the agreement, Tarion provides as consideration \$2.00 payable to the Indemnitor and agrees to register the Applicant under the Act. The limit of the Indemnitor's liability under the agreement is \$40,000.00, the sum allowable for individual claims. The agreement contains a clause denoting agreement that the Indemnitor is principal debtor, not a surety, and an agreement to suspend any legal right to raise the distinction as a matter of law in any legal proceeding under the agreement. This and other clauses such as the "attornment" clause contemplate determination of liability under the agreement before a court. There has been no court decision interpreting the agreement as to the rights and obligations there under or on the amount in issue or whether the payment of the claim was in accordance with the Act. The indemnity also allows Tarion to reduce or rearrange other obligations between the parties without notice. This right would apply to amounts determined to have been in fact owing, as in this case, in answer to a legitimate claim under section 14. In any event the enforceability depends upon amounts paid by Tarion "acting reasonably".

Should Tarion successfully make out the case that the owner of Property A had a cause of action in damages under section 14 and therefore a viable claim for breach of contract, the measure of damages under the Act is the difference

between the value of work and materials provided and the amount paid therefore. Here Tarion's position was that section 14 was satisfied and the claim to the owners was properly paid. That payment gave rights of recovery against the builder. The question remained as to the validity of those rights, the appropriate way to pursue them, and the use of them in the registration process.

Mr. Massoud Ghahremani was called as a builder. He stated that he built some two to four custom homes per year. His everyday activity is the manufacture of bathtubs which he supplies to builders such as the Applicant. The going rate per square foot for custom homes in 2003, was \$135.00, although this will vary depending on the house type and builder. He viewed the plans for Property A and stated he has built similar homes of 3,041 square feet in this area. He reiterated the difference pointed out by other witnesses between subdivision or tract homes and custom built. The latter will be more expensive, as they will require more time consuming construction and the labor and material costs will be higher. For example roofs are typically more expensive as more intricate or one off framing is necessary.

Mr. Pinchas Tofman was called to testify as to his participation in the construction of the home at Property A and its state of completion. He knew the Applicant for several years and has done framing work for him. He was asked to come to the site to attend to the owner's requested changes. He did so, taking a week to accomplish the job. He stated that the owner asked him for a business card as she was satisfied with the job. He was paid \$2,000.00. He was asked the stage of the house in May. He stated that the roofing was done, the stone work was on the wall with a pile remaining on the ground as there was apparently a change required by the owner, the stucco as far as he could see was done, the framing was finished, stone steps were done, the air conditioning installer was present, the plumbing had yet to be done and he could not state whether the electrical work was done. He was asked to come again to the site and did so to move the front bow window as was requested by the owner.

The Applicant

The Applicant took the stand to tell his side of the matter. He had been registered under the Act for some 15 years with a good record. He has been building homes for 18 years. He typically builds one to four homes per year. He stated that he had never had a financial loss claim. He has never had a prior rejection by Tarion and has filed Net Worth statements regularly. The Decision Letter was delivered when he was in Israel. He was registered until August 20, 2003. Introduced was a letter confirming a registration in September 2003. The registration under which he commenced the Property A home was from September 16, 2003. The original scheme was to have the house built to the Applicant's plans, essentially to be a house similar to the one the owner viewed. The owner then retained her own architect and it was agreed the home was to be built to these new plans with the cost of changes if any to be adjusted as they occurred. The architect's plans and

survey went to the City of Mississauga by September and the building permit was granted by December 16. The permission for demolition was stamped for November 14. The basement excavation began shortly into the new year at a cost of \$18,276.00. The basement was inspected by January 7. The date for framing was February 23. At this juncture and without repeating the evidence it is sufficient to say that relations between the parties began to founder. He maintained the position that the timeliness of payment, the number of changes and other matters of interference with the progress of the house were more the doing of the owner.

He entered into an amendment of the contract with the owner on July 20, 2004. He stated the amendment was necessary due to differing prices. Attached was a list of deficiencies; he disagrees with the owner that this page formed part of the contract. The page is not referred to in the agreement. He stated that where an "x" appears beside an item he agreed with it. He was given \$8,000.00 to begin work. He brought in a carpenter who dealt with window over the master bedroom. After the stucco work of some \$6,000.00, the owner insisted that TYBEC had to be installed underneath. The Applicant disagreed. The stucco man was not paid and the Applicant informed the owner that the trades would not show up without payment. As he put it, by the first week in August things fell apart. A fax was sent to the Applicant August 16.

His testimony was that Mr. Meronyk from Tarion called for a conciliation August 20. He related the events of the meeting. Mr. Meronyk took pictures and there was a discussion regarding the stucco. The owner then produced a letter laying off the Applicant. Mr. Meronyk asked the Applicant if he wanted to finish the job and he answered in the affirmative. The owner responded that she wanted the Applicant off of the property and that she had retained another builder. The issue as to who was responsible for the lack of progress on the house was not addressed at this meeting.

The Applicant stated that he did not receive the details of the claim settlement and that everything came to a head when he was refused the March 18 application for a registration. He maintained that his prior registrations, given his record, were approved essentially pro forma and that the only explanation for the interventions of Mr. Brodie were to do with debt collection and not legitimacy of registrations. The Applicant claimed he could not get a meeting with Mr. Brodie. He repeated that if he would have paid the Property A claim, he would have been registered.

The Applicant's counsel urged the Tribunal to accept the evidence concerning the demand on the Applicant for payment of the claim for Property A as being consistent with the demand for payment being the real basis for the refusal of his registration and hence his ability to make a living. Counsel argues that the asserting of an unadjudicated and disputed claim as a grounds for refusal under section 7 was an abuse of the Registrar's authority, particularly when the Act

grants the Registrar the means of pursuing the claim under the Act by other means. Counsel argued that an unresolved issue between a regulator and an applicant otherwise entitled to registration should not be used as a barrier to that registration. This elemental fairness equally applies to issues claimed by the regulator to be unilaterally determined by that regulator.

Non Enrolled Homes

Property B

On Property B, the Applicant stated that he mistakenly gave the wrong registration number and as the home was for his son he did not believe enrollment was necessary. He stated his habit was to let his registration lapse and then re-apply. He also stated he did not know he could get a permit without the property being enrolled.

Mr. Barry Attwood was called. He is an enforcement officer employed by Tarion. He testified that on July 22, he noticed the Applicant's sign on a vacant lot at Property B. A certificate from Tarion was entered as an exhibit, attesting to the fact that as between July 24, and August 25, 2003, neither Kenigsvain nor Riva's Emporium notified Tarion or submitted an enrollment form for the property. Mr. Attwood stated that no enrollment showed up on the Tarion computer. Introduced was an application for a building permit for the property dated April 28, 2003, signed by the Applicant and bearing a Tarion registration number of 37880, a number that does not in fact exist. Mr. Nadav Kenigsvain is listed as owner. It would be logical sequence to first receive a building permit, as it would be pointless to enroll a home with Tarion without having permission to in fact build it. The Applicant was registered with Tarion at the time of the permit application under number 31808 until its expiration date of August 20. Mr. Attwood testified that sometimes building departments issue permits without cross checking Tarion registration numbers.

Mr. Attwood laid a charge under Section 22 of the Act on September 4, upon seeing construction at site and served it personally on Kenigsvain September 4. The work was halted. The Applicant's registration lapsed in August 20, 2003, and was reinstated September 16, under 33812. Property B became listed as one of the permitted properties under the September 16 registration. There was a hearing date for the Section 22 charge set for October and an adjournment until November. Mr. Attwood gave evidence and a conviction was registered. The convictions were appealed to December 19, and this trial did not proceed.

Property C

The Applicant stated that he built the house at Property C while he was not registered; he did, however, send in an enrollment. He stated he did not realize

he could get a permit without a Tarion number. He stated that in fact an enrollment form was sent in.

A certificate of Tarion dated July 19, 2005, requested by Mr. Attwood as part of his investigation into the affairs of the Applicant attested to the fact that at no time between October 12, 2004, and July 14, 2005, did the Applicant submit an enrolment form and fee for Property C. An application for a building permit was introduced, listing one Molly Finklestein as owner and signed by Kenisvain dated September 28, 2004. The Tarion registration number inserted was 37883, a number that did not exist. The Applicant's registration with Tarion had in fact lapsed 12 days previously on September 16, 2004.

Properties D1 and D2

Counsel for Tarion introduced particulars of two further violations by the Applicant dealing with the above properties in April 2006, six months into the hearing. They were obviously not part of the original grounds. The cases involved entry into construction contracts without being registered and not enrolling the homes. Lack of enrolment does not remove the protection of the Act. The presumption was raised that the mere signing of a construction contract is sufficient to trigger the commission of an offence under the Act. As most construction contracts are executory, that is the triggering of rights and obligations are dependent upon the happening of future event such as issuance of building permits, it was suggested that until that time the Act can be of no consequence.

Mr. Bahir Vivekamand was called about the Property D1, a few doors away from Property D. He answered an ad and accompanied the Applicant to the property. He became the owner on January 5, 2005. He anticipated the home would be covered by Tarion. He was to pay \$175,000.00 and the rest was from lending institutions. There was a price of \$298,000.00 for the lot. The Applicant was not involved with this. Originally Mr. Vivekamand stated he was to live in the house with his parents and this changed. A building permit was applied for, dated 20 April, 2005, and construction was commenced by the Applicant May 17, 2005.

The Applicant was shown a contract for construction of a home between Bahir Vivekanand as owner and the Applicant as builder dated 24 November 2004. The owner was to purchase Property D1, and the Applicant was to demolish the existing house and build a 3000 square foot new home. Among other things the Applicant agreed to obtain a Tarion new home warranty. The Applicant was not registered with Tarion at the time of execution. His prior registration had lapsed the previous September.

Mr. Vivekamand was shown an MLS listing for January 25, 2006. He was asked if it was his intention to live in the house and why was he putting it up for sale. He replied that he was testing the market. Riva Kenisvain was listed as the broker.

Most of the construction was done and it was for sale as at March 17. It remained unsold as at the hearing and he stated that he wants to get it enrolled with himself as Vendor. Tarion told him he was legally bound to register the home, failing which, he testified, he could be fined and jailed.

The Applicant stated that he was sure he was going to be exonerated from the demand on the Property A claim and that his registration would render the problem moot. The length of time of the hearing was surprising to him.

Tarion at all times considered the Applicant to be the builder.

A similar situation applied to Property D2. A construction contract was entered regarding the property; it was signed in the presence of a lawyer. The Applicant stated that at the time of the entering into the contract the intention was to have the contracting owners live in the homes. To him enrollment under these circumstances would be pointless. Putting the properties up for sale was merely a method of testing the market. Eventually under the threat by Tarion they were enrolled.

THE LAW

The Ontario New Home Plan Warranties Act R.S.O. 1990 c. O 31
14(1)

6. No person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act.

7.(1) An applicant is entitled to registration by the Registrar except where,...

(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 undertakings,
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty...

8. (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 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 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or a failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

12. A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

22(1) "Every person who,....

(b) contravenes section 6 or 12 or subsection 18 (4)

and every director or officer of a corporation who knowing concurs in such furnishing or such contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000.00 or imprisonment for a term of not more than one year, or to both”.

Regulation 892;R.R.O. 1990:

9 (3) The applicant shall furnish to the Registrar:...

3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

13(1) The Corporation shall be subrogated to all rights of recovery of a person to whom payment has been made out of the guarantee fund under the Act and may maintain an action in its own name or the name of the person against any other person against whom the action lies in respect of such rights of recovery.

Regulation 894,1990

4. The registrant shall indemnify and save harmless the Corporation and the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund, from any loss which they or any of them may suffer by reason of the registrant's failure to diligently perform or cause to be performed all obligations imposed under the Plan and any agreement made with the Corporation in respect of the Plan...”.

6 The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

8. The registrant shall offer for sale and take all reasonable steps to complete the sale of every home commenced by the registrant in accordance with the Act within two years after the date on which the building permit for the home is issued.

APPLICATION OF LAW TO FACT

It was the task of Tarion to establish that the evidence before the Tribunal on the balance of probabilities proves Tarion's allegations as set out in the Notice of Proposal. The allegations were failure to supply adequate financial information, the refusal to pay a claim amount Tarion stated was owing to it as regulator, and the construction of homes while not registered and failure to enroll same under the Act. This appeal regarding the Applicant's registration began with an application for registration submitted by the Applicant dated March 18, 2005. He had been a prior registrant. Requests by Tarion for financial information and indemnity was sent by letter of March 24. A further letter of March 30 was sent to the Applicant demanding payment of a claim outstanding, referred to as the Property A claim. A final notice was sent April 13.

Section 7 (1) (c) (ii), the Property A claim

Tarion paid out to an owner the amount permitted under the Act of \$40,000.00 in response to the owner's claim under section 14(1)(a). Tarion declared the claim valid under the Act on the basis of the Applicant's actions as a builder under the

Act and paid over to the owner the amount allowable under the Act of \$40,000.00. The damages set out in the Decision Letter to the owner of February 22, 2005, were assessed as being the difference between the amount paid to the builder by the owner and the value of the work done in accordance with the dictates of Section 14(2). Tarion sought payment from the Applicant for this amount plus fees as a debt owing by letter dated February 23, 2005. On March 18, 2005, as stated, the Applicant sought registration under the Act. That registration was refused and part of that refusal was based on the Applicant's refusal to respond to the payment demand. The Applicant's position was that his failure to respond to Tarion's demand was in fact the principle reason for Tarion's proposal to prevent his registration under the Act; a registration to which the Applicant would be otherwise entitled and which he must have in order to make a living. He claimed that the evidence surrounding the other grounds was not sufficient to block the registration and that the issue of the Property A claim was a form of enforced debt collection at best and extortion at worst. In any event the Applicant felt the claim should not be allowed as a criterion for registration and as such is an overreach of the Registrar's authority regarding the registration process set out in section 7.

A further issue was raised on the legitimacy of the demand itself. The Applicant stated that the use of the demand should not be determinative for registration, even if allowable under the Act, given the surrounding evidence of eligibility. The demand should not be permitted to stand as an impediment to registration if the demand was unwarranted from the outset either as to merit or amount. The hardship in the case of an application for registration differs markedly from the case of an existing registrant when so confronted by this administrative action, as the latter is able to make a living until his rights under the Act have been determined; unless of course his existing registration lapses before the adjudication. The Tribunal reviewed the testimony.

The Tribunal found the attempt by the witness for Tarion to distance the demand for payment of the Property A claim from one of the other stated bases of the refusal to register, namely the failure to provide financial information, disingenuous to the point of annoying. The witness was the head of the Underwriting Department and had not reviewed the Applicant's past registration data to any degree. The original demand for the Property A payment was from a claims representative, not from the underwriting side of customer relations. The initial response regarding the application under review came as is normal from Underwriting and it did not mention the Property A claim. The follow-up letter from Underwriting did mention the Property A claim, as did the Final notice. The most reasonable construction on this documentary evidence, even to the exclusion of the oral testimony, is that payment of the \$40,000.00 to the Property A owner by the Applicant, which he disputes, was to be a prerequisite to his receiving a registration as a builder. To put it in the terms employed by the Applicant, he was going to be deprived of the ability to ply his trade as a builder

unless he indemnified Tarion for a claim he did not believe he owed and which was never adjudicated.

As stated, Tarion's witness, the head of the Underwriting Department, got personally involved in this, but not past, registrations of this Applicant. He was candid enough to state the obvious, that the demanded financial and net worth statements provide but a snapshot of the economic health of an ongoing enterprise. There was no satisfactory answer to the fact that prior registrations of the Applicant had been accepted on essentially the same economic data and without the degree of supporting background documentation as was provided in this case. In any event the Tribunal was satisfied that the information provided by the Applicant albeit late was adequate both in keeping with the "may reasonably request" obligation of the parties set out as a condition of registration in O. Reg 894 Section 6. Tarion is perfectly entitled, indeed obligated, to assure itself of the financial health of prospective registrants but it can not extend its requirements for financial information for purposes ancillary to the registration process contemplated by section 7 (1)(c)(i) such as enforcement of disputed claims. There was no conclusive evidence from prior registration processes between Tarion and the Applicant which could lead the regulator to reasonably expect that the Applicant would be financially irresponsible.

Accordingly the Tribunal finds that the evidence does not support the grounds stated in paragraph 1 of the Notice of Proposal for refusal of the Applicant's registration.

Section 7 (1)(c)(ii) was relied on in Tarion's assertion that failure to pay the Property A claim provides the basis of Tarion's position that the Applicant would not carry on an operation with honesty and within the law. O. Reg. 894 Sections 3 and 4 are cited in the Notice as the Applicant's obligations under the Act, subsequent to the payment by Tarion in answer to an owner's claim. The demand letter sent by Tarion to the Applicant states that there has been a determination by Tarion that the Property A claim was valid and that O. Reg 892 Section 6(1) obligates Tarion to pay the amount so determined to a maximum of \$40,000.00 out of the fund. Tarion's approach to impose a reimbursement to itself of this amount from a registrant involves both subrogation rights and indemnity agreements.

The Tribunal is dealing in this regard with an attempt to enforce the payment of an obligation that must be considered inchoate, until such time as the necessity for the payment in the first place has been adjudicated as having been necessary, lawful or reasonable either at law or by statute. In the case at hand the Tribunal finds that even the amount claimed could not be declared as being reasonable, given the evidence surrounding the methodology of assessment. Even if the monies paid to the owner of Property A were shown to have been reasonable, the Tribunal has some difficulty allowing an untested assertion to stand as a basis for the exercise of the regulatory prerogative of refusing a

statutory entitlement to registration. The Applicant was invited to participate in determining the amount owing but did not do so to any great degree, mainly as he was out of the country. He appears to have maintained the position which is supported by the evidence that he was fired from the Property A job while he was willing to continue. In these circumstances, the legitimacy of the claim does not conform with a proper adjudication of that claim. Such an invitation to participate cannot in itself validate the Tarion's decision as a grounds for the relief sought. If the circumstances had been such that there had been an appeal of the Property A claim before the Tribunal with the Applicant joined as a party to those proceedings, then the legitimacy of the Property A claim under section 14 may have been determined. The Registrar might have been able to use any failure by the Applicant to respond to a claim over as a basis for the Registrar's position under section 7 (1)(c)(ii).

Rights of subrogation have been granted to Tarion by way of the enabling clause section 23 and by the enactment thereunder of O. Reg. 892, Section 13. The Tribunal must assume that such provisions were included in the legislation for a purpose. Certainly under any interpretation of subrogation rights with which the Tribunal is familiar, Tarion is entitled to pursue the Applicant by way of an action in damages. That suit would necessitate establishing to a civil onus the underlying cause of action involving the owner of Property A and the Applicant and the amount paid. There may also be an action available under the Indemnity agreement between the Applicant and Tarion, which purports to obligate Kenigsvain, to save harmless Tarion for... "amounts paid by ONWHP (Tarion) in its sole judgment, acting reasonably, to satisfy any claim made against it under the Act"....

Neither of these courses of action suggests recovery being available to Tarion pursuant to a bare demand from a registrant either as a defendant to an action in subrogation or as Indemnitor based upon its own assessment of the underlying claim. The real problem for the Applicant is of course that as an unregistered builder, this ill-founded ground, if shown to have been the real basis of the Registrar's decision, has deprived him of the ability to make a living as a builder for a almost two years. The difficulty for the Tribunal in such a case is whether or not it now sits as the appropriate forum for the determination as to the validity of the underlying claim. If the Tribunal finds that the Property A claim did indeed fit within section 14 (1)(a), it can not serve to be one of the justified grounds of Tarion's refusal of the Applicant's registration. For there to be grounds under section 7 to refuse registration on the basis of failure to live up to obligations under the Act there, would have had to have been a determination in front of the Tribunal or the Court of that failure.

In any case, as it goes to the decision to refuse registration, the Tribunal finds itself in the position of being asked to make a finding of fact which does not serve the ends of the matter before it. It was the use of the assumed validity of the owner's position under section 14 to prompt administrative action against the

Applicant that the Tribunal finds offensive and an unwarranted abridgement of the Applicant's entitlement to registration.

After examining the facts surrounding both the making and the execution of the contract, it would appear that the Applicant was fired by the Property A owner. There was no evidence that he was refused to or was unable to finish the job. The quarrel over the payment of the Stucco workman, when taken with all of the other fits and starts of the construction, can not be pinpointed as some kind of deal breaking justification giving the owner a right to rescind.

The facts leading up to the firing were, to say the least, confusing as to who was defeating the progress of the project and to what degree. There was evidence that the owner had made the decision to hire a new contractor in June. As a job with two contractors is nonsense, the firing of the Applicant was a foregone conclusion. No evidence was led that would reflect upon the Applicant as a contractor who failed to complete contracts in the past or one who used improper materials or incompetent workmen. The initial contract had been verbally changed to the point where it was becoming unrecognizable. For example, the evidence was that the increased costs from the changes would be dealt with as they arose.

The "renewal" shortly before the termination was so indeterminate that the Tribunal was left with no alternative but to look at how Tarion viewed the actions of the parties in coming to its conclusion that the owner's claim fell within Section 14. Mr. Johnson, the senior Tarion representative who was present at the home site during the visit with all parties of August 20, stated that the visit was a claim inspection, not a conciliation. A claim under section 14 has to be based on the owner having a cause of action in contract against the builder for failure to perform the contract. The owner terminated the services of the builder. On the evidence presented, the Tribunal was under the impression that Tarion elevated this action of the owner to the status of granting the owner a right of action in contract with only damages to be determined. The Tribunal disagrees. There is an intermediate step, the establishment of that cause of action in contract law. The damages as calculated in any event are not accurate to the required standard. On both counts the claim for the \$40,000 paid out for Property A can not stand as a grounds of refusal of registration.

It is the decision of the Tribunal that the evidence concerning Property A and the claim for reimbursement of the \$40,000 paid to the owner and the Applicant's failure to do so does not support a finding that the Applicant is not entitled to be registered in accordance with the application filed.

Property C

Tarion states that it acted reasonably in refusing the Applicant's registration pursuant to section 7(1)(c)(ii) on grounds that the Applicant pleaded guilty to an

offence under section 22 (1) (b) in failing to enroll the cited home under the Act. He then applied for a building permit, and as he was not registered with Tarion at the time, used a false registration to obtain the certificate. He proceeded to build the home.

Property B

The evidence was unclear as to the ultimate disposition of the charges laid under Section 22. The house did appear to be under construction for a period in the summer of 2003, but subsequently became enrolled under the September 2003, registration.

The Applicant stated that it was being built for his son. It was in fact enrolled and the \$5,000.00 fee paid. There may have been a window of some weeks in the summer of 2003, when the Applicant was in default of obligation to enroll.

Properties D1 and D2

The submissions on these two counts, added to this matter over the objections of Applicant's counsel, were that, taken together, they represent a cumulative total of three offenses over a fifteen year history, which, even if taken as breaches, could not qualify as grounds to deny a registration outright. The only mitigating circumstance was that the Applicant was being squeezed financially and he had to make a living. Counsel urged that the Registrar holds a hammer over builders even where there has been no redress. He added that the Tribunal should take less notice if indeed the grounds for refusal are shown to have been illegitimate and operating under a colour of right argument.

It was counsel's expressed fear that if registration in this instance was denied the Registrar would deem the Applicant to be in permanent registration limbo, a dead man walking as far as making a living in construction. Counsel urged that the provisions of section 10 allowing for a renewed application on "new or other evidence" would be cold comfort to a person in the Applicant's position. His fear is that there would be no registration based upon "new or other evidence" until the Applicant paid over the amount of the Property A claim. Based on the evidence the Tribunal is forced to agree.

Tribunal has ruled that the Property A claim was without merit as a basis for refusal and was in fact the real reason for the Registrar's position. The Tribunal therefore considered the Notice of Proposal without regard to the Property A claim. A review of instances involving similar breaches when balanced against the Applicant's record leads the Tribunal to the conclusion that a registration with conditions would be the appropriate sanction, certainly not an outright refusal. As it is, the Applicant has been wrongly denied the right to make a living for two years. When measured against the gravity of the Applicant's actions, and taking

into consideration his prior good record, the Tribunal finds that this hiatus in his livelihood has been a considerable burden.

DECISION

The Tribunal by the powers vested in it rules that the denial of the Applicant's registration as a builder under the Act as set out in the Notice of Proposal was not properly founded. The result has been the inability to make his living as a builder for two years. The Applicant shall be granted a registration as a builder under the Act forthwith upon issuance of this decision.

The registration shall have the following conditions attached:

1. The Applicant shall enroll each home he commences under the Act.
2. The Applicant shall not be permitted more than two enrollments for the first year of his registration.
3. The Applicant will not enter into construction contracts without a registration number.
4. Each enrolled home under the Applicant's number shall be accompanied with a \$10,000.00 enrolment fee.
5. A breach of any of these conditions shall result in a forfeiture of the Applicant's rights under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice Chair

Released: April 16, 2007

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



ONHWPA-CLAIM

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

TO DISALLOW A CLAIM

TRIBUNAL: JANE WEARY, Vice Chair

APPEARANCES: APPLICANT, appearing on his own behalf

NEIL ABBOTT
SAMIR GASSANOV, Counsels, appearing on behalf of
Tarion Warranty Corporation

PAUL STARKMAN, Counsel, representing the Added Party,
Greenvilla Development Group Inc.

DATE OF
HEARING: January 8, 9, 10, 11, 12, 15, 16 and 17, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") under section 14 of the *Ontario New Home Warranties Plan Act* (the "Act") respecting three decisions by Tarion Warranty Corporation ("TWC" or the "Program") denying the Applicant's claims in regards to his new home built by the Added Party, Greenvilla Development Group Inc. ("Greenvilla" or the "Builder"). The Applicant took possession of the home in January, 2003.

The Applicant appeals the Decision Letter of Tarion dated April 18, 2005, denying nine Warranties he had claimed since taking possession of the home:

1. Floor cold master bedroom at bay window, master bedroom ensuite, bedroom 4.
2. Window should be wider at least 8 feet as per plan, bedroom 3.
3. Central vac outlet located, so that upstairs the hose does not reach into ensuite.
4. Door warped, leaking air.
5. Bulkhead missing – boundary of great room and foyer.
6. Cabinet missing from next to dishwasher.
7. Cabinets should be of dark oak finish, edges of cabinets are white.
8. Knick knack shelf substituted an existing cabinet – we paid to add extra cabinet.
9. Wood cladding not sealed prior to painting.

Further, TWC issued a Decision Letter dated September 2, 2005, forfeiting warranty benefits for a claim originally warranted for an out of plumb condition on the rear exterior wall of the house because the Applicant had refused access to Greenvilla for repair, as well as three additional Claims earlier deemed warranted due to the Applicant's refusal to accept the Builder's settlement proposal in lieu of their repair. This Decision is appealed by the Applicant.

In a Supplementary Decision Letter of Tarion dated December 5, 2006, TWC reversed its earlier finding of a warranted out of plumb condition on the rear exterior wall of the home. This too is appealed by the Applicant.

Finally, the Applicant appeals the Decision Letter of TWC dated January 31, 2006, whereby TWC denied his claims for certain closing costs.

At the second day of the Hearing the Applicant advised the Tribunal he was withdrawing his appeal on item #3 (central vac hose) and #5 (bulkhead missing) specified above.

EVIDENCE

Window of Bedroom #3 Should be Wider as Per Plan

The Applicant testified that the window provided by the Builder was smaller than that promised in the Agreement of Purchase and Sale (the "Agreement"). His

evidence consisted of a picture of the window installed showing three sections of glass – Exhibit 6, Tab 69. The Applicant stated he measured the window and found these to be three 19 inch panes measuring 57 inches in total. The Agreement had, by virtue of Schedule “E” (Exhibit 5, Tab 1), provided for a window of 94 inches. While he acknowledged that Schedule E did not include any measurements, the Applicant testified that the sales agent had told him at the time of his entering into the Agreement that each tile delineated measured approximately one foot. Extrapolating the width of the panes contained in the Schedule and comparing those to the sketch provided for the window, the Applicant concluded 94 inches was what his window should measure.

Mr. Bruce Stephens, Field Claims Representative who has worked for TWC since 1988, testified that he completed the Program’s inspection of the initial warranty claims in April, 2004. He had taken the unusual step of requesting a second inspector to attend with him as he was aware that the Applicant had earlier appealed to this Tribunal TWC decisions on a previously owned new home. Mr. Straiko, the additional Inspector, did not testify at the Hearing as he is on sick leave, although it was he, and not Mr. Stephens, who attended in January 2005, to re-inspect all items which remained disputed by the Applicant.

As concerned the window size, the inspectors determined the complaint was not warranted under the legislation as there was no reference to the window size in the Agreement. They noted that the Agreement did, however, contain a provision whereby the builder was entitled to alter, change or modify the plans at its sole discretion without notice to the purchaser. In the second inspection of January, 2005, Mr. Straiko did not alter this position despite the Applicant claiming that the Builder had, in changing the size of the window, performed a substitution under section 19 of the Act (Exhibit 7, Tab 38).

Door Warped Leaking Air

The Applicant presented video evidence demonstrating that the front door leaks water into the main foyer. In the video taken in June of 2006, his wife aims a garden hose at the centre of the double doors where the two portals open. The doors are closed. After approximately 40 seconds of steady full-on water pressure the hose is directed away from the door. The doors are opened from the inside and reveal water seepage on the floor. The Applicant testified that the Builder had earlier twice attempted to improve the air seal on the doors.

Mr. Stephens inspected this item of complaint when he attended at the home in April of 2004, for the first inspection. At the time he was advised by the Applicant that the Builder had already twice attempted repairs. He noted that the door sweep was in contact with the floor, that the planes of the doors were flush and that the door edges were in full and proper contact. He did not note whether it was a windy day, and had no reason to perform a water test as the complaint was one of air seepage, not water. He concluded that there was no defect or

workmanship issue and that the door was functioning appropriately. Warranty coverage was therefore denied.

The Applicant stated that the re-inspection of his claims by Mr. Straiko in January, 2005, was to have included this new complaint. Three months prior, on October 5, 2004, he had written and emailed TWC about his concerns of water leakage (Exhibit 7, Tab 38). However, Mr. Straiko did not re-examine the door seal, choosing rather to rely upon the Investigators' earlier observations.

Mr. Stephens' evidence was that the water test as undertaken by the Applicant and revealed in the Applicant's video is not the test recommended in the Construction Performance Guidelines 4.19 referenced on Tarion's website. The water test recommended calls for water pressure which simulates rain and should therefore consist of indirect sprinkle over a longer time period. Ten minutes is advised for above grade, leakage in the Guideline.

Cabinet Missing From Next to Dishwasher

The Applicant's evidence consisted of photographs of his kitchen. These illustrate that the kitchen counter and under-cabinetry extend in an "L" shape one cabinet width after which the dishwasher is positioned – Exhibit 6, Tab 28. This is not what Schedule "E" of the Agreement of Purchase and Sale illustrates. On the Schedule there is an additional cabinet with counter extension beyond the dishwasher resulting in a cabinet, a dishwasher and a second cabinet all within the "L" section of the counter.

Mr. Stephens for TWC inspected this item of the Claim. It was his evidence that there was nothing stipulating the number or dimensions of the kitchen cabinet. The location of the cabinets was a matter of design only. The Agreement of Purchase and Sale Schedule "A", paragraph one, specifically included a clause allowing the Builder to alter or modify such matters without notice to the purchaser:

The Purchaser acknowledges and agrees that the Vendor may, from time to time, and in its sole discretion, or as required by any governmental authority, change, alter, vary or modify the Plans...without notice thereof to the Purchaser.

(Exhibit 5, Tab 1)

The evidence established that the Applicant had gone over the Agreement of Purchase and Sale with his lawyer with the result that numerous clauses were re-written and/or amended prior to execution. This clause, however, was not.

Knick Knack Shelf

The Applicant again referenced Schedule "E" of the Agreement of Purchase and Sale. He highlighted his having specifically requested the additional item to be added to the Agreement for which he paid the Builder an additional \$300.00 – see "Purchaser's Request for Extras" dated March 10, 2002, item 12 (Exhibit 5, Tab 1.) This shelf is hand drawn in by a straight line running from the end of the upper cabinetry on Schedule "E". No dimensions are specified.

Photographs submitted by the Applicant demonstrate that the knick knack shelf provided is added on to where the upper cabinetry ends. It appears to be in place of a cabinet rather than in addition. It is positioned so that it falls short of the bulkhead overhang by some few inches and significantly short of the counter end (Exhibit 4, Tab 28), although it is in line with the end of the counter backsplash.

Mr. Stephens observed that the counter backsplash ends some 12 inches back from the counter edge where the counter mitre is positioned and the last cabinet is positioned. The knick knack shelf is aligned with this feature. He concluded its position is therefore a design feature which is not warranted.

Cabinet Edges

The Applicant claimed that he had received kitchen cabinets with the burgundy finish as he had selected in accordance with his contract; however, the edging of the interior shelves are visible and these are white. The effect is therefore not a dark oak cabinetry finish, but rather a dark oak door with a lower white strip.

Mr. Stephens testified this is not a Warranty issue. It is rather a matter of the cabinet design. Some kitchen manufacturer's will have larger doors or supply edging to make the doors and interior one colour. Others will not. The Applicant did in fact receive the dark burgundy doors for which he contracted.

The reassessment undertaken by TWC Inspector Mr. Straiko (Exhibit 7, Tab 50) on January 24, 2005, did not alter the Program's position.

Painted Cladding

The Applicant claimed that the wood cladding on the exterior of the bedroom #3 window was never primed or sealed appropriately. He relied on pictures he had taken purportedly showing cracking in exterior paint. The photographs demonstrate some gaps between the wood pieces framing the window which the Applicant claimed would allow water penetration over time. He alleged this indicated poor workmanship which should be remedied under Warranty.

In testifying for TWC, Mr. Stephens noted that this complaint had been received beyond the time limitation of one year specified for this type of warranty complaint. The Decision Letter further concluded that the complaint was consistent with normal shrinkage of materials and there was no evidence sealant had not been used.

Cold Floors Upper Level

At the Pre-Delivery Inspection, the Applicant complained of cold floors in the master bedroom, master ensuite and northwest bedroom. He also submitted numerous pictures taken by him on his many visits to the site during the construction of the residence, which illustrate rips and tears in the plastic wrap on the rim joists of the floors separating the main and second stories of the home (Exhibit #8). None were ever listed as a deficiency claim. It was not until February of 2004, when he contracted a consulting firm specializing in brick reconstruction work, Winmar, (for an estimate to correct what he then believed were other, unrelated deficiencies with the rear wall brickwork) that the suggestion was made to him that the wrap rips could be connected to his cold floor complaint.

In April, TWC inspectors Stephens and Straiko investigated his claim concerning the cold floors. The Applicant verbally advised them he believed the cause was the allegedly ripped wrap. The Inspectors concluded that without the Applicant demonstrating the existence of the ripped wrap, there was no evidence upon which they could conclude that the alleged deficiency caused the alleged cold floors. At that time, they did warrant an undersized furnace which the Inspectors believed might explain why some rooms appeared colder. The undersized furnace was rectified by the Builder.

The Applicant testified he later queried the Builder's representative, Ms. Acchionne, as to whether these rips had been remedied and was advised by letter from her on December 9, 2004, (Exhibit 7, Tab 43) that: "...Greenville believes (this) has been corrected." Although he requested a more precise response, such was never received.

When Mr. Straiko returned to review various items of complaint in January 2005, he reconsidered the cold floor complaint. His Report (Exhibit 7, Tab 49) based on the investigator's temperature readings which revealed a difference of 2 degrees between the window outside wall (20 degrees) and the interior bedroom wall (22 degrees), denied the claim. In testimony Mr. Stephens stated the interior of the home was "warm and dry".

In September 2005, this Tribunal issued a Pre-Hearing Order which included the requirement that the parties attend the residence at a mutually agreed upon time for the Applicant to open up a section of the wall to demonstrate the alleged ripped wrap. The Order also required the Parties discuss how to ensure access

for experts to determine the method of repairing another warranted item, that being that the middle basement section of the west wall was out of plumb.

The first part of the Order was complied with on October 4, 2005. The Applicant himself exposed the area of his choice which was not on the rear wall but rather on the south wall, an area more easily accessed by him on a ladder. In her testimony Ms. Acchionne stated that the Applicant's decision to remove bricks on the southern wall surprised those in attendance. Ripped wrap was noted. On October 14th, a repair was performed by the Builder. Exhibit 6, Tabs 47 and 48 are photographs taken by the Applicant at the time of the repair. They demonstrate that an additional piece of vapour barrier wrap was stapled on to the faulty area and a piece of drywall attached thereto.

As to the second aspect of the Tribunal Order, it took another year before the Parties finally sought and received Vice-Chair Flude's Order that TWC and the Builder have engineers access the Applicant's home to prepare Reports in response to a November, 2005 Applicant Expert Report by Mr. Nellis of Kleinfeldt Consultations Ltd. (Kleinfeldt) (Exhibit 10, Tab O). The Kleinfeldt Report had concluded an appropriate method of repair in contrast to the Builder's proposed method concerning a warranted claim involving the rear west wall - dealt with in some detail below. The Report also concluded the rim wrap deficiency could best be remedied during the rectification of the rear wall as suggested. The Applicant had taken the position that the Builder's proposed repair, based on inspection by Venditti Engineering limited ("Venditti") (Exhibit 10, Tab N) of July, 2005 was not reasonable. Vice-Chair Flude noted that TWC and the Builder each needed to have their own expert attend to inspect the wall and respond to the Kleinfeldt Report. In formulating their subsequent Reports, both Mr. Genge of Arbitech Consultants ("Arbitech") for TWC, and Mr. Rymell of RBS Consulting Engineers ("Rymell") for the Builder, also investigated and made recommendations as to the procedure to be undertaken concerning the rim wrap.

The Experts

Mr. Nellis prepared the Kleinfeldt Report. He was accepted as an expert for the purposes of his Report, although he acknowledged he last gave evidence as an expert over 15 years ago and has never appeared before this Tribunal. He is not a licensed engineer but holds a 1979 certificate in engineering technology from a Quebec CEGEP and has taken various courses in Playgrounds (2004), Fire and Explosives (2003) and Environmental Audits (1999). He has some extensive experience with the requirements of the OBC as his work since 1989 has been evaluating engineering assessment failures, the majority of which involve masonry and knowledge of the OBC. He has, however, no qualifications under the OBC. He did not inspect the Applicant's home, but based his Report on the pictures taken by the Applicant in (Exhibit #8), as well as the TWC Decision Letter concluding that the west rear wall was out of plumb and the Venditti Report determining that the repair was most appropriately performed from the interior.

It was Mr. Nellis' opinion that any repair should bring the home to the same standard as that required for initial construction. His position was that the best way to repair the ripped wrap was from the exterior, although he conceded it could be performed from the interior by cutting through the basement ceiling drywall and the upper floor to ensure the wrap is properly sealed around the floor joists. He stated that this latter process was not the usual method of inserting the wrap during initial construction.

In cross examination, Mr. Nellis acknowledged that deficiencies in the wrap could also be rectified by accessing specific areas of concern and that this did not require removal of the entire brick facing. He agreed that the purpose of the wrap was to prevent air/moisture from accessing the interior sections of the home and that foam could also be used as an alternative to wrap.

The evidence demonstrated that Mr. Nellis had referenced a document drafted by the Applicant in preparing his Report. While the Expert denied using the Applicant's words verbatim and claimed that similarities of language were simply "coincidence", he was willing to use the Applicant's wording where he agreed in principle with the homeowner. The evidence illustrated that Mr. Nellis was comfortable with the concluding opinions as put forward by the Applicant in four out of seven proposed statements in the Report.

The Applicant also requested that Winmar return for more detailed estimates as to the recommended repairs and in July of 2006, Mr. Caron, owner, obligingly prepared a revised estimate at a proposed cost of over \$100,000.00 (Exhibit 10, Tab T). It involves removing and replacing the brickwork on the west, north and south elevations, including roofing in part, whereupon the entire building can be covered in Tyvek wrap.

Mr. Caron also appeared before the Tribunal. He testified that Winmar is a franchisee, one of ten in the GTA, which mainly deals with flood, fire, water damage and mould remediation construction work – largely for insurance claims. Mr. Caron was accepted as an expert for the purposes of his remedial recommendations contained in his Report. His qualifications include certification as a Residential Home Inspector from Durham College in 2000 and as a Certified Restorer from the National Institute of Disaster Restoration in Virginia. He has been a Certified General Carpenter since 1983 and has specialized in Restoration and Construction work since 1993. He has spent the last five years working on estimates for reconstruction on a daily basis wherein he deals with all aspects of home building. He is not a qualified engineer and has no specialist training in the Ontario Building Code or Ontario New Home Warranty Plan. This was his first experience testifying in a quasi-judicial proceeding as an expert.

Mr. Caron's Report was based on his site review of 2004, as well as the Applicant's photographs of the rim wrap during construction. He testified that the purpose of the rim wrap is to provide a continuous air/moisture barrier - specified in the Ontario Building Code ("OBC"). He acknowledged, however, that this is never 100%, particularly where the floors interrupt the frame of a home, and that tears in wrap as denoted on Exhibit 8 are "typical".

He opined that inadequate moisture/air barrier can lead to water penetration which, in turn, can lead to mould and resulting health issues for occupants. It could also lead to increased heating costs. He had not taken any temperature readings at the home, nor had he seen any evidence of there being mould or air/moisture penetration. Further, he agreed that repair to the rim wrap could be effective on a section by section basis, but noted that such a repair may not be thorough as sections of compromised wrap could be missed.

Mr. Genge prepared the Arbitech Report on November 8th, 2006 (Exhibit 10, Tab Q) for TWC. He was accepted as an expert based on his extensive background and recognition as a specialist in the fields of building performance and new home construction. He has appeared as an expert before this Tribunal on a number of occasions relating to homeowner claims under the Act and is currently Vice-Chair of the Ministry of Municipal Affairs and Housing Building Materials Evaluation Committee. Among his professional licenses and memberships, he is Past President of the Ontario Building Envelope Council, Member of the Ontario Society of Professional Engineers, Chartered Arbitrator, and holds a designation in Ontario Building Code Act qualification for "Complex Buildings", "Large buildings", "Small Buildings", "House", and "Building Structures".

Mr. Genge based his observations and conclusions on his review of the Kleinfeldt Report, the Winmar Report, TWC's Warranty Report, the legislation, the OBC and a site visit.

Mr. Genge noted that the purpose of section 9.25.3 of the OBC, which requires a continuous barrier where the floor meets the wall, is to prevent moisture from seeping into the interior of the home. He stated that the intent of the section was not to prevent air movement, except in so far as air might contain moisture. Mr. Genge noted that since there was no evidence or allegation of moisture problems with the home, there was no reason to perform any repair. It was Mr. Genge's experience that such wrap is commonly torn or ripped during construction.

When asked what repair would be appropriate if such were found to be required, Mr. Genge testified that, where accessible, it was common practice to provide section repair with tape and sealant (he has never used caulking although this is specifically referenced in the OBC); however, where the tears were not readily accessible, then alternate measures are necessary. He noted that his experience led him to conclude that contractors generally prefer to work from the interior. He testified that the preferred method would be to remove ceiling drywall

where the wrap was compromised and spray foam into the cavity exposed. This would be cheaper and less intrusive than removal of the outer brick wall. He noted this procedure would take less than one day, whereas removal and rebricking from the outside would be more extensive a procedure, involving a longer time commitment.

West Rear Wall

The initial inspection by TWC in April 2004, concluded that the exterior middle west wall brickwork was out of plumb and therefore warranted and required correction by the Builder (Exhibit 11, Tab 12 #103). The actual Applicant complaint, numbered 103, stated "*Brick veneer wall not straight, not square no air gap behind it – exterior middle of west wall*". Mr. Stephens testified that his inspection from the interior revealed the air space to be less than the 1 inch required in the OBC.

The Warranty Assessment Report also concluded that the same wall area had insufficient sheathing in violation of the OBC. This too was warranted (Exhibit 11, Tab 12 #78).

The Report noted that the Builder would need to have access to the home in order to determine the scope and method of repair required. However, the Applicant had finished off the basement making such access difficult; the inspectors themselves had been limited to a small section where the drywall had been cut out by the Applicant.

When the Applicant appealed the Assessment, causing Mr. Straiko to attend the home again in January 2005, these issues were not recanvassed. The Applicant, however, did request TWC issue a payment amount instead of ordering repair by the Builder as he disputed the Builder's ongoing requirement that the basement drywall must be removed in order to allow inspections by engineers. The request was not approved by TWC and in mid February the Applicant wrote the Builder removing his obstruction to the presence of an engineer at the home.

The Builder's engineer, Trow, issued his Report in April 2005. The Report conclusion was that there appeared, from the small opening provided by the Applicant that insufficient sheathing and air gap were present behind the brick. It noted that "there was some variation with respect to the wall being plumb"; however, the wall appeared to be functioning and showed no evidence of any water penetration or compromise to longevity. The Report did not suggest any method or scope of repair (Exhibit 10, Tab M).

Throughout the spring, the Applicant demanded numerous conditions of the Builder in the performance of any repairs to the home which he insisted be performed from the exterior. These included the requirement that all repair people be bonded and the demand that, due to the need to remove his satellite

dish located on the rear brickwall, he and his family would require alternate accommodation for the weeks of reconstruction. On June 20th he wrote the Builder that if his proposed repair method was not followed he would add such to his threatened lawsuit against Greenvilla (Exhibit 7, Tab 70).

In mid-July, a second Greenvilla engineer, Venditti, issued its report as to scope and repair method. Given that access to the engineer was not provided by the Applicant, it was based only on information provided to Venditti by the Builder. The Applicant testified he had omitted to advise his wife of the scheduled inspection when he left the premises to get a haircut.

The Venditti Report proposed that the appropriate method of repair to the air gap and insufficient sheathing was to tear down the inside basement framing and reinstall it 1.5 inches from the exterior brick thereby allowing for the 1 inch air gap and second sheet of sheathing (Exhibit 10, Tab P). The Report made no mention of the warranted out of plumb condition.

The Applicant testified that this Report completely flummoxed him, as he had expected that the out of plumb condition could only be properly rectified by tearing down the exterior brick which would, of course, also determine the extent of the alleged rim wrap deficiency. The Applicant wrote to both Greenvilla and the engineer advising the Report was negligent and inadequate. He refused the Builder further access to review the site for the warranted plumb condition. He has since instituted a formal complaint to the Professional Engineers of Ontario concerning the Vendetti Report (Tab 94).

In August, the Parties entered into settlement discussions. Three warranted items not canvassed here were subject to a settlement agreement which will be further discussed below. The Applicant requested that TWC provide a Decision Letter regarding the out of plumb claim. It did so in September denying further warranty coverage based on the Applicant's refusal to provide access to the Builder to complete the repairs.

In November, Greenvilla brought a Motion before the Tribunal requesting that the Applicant provide access to its third engineer to evaluate the scope and method of repair to the plumb condition. The Motion was denied by Vice-Chair McIntosh who determined that such evaluation was unnecessary, given that the Program's Second Decision Letter had denied the Applicant warranty coverage based on his denying access. As the warranty itself was now denied by TWC, the Tribunal could not fathom why access for Builder repair was relevant.

As noted above, it was also in November that the Applicant retained Kleinfeldt to estimate the cost of repairing the warranted out of plumb brick wall. Mr. Nellis' Report concludes that the repair is only possible by tearing down the back wall brickwork and notes there is no need to interfere with the interior.

Various Motions were brought before the Tribunal over the next months whilst the Parties sought resolution of procedural issues. Finally, in September 2006, the Tribunal ordered that TWC and Greenvilla be given access in order to adequately prepare Expert Reports to respond to the Kleinfeldt Report relied upon by the Applicant to support his argument that his denial of access to the property was not unreasonable. The result of the Vice-Chair's Order was the submission of the Arbitech Report of Mr. Genge and the RDS Report of Mr. Rymell, both of which are referenced in part above.

Both Reports conclude that the rear west wall is not out of plumb.

The Applicant presented measurements he took himself of the rear west wall which contradict the findings of Genge and Rydell. These measurements do not substantially differ from the reports as they concern the lower basement wall area which is the section of wall at issue. Where they do differ is on the upper levels. Mr. Genge testified that the Applicant's method of measurement was faulty in that he had no way to ensure the plumb line which he used remained taut while he climbed a ladder to record his measurements. Although the Applicant testified that the day was still, Mr. Genge noted that movement will occur – especially at higher levels such that a weight, or a collaborator, is necessary to ensure the figures are true.

Both Mr. Genge and Mr. Rymell conclude that the sheathing membrane and air gap behind the brick are less than that required in Part IX of the OBC. Mr. Genge stated that their review of the exterior wall had been limited by the Applicant who, despite being asked to do so, refused to provide access to any portion beyond that of the small drywall hole he had made earlier. From that hole, Mr. Genge observed only one layer of sheathing over the exterior framing and was able to see an air gap of approximately a quarter inch. He found no indication of any moisture, nor had such been alleged. He concluded from his observations that there was no reason to conclude the air gap was the cause of any damage or had in any way failed to achieve its purpose of ensuring that water seepage drains to the bottom flashing, rather than penetrating the interior.

Mr. Genge testified to his experience and knowledge as to the purpose and intent of the 1 inch air gap requirement, stemming in part from his position with the Ministry of Municipal Affairs and Housing Evaluation Standards Committee. He stated that the air gap, although mandated to be a minimum of 1 inch in Part 9 of the OBC, frequently is less in practice. He testified that appropriate wall performance is not dependent on the existence of a 1 inch gap:

The purpose of the air gap is to provide a cavity for water that may leak through the brick to drain to weepholes at the base of the wall or to weepholes over flashings over other openings such as windows. In practice, the air gap as constructed in masonry walls is not 1inch wide, but may vary from less than ½ inch to far more than 1inch, as the mason

constructs a wall to be plumb and square and yet accommodate normal construction tolerances and irregularities in the building framing. In fact, it has been our experience that a 1-inch gap for drainage of the cavity, while often specified, is not required for drainage and is rarely achieved. (p. 14 of 24 Report)

He noted that Part IV of the OBC dealing with larger building standards requires only a tolerance of a quarter inch gap. It was his conclusion that, as nothing was found to be inadequate or problematic, nothing required repair. Nonetheless, if repair was required in order to meet the requirement stipulated, then it was his position that the Vendetti method of performing the work from the interior was reasonable and appropriately measured. In contrast, he characterized the Caron repair estimate as “overkill”.

Mr. Genge observed no sheathing on the wall section he was able to observe from the test hole provided by the Applicant. According to the OBC Part IX, where no sheathing is provided, two layers of membrane are required (s. 9.23.17.5). Mr. Genge observed only one such membrane. He noted again, however, that the intent and purpose of the membrane is to provide further protection to the interior of the home from moisture seepage through the brick. It acts as an air breakage so moisture can drain down the outer wall and not penetrate the interior of the home. As there was neither an allegation, nor evidence, of any water staining or moisture buildup, it was his opinion that, despite a technical violation, the intent of the Code had been met as the wall appeared to be performing as it was designed. He concluded that any remedial work would be, as with the air gap, to provide OBC compliance and not to correct any failure in wall performance.

In cross examination, Mr. Genge stated that compliance with Part 9 provisions of the OBC deems the construction standard is met. Where there is no compliance, the standard can still be met where it can be shown that the circumstance meets the intent behind the standard. In his opinion, both the membrane and the air gap met the intent of the standard and he agreed with the conclusions of the Builder’s first engineer Report, Trow, that no correction was required. If, nonetheless, repairs were required by this Tribunal, then he believed the Venditti proposal was reasonable. He did not believe that tearing down the complete brick facing of the home was reasonable in any event.

Mr. Rymell is a professional engineer who has been actively involved in the field of building science for over 20 years and has extensive expertise in the effect of air/moisture and thermal design on a building envelope. He is currently the President of the Ontario Building Envelope Council and is past Chair of Construction Specifications Canada. His areas of expertise include building codes, technical review of codes and standards, investigation and evaluation of building deterioration and construction litigation. He has “on-site” experience of

over 500 construction sites and has testified in courts as an expert in construction practice at a rate of about 8 cases annually.

Mr. Rymell noted the insufficiency of the air gap when inspecting the test hole provided by the Applicant. It was his opinion that, since there was no allegation of any deficiency or failure in the purpose of the air gap, and the home was over three years old, there were no reasonable grounds to conclude that the gap was not providing the protection intended by the OBC requirement for a homeowner's health and safety.

Mr. Rymell testified that he did not believe the rear west basement wall, warranted as out of plumb by TWC in 2004, was in fact, out of plumb. He stated that his measurements were taken in tandem with Mr. Genge in accordance with Vice-Chair Flude's September, 2006 Order. Both Experts co-operated in taking measurements to determine plumb. Their Reports set out the methods and results. In sum, both conclude the wall is not out of plumb. As a consequence Mr. Rymell does not recommend any repair.

As a result of the Arbitech and RDS findings, TWC issued its third Decision Letter, dated December, 2006, reversing its earlier finding that the out of plumb condition of the Applicant's west rear basement wall was warranted under the Act.

Delayed Closing Costs

In November 2003, some 10 months after possession of the home by the Applicant, Greenvilla paid \$3,800.00 to the Applicant for costs he had claimed were incurred by him as a consequence of the delayed closing (Exhibit 5, Tab 83).

The Applicant requested additional sums be paid to him for costs allegedly incurred due to the delay period from December 20, 2002 through to January 3, 2003. It was the Applicant's evidence that his family had their household belongings, including dishes and cookware, all in boxes when they were served with the Builder's closing extension notice (Tab 44). He therefore requested meal expenses for three (his wife and child included) for these 14 days at \$25.00 per day as well as costs for rent for the whole month of January required by the landlady, who was the purchaser of his old home. The lease provided that "partial months" would be accepted and prorated (Tab 67).

TWC denied his claim in Decision Letter of January 31, 2006, based on the fact that the Applicant remained in his home where he had access to cooking facilities, and that he had failed to submit receipts to verify that he and the family had eaten out, as is required under section 17 of Regulation 892.

It denied the claim for rental costs as the Applicant had already accepted the earlier sum provided by the Builder “as compensation for the delay in closing from November 14, 2002 to January 3, 2003”. It relied too, on the fact that January, being only three days, should have been prorated as agreed to in the lease. TWC ‘s position was that rental costs for November were not payable as the rent he was to pay was due and payable the first of each month and his initial closing delay commenced the 14th of November.

The \$100.00 deposit claimed for the moving company was denied as TWC verified this was not an additional charge or penalty resulting from delays.

The amount claimed for travel to his lawyer on November 13, and on December 20, 2002, as well as the half day of lost wages, was also denied. TWC relied on the fact that there was no evidence that these trips were required as a consequence of the delay in closing. It noted that numerous other legal issues between the Builder and the Applicant were then occurring. Further, no receipts were provided demonstrating the validity of either claim.

The Applicant did refuse the Builder’s initial offer, back in early 2003, to settle all claims for delayed closing by payment of \$5,000, the maximum allowable under the legislation, because he did not wish to sign the Builder’s Release.

TWC argued it was within its rights to have refused any payment to the homeowner as a consequence, in light of section 14(6) of the Act.

Effect of Settlement on Warranted Claims

Mr. Chad Foreschew is the Manager of Field Claims for TWC. He has a Diploma in Civil Engineering and a Certificate in Building Science from University of Toronto. He is a Municipal Building Inspector and a Planning Examiner and was Chief Building Official for the Town of Lindsay prior to accepting employment with TWC twelve years ago.

Mr. Foreschew is responsible for supervision of Mr. Stephens and Mr. Straiko. He is also responsible for the drafting of the Decision Letters in this matter.

Mr. Foreschew stated that the TWC decision in September 2005, to deny the Applicant’s Claim of: (a) the out of plum warranted wall, was the result of the Applicant, having determined a particular method of repair was appropriate for the Warranted condition determined to exist and effectively denying the Builder access to complete repairs, and (b) three other Warranted claims, was due to the Applicant unreasonably refusing to sign the Builder’s requested legal Release as part of an agreed-to settlement amount.

As concerns (a), Ms. Acchione testified for Greenvilla. She is the Customer Service Manager for the Builder. She stated that the Applicant continued demands for the repair to be performed either with his presence, including video taping, etc, or without his presence "as the repair could be performed from the exterior" made for a very difficult client. She stated such conditions were "typical for the Applicant - completely unreasonable and irrational". The evidence included the Applicant demanding the Builder supply its own water cistern, allow videotaping, provide the family alternate accommodation for two weeks, or, in the alternative, provide parking and television accessibility. By the time the Applicant finally reconsidered some of the more exacting of these conditions, the Builder and TWC had advised him the repairs were possible from the interior.

As regards (b), the testimony of Mr. Forechew was that a monetary settlement had been agreed to by all the Parties following extensive discussion of the ongoing issues in September, 2005. The only outstanding detail at the time was that the Builder was to supply the Applicant with a blank release form for his signature. TWC had faxed a sample of the form it uses to the Applicant. On receipt of Greenvilla's form using identical language, the Applicant refused to sign the release, thereby leaving TWC in a position of no option other than to refuse the Claims.

The Release condition reads as follows:

In consideration of the payment, we release Tarion Warranty Corporation ("Tarion") and the Builder and their respective directors, officers, servants, employees and agents from any and all claims for damages, costs or injury, which we ever had, now have or in the future may have against them arising from or relating to the items set out in the Schedule.

The Applicant noted that the Builder did not require a Release be signed when it performed repairs and queried its right to so demand when paying for a homeowner to provide his own repair. More importantly, however, the Applicant testified that the Release as faxed to him was disturbing him, in that it not only removes any Builder liability for damages for whatever future ensuing repairs may be performed concerning these items, but it also purports to remove liability from both TWC and Greenvilla for damages for any prior condition of these items.

Costs

The Applicant stated that he had put the Parties on Notice that he would be requesting his costs for this proceeding based on his evidence throughout the Hearing of vexatious conduct on their part. Both TWC and the Added Party asked for the right to also submit argument as to costs. Their submissions were received by the Tribunal within the time allotted.

THE LAW

The *Ontario New Home Warranty Plan Act* provides:

Subsection 13(1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations. R.S.O. 1990, c. 0.31 s. 13(1)

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon. R.S.O. 1990, c. 0.31, s. 13 (6).

Subsection 14(3)

Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty. 1998, c. 19, s. 185 (1); 2000, c. 26 Sched. B, s. 15 (3, 4).

(4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim with four years after the warranty expires or such longer time under such conditions as are prescribed. 1998, c. 19, s. 185 (1).

(6) In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source. 1998, c. 19, s. 185 (1).

(7) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section. 1998, c. 19, s. 185 (1).

Section 16.

(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefore, on the person or owner affected. R.S.O. 1990, c. 0.31, s. 16 (1).

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal. R.S.O. 1990, c. 031, s. 16 (2).

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation. R.S.O. 1990, c. 031, s. 16 (3).

Regulation 892 under the Act provides in part:

Section 5.

- (1) An owner who requires conciliation of a dispute between the owner and the vendor shall make request therefor to the Corporation and both the owner and the vendor shall each pay to the Corporation the applicable conciliation fee set out in Schedule A. R.R.O. 1990, Reg. 892, s. 5 (1).
- (2) Within fourteen days of the commencement of the conciliation proceedings, the Corporation shall provide the vendor and the owner with a decision in writing setting forth such remedial work, if any, as may be required to settle the dispute. R.R.O. 1990, Reg 892, s. 5 (2).
- (3) If the Corporation determines that the remedial work will require time to complete, the Corporation shall continue to conduct such in sections of the home as the Corporation considers necessary until the work has been completed. R.R.O. 1990, Reg. 892, s. 5 (3).
- (4) If the award of the Corporation is in favour of the owner or if the Corporation rules that the request for conciliation was justified in any event, the conciliation fee paid by the owner shall be refunded by the Corporation. R.R.O. 1990, Reg. 892, s. 5 (3).

Section 6 (3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to an owner out of the guarantee fund in respect of a claim made under subsection 14 (3) or 14 (4) of the Act is,

- (a) \$100,000 if the claim relates to a purchase agreement, or a construction contract, entered into before September 1, 2004; or

Section 6 (6) Liability under subsection (3) or (4) is limited to damage to the home only and liability under subsection (5) is limited to damage to the common elements only and there is no liability for any other damage, direct or indirect. R.R.O. 1990, Reg.892, s. 6 (6).

Section 15 (1) In this section,

"building envelope" means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits; ("enveloppe")

"delivery and distribution systems" include all wires, conduits, pipes, junctions, switches, receptacles and seal, but does not include appliances, fittings and fixtures; ("reseaux de distribution")

"exterior cladding" means all exterior wall coverings and includes siding and above-grade masonry as required and detailed in the relevant sections of the Ontario Building Code under which the Building Permit was issued. ("habillage exterieur") R.R.O. 1990, Reg. 892, s. 15 (1).

Section 15 (2) Every vendor of a new home warrants to the owner,

- (a) that the home is constructed in workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;

- (b) that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;
- (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
- (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and
- (e) that the home is free of major structural defects. R.R.O. 1990, Reg. 892 s. 15 (2); O.Reg. 697/92, s. 1.

Section 15 (3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes that were enrolled, or should have been enrolled, after the 31st day of December, 1990. R.R.O. 1990, Reg. 892, s. 15 (3).

Section 19. Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement. R.R.O. 1990, Reg. 892, s. 19

The Tribunal's *Rules of Practice* provide:

Rule 14 Costs

- 14.1 Where a party believes that another party in the 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:
 - (a) failing to attend a hearing before the Tribunal or to send a representative when properly given notice, without contacting the Tribunal and other parties to the hearing;
 - (b) failing to comply in a timely manner with a procedural order or direction of the Tribunal where the result therefrom is undue prejudice or delay to another party or parties in the proceedings before the Tribunal;
 - (c) failing to comply in a timely manner with the disclosure requirements set out in the Tribunal's Rules of Practice, including without limiting the generality of the foregoing, the disclosure requirements respecting documents, particulars, or constitutional issues; or
 - (d) knowingly presenting false or misleading evidence.
- 14.3 Where the Tribunal finds that a party has acted unreasonably, frivolously, vexatiously, or in bad faith, the Tribunal may order that party to pay the costs of another party or parties to the proceedings subject to Rule 14.4 respecting the amount of costs that may be ordered by the Tribunal panel.
- 14.3 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, amount of costs incurred by the party requesting costs, and the conduct of the party requesting costs; and
- (2) the amount of costs shall not exceed,
 - (a) where the Tribunal has not commenced a hearing, the sum of \$400.00;
 - or
 - (b) where the Tribunal has commenced a hearing, the sum of \$800.00 multiplied by the number of days that the Tribunal conducts a hearing of the matter, with any part day being considered a full day for the purpose of this calculation of costs.

Analysis

This was a difficult and lengthy proceeding. The history of the building of the home was mired in growing irritation, suspicion and mounting frustration between the Applicant and the Builder. With the introduction of TWC, relationships grew more complex. The fact that the Applicant had appealed a prior TWC decision involving a previous home he owned seems to have played a role in the increasing levels of mistrust and consequent disagreement between all involved. By the time this hearing commenced, the Applicant had created over 700 documents, numerous books of evidence and video and computer documentation. All three parties had retained experts. Litigation has commenced in civil court. Professional disciplinary proceedings have been commenced in one case; in another they are completed with a guilty plea. Settlement offers have been made and broken. Numerous Pre-Hearing Orders have been made.

Before discussing the various issues and claims raised in this matter, it is important to remember that the *Ontario New Home Warranty Plan Act* does not purport to cover all legal issues which may arise in the construction of a new home. It is limited in its scope. In effect it sets out an insurance scheme whereby consumer protection is available to homeowners with purchase claims against their builder and also in the form of warranties for specified aspects of new home construction. Builders pay into a compensation fund for each home they construct. This fund is administered and managed by TWC whose duty it is to oversee claims against it by homeowners and conciliate resulting disputes which may then arise with builders.

The warranties themselves are also limited. They can generally be categorized as arising from issues concerning the integrity of the building structure and/or safety and health of its occupants. Before this Tribunal the onus is on the homeowner to demonstrate that the builder failed to meet a given warranty obligation.

Only where an Applicant persuades the Tribunal, on a balance of probabilities, that there has been breach of a warranty, is he entitled to certain damages. These, too, however are subject to limits set out in the legislation. Damages payable to a homeowner are limited in time and in amount and, as is discussed below, in nature. TWC can, at its discretion, opt to arrange for repair of damages as opposed to paying out a cash amount.

Window Size in Master Bedroom/Kitchen Cabinet/Knick Knack Shelf

Both the Respondent and the Added Party took the position that these claims must fail as there is no allegation of any breach of warranty.

The Tribunal agrees. All three involve complaints which, at various times, were referenced by the Applicant himself as “contractual issues”. All arise from the Applicant’s position that he did not receive what he believed he contracted for in his Agreement of Purchase and Sale. He does not allege, nor is there any evidence of, a material defect, poor workmanship or violation of the Ontario Building Code. The complaints thus may be contractual issues, but are not subject to the warranty protection afforded under the legislation.

Numerous decisions of this Tribunal have considered the distinction between contractual remedies which may be available to a homeowner through the courts and warranty remedies available under the Act. Most recently Vice-Chair Wallace in *Dirani* (2005) LAT, refusing a claim concerning a light fixture placement which the homeowner alleged was not in compliance with her contract, reviewed a number of these cases. He noted the distinction this Tribunal has drawn between issues of contract or design, which are remedied by way of civil court, as contrasted with issues of workmanship, which may find a remedy under the Act. These included cases where the Tribunal held that the removal of an unwanted garage wall, failure of a builder to build a fireplace and cold cellar, installation of an oversized window, and ineffective location of a TV wall unit were all matters of design under the Agreement of Purchase and Sale and not workmanship and thus not protected by Warranty under the legislation.

In this case the Applicant had taken the time and trouble to closely review his Agreement of Purchase and Sale with the benefit of legal counsel. He had, as a result, modified and amended various clauses to meet his requirements. The clause stipulating the Builder’s right to vary or alter design at its sole discretion was not so modified.

The Applicant relied on the decision of *Kritenko* (2003) LAT which concerned a homeowner claim for a larger payment than he had been earlier paid by a builder for a window TWC had warranted as in excess of Ontario Building Code requirements. The Tribunal does not find this case helpful to the Applicant.

Vice-Chair Turk did not allow the Applicant's claim, finding no evidence before him of defect nor any evidence of consequent damage to the homeowner.

Contrary to the Applicant's position, the Tribunal does not find section 19 of the Regulations dealing with substitution relevant to the facts as established by the evidence. There is no evidence before this Tribunal that the Applicant's window is not that which he had bargained for in the contract. Schedule E is a photocopy of the original sales brochure design illustrating the lay-out of the home. The illustration of the window in the front of the Brochure shows a three paned window. This is not included in Schedule E which rather consists of the design sketch alone with no dimensions referenced. Neither it nor the Applicant's extrapolated measurements based on a salesperson's comments as to sizing is evidence the Builder made a substitution in providing a three paned 54 inch window. Even if it were, there is no evidence that the quality of the window received is less than the quality of what was stipulated in the Agreement of Purchase and Sale. "Quality" is the term used in section 19, not "size".

Warped Door

The Tribunal is satisfied that the air problems experienced by the homeowner with his door were indeed remedied by the Builder prior to the TWC conciliation investigation of April, 2004.

The issue now is not the same. It is presented as water leakage and, as such, is subject to the two year building envelope warranty in Section 15(3) of Regulation 892. Despite being notified in writing of this claim within the warranty timeframes the evidence is clear and undisputed that TWC failed to investigate the new allegation on Mr. Stephens re-attendance at the home in January, 2005.

This failure to conciliate the new complaint was the cause of the homeowner's attempts to properly test for the condition in order to have evidence to persuade this Tribunal of the concern. While the Tribunal agrees that the test was not that which is set out in the Construction Performance Guideline, it finds that it is the best evidence available as to the efficacy of the door to properly repel water. Given the Applicant's oral and video evidence, the Tribunal finds it reasonable to conclude that the front door failed to function as is intended within the appropriate period. The inescapable conclusion to be drawn from this inadequate function is that there was a breach of section 15(2)(a) of the Regulation.

The damages which flow from this breach include the inconvenience and disruption which seeping water might cause, but more importantly the inability to use the front door. The Applicant testified that the door is kept duct taped over the winter months and guests and family enter and exit through the garage. This damage can only be remedied by repairing or replacing the door with one which functions appropriately. The only evidence before the Tribunal as to how this can be achieved was presented by the homeowner in an estimate he had obtained

for the door's replacement in the amount of \$2,500.00 (Exhibit 5, Tab 63). This sum will be paid to the Applicant.

Cabinet Trim

The complaint as made by the Applicant was that the cabinetry he had selected was defective as it was not the colour selected by him – being dark burgundy-but rather dark burgundy doors with white melamine interior. This would be acceptable if indeed the interior remained interior, but in his case the evidence established that the interior edging was visible, given the size of the outer doors. The Applicant concluded this “doesn’t look right.” He wants it changed under warranty. His estimated cost from a kitchen contractor was between \$75.00 to \$125.00.

The Tribunal is not convinced that the Applicant has a case for warranty protection. It finds that the matter in question is really an issue of design and notes in particular the testimony of Mr. Stephens that the product provided is in keeping with “typical” installation where white melamine is used for the interior cabinetry.

If this is typical workmanship, does it meet the workmanship standard intended under section 13 of the Act? The Tribunal finds that it does and adopts the reasoning of Vice-Chair Wallace in Dirani, supra, where he considers what factors may determine when workmanship, which does not meet the Applicant's expectations, are of a nature that fail to meet the standard set out in section 14 and thereby trigger the authority of this Tribunal to grant a remedy to the homeowner. The Vice-Chair noted the Tribunal will first consider industry standards in the Ontario Building Code or the Construction Performance Guidelines, but the Tribunal also looks to functionality, craftsmanship and aesthetics.

As concerns the latter, this Tribunal has made clear that the standard is not a subjective sense of what is acceptable aesthetically, but rather an objective and reasonable consideration of what is acceptable. Vice-Chair Hiley's decision of Sirbu (Re) (2002) LAT summarized workmanship as follows:

In determining whether or not there has been a defect of workmanship...one must consider a multitude of issues of which aesthetics certainly is part of the consideration but not the prominent consideration. In this case the Applicants examined each repair issue with microscopic scrutiny. The Tribunal understands that these homeowners were involved in a lengthy process of repairs and it is evident that mutual understanding is lacking in the relationship between these homeowners and their builder. But the warranties stated in the legislation are founded on the concept of what is reasonable, not on what is perfect.

This claim is therefore denied.

Wood Cladding

The evidence relied upon by the Applicant to support his allegation of insufficient sealant, and thus poor workmanship, is not persuasive. The pictures taken do illustrate some wear to the paint surface involved; however there is no reason to believe this is not consistent with exterior wear and tear.

The Tribunal notes that the complaint was made by the Applicant outside the warranty period set in the legislation and thus falls outside the Act's protection.

Cold Floors

Although this complaint took up a great deal of time in the Hearing and was the root cause of the worsening relationship between the homeowner and the Builder, the Tribunal has no evidence on which to base a finding that there are cold floors. Despite being asked to do so, the Applicant did not bring any witnesses from the numerous adult individuals who live or have lived in the home, to corroborate his unsupported allegation of cold floors. Despite suggestions that he do so, he also failed to produce any documents demonstrating inadequate temperature readings or that his heating costs were increased.

The only independent evidence presented as to the complaint was that of Mr. Straiko's Report wherein he noted temperature readings resulted in a 2 degree difference between the outer and inner bedroom walls. This finding does not support a conclusion of cold floors. Mr. Stephen's testimony also supported a finding that the rooms were not cold. In his statement he found the home to be "warm and dry". Based on the evidence there are no reasonable grounds to conclude the condition exists and the Decision Letter denying coverage is therefore upheld.

Rim Wrap

(a) whether warranted :

The Applicant's real concern was the indication of ripped rim wrap that he had observed during construction of the home and which he believed had never been rectified. The Applicant testified he had not originally formulated this complaint in his warranty claims because he had understood from Ms. Acchione that he could only complain of visible deficiencies. He had, however, brought it to the attention of the TWC inspectors at the first investigation into his deficiency list in April, 2004, albeit as the potential cause of the allegedly cold floors. He did so because by this time he had the benefit of the Winmar Report which suggested the relationship between the two conditions.

TWC denied the Applicant's request for coverage based on insufficient evidence that the wrap remained compromised. The only evidence presented to the Tribunal that the wrap was no longer compromised was that uncertain response of Ms. Acchione in her December 2004, that the Builder "believes" it has been corrected. By the time of this Hearing, the Applicant had exposed a section of the wall, in the presence of all the Parties pursuant to the Tribunal Order of September 2005, which demonstrated that at least that section of wall still contained compromised wrap.

Given that all the experts who testified agreed that compromised rim wrap is indeed a violation of the Ontario Building Code in that it no longer provides a continuous barrier to air and moisture penetration as is required in section 9.25.3, it seems to this Tribunal that it was incumbent on the Builder to provide the evidence that the wrap was in compliance. After all, whether or not it had been repaired was in the knowledge of the Builder who would have ordered and supervised such repair.

The Tribunal has recently considered a similar situation. In Cecilio (2005) LAT Vice-Chair Diamond reviewed a homeowner's claim which had been denied by TWC based on insufficient proof of the deficiency. The case turned on the acoustic transference of a wall, which the applicant had not demonstrated violated OBC requirements. The Tribunal quoted the Supreme Court of Canada decision Farrell v. Snell [1990] 2 S.C.R. 311, a case of medical malpractice where the issue before the Court was: how does a plaintiff satisfy the burden of proof as to causation when the defendant is usually in a better position to know the cause of the injury to the patient? In dealing with this issue the Court held:

The allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts (cite omitted).

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted.

It is not strictly speaking accurate to speak of the burden of proof shifting to the defendant when what is meant is that the evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary....

The legal or ultimate burden remains with the plaintiff, but in the absence to the contrary adduced by the defendant, an inference of causation may be drawn although positive scientific proof of causation has not been adduced.

In that case, the Vice-Chair concluded that where the homeowner had provided evidence that the wall had not been built using a method prescribed by the OBC and the wall had sound transmission deficits, it was incumbent on the Builder to

provide evidence the wall was compliant, as it was the Builder who was in the better position to provide the evidence.

Here the Applicant has demonstrated violations of the OBC. The Builder is in the best position to adduce evidence that these violations were corrected, as such corrections would have occurred under its authority and direction prior to the Applicant's possession. It did not do so. The Tribunal is entitled to draw the inference that the wrap continues to violate OBC requirements.

(b) Whether damages:

Given that the Applicant has established the existence of a violation of the OBC affecting air and vapour barriers within the meaning of section 15(2)(d) of the Regulation and did so within the two year time frame required, it is now necessary to consider what remedial response is available.

TWC and the Builder both argued that there was no evidence of damages resulting from the ripped and deficient wrap. Certainly the alleged damage of cold floors and/or increased heating bills is not made out, as was noted above. And, while Mr. Genge conceded the violation may exist, he concluded any repair would only be to make the home compliant as no damage was apparent or alleged.

The Applicant argued that damages are suffered given the cost to him to have the home rectified so as to meet OBC compliance. He also surmised that, while there may be no evidence today of water penetration or mould, Mr. Caron testified to the possibility of such occurring and he remains concerned for future costs should such be the case. He relied on the Tribunal decision of Calderai (2003) LAT where the Tribunal found that the basement concrete flooring of a homeowner's residence was less than the thickness required in the OBC and thus section 13(1)(a) warranty was breached. Although TWC had taken the position there was no remedy available as no damages had been proved, the Tribunal disagreed. It found that a Work Order had been issued by the municipality requiring that the floor be compliant, which the Builder had not acted upon. It also found that the "Applicant's heating bills will be higher because the concrete slab is less thick." The Tribunal concluded that there were damages and allowed the claim.

Counsel for TWC argued that Tribunal caselaw is well settled that damages must be for costs incurred by the homeowner outside simple economic loss from cost of repair. He relied on Vera (1988) CRAT, a decision of the Tribunal's predecessor, which concerned a homeowner's complaint that the rebricking of

his home was carried out in conditions which contravened the OBC. There was no evidence of any inadequacy of workmanship or other defects, nor was there

any problem with the brick condition. The Tribunal found there were no damages suffered as a result of the breach in warranty and thus denied the claim.

The CRAT decision of *Fernlund* (1993) was also relied upon. This involved a homeowner complaint that the living room of his home was not sunken as was stipulated in the Agreement of Purchase and Sale. While the Tribunal was not convinced this was a breach of warranty under the Act, it held that the applicants would not be entitled to damages such as loss of enjoyment of their home in any event as: "Under the Act, the Applicants are only entitled to the financial loss resulting from the builder's breach." Since they led no evidence that the home was devalued nor any less in space nor any other financial loss established, the claim was denied.

Finally, the case of *Peter John Gray* (2004) LAT is pertinent to this discussion. The facts there were similar, as the homeowner in that case alleged coldness from insufficient cladding placed around the windows during construction of the home by the builder. The Tribunal found there was indeed a technical violation of the OBC, but no evidence of cold as alleged or any other damage, and thus rejected the consumer's warranty claim.

In contrast however, the Tribunal notes the decision of *Cecilio*, supra, also reviewed the type of damages recoverable under the Act. The Tribunal in that case noted that the *Ontario New Home Warranties Plan Act* has recently been termed consumer protection legislation by the Ontario Court of Appeal and thus, in intent, remedial. As such the *Interpretation Act*, s.10 applies. It states that such legislation "...shall receive such a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." Vice-Chair Diamond concluded that:

the true intent and spirit of the legislation is to protect members of the public who are new home buyers in the province of Ontario and give them assurance in part that the homes they are buying comply with the OBC. It should not be a defence for a builder to say: "I agree that I did not build the house to Code, but I built it well enough that it will not deteriorate in one year." A house is either built in conformity with the OBC or it is not. If it is not, there is a breach of warranty which entitles the purchaser to a remedy.

When the Tribunal then turned to consider what remedy was available under the Act, it concluded that costs for the repair of the deficiency were recoverable based on clear evidence that the failure to build the kitchen floor in accordance with the OBC would result in its premature degeneration. As a consequence the Tribunal found the failure to build in accordance with the OBC led to the very real damage of a shortened life expectancy to the floor and was, thereby a latent, but existing, defect or damage.

Given the finding of the Tribunal that there was indeed evidence of existing failure before it and it was this failure which was to be remedied by the warranty protection provided in the Act, I am unable to conclude that the Vice-Chair intended that the economic cost to simply bring a consumer's home into compliance is recoverable, absent any evidence of harm arising from not doing so. The object and intent of the Act is to ensure consumers are protected from loss or harm which faulty, incompetent or negligent construction practice may cause. Such may indeed be founded on contravention of the OBC, but the remedy available under the legislation requires a factual finding of harm beyond merely a finding of the contravention. As such, the protection provided in the Act is not protection from the violation, but rather protection against any costs or harm which may arise from such violation. In the case of a breach under subsection 15(2)(d) of the Regulation, this means protection from harm or likely harm to health and safety of the homeowner caused by a violation to the air and moisture barrier requirements.

That this is so seems clear from the wording of section 14(3)(d) which limits the damages payable to those "resulting from a breach of warranty if....the person has a cause of action for damages resulting from the breach of warranty...". In contrast, the very next subsection which speaks to damages recoverable in a claim under the major structural defect warranty, provides that the owner is "...entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect...". Had the intent of the Act been to compensate a homeowner for remedial costs for warranties other than major structural defect, why would this distinction be necessary? The reasonable conclusion is that the distinction had been drawn for the express purpose of limiting the former and not the latter.

The Tribunal is also limited in its authority. As a creature of statute it is bound by the limits to its authority set out in the legislation. Under section 16 of the Act, it can do no more than "...order the Corporation take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations...." (s.16(3)). In the recent LAT decision Deneau (2006), the equitable jurisdiction granted to the Courts was expressly recognized as beyond that given to a Tribunal created by statute.

Given this, the Tribunal is limited to reviewing the evidence to determine whether it establishes any harm to the Applicant has been caused by the compromised wrap. If it does, then the costs of remedying the breach itself may rightly be considered recoverable.

The concept of “harm” is not confined to tangible present harm, but can be extended to include likely or latent harm. See the decision of *Degura* (2005) LAT where Vice-Chair McIntosh had occasion to also consider the issue of a warranty breach in the absence of any proven damage. In finding that the claim for damages was indeed merited the Tribunal stated:

The proposition that the Tribunal should not rule upon damages that are inchoate or not yet manifested has some rational resonance in that the Act makes a claim by an owner for a breach of warranty conditional upon a claim supportable in damages. This would leave the owner out of luck in the case of a discernable breach of warranty but damages that will only become apparent and therefore ground the claim subsequent to the expiry of the one year limitation. Surely to make sense of the governing legislation in a case where the evidence is more consistent than not with future damages becoming manifest from a breach of warranty even after the expiry of the limitation the claim could proceed.

In this case, there is no evidence of any current consequential harm resulting from the violation. Not one of the witnesses who had observed the exterior of the inside wall, including the Applicant himself, had noted any evidence of moisture buildup or condensation. It is unfortunate in this respect that the Applicant refused the request of Mr. Genge to remove more of the interior wall so that he could observe the condition of the interior wall closer to where the floor joists are located. However, the evidence before the Tribunal failed to demonstrate any damages.

Nor is there any evidence to suggest that such damage is likely to occur in the future. While Mr. Caron suggested mould may arise as a result of moisture penetration, the evidence established there was no such penetration. This Tribunal has long maintained that speculative damages are not recoverable under the Act. Most recently in *Buonincontro* (2004) LAT where Vice-Chair Hiley stated:

The protection afforded under the *New Home Warranties Plan Act* does not deal with future or speculative problems. The homeowner must bring an actual problem which can be objectively assessed and a method of repair proposed by a builder or the Program. The Tribunal can not provide remedies based on worries as to future damage.

As a consequence of there being no evidence that the warranty breach has caused any damages, either current or probable in the future, there is no remedy available to the Applicant under the Act and therefore no relief available to him through this Tribunal.

Wall Out of Plumb/no Air Gap/no Sheathing

TWC had in fact warranted all three complaints in its initial inspection of the home in April, 2004. At that time it had required that the Builder be given an opportunity to have its experts determine the appropriate scope and method of repair. The Builder attempted to get access to the interior basement in order to perform this evaluation.

This was not agreeable to the Applicant who had a month earlier retained the services of Winmar. Mr. Caron had advised him the rim wrap deficiency could be ascertained and best corrected when the rear brick wall was removed for these other issues. Given this information, as well as the fact that one of the warranted deficiencies was that the brick facing was “out of plumb”, the Applicant was of the opinion that the only possible method of repair was from the exterior involving removal of the brick. The Applicant had no faith in Greenvilla given his evidence that an earlier engineer retained by the Builder to review issues also not pertinent to this appeal had issued a misleading report.

The Tribunal sympathizes with the growing frustration and suspicion which the Applicant had with Greenvilla as a result of these circumstances; however, it finds the Applicant was not reasonable in his refusal to allow for the inspection and evaluation determined required by the Program as necessary preconditions for the Builder to perform repairs. He clearly knew that any repairs would be extensive and that TWC inspectors had not stipulated any particular method. It was not reasonable for him to expect that the only reasonable repair should be determined without any input or consultation with the Builder who had the obligation to perform that repair.

The Act provides TWC with the authority to arrange for repairs in mitigation of damages under section 14. It does not provide the homeowner with a right to determine the extent and method of that repair. Numerous decisions of this Tribunal have held that, as long as the repair proposed by TWC is reasonable, a refusal by the homeowner to cooperate will act as a bar to continued warranty protection available.

Gorscak (Re) (1999) CRAT This was a decision from the Tribunal’s predecessor. It involved a claim by a homeowner with regard to alleged deficiencies in the brickwork of his home. The homeowner had refused the Builder access to inspect the brickwork in preparation for repairs. The Tribunal noted that the predecessor of TWC had recommended repairs which appeared reasonable and consequently the Tribunal directed that such repairs be performed.

The case of Liddy (Re) (1997) CRAT was also a case where the Tribunal upheld TWC’s decision to deny warranty. The Tribunal found from the evidence that the Applicants had denied its builder access to perform repairs designed by its builder which TWC had advised the consumer appeared to be “...concise, has

been designed and stamped by a certified engineer, and has been approved by the City of Vaughan, who is the authority having jurisdiction". The Tribunal concluded that, in failing to follow the procedure proposed by the TWC, the homeowners were precluded from successfully appealing to the Tribunal.

More recently, Vice-Chair Israel in Charan Lakhan (2006) LAT found that, where the Applicant has unreasonably refused an industry standard repair proposed by the builder, he had thereby denied the builder his right to meet warranty obligations as determined by TWC under section 14(7).

The facts in this situation differ fundamentally from these earlier cases in that the Tribunal finds that the Applicant had a reasonable basis to strenuously object to the proposed repair (or lack thereof).

Certainly this was the situation after July 2005, when the Vendetti Report did not reference the TWC warranty of the out of plumb exterior brickwork and concluded remedial repair action to the home be performed from the interior. The Tribunal finds the Applicant acted reasonably in refusing the repair proposed in the July Vendetti Report. It makes no sense to recommend an interior repair to a warranted out of plumb exterior wall.

As a consequence, the Tribunal does not find that the actions of TWC in issuing the Decision Letter of September valid as it purports to remove from the Applicant his warranted protection with regard to the complaint #103. That the Program chose to do so based on the Builder's proposed unrealistic repair method, with no independent expert evaluation of its own, clearly only added to the Applicant's sense of being ganged up on by both TWC and the Builder.

Since then, the Reports of Genge and Rymell have concluded that the out of plumb condition is not valid and TWC has, as a consequence, reversed its warranty finding with regard to that complaint. This is certainly within its authority.

Where the various experts disagree in their testimony before it, the Tribunal finds that the testimony of Mr. Genge is most persuasive. Neither Mr. Nellis nor Mr. Caron have as extensive a level of expertise; neither are engineers and neither are qualified nor experienced in expert evaluations of the OBC and the Act. Mr. Genge has all of these attributes. Mr. Caron did stand to gain considerable financial benefit from his estimates, if indeed the repairs he recommended were to be ordered. Mr. Nellis drafted his Report and presented opinions on information provided to him as to the state of the Applicant's construction and not on any independent investigation. Indeed, he conceded in cross-examination that his opinion would differ if in fact he were told that the rear west wall was not out of plumb. Further, both Mr. Caron and Mr. Nellis did modify and/or alter the wording of their Reports based on requests by the Applicant. This is not to find

they were in any way dishonest; it is simply a fact of their retainer and a result of their inexperience.

Clearly neither Mr. Straiko nor Mr. Stephens, who originally warranted the wall as out of plumb, are engineers, nor did the evidence reveal they undertook measurements in the appropriate, methodical fashion of Mr. Genge and Mr. Rymell. The Applicants' own measurements are similarly flawed.

As a result the Tribunal has no hesitation in accepting Mr. Genge's conclusion that the rear west wall was not out of plumb.

The Tribunal notes how extremely disheartening this reversal of the decision to warrant must have been for the Applicant who, until this juncture, had honestly been led to believe by TWC that he had a valid claim which should rectify all of his concerns with the negligent construction in his home. Nonetheless, the Tribunal is convinced that the out of plumb finding was an error and the decision to reverse it not without precedent or merit.

There remains the issue of air gap which was warranted by the Decision Letter of August, 2005 and not rescinded in the Decision Letter of December, 2006. As with the sheathing – also found warranted and never rescinded – TWC instructed the Builder to perform repairs which would bring the two deficiencies into OBC compliance. This decision remains outstanding and has not been rescinded. The Builder has not made the repairs. In the complex and confusing labyrinth of conflict between these Parties, this failure is understandable and the Tribunal does not conclude any bad faith on the Builder's part. However, the fact remains that these repairs have been the subject of a repair order; a proposed method of repair has been determined appropriate by two separate engineers – Venditti, for the Builder and Mr. Genge for the TWC and there is no evidence that the proposed method will not effectively deal with the violations.

Thus for these reasons the Tribunal orders that the repairs as proposed by Genge in the Arbitech Report with reference to the air gap and wall sheathing be performed on the condition that the Applicant provides the Builder with access to commence the work within 60 days of this Order. If such access is not provided, then the Applicant will be deemed to have rejected such consideration being furnished to him sufficiently to bar any further claim to repairs he may have in accordance with section 14 (6).

Effect of the Settlement Release

Counsel for TWC submitted the settlement offer and rejection was outside of the jurisdiction of this Tribunal. I disagree. By issuing a Decision Letter denying the Applicant warranty protection based on refusing to settle on the terms specified in the Release, the Program had made a determination that the Applicant is no

longer entitled to damages as allowed under section 14. The Tribunal has jurisdiction over the Program decisions as is stipulated in section 16(3) of the Act.

While the details of the settlement negotiations may well be subject to confidentiality and not therefore within the mandate of this Tribunal to comment on or review, the facts leading to the issuance of a Decision Letter are very much within its purview.

The question for this Tribunal is whether or not the Program's decision to deny the Applicant warranty protection was reasonable. The Program maintains it was because the Applicant did not accept the settlement offered. Counsel for the Program urged me to determine that this led TWC to legitimately denounce any further right of the Applicant to compensation under the warranty protection.

The Applicant claimed the settlement was not reasonable and relied on the earlier LAT decision of *Fuller (2001)* where the Tribunal upheld the Applicant's refusal to settle as it found that the builder's settlement offer was one "...they had no obligation to accept...Indeed it would have been unwise for them to have done so." In that case the Tribunal was concerned that the settlement contained a scheme whereby an independent contractor chosen by the Builder, without consultation with the homeowner, was to provide the remedial repair. Further, that independent contractor would be paid with monies from the Builder directly. Most unusual, however, was the broadly worded clause releasing both the Builder and TWC from all existing and future claims for deficiencies in the construction of the home. The Tribunal surmised that this was an attempt to contract out of the warranty protection provided by the Act.

The situation here is quite different. In this case the settlement envisioned by Greenvilla and the Program was a pure cash transaction which did not implicate any particular contractor. Indeed, the Applicant himself was to be the recipient of the monies so that he select a contractor of his choosing to provide the repairs.

The Tribunal notes that the Court of Appeal has held that it is not possible to contract out of the warranty provisions of the Act, unless the wording purporting to do so is explicit – see *Mandos v. Ontario New Home Warranty Plan (1995) O.J. No 347 (Ont C.A.)*. The wording contained in the release provided to the Applicant in this case is determined to be sufficiently explicit to achieve a contracting out of the warranty provisions of the legislation. While the wording is not as broad as that in the *Fuller* situation in that it does not extend to the house construction as a whole, there may well be some prior condition in one of the three included warranties – here I am thinking of the vapour barrier problem in the garage – which could in time possibly lead to a claim major structural defect.

Given such a possibility, as well as the existence of such mistrust between the Parties as well as the unrepresented Applicant's evidence of feeling intimidated at the settlement negotiations, I find that his refusal to agree to the settlement was not unreasonable and, as a result, his warranty claims therein contained should not be therefore rejected.

The sensible conclusion is to simply redraft the Release omitting any reference to a waiver of damages for any future claim based upon a condition pre-existing at the time of executing the Agreement. Since the Settlement is not between the Program and the Applicant, this Tribunal has no authority to dictate its terms and conditions. It would therefore be appropriate for the Program to enter into the settlement and claim any funds paid out from the Builder.

Delayed Closing Costs

The Applicant failed to produce any independent evidence to support his allegation that restaurant meals were incurred on a daily basis between December 20, 2002 and January 3, 2003. His claim of \$25.00 per day is certainly not unreasonable given that his is a family of three, but the Tribunal is not convinced the costs were in fact incurred. The Applicant's credibility was not entirely without question given his claim to the Tribunal he had no experience in appearing before it when he did in fact have an earlier Hearing in which he represented himself for the most part. Further, the Tribunal finds it unlikely a family would eat out daily over the holidays when it did have all cooking facilities available to it in the home. This part of the claim is denied.

The Claim for the January rent is also denied based on the clear evidence that this rental cost was already reimbursed by the Program in the terms of the earlier Delayed Costs settlement amount paid to the Applicant.

Finally, the Tribunal is not persuaded that the Applicant actually incurred the costs he claims for legal advice as a consequence of the delayed closing. He may indeed have made the two trips to the lawyer which he claims and it may have cost him some wages to do so, neither of which is supported by any receipt or documentation. Nonetheless the facts have established there were a number of other legal issues taking place at this time, any one of which may have led to the need to personally attend at his counsel's premises. The Tribunal denies this claim as well.

Costs

All three Parties have submitted written arguments for cost under Rule 14.

As already noted, the relationship between these parties is not a happy one. Bad faith has been alleged on all sides. The Tribunal finds that neither side is blameless. The Applicant is clearly a methodical and detailed individual and an

exacting purchaser. As noted, he had already purchased a home which had not satisfied him such that he had claimed against TWC before this Tribunal; he was therefore extra vigilant in this purchase. He attended the site daily, as he had the Agreement of Purchase and Sale amended to remove restrictions to his presence on the site. The evidence was that he had interfered with the trades

and with the construction sufficiently to earn him the reputation with the Builder and subtrades of being a problem. Trespass charges were seriously considered and extensive legal negotiations and representations made concerning his activity on the site prior to possession. TWC witnesses testified that the Applicant was “difficult” and Mr. Stephens stated the Program took the “unusual step” of ensuring two inspectors attended at the initial inspection into his warranty claims based on the Applicant’s reputation and history. Ms. Acchione for the Builder testified that numerous homeowners have had claims against Greenvilla for this site; all have been resolved over time - save for the Applicant.

On the other side, the Applicant had already experienced the frustration of having to appear before this Tribunal against a builder he believed had constructed a deficient house, only to have lost his appeal to more experienced counsel representing TWC and the builder. Further, he believed strongly that this home had serious construction infractions, only some of which were in issue before the Tribunal. Despite his having so advised the Builder on a number of occasions, no attempts at rectification had been apparent. Once he involved TWC, whom he expected would act on his behalf to assist him against the Builder, it rather sided with the Added Party, even eventually reversing its decision to provide him the warranty coverage he had initially been granted.

Recently Vice-Chair McIntosh considered submissions by Parties on costs before this Tribunal. In 2606 ONHWP Claim (2005) he noted that costs do not follow the event, as was argued by Counsel for TWC, under the Licence Appeal Tribunal Rule 14, but are rather subject to conditions outlined specifically in the Rule. His synopsis of the normal precursors to the costs request are very much on point:

The Tribunal is often faced with a good deal of acrimony between the Parties in these matters. The Applicants have normally expended a great deal of their capital in a home which, given the size of that expenditure, leads them to an expectation of perfection which is at odds with what the builder deems to be his obligation under the APS and the codes and regulations to which he is subject. New homeowners, quite naturally given the proclamations of consumer protection that accompany the Act, look to Tarion to be the consumer’s champion against the builder whom they almost always come to view as a large and uncaring corporate entity. When Tarion takes the view that homeowner’s claims are without merit or not warranted under the Act and the perception can quite quickly form that Tarion is no longer the consumer’s champion but rather a “tool” of the development industry. This perception is unfounded, and is certainly so in this matter. It is, nevertheless, extremely difficult to disabuse. This is particularly the case when, at the hearing stage, counsel for the developer and Tarion find themselves essentially in concert against an unrepresented Applicant...

The fact of Applicants coming before the Tribunal unrepresented and finding arrayed against them not only extremely competent counsel, but counsel also specialized in the workings of the Act, is simply a fact which the exigencies of these claims dictate. The amounts in issue, while in variance from case to case usually even, if recovered, would not be enough to cover the most modest of counsel fees....

The converse is of course also true. If the mediation mechanism between Tarion, the builder and the owner breaks down for whatever reason Tarion and the builder are forced to defend claims incurring legal costs usually far in excess of the amounts in issue. Such matters would, in the ordinary course of civil litigation, be resolved if opposing counsel and the imposition of party and party costs following the event were involved, which is not the case before the Tribunal for the reasons stated.

The realities surrounding these matters are the fault of no one. Tarion and the Added Party have every right to hire competent counsel, as in this case they have, and the position of the Applicant as unrepresented is practically speaking beyond his or her control....

Rule 14 specifically limits the role of a party's conduct giving potential rise to a costs award to conduct of a party "in proceedings before the Tribunal". It is not conduct which occurred in creating the proceedings which is caught by this section, such that conduct of the Parties prior to the Hearing is not a factor. Rather the conduct to be reviewed is that which occurred during the proceedings, as is obvious from subsection 14(2) which, although not an exhaustive list, only references actions taken by parties within the Tribunal process.

This Tribunal adopts the reasoning in 2606 ONHWPA Claim, supra, as concerns the conduct of the Parties before it during this Hearing. Consequently, it dismisses all claims for costs incurred during the eight days of the Hearing.

With regard to the Added Party's submissions concerning alleged misconduct of the Applicant in (a) his attempt to mislead the Tribunal concerning his lack of experience in appearances before it, and (b) his "improper interference" with the drafting of both Mr. Caron and Mr. Nellis' Reports, the Tribunal concludes that the Applicant is, in fact, relatively inexperienced. Further, he has already faced the consequences of his representations in the Tribunal's finding as to his credibility. As concerns the latter, the Tribunal has earlier commented on this to the effect no negative inference was drawn.

Despite submissions made by both the Added Party and, by adoption, Tarion, the Orders of Vice Chairs Israel, Flude and Kennelly concerning preliminary hearings held on this matter all concluded that the Applicant's actions under review were taken in good faith and, as such, the Tribunal finds no basis to conclude they were unreasonable, frivolous, vexatious or in bad faith. No costs are therefore to be awarded on their basis.

The preliminary Order of Vice-Chair McIntosh dated January 2006, requires some consideration. The Motion brought by the Builder was for access to the Applicant's home by his engineer to assess the warranty and recommend a repair method. On hearing submissions the Motion was denied. The Vice-Chair noted in his reasons that he was perplexed as to the request given that the issue before the eventual Tribunal Hearing was whether the Applicant had forfeited his warranty based on unreasonably denying access, hence the builder's reasons for the Motion seemed unnecessary.

In the event however, the Tribunal at the Hearing has concluded that the denial of access was not so unreasonable as to justify Tarion's denial of the warranty coverage. As a result, the scope and method of repair do become relevant and evidence on both is necessary to properly deal with the issues raised. Consequently, in light of the circumstances which unfolded, the evidence sought by the Builder was very much relevant and this Tribunal is unable to conclude its reasons for bringing the Motion were of a nature to trigger a costs penalty under Rule 14.

The Tribunal finds no justification to award any costs under Rule 14.

DECISION

The Tribunal orders

1. The Program provide the Applicant with \$2,500.00 for the repair/replacement of the front doors;
2. The repairs recommended by Mr. Genge for the air gap/membrane deficiency be conducted. If access is not provided by the Applicant for this purpose within 60 days of this Order, then he will be deemed to have rejected this repair as a benefit in terms of s.14(6) of the Act and thereby be barred from further warranty repair/compensation on these items; and
3. The Program is to pay compensation to the Applicant for those three items warranted and referenced in the settlement offer he rejected with the Builder.

All other claims by the Applicant are denied.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

Released: April 24, 2007

The 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

FIELDSTONE HOMES LTD.-ADJ-Adjournment

IN THE MATTER OF a REGISTRATION by
FIELDSTONE HOMES LTD.

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Ontario New Home Warranties Plan Act*

TO REFUSE REGISTRATION

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

FIELDSTONE HOMES LTD.

Applicant

-and-

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

Respondent

ADJOURNMENT

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

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, July 4, 2007.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

RELEASED: April 2, 2007



ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter O.31

RITA M. WALLACE-ADJ – Adjournment

IN THE MATTER OF a CLAIM by
RITA M. WALLACE

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)

RITA M. WALLACE

Applicants

-and-

TARION WARRANTY CORPORATION

Respondent

-and-

THORNWOOD (SCRIVENER SQUARE) INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a pre-hearing in the above matter on April 16, 2007;

AND WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on June 4 and 5, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing to commence at 9:30 a.m., on Wednesday May 16, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at 9:30 a.m., on Monday June 25, 2007 and to continue on Wednesday June 27, 2007, if necessary.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Acting Chair

RELEASED: April 11, 2007

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

DAN AND ASAF LUZON

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

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: NAVA YEHUDAIFF, representing DAN & ASAF LUZON, the
Applicants

BRENT ARNOLD, Counsel, and KARIN GAUPHOLM, Field Claim
Representative, representing Tarion Warranty Corporation

NICK CIRCOSTA, representing Lakeburn Land Capital
Corporation, the Added Party

DATE OF
PRE-HEARING: March 21, 2007

Toronto

ORDER

Following attendances on March 21, 2007, at a hearing before the Licence Appeal Tribunal of Nava Yehudaiff, ("the Applicants' Representative"), Brent Arnold, Counsel and Karin Gaupholm, Field Claim Representative, representing Tarion Warranty Corporation (the "Respondent"), and Nick Circosta, representing Lakeburn Land Capital Corporation, ("the Added Party");

The Tribunal makes the following order respecting the hearing:

1. The Parties to this matter are the Applicants, Dan and Asuf Luzon, Tarion Warranty Corporation, ("the Respondent") and Lakeburn Land Capital Corporation ("the Added Party").

2. The proceedings in this matter are settled in accordance with the Settlement & Release executed by the Applicants' representative on March 21, 2007, a copy of which has been filed with the Tribunal.
3. The hearing scheduled for April 26, 2007, is cancelled.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Member

RELEASED: April 3, 2007

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



PRE-HEARING

JEFFREY AND TRACY COMPTON

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

TO DISALLOW A CLAIM

TRIBUNAL: DONALD BENNINGER, presiding Member

APPEARANCES: BERND MICHAEL RICHARDT, Counsel, representing the
Applicants

BRENT ARNOLD, Counsel, representing Tarion Warranty
Corporation

W. RANDALL SELLER, Counsel, representing the Added Party,
B & C Contracting (Kenora) Inc.

DATE OF
PRE-HEARING: March 29, 2007

by teleconference

ORDER

A pre-hearing was held in this matter on March 29, 2007, before this Tribunal in the presence of Bernd Michael Richardt, Counsel, representing Jeffrey and Tracy Compton (the "Applicants"); Brent Arnold, Counsel, representing Tarion Warranty Corporation ("Tarion") and W. Randall Seller, Counsel, representing B & C Contracting (Kenora) Inc. (the "Added Party").

The Tribunal Orders that:

1. The Parties to the hearing are the Applicants, Tarion and the Added Party.
2. The Supplementary Decision Letter dated March 9, 2007, is not at issue in this matter.
3. There was no resolution of the quantum issues identified in the Decision Letter dated December 4, 2006. The Parties were advised that in the event the matter

is settled prior to the hearing date, the Tribunal shall be advised of this in writing, with copies to all other Parties.

4. The Applicants agreed to provide access to Tarion and the Added Party, at a prearranged date and time, in order for their experts to carry out an on-site inspection and prepare an estimate to resolve this matter. This will be completed within seven business days from the date of this order. Should the matter be settled prior to the release of this Order, no such inspection need take place.
5. The Parties shall make full, complete and timely disclosure as required by Rule 6 of the Rules of Practice of this Tribunal. The expert reports shall be exchanged on or before April 27, 2007.
6. By no later than May 4, 2007, all Parties shall advise the others of the full names of the witnesses they propose to call to testify at the hearing. Such advice shall also contain a brief synopsis of the proposed testimony of each witness. The Applicant intends to call two witnesses and the Respondent intends to call two witnesses. The Added Party intends to call up to three witnesses.
7. The hearing scheduled to commence on April 30, 2007, at 10:00 a.m. in Thunder Bay is adjourned and re-scheduled for May 16, 2007, commencing at 9:30 a.m., to continue, if necessary, on May 17, 2007, at The Lakeside Conference Centre, 470 First Avenue South, Kenora, Ontario.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
presiding Member

RELEASED: April 12, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



KRYSTYNA RUTA

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: KRYSTYNA RUTA, appearing on her own behalf

SCOTT KIRKPATRICK, Counsel, representing Tarion Warranty
Corporation

GREGORY DIMITRIOU, Counsel, appearing on behalf of Georgian
Glenlake Inc.

DATE OF
HEARING: March 14, 2007

Toronto

ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (the "Tribunal"), from a Decision Letter dated October 25, 2006, issued by Tarion Warranty Corporation ("Tarion"), in which decision Tarion denied the claim of Krystyna Ruta (the "Applicant") under Section 14.(3) of the Ontario New Home Warranties Plan Act (the "Act").

The Applicant's claim relates to a residential condominium unit situated in Toronto, that the Applicant purchased from the builder, Georgian Glenlake Inc. (the "Added Party"). The Applicant and the Added party signed an Agreement of Purchase and Sale ("A.P.S.") dated February 24, 2002, and the Applicant duly paid the purchase consideration due to the Added Party. The unit purchased by the Applicant was, after the signing of the A.P.S., substituted for another larger unit by way of a written amendment signed by both parties. In terms of this amendment, the Applicant purchased another unit in the condominium development, subject to the same terms and conditions as agreed under the A.P.S., save and except for an increase in the purchase consideration due to the larger unit being substituted for the original unit.

The unit was completed for possession on January 7, 2005, and the Applicant took actual occupation in March 2005. Included in the consideration were "black appliances including eighteen cubic foot frost free refrigerator", as well as other appliances (Exhibit 4, Schedule "B").

Certain deficiencies were observed by the Applicant after she took occupation of her unit and were reported to the Added Party and rectified. However, there was one deficiency that was reported to the Added Party and which is the sole issue for decision by this Tribunal. This issue relates to the fridge door not being capable of opening or swinging to 90 degrees as the door is prevented from so doing by the kitchen's central immovable island with which the door touches when it opens to 80 degrees. The Applicant complained to Tarion as a result of which an inspection by Tarion was conducted at the unit on July 17, 2006, at which the Applicant and Tarion's representative were present. A report styled "Warranty Assessment Report" dated July 26, 2006, was then issued by Tarion. The report, insofar as it related to the Applicant's claim involving the fridge door, stated as follows:

Item:

Counter top to be moved further back as not enough room to move about and to open fridge fully.

Observation:

The kitchen is located at the central east side of the unit.

The owner indicated the fridge door does not open fully because it hits the counter top in front of the door.

The builder stated the counter tops were built according to the construction drawings approved by the City of Toronto.

The owner had upgraded to a stainless steel fridge from the original builder supplied "black" appliances. There is one single door that opens from left to right. The width of the aisle between the counter tops measured approximately 2'-8" or 32" which allowed the fridge door to open approximately 80 degrees.

This complaint is a design matter and does not fall within the statutory warranties provided by the Ontario New Home Warranties Plan Act. This complaint may be covered by contractual warranties in your purchase agreement. You may therefore have recourse for this complaint under your purchase agreement.

Assessment:

NOT WARRANTED

Under sections 13(1)(a)(i) and (iii) of the Act, every vendor of a new home warrants that the home is constructed in a workmanlike manner and is free from defects in material and that it is constructed in accordance with the Ontario Building Code. This complaint does not represent a defect to work or materials, nor is it a violation of the Ontario Building Code.

(Exhibit 3, Tab 9)

The Applicant did not accept Tarion's conclusion that this issue was "not warranted" and pursuant thereto Tarion issued a Decision Letter dated October 26, 2006, to which the Applicant appealed to the Tribunal and which appeal forms the subject matter of this hearing. The following is quoted from Tarion's Decision Letter.

The builder has provided an "upgraded" stainless steel fridge that you chose in

lieu of the standard "black" appliances which are smaller in size in comparison to the "upgrade". The width of the counter space and wall behind the fridge is a matter of "**design**" which falls beyond the scope of the statutory warranty provisions set forth in the *Act*. The *Act* warrants defects in workmanship and materials, not **defects** in the "design" supplied by the builder.

This complaint is a contractual matter between you and your builder. You may have recourse for this complaint under your agreement of purchase and sale. Your builder can provide a fridge that will fit and operate in the manner it was intended within the parameter of the counter space or make adjustments in the "design" of the wall area behind the fridge.

Under sections 13(1)(a)(i) and (iii) of the Act; every vendor of a new home warrants that the home is constructed in a workmanlike manner and is free from defects in material and that it is constructed in accordance with the Ontario Building Code. This complaint does not represent a defect in work or materials, nor is it a violation of the Ontario Building Code.

(Exhibit 3, Tab 2).

THE EVIDENCE

The evidence of the Applicant consisted of Krystyna Ruta's testimony while the evidence of Tarion consisted of the testimony of Field Claims Representative, James Alegre and Jeffrey Usher. A summary of the testimony of the aforesaid persons follows.

THE TESTIMONY OF KRYSTYNA RUTA

Ruta stated in her testimony that the appliances were placed in the unit some three weeks after she took possession. She commenced to reside in the unit in March 2005, and insofar as the kitchen was concerned, she observed it to be "dysfunctional". She explained this to mean that she could not "fully open" the fridge door as the central kitchen island counter prevented the door opening fully. The fridge itself is recessed in the kitchen counter with its back against the kitchen wall and the fridge cannot be moved back any further.

In cross-examination, she stated that originally she purchased a one-bedroom unit in the condominium but changed to a two-bedroom unit. She had not observed a two-bedroom unit in the condominium prior to purchasing her two-bedroom unit, nor had she observed a model of a two-bedroom unit.

She went on to state that she did receive a written quotation for \$5,600.00 for alterations to the unit's kitchen so as to permit the full opening of the fridge door (Exhibit 3, Tab 12).

She also confirmed having entered into the A.P.S. and a subsequent amendment thereto regarding the change to a larger unit in the same condominium development (Exhibit 4). Other than a change in the purchase consideration and larger unit, the terms of the A.P.S. remained unchanged.

Ruta was shown and confirmed paragraph 22 in the A.P.S. signed by her, which reads as follows:

The Vendor represents and warrants to the Purchaser that the Vendor is a registered vendor/builder with the Ontario New Home Warranty Program (the "Warranty Program"). The Vendor covenants that on completion of this transaction a warranty certificate for the Unit will be requested by the Vendor from the Warranty Program. The Vendor further covenants to provide the Corporation with a similar warranty certificate with respect to the common elements. These shall be the only warranties covering the Unit and common elements. The Purchaser acknowledges and agrees that any warranties of workmanship or materials, in respect of any aspect of the construction of the Condominium including the Unit whether implied by this Agreement or at law or in equity or by any statute or otherwise, shall be limited to only those Warranties deemed to be given by the Vendor under the Ontario New Home Warranties Plan Act, R.S.O. 1990 degrees c.o. 31 ("ONHWPA") and shall extend only for the time period and in respect of those items as stated in the ONHWPA; it being understood and agreed that there is no representation, warranty, guarantee, collateral agreement, or condition precedent to, concurrent with or in any way affecting this Agreement, the Condominium or the Unit, other than as expressed herein. The Purchaser further acknowledges and agrees that notwithstanding the fact that the deposits payable under this Agreement are paid to the Vendors Solicitors in trust or to a trustee pursuant to the Act, the Vendor's Solicitors or the trustee shall have the right to release such deposits to the Vendor or to any other party provided that the Vendor obtains prescribed security under the Act. The Purchaser hereby irrevocably appoints the Vendor his/her agent to complete the Ontario New Home Warranty Program Certificate of Deposit and any excess condominium deposit insurance documentation in this regard as required.

(Exhibit 4)

Ruta further confirmed paragraphs 27, 32, 34 and 43, in the A.P.S., and which state as follows:

27. The Purchaser acknowledges that the Condominium will be constructed to Ontario Building trade requirements at the time of issuance of the building permit. The Purchaser covenants and agrees the Purchaser shall have no claims against the Vendor for any equal, higher or better standards of workmanship or materials. The Purchaser agrees that the foregoing may be pleaded by the Vendor as an estoppel in any action brought by the Purchaser or his successors in title against the Vendor. The Vendor may from time to time, change, vary or modify in its sole discretion or at the instance of any governmental authority or mortgagee, any elevations, building specifications or site plans of any part of the Condominium, to conform with any municipal or architectural requirements related to building codes, official plan or official plan amendments, zoning by-laws, committee of adjustment and/or land division committee decisions, municipal site plan approval or architectural control. Such changes may be to the plans and specifications existing at inception of the Condominium or as they existed at the time the Purchaser entered into this Agreement, or as illustrated on any sales material, including without limitation, brochures, models or otherwise. With respect to any aspect of construction, finishing or equipment, the Vendor shall have the right, without the Purchasers consent, to substitute materials, for those described in this Agreement or in the plans or specifications, provided the substituted materials are in the judgment of the Vendor's architect whose determination shall be final and binding.
32. The Vendor and the Purchaser agree that there is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed herein in writing.
34. The Purchaser acknowledges that the suite area of the Unit as may be represented or referred to by the Vendor or any sales agent, or which appear in any sales material is approximate only, and is generally measured to the outside of all exterior, corridor

and stairwell walls, and to the centre line of all party walls separating one unit from another. NOTE: For more Information on this method of calculating the floor area of any unit, reference should be made to Builder Bulletin No. 22 published by the Ontario New Home Warranty Program. Actual useable floor space may vary from any stated or represented floor area or gross floor area, and the extent of the actual or useable living space within the confines of the Unit may vary from any represented square footage or floor area measurement(s) made by or on behalf of the Vendor. In addition, the Purchaser is advised that the floor area measurements are generally calculated based on the middle floor of the Condominium building for each suite type such that units on lower floors may have less floor space due to thicker structural members, mechanical rooms, etc., while units on higher floors may have more floor space. Accordingly, the Purchaser hereby confirms and agrees that all details and dimensions of the Unit purchased hereunder are approximate only, and that the Purchase Price shall not be subject to any adjustment or claim for compensation whatsoever, whether based upon the ultimate square footage of the Unit, or the actual or useable living space within the confines of the Unit or otherwise. The Purchaser further acknowledges that the ceiling height of the Unit is measured from the upper surface of the concrete floor slab (or subfloor) to the underside surface of the concrete ceiling slab (or joists). However, where ceiling bulkheads are installed within the Unit, and/or where dropped ceilings are required, then the ceiling height of the Unit will be less than that represented, and the Purchaser shall correspondingly be obliged to accept the same without, any abatement or claim for compensation whatsoever.

43. The Purchaser acknowledges and agrees that the Vendor may, from time to time in its sole discretion, due to site conditions or constraints, or for marketing considerations, or for any other legitimate reason, including without limitation any request or requirement of any of the governmental authorities or any request or requirement of the Vendor's architect or other design consultants:
- i) change the Property's municipal address or numbering of the Unit (in terms of the unit number and/or level number ascribed to any one or more of the units comprising then Unit)
 - ii) change, vary or modify the plans and specifications pertaining to the Unit or the Condominium, or any portion thereof (including architectural; structural, engineering, landscaping, grading, mechanical, site servicing and/or other plans and specifications) from the plans and specifications existing at the inception of the project, or existing at the time that the Purchaser has entered into this Agreement, or as same may be illustrated in any sales brochure(s), model(s) in the sales office or otherwise, including without limitation, making any change to the total number of dwelling, parking, locker and/or other ancillary units intended to be created within the Condominium, and/or any change to the total number of levels or floors within the Condominium, as well as any changes or alterations to the design, style, size and/or configuration of any dwelling or other ancillary units within the Condominium;

Finally Ruta confirmed the following clause appeared at page 19, of the A.P.S.:

Actual usable floor space may vary from the stated floor area as per Ontario New Home Warranty Program guidelines. The Purchaser acknowledges and agrees that various types of flooring, such as carpets, marble, tile and/or hardwood floors in the Unit may result in different heights (to be established by the Vendor in its sole discretion) in the transitional areas between them, and that the Vendor may use appropriate reducers in the area. Materials, specifications and floor plans are subject to change without notice. All selections to be made from builder's samples only. All illustrations are artist's

concepts. All floor plan dimensions are approximate.

Ruta continued to state under cross-examination that when she advised the Added Party that the fridge door did not open more than 80 degrees, she was offered, without charge, a different fridge, which was more expensive than the one already in the unit and was a better quality model. She also stated that the fridge as installed under the A.P.S. "does fit properly into the cabinetry. She conceded that a smaller fridge "would permit full opening" of the fridge door.

She went on to state that she has used the fridge since 2005, and does make full use of any of the shelves on the inside of the fridge door. She explained that there are "two crispers" in the fridge both of which she is able to use, and she can quite easily remove the right hand crisper when the door is open. However, removal of the other crisper for cleaning "causes difficulty". Since occupation she has removed both the crispers on three occasions when she needed to clean the fridge. The island prevents the fridge door from fully opening through 90 degrees although it can open to 80 degrees. The central island has a sink in it and an electrical connection and is fully functional.

She conceded that the Added Party is entitled to make substitutions of products of equal or better quality as compared to products supplied.

The Applicant at this point closed her case.

THE TESTIMONY OF JAMES ALEGRE

Alegre testified that he has a Diploma in Architectural Technology from a community college and has extensive knowledge of construction in the building industry. He is presently a Field Claims Representative with Tarion and prior to this position, he worked for architectural firms. He has been with Tarion for some 1 ½ years during which time he has inspected some 200 residential homes.

He went on to state that he inspected the Applicant's condominium unit insofar as the Applicant's complaint regarding the fridge door was concerned. He determined there was no violation of the Ontario Building Code (the "Code") relative to the complaint of the Applicant.

Shown a copy of a photograph (Exhibit 3, Tab 3), he confirmed having taken the original thereof. This copy photograph indicates the door of the fridge open to about 80 degrees and further indicates that contents within the fridge can without difficulty be moved in and out of the fridge through the opened door. Shown two further copies of photographs (Exhibit 3, Tab 3), Alegre confirmed having taken those photographs as well and also confirmed that the open fridge door contained and held various articles on the shelves of the door itself. The third copy of a photograph shows Alegre measuring the distance from the countertop between the fridge and the island. This measurement, according to Alegre, is 32 inches which "is sufficient to meet the requirements of the Code".

He went on to state that the layout of the Applicant's unit is typical of compact

condominiums units. Large kitchen units such as fridges “will affect space”.

Alegre went on to state that the Decision Letter appealed by the Applicant refers to the Added Party having “provided” an upgraded stainless steel fridge “in lieu of the standard black fridge” installed by the Added Party. This statement is not correct. The Applicant wanted to retain the “black” fridge as it blended with the other appliances, which were also black in colour. Accordingly, no other fridge was actually provided to the Applicant, although offered by the Added Party. Had the Applicant accepted the Added Party’s offer of the upgraded stainless steel fridge in replacement of the original black fridge, the door of the former would have opened fully. Only a replacement fridge in stainless steel was available. This replacement fridge is of better quality, as compared to the installed fridge.

He concluded his testimony by stating that both “crispers” within the fridge can be cleaned and can be removed in order to adequately clean them.

THE TESTIMONY OF JEFFREY USHER

Usher testified that he is currently the Vice-President of the Added Party’s high-rise developments. Prior to his employment with the Added Party, he was also employed in high-rise developments of other builders/developers and, in the course of his career, has overseen the construction of some five thousand to six thousand residential homes.

After the Applicant had purchased her condominium unit, Usher met with her a number of times when he had discussions with her.

He went on to state that the A.P.S. signed by the Applicant and the Added Party is a standard type agreement in use in the building industry and it outlines the rights and duties of those parties.

In his discussions with the Applicant, they resolved all the Applicant’s complaints, other than the one issue that founds this appeal. In dealing with the Applicant’s other complaints, the Added Party, in order to satisfy the Applicant, had gone beyond both the terms of the A.P.S. and the Added Party’s obligations thereunder so as to show the utmost good faith.

Insofar as the issue of the fridge is concerned, the Added Party offered to replace the installed fridge with an upgraded stainless steel fridge which would ensure the door of the latter fridge had full clearance when opened. The proposed replacement fridge was more expensive than the fridge installed and the Added Party offered it as a no cost replacement to the Applicant. The Added Party did not have a full size model suite to show to prospective buyers of units, although there was a figurette of the unit’s kitchen available for inspection by prospective purchasers.

The fridge supplied and installed by the Added Party in the Applicant’s unit was fully functional and could be adequately cleaned when required. The fridge supplied with the unit could be adequately cleaned within no more than ten minutes. The fact that the door did not open to 90 degrees, but only to some 80 degrees, did not affect the

removal of the “crispers” for cleaning purposes. One crisper had to be removed so as to enable the other crisper to be removed. The removal and cleaning of the crispers would take no more than ten minutes. The fridge as installed could and did hold articles such as bottles and other objects in the door of the fridge. The fridge could be fully utilized and was fully functional and not defective in any manner.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal.

1. The Applicant and the Added Party entered into an A.P.S. on February 24, 2002, in terms of which the Applicant purchased a residential condominium unit from the Added Party.
2. Included in the unit purchased by the Applicant, were included certain kitchen appliances including a 18 cubic foot black refrigerator.
3. The Added Party supplied and installed an 18 cubic foot black refrigerator in the unit purchased by the Applicant.
4. The door of the 18 cubic foot black refrigerator supplied by the Added Party opened to some 80 degrees. It was not able to open further, as beyond 80 degrees, the door came into contact with her kitchen’s central island.
5. The Added Party, at no cost to the Applicant, offered to replace the black fridge with a replacement fridge of stainless steel but this offer was refused by the Applicant as she wished to have a black replacement fridge.
6. The stainless steel fridge offered by the Added Party would have enabled the door thereof to open to 90 degrees and beyond without contacting the built in centre island in the unit’s kitchen.
7. The stainless steel fridge offered by the Added Party is of equal or better quality than the black fridge installed in the unit’s kitchen in terms of the A.P.S.
8. The fridge installed in the unit’s kitchen is fully functional and is capable of being cleaned insofar as the interior and its components are concerned.
9. The unit, including the kitchen, has not been constructed contrary to the Ontario Building Code.
10. The unit, including the kitchen, has been constructed in a workmanlike manner and is free from defects in material.

THE LAW

The *Ontario New Home Warranties Plan Act* states as following:

13. (1) Every vendor of a home warrants to the owner,
- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
14. (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
- (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
 - (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Regulation 892 to the *Ontario New Home Warranties Plan Act* states as follows:

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

DECISION AND REASONS

The onus of proof rests upon the Applicant to satisfy the Tribunal that it should hold in favour of the Applicant.

The onus requires the Applicant to prove that:

- (i) the unit, including the kitchen, which she had purchased is not constructed in a workmanlike manner, is not free from defects in material and is constructed in violation of the Ontario Building Code as set forth in section 13. (1) of the Act, and
- (ii) she is entitled to receive payment out of the guarantee fund for damages for breach of warranty provided she has a cause of action against the Added Party for damages resulting from the breach of warranty as set forth in section 14. (3)(b) of the Act.

The evidence adduced in this matter shows that the Applicant was entitled to receive, and did receive, an 18 cubic foot fridge in black. However, the fixed centre island in the kitchen was so positioned that it only allowed the door of the fridge to open some 80 degrees before contacting the island itself. The Applicant wanted the door to open 90 degrees and found that in opening only some 80 degrees she had difficulty in cleaning the “crispers” within the fridge, when such crispers required cleaning. She conceded that in the period of approximately two years during which she had been in occupation of the unit she had only removed the “crispers” on two or three occasions so as to clean them. She had no other concerns concerning the fridge. Photographs taken by Tarion’s representative at the time he inspected the unit showed the inside shelves of the fridge’s door to be stocked with normal every day food objects that one would expect to find on the shelves of a fridge’s door (Exhibit 3, Tab 3). When offered a free replacement fridge of superior quality, she declined the offer on the sole basis of colour.

The replacement stainless steel fridge would have satisfied the Applicant’s concern insofar as being able to have the door open to 90 degrees, which was her sole complaint with the installed fridge.

The Applicant conceded all the terms and conditions set forth in the A.P.S. (Exhibit 4).

The Applicant quite readily conceded that the fridge installed in the unit operated satisfactorily, that the central fixed island is functional, that there is nothing in the documentation signed by the Parties as to where the island would be situated and that there is nothing in the documentation that the fridge door would swing through 90 degrees. She also conceded that she neither visited nor viewed the model units available for viewing by the Added Party. Additionally, she had not visited a two-bedroom unit prior to her signing the A.P.S., and thereby denied herself the opportunity of viewing and inspecting the kitchen and its appliances.

The scant interest or lack of interest in viewing the unit before purchasing it, indicates to the Tribunal that she was, to a large extent, the author of the situation she finds herself in. By viewing the unit prior to purchasing it, she may well have avoided the position in which she finds herself.

Having considered the evidence presented at the hearing, the Tribunal finds that the fridge installed in the unit’s kitchen complied with the terms and conditions of the A.P.S.; that the unit’s kitchen is constructed in a workmanlike manner; is free of defects in material and is constructed in accordance with the Ontario Building Code. The Tribunal also finds that the Applicant, when offered free of cost another fridge of better quality, albeit of a different colour, she rejected the offer.

The Tribunal further finds that at most, the Applicant may be occasionally inconvenienced by the fridge’s door not fully opening so as to allow unimpeded access to its interior so as to clean it. This occasional inconvenience, by her own admission, had only occurred on three occasions over some two years and can hardly be regarded as a hardship, but only as an occasional nuisance. The Applicant expected perfection in the unit’s kitchen. While perfection may not have been as expected, the Applicant

received a kitchen that is perfectly acceptable and contained no violations of the Ontario Building Code, nor has it been constructed in an unworkmanlike manner. Additionally, it is found to be free of defects in materials.

The Tribunal finds that the Added Party has not been in breach of warranty under section 13. (1) of the Act and the Applicant has no cause of action against the Added Party as envisaged by section 14. (3) (b) of the Act.

The Tribunal further finds that the Applicant has brought no evidence before it to substantiate damages resulting from breach of warranty (which has neither been proven nor found by this Tribunal). Accordingly, the Tribunal finds that the claim under sections 14. (3) of the Act is not proven.

For the Reasons above stated, the Tribunal disallows the Applicant's appeal.

ORDER

Accordingly, pursuant to the authority vested in it under section 16. (3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs Tarion to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: April 12, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
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PRE-HEARING

R. BARRY WRIGGLESWORTH

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

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: R. BARRY WRIGGLESWORTH, Applicant, in person

KERRI POPE, Counsel, appearing for Tarion Warranty Corporation

KATHERINE NEWMAN, Agent, appearing for Terra Developments
(Guelph) Inc., the Added Party

DATE OF
HEARING: April 4, 2007

Toronto

CONSENT ORDER

Upon the application to the Tribunal at the conclusion of the pre-hearing of this matter by all of the parties 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;

NOW THEREFORE, upon the consent of the Applicant, the Respondent and the Added Party, this Tribunal orders that the proceedings in this matter are now concluded and disposed of without a hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: April 12, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MOHAMMAD & SHAHEEN SAEED

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

TO DISALLOW A CLAIM

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

APPEARANCES: MOHAMMAD & SHAHEEN SAEED, Applicants, did not appear

PETER BALASUBRAMANIAN, Counsel, representing Tarion
Warranty Corporation

GINO BELVEDERE, Agent, representing National Homes
(Wellington 2) Inc. the Added Party

DATE OF
HEARING: February 5, 2007

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is the hearing of an appeal brought by Mohammad and Shaheen Saeed (the "Applicants") from a decision dated September 20, 2006 made by Tarion Warranty Corporation ("Tarion") denying the Applicants' 30-day and year-end warranty coverage under the *Ontario New Home Warranty Protection Act* R.S.O. 1990, c.O.31 (as amended)(the "Act").

The Applicants took possession of their new home on July 22, 2004, which is the date from which warranty coverage begins. The Applicants submitted their 30-day form to Tarion in a timely manner. They were thus eligible to ask Tarion to assist them with their outstanding items between December 16, 2004 and January 14, 2005, by requesting a conciliation inspection. A conciliation inspection was scheduled for February 15, 2005. On February 14, 2005, the Applicants contacted a Tarion representative and cancelled the appointment. As a consequence of the cancellation for the conciliation inspection,

the Applicants' 30-day claims were denied and all items listed on the 30-day form are considered resolved. The Applicants filed their Year End Form on time but did not request conciliation from Tarion regarding this form. Tarion denied the Applicants' Year End claim because the Applicants did not exercise their right to conciliation when eligible to do so. All of the items listed on the Year End Form are considered to be resolved. Having been denied 30-day and Year End warranty coverage by Tarion, the Applicants now appeal this decision to the Licence Appeal Tribunal (the "Tribunal").

REQUEST FOR ADJOURNMENT

On January 31, 2007, Mohammad Saeed sent a letter to the Tribunal requesting an adjournment of his hearing scheduled for February 5, 2007, because he had just returned to Canada after being out of this country and was not feeling well enough to attend the hearing. The Tribunal advised Mr. Saeed that the Tribunal would consider the request for adjournment at the hearing. On February 5, 2007, Mr. Saeed sent the Tribunal a copy of the letter he sent on January 31st, 2007, requesting the adjournment. There is no evidence to show that Mr. Saeed advised either Tarion or the Added Party of his request for an adjournment. He made no comments on the extent of his preparation for the hearing nor did he provide particulars of his medical condition.

Tarion opposed the request for the adjournment submitting that Mr. Saeed did not seek their consent for the adjournment nor did he even advise Tarion that he would be seeking an adjournment. The Tribunal notified Tarion a few days before the hearing that Mr. Saeed would be seeking an adjournment. Tarion had its witness present at the hearing and was prepared to proceed.

Gino Belvedere, agent for the Added Party, stated that the Added Party was prepared for the hearing and objected to the request for adjournment. Mr. Saeed did not inform the Added Party of his request for adjournment.

Upon careful consideration of the submissions of the parties hereto and of the circumstances of this case, the Tribunal denied the request for an adjournment. The hearing proceeded in the absence of the Applicants.

EVIDENCE

Patricia Lutz is the Tarion document manager and is familiar with the warranty process as well as with the documentation submitted with respect to this case. During the course of her testimony, Ms. Lutz was referred to the documentation found in the Respondent's Book of Documents. (Exhibit 3).

On December 10, 2003, the Applicants confirmed in writing that they received a copy of the Homeowner Information Package that was given to them by their builder. This package explains to new home buyers their rights and responsibilities under the Act including information relating to the 30-Day Form and the Year-End form. The Applicants were advised that, if after filing the 30-Day Form they failed to schedule an

inspection, then all of the items listed on the Warranty Service Form would be considered resolved and the matter closed.

Ms. Lutz stated that the Applicants filed their 30-Day Form on time and that they requested an inspection. In a letter sent to the Applicants dated August 27, 2004, Tarion acknowledged receipt of the 30-Day Form and advised the Applicants of their right to claim an inspection and the consequences of their failing to do so.

The inspection of the Applicants' home was scheduled for February 15, 2005. The Applicants cancelled the inspection. On February 14, 2005, Tarion wrote the Applicants confirming the cancellation of the inspection scheduled the next day and that "Your 30-Day Form warranty service request is now considered closed."

The Applicants filed their Year-End Form on time, and receipt was acknowledged in writing by Tarion. On August 8, 2005, Tarion wrote the Applicants advising that if the items found on their Year-End Form were not corrected by their builder by November 18, 2005, then the Applicants should contact Tarion between November 19, 2005, and December 19, 2005, to request a conciliation inspection of their home.

Ms. Lutz stated that she has reviewed all of the documentation relating to the Applicants' Year-End warranty claim and that she has found no records to show that the Applicants requested a conciliation inspection with respect to the Year-End claim.

THE LAW

Section 13 of the Act states, in part:

- (1) Every vendor of a home warrants to the owner,
 - (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material.
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code.
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

- (4) A warranty under subsection (1) applies only in respect of claims made hereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Section 16 of the Act states in part:

- (1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.
- ...
- (3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance

with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Subsections 4.2 (1) (2) and (10) and subsections 4.3 (1) (2) (9) and (10) of Regulation 892, as amended read as follows:

4.2 (1) In this section,

“30-day form” means the form that the Corporation requires for a warranty claim that an owner submits to the Corporation within 30 days after the date of possession.

(2) In order to make a warranty claim within 30 days after the date of possession, the owner shall complete and submit to the Corporation a 30-day form.

(10) If the owner does not request conciliation under subsection (9) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the 30-day form that the vendor does not repair or resolve by the end of the 180th day after the date of possession.

4.3 (1) In this section,

“year-end form” means the form that the Corporation requires for a warranty claim that an owner submits to the Corporation within the 30 days before the first anniversary of the date of possession.

(2) In order to make a warranty claim within the 30 days before the first anniversary of the date of possession, the owner shall complete and submit to the Corporation a year-end form.

(9) If the vendor does not repair or resolve all of the claim items listed on the year-end form mentioned in subsection (7) by the end of the 120th day after the first anniversary of the date of possession, the owner may request a conciliation by contacting the Corporation at any time from the 121st day to the 150th day, both inclusive, after the first anniversary of the date of possession..

(10) If the owner does not request conciliation under subsection (9) or if the owner cancels the conciliation requested under that subsection, the owner shall be deemed to have withdrawn all claim items listed on the year-end form that the vendor does not repair or resolve by the end of the 150th day after the first anniversary of the date of possession.

ANALYSIS

The Applicants cancelled the inspection with respect their 30-Day Form on February 14, 2005. Subsection 4.2 (10) of Regulation 892 provides that in such circumstances, the owners shall be deemed to have withdrawn all claim items listed on the 30-Day Form that the builder did not repair or resolve by the end of the 180th day after the Applicants took possession of their new home.

There is no evidence to suggest that the Applicants requested a conciliation inspection with respect to their Year-End claim. Under subsection 4.3 (10) of Regulation 892 the Applicants are deemed to have withdrawn all claim items listed on that form that their builder did not repair or resolve by the end of the 150th day after the first anniversary of the date of possession.

The Applicants therefore have no claim to 30 Day or Year-End warranty coverage.

DECISION:

The Tribunal dismisses the appeal and confirms the decision denying the Applicants' claims.

LICENCE APPEAL TRIBUNAL

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

RELEASED: April 3, 2007

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



ANTHONY AND MARLENE NASO

MOTION FOR AN EXTENSION OF TIME TO CONSIDER AN
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: NICOLE PADURARU, Counsel, representing the Applicants

NEIL ABBOTT, Counsel, representing Tarion Warranty Corporation

DATE OF
HEARING: April 2, 2007

Toronto

ORDER

Following attendances on April 2, 2007, at the Tribunal's Chambers at 1 St. Clair Avenue W., Toronto, Counsel for the Applicants advised that settlement discussions between the Applicants and their Builder had concluded only recently, such that the Appeal in this matter would, in all likelihood, be rendered unnecessary. Counsel further advised that settlement details are yet to be completed. In anticipation of such, Counsel advised the Tribunal that her clients requested an adjournment of this hearing until a later date.

Counsel for Tarion Warranty Corporation advised that his client had no objection. Given the potential for a four-day hearing, he submitted such an adjournment, if made peremptory on the Applicants, was consented to by the Respondent.

Having heard the submissions, the Tribunal makes the following Order:

1. The matter is adjourned to commence on Monday, July 16, 2007, at 9:30 a.m. at the Tribunal's Chambers at 1 St. Clair Avenue W., Toronto, to continue July 17, 18 and 19, 2007, if necessary.

2. This adjournment is peremptory on the Applicants.
3. The Applicants are to advise this Tribunal, and the Respondent, promptly, if and when the matter settles and their Appeal is, therefore, withdrawn.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: April 3, 2007

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

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d'appel en
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DOUGLAS BUCHANAN and DIANE DELANEY

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

TO DISALLOW A CLAIM

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: DOUGLAS BUCHANAN and DIANE DELANEY, Applicants,
representing themselves

ALISON BURTON, Counsel, representing Tarion Warranty
Corporation, Respondent

LIVIA CERASA and FRANK CERASA, officers of F. & W. Builders
Inc., Added Party

DATE OF
HEARING: January 9, 2007 Windsor

REASONS FOR DECISION

EXHIBITS

- Exhibit 1 Decision letter from Tarion dated August 15, 2006
- Exhibit 2 Notice of Appeal
- Exhibit 3 Respondent's Book of Documents
- Exhibit 4 Letter dated May 5, 2006, from Jennifer Goudie to Applicants
- Exhibit 5 Schedule Report dated June 8, 2006
- Exhibit 6 Group of photographs from report of Doug Dickinson dated August 24, 2006
- Exhibit 7 Two pages from the Ontario Building Code, detailing sections 9.30.6 (Ceramic Tile) and 9.23.14.5 (Subfloor thickness or Rating)

BACKGROUND

This matter involves an appeal to the Licence Appeal Tribunal (the "Tribunal") by the Applicants from a decision of Tarion Warranty Corporation ("Tarion"). The written decision of Tarion is set out in its letter dated August 15, 2006, wherein Tarion offered the sum of \$5,000.00 as damages for the Applicants' claim. The Applicants refused to accept this offer. These proceedings fall within the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990 c. O. 31("Act").

The Applicants purchased a newly constructed house in June 2004. The Added Party built the house. The floor on the main level had ceramic tiles laid throughout. However, within the first month of having taken possession, the Applicants noticed that the grout between the tiles had come loose so that the Applicants were sweeping up loose grout on a daily basis.

On inspection by Tarion, the problem with the grout was considered to be a warranted item. The builder was directed to repair the problem by January 23, 2006. For various reasons, the builder could not gain entry to the house in order to effect repairs. The Applicants either were absent, or wished to have other repairs done before the grout problem was remedied, or did not consider as being suitable the time or times that the builder's repairmen attended at the house to do the grout repair.

At the request of the Tarion representative, the Applicants had three estimates done which estimated the cost of repairs to the flooring. On their own initiative, they also had a report done by another inspector to outline what that inspector believed the problem was with the tiles. Tarion also had a person who was in the tile business inspect the tiles and do a further estimate for remedying the problem.

After Tarion's representative performed his inspections, and after receiving copies of the three estimates that the Applicants had obtained, and after receiving the estimate that Tarion itself had requested, Tarion offered to have the grout problem remedied by paying the sum of \$5,000.00 to cover the costs of replacing all the grout on the main floor, but with a different kind of grout that Tarion considered to be superior to the grout originally used.

The Applicants did not find this offer to be acceptable because they felt that the entire floor had to be taken off, a proper sub-floor put on and tile re-laid. Since the Applicants did not accept the decision of Tarion, they appealed to this Tribunal.

ISSUE

Whether the Applicants are entitled to have their entire floor replaced or to have all the grout replaced

EVIDENCE

Evidence of Diane Delaney

Ms. Delaney stated that the Applicants purchased the house on June 25, 2004. However, the decision letter dated August 15, 2006, Exhibit 1, states that the date for possession was June 12, 2004. But, since Ms. Delaney testified that she first noticed the problem on June 20, 2004, this Tribunal would accept the date for possession to be June 12, 2004. In any event, little hinges on the difference in the dates since Tarion acknowledges that the Applicants made the warranty claims under the Act within the applicable warranty periods.

After having moved in, Ms. Delaney at first thought that sand was being brought into the house. He would have to sweep up the grit daily. However, she soon realized that it was grout that had loosened from between the floor tiles that she was sweeping, and not sand. She stated that, at one location, the grout surrounding all four sides of two large pieces of tile had come out. Ms. Delaney further testified that, about two months later, grout was coming out "everywhere on the floor." These areas of the floor included the hallway, kitchen, front room and bathroom. She said that she called the builder many times, but they were too busy to come over.

An inspector from Tarion, a Mr. Sholtanuk, came over to inspect the floor and agreed that the grout problem was a warranted item. Ms. Delaney stated that, on the suggestion of Mr. Sholtanuk, the Applicants arranged to have three estimates prepared to determine the costs of repairing the problem. She loved her floor, but said, "...everything is falling apart on it." However, in light of the other evidence presented to this Tribunal, that statement does not stand up to further scrutiny.

Of the three estimates that the Applicant obtained, one estimate, found at Tab 16, Exhibit 3, was dated March 21, 2006, and was in the amount of \$17,922.00. Another estimate, dated March 23, 2006, and found at Tab 10, Exhibit 3, was in the amount of \$15,252.00. A third, undated, estimate, also found at Tab 16 of Exhibit 3, was in the sum of \$15,300.00.

Subsequently, by way of a Schedule Report, dated May 5, 2006, and filed as Exhibit 4, Tarion offered the sum of \$1,500.00 to "**remove all loose grout and replace with new grout**" (emphasis is added). In view of the three estimates that the Applicants had in hand, this offer was rejected.

Subsequently, after having an estimate done for it by another tradesman, Tarion offered, in its Schedule Report dated June 8, 2006, and filed as Exhibit 5, the sum of \$5,00.00 to "**Remove all grout** (note: not just the loose grout) **and replace with new epoxy grout and repair loose tiles to meet the performance standard**" (emphasis is added). However, after the Applicants had discussions with the tradesman who did the inspection for Tarion, the Applicants still refused the offer.

Then, in August of 2006, the Applicants had the floor inspected by one Doug Dickinson, the Executive Director of the Terrazzo, Tile and Marble Association of Canada. His

report, dated August 24, 2006, was attached to the Notice of Appeal in this case, filed as Exhibit 2. The Respondent objected to the admissibility of this report because its author was not present to give evidence before this Tribunal, so that the Respondent could not have the opportunity to cross-examine its author. In effect, it was hearsay evidence. The report was already before this Tribunal, as an attachment to the Notice of Appeal; however, the lack of oral testimony from the writer of that report and the lack of opportunity to cross-examine him would go to the question of what weight this Tribunal would place on that report, when compared to the other evidence presented to this Tribunal.

Although the report itself was attached to the Notice of Appeal, there were several photographs that had been attached to it, but which were not before this Tribunal. In effect, this Tribunal had an incomplete report before it. Accordingly, since the Applicants had a copy of the photographs, and since copies of them had already been sent to counsel for the Respondent, this Tribunal had those photographs filed as Exhibit 6 at this hearing. However, as it turned out, no evidence was given to explain any of those photographs.

In her testimony, Ms. Delaney stated that, in accordance with the information given to the Applicants by Mr. Dickinson, the problem with the tile floor arose, not from a problem with the grout, but, to use her words, from his belief that “nothing is holding the tile to the fiber board. The mortar is not cured to the floor.” She stated that one piece of tile just popped up easily. This piece of tile, as it was established from the evidence of Mr. Buchanan, the other Applicant, was a small, 4” x 4” diamond-shaped piece of tile clearly shown in a photograph found at Tab 19D of Exhibit 3. The subject tile piece is the only one in that photo surrounded by duct tape. Ms. Delaney stated that the Applicants sent a copy of Mr. Dickinson’s report to the builder and to counsel for the Respondent and to this Tribunal. There is no record, however, that this Tribunal ever received the photographs attached to the report.

Relying on the Dickinson report, the Applicants were of the opinion that re-grouting would not hold the tiles in place; it was the underlying mortar and the possible lack of proper sub-floor that was at fault.

In fact, this Tribunal noted that the replacing of the flooring was the subject of the three estimates obtained by the Applicants, whereas the estimate obtained by Tarion was only for re-grouting the main floor tiles. This difference in the work proposed to be done is, no doubt, the main reason for the huge variation in repair costs between the estimates that the Applicants had obtained and the estimate that Tarion had obtained.

In cross-examination by counsel for the Respondent, Ms. Delaney acknowledged that she has no background in the construction industry and was only “a little familiar” with the Ontario Building Code. Ms. Delaney was directed to review the letter dated February 16, 2006, from the Added Party to Tarion, and found at Tab 6 of Exhibit 3. The letter cited the inability of the Added Party to enter the Applicants’ premises to correct the grouting problem. Although the letter gives January 18, 2006, as the date the builder contacted the Applicants, Ms. Delaney states that the date was actually later than that, on January 31, 2006. That was the only date on which Ms. Delaney states they heard from the builder. She also said that she did not want the builder to re-grout the floor

because the Applicants had been told by Mr. Sholtanuk to obtain some estimates. As well, the Applicants wanted the builder to complete repairs to some walls in their house before any re-grouting was done.

Counsel for the Respondent also was able to have Ms. Delaney confirm that no municipal orders from the city where the house was built had ever been issued under the Ontario Building Code concerning any problem or problems with the flooring in the house. They never received any Order to Comply from their municipality.

In fact, this Tribunal notes, as appeared from the testimony of a representative of the builder/Added Party, no Order to Comply had ever been issued by the municipality relating to the Applicants' house.

Evidence of Doug Buchanan

Mr. Buchanan, the other Applicant, was the only other witness to testify on behalf of the Applicants.

He confirmed that, on his 30-day warranty claim form, he noted that mortar was missing from the main floor tiles. Subsequently, on his year-end form, found at Tab 3 of Exhibit 3, item 22 on the list of outstanding items, reads as follows:

22. Main Floor. Grout coming out of several tiles and not sealed.

It is that item number 22 which is referred to in Tarion's decision letter of August 15, 2006, and for which the cash settlement of \$5,000.00 was offered.

Mr. Buchanan said that, on November 22, 2005, he had sent all the documentation that he had in his possession at that time to the local Better Business Bureau (BBB) regarding the problems with his floor. Just what he hoped the BBB would do is not stated in his evidence. Nor was any further evidence given as to what reply, if any, the Applicants received from the BBB.

Then, on December 12, 2005, the Tarion representative, Mr. Sholtanuk, did an inspection of the flooring problem. As already stated, he considered the grout problem to be a warranted item. The Warranty Assessment Report, prepared as a result of that inspection, is found at Tab 5, Exhibit 3. The letter accompanying it stated that the builder must resolve the problem by January 23, 2006. Mr. Buchanan explained the reasons for not giving access to his house to the builder's repairmen for the purpose of repairing the grout problem. Such reasons included:

1. A representative of the builder called on January 31, 2006, to arrange repairs, but the Applicants were to leave on a holiday soon, and did not agree to have work done before their departure.
2. On February 28, 2006, a "handyman," to use Mr. Buchanan's words, from the builder showed up. He told Mr. Buchanan that replacing the grout would be noisy. Mr. Buchanan, therefore, asked the handyman to repair some wall cracks, first, because Mr. Buchanan would be sleeping, as a result of shift work.

3. On the same day, February 28, 2006, Mr. Buchanan called Tarion. Because the date of January 23, 2006, had already passed, being the date by which Tarion had required the builder to complete the repairs, Mr. Buchanan said that a representative of Tarion told him during that telephone call that he did not have to have that builder do the repairs.
4. Subsequently, on March 3, 2006, Mr. Buchanan said that Mr. Sholtanuk told him that he, Mr. Buchanan, must use the builder to do the repairs. However, this Tribunal noted that, in subsequent evidence given by Mr. Sholtanuk himself, he uncategorically stated that his advice to homeowners who are in the same situation in which the Applicants found themselves is always that they should work together with the builder. It was not true that he told Mr. Buchanan that he must use this builder. Mr. Sholtanuk merely encourages them to work together.

Mr. Buchanan then referred to the discrepancies that he found in two mailings that he received from Tarion. Both have already been referred to in these Reasons. One, a Schedule Report, dated May 5, 2006, and filed as Exhibit 4, stated that Tarion offered the sum of \$1,500.00 to remove and replace all loose grout. The second, a Schedule Report dated June 8, 2006, and filed as Exhibit 5, refers to an offer of \$5,000.00 to remove and replace all grout on the main floor with epoxy grout. Mr. Buchanan stated that he was confused by the different information in the two reports, especially since the subsequent decision letter refers to replacing loose grout only. At this hearing, however, Mr. Sholtanuk confirmed that Tarion's position was to offer the sum of \$5,000.00 to remove and replace all grout with new epoxy grout.

On July 25, 2006, Mr. Buchanan sent to Mr. Sholtanuk, by facsimile transmission, a letter found at Tab 14 explaining why he was refusing that cash settlement. Mr. Buchanan preferred to rely on the three estimates that he had in hand by that time, and which have already been referred to earlier in these Reasons.

Again, in his testimony, Mr. Buchanan referred to the report of Mr. Dickinson, filed with Exhibit 2, and maintained his position that the problem was, not with the grout, but with the floor underneath the tile, including a poor contact with the underlay.

In fact, it was at this point in his testimony, in response to questioning from this Tribunal, that Mr. Buchanan stated that the primary foundation of this Appeal was the report from Mr. Dickinson.

On cross-examination by counsel for the Respondent, Mr. Buchanan acknowledged that he was a power engineer, but was not familiar with the Ontario Building Code. He agreed, as well, that the builder was not allowed into the house to do the repairs to the grout.

He further stated that floor tiles were cracked in the outer perimeter of the floor. However, this Tribunal notes that Mr. Sholtanuk, who examined the floor on behalf of Tarion, saw no cracked tiles at all. Nor are any cracked tiles referred to in the report from Mr. Dickinson, on whose report the Applicants heavily relied. Faced with this conflicting

testimony, this Tribunal finds it to be incredible that no cracked tiles were observed or reported on in the outer perimeter of the floor. This Tribunal would reject that evidence. Mr. Buchanan also said that the diamond-shaped piece of tile shown in the photograph found a Tab 19D, and the only tile he removed, had popped out easily when the grout had been removed and that the mortar found on its underside was not applied evenly. There is no evidence before this Tribunal that any other tile, large or small, had been lifted up, other than this one small piece. This Tribunal would find it difficult, therefore, to consider that the amount of mortar under this one small piece of tile would be representative of the mortar under the tiles in the entire main floor area, comprised of the entry hallway, the kitchen, living room and bathroom.

In cross-examination by Mr. Frank Cerasa, on behalf of the Added Party, Mr. Buchanan also acknowledged that, after he lifted out the small, diamond-shaped tile piece, there were three screws in the underlying floor that Mr. Buchanan had removed. Mr. Buchanan submitted that the screws that were used were too short, relying on some printed information that was attached to the Notice of Appeal. Again, however, since only the printed information was before this Tribunal, and since no oral testimony was presented on behalf of the Applicants on the issue of the length of screw, there was no compelling evidence before this Tribunal that would allow it to reach the conclusion that the screws used were too short. At best, the printed material, far from establishing the truth of the matters stated therein, could only be used to explain the state of mind or reasoning of the Applicants in taking the position that they took in this Appeal.

Evidence of Robert Sholtanuk

Mr. Sholtanuk is an appeals claim representative for Tarion. In this position, he is to assess complaints and resolve disputes between builders and homeowners. He has been with Tarion for three and a half years. Before then, he was the Chief Building Official for Adelaide/Metcalf Township in Ontario, where he issued building permits and performed building inspections and enforced building by-laws and the Ontario Building Code. For eight years, he gave instruction on the Ontario Building Code for the Ministry of Municipal Affairs and Housing.

In this case, it was Mr. Sholtanuk who inspected this house and who wrote the decision letter of August 15, 2006, where he considered the grout problem in the Applicants' house to be warranted. He was also the person who inspected the premises on December 12, 2005, and who wrote the Warranty Assessment Report found at Tab 5 of Exhibit 3. However, although Ms. Delaney, in her evidence, stated that the grout problem was "everywhere on the floor," Mr. Sholtanuk found the problem in only about 10 to 15 percent of the entire main floor area. The areas affected were mainly the entryway, kitchen (sink area) and kitchen eating area.

There were no complaints made to him of structural problems. There were no signs of structural defects such as broken or cracked tile. Nor were there any outstanding Ontario Building Code violations relating to this house.

After Mr. Sholtanuk prepared his Warranty Assessment Report in December, 2005, the builder was given until January 23, 2006, to effect repairs. At Tab 11 of Exhibit 3 is found a copy of Mr. Sholtanuk's subsequent claim inspection done on March 29, 2006, which

listed warranted items which were not resolved by the builder and which were, therefore, to be settled by Tarion.

Tab 19 of Exhibit 3 contained copies of photographs that Mr. Sholtanuk had taken in the Applicants' house on October 23, 2006. He had taken photographs previously, but he stated that those were lost on his computer. But, he stated that on October 23, 2006, the condition of the floor was quite similar to that when he was first there in December, 2005. The only exception was the photograph at Tab 19D; when he was first there, the diamond-shaped piece was not secured with duct tape. The photos at Tabs A and I all reveal areas of either repaired or missing grout. The Tribunal circled those areas on those photographs as Mr. Sholtanuk was describing them.

Photo 19C, taken from the front entry and looking toward the living room and dining room, shows no missing grout, no loose grout or any deterioration. Photo 19J, taken in the dining room, shows no area of deterioration. Nor did he find any cracked or broken tiles.

Having regard to the content of these photos, and the evidence of Mr. Sholtanuk, not to mention the absence in the Dickinson Report of any reference to any broken or cracked tiles, this Tribunal considers the Applicants' claim of the condition of the grout and of the entire floor to be somewhat exaggerated. Accordingly, where the evidence of the Applicants and Mr. Sholtanuk differs, concerning the state of the Applicants' floor, this Tribunal prefers the evidence of Mr. Sholtanuk.

Mr. Sholtanuk agreed that the original offer, in Exhibit 4, was for the amount of \$1,500.00, and was for the purpose of repairing only the loose grout. Later, the subsequent offer of \$5,000.00 was for the purpose of replacing all the grout, in order, he said, to avoid the appearance of patchwork and to provide consistency in the appearance of the grout. Also, the suggested epoxy grout that was to be used was more expensive than the original grout that had been used in the first place. The epoxy grout is more expensive because it has greater elasticity and would not crack easily, whereas the original was more brittle. Mr. Sholtanuk went so far as to say that he thought that he overstepped his authority in making this offer, because, normally, Tarion would agree only to repair the loose and missing grout. In making the offer of \$5,000.00, Mr. Sholtanuk relied on the estimate contained in the letter dated October 5, 2006, found at Tab 17. His proposed solution to the Applicants' problem was the first occasion that he recommended using epoxy grout; on other occasions, he arranged for the use of portland-based grout, which happens to be more brittle, and less costly.

He did not accept the three estimates from the Applicants because they were exploratory in nature. In other words, they outlined the work that would be done to find out if there was a major underlying problem in the first place. He referred to them as "fishing expeditions," and that's why the amounts were so high. As well, those estimates dealt with replacing the entire floor, not just correcting the grout problem; but, as he already stated, he saw no reason to rip up the entire floor. He saw no indication that there was any kind of structural problem under the tiles. Nor did the tradesman whom Tarion used to obtain its estimate. There was, furthermore, no evidence that the floor had been improperly installed. On Mr. Sholtanuk's inspection of the floor, he saw no signs of tile

movement. If, as the Applicants alleged, the mortar under the tile was not adhering, he would expect to find broken tiles, but there were none.

He also commented on the evidence of Mr. Buchanan that the screws that Mr. Buchanan removed from the floor, from underneath the diamond-shaped piece that was removed, were 32 millimeters long and, therefore, too short. But, although Mr. Sholtanuk could not verify the length of the screw, he said that a 32-millimeter screw was equal to 1 1/8 inches in length. The underlay was 1/2 inch thick and the subfloor was 5/8 inch thick. This makes a total thickness of 1 1/8 inches. Therefore, a 1 1/8 inch screw would certainly penetrate both the underlay and the subfloor. He determined the thickness from reviewing the Applicants' photos and by going to the basement and looking up into the flooring.

Concerning Mr. Dickinson's report, Mr. Sholtanuk stated that the claim that there was no subfloor could not be the case. Plywood must first be placed down because that is what the walls are framed over. After that, the underlay is then put on.

Finally, he said that, if the builder had replaced the grout, Tarion's practice would have required the builder to give a further one-year warranty. That is no longer available since the builder had not been allowed onto the premises to do the grout repairs.

Evidence of Livia Cerasa

Ms. Cerasa is the President of the Added Party. The company has been in the building business for 15 years. She works in the service department, handles claims, and arranges appointments with the builder's servicemen. This case is the first time in those 15 years that this company has had to appear before this Tribunal.

Ms. Cerasa confirmed the difficulties that the builder had in not having been allowed to enter into the Applicants' house to repair the grout problem. She is the one who wrote the letters found at Tabs 6, 7, 8 and 9, outlining those problems.

The Tribunal accepts the evidence that such repairs were hampered by the unwillingness of the Applicants to allow entry to the workmen for the purposes of repairing the grout problem.

Ms. Cerasa also confirmed that the Added Party had never received a notice from the municipality that there were any outstanding work orders on the Applicants' house. If defects had been found on inspection, including any defect in the flooring under the tiles, the Added Party would have been given such a notice.

Evidence of Frank Cerasa

Mr. Cerasa is the Vice-President of the Added Party. He oversaw the construction of the Applicants' house. He saw the flooring and it was proper.

He is aware of the attempts made to repair the grout problem. This house had been a model home before the Applicants bought it. While the house was still a model home, the builder's office was in the garage. When the house was sold, the office was moved to the

house next door. Therefore, the builder was always easily accessible if the Applicants wanted them to come to the house to do repairs. The builder's servicemen could be contacted easily by radio.

Concerning the diamond-shaped piece of tile in the photo at Tab 19D, and the little amount of mortar on its underside, Mr. Cerasa testified that that piece could be easily lifted without cracking, once the surrounding grout was removed, because it was harder than the surrounding tile. It is made of porcelain and is not ceramic, as are the surrounding larger tiles. It is also thicker. Therefore, it needs less mortar underneath, in order to be pressed down to be level with the surrounding larger tiles.

He stated that his company has always been willing to repair the grout for the Applicants. In fact, he personally felt that Tarion was far too generous in offering the sum of \$5,000.00 to be paid out of the fund to which all registered builders contribute, including Mr. Cerasa's company. Having been in the construction business for 40 years, he felt that the repairs could have been done for less. Since 1992, the Added Party has built 800 or 900 houses. The Applicants' house was the first about which the Added Party has had to appear before this Tribunal. The company has even received a service award for excellence from Tarion.

According to Mr. Cerasa, to say there is no subfloor is ridiculous. This tile floor cannot be done without one. The grout problems resulted from shrinkage in the grout, not from a structural problem. In fact, on cross-examination by Mr. Buchanan, Mr. Cerasa stated that if there had been a problem with the tiles bonding to the mortar, the tiles would crack, but, here, there was no cracking.

THE LAW

Section 14(3) of the *Ontario New Home Warranties Act* provides as follows:

14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

(a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

Sections 16(1), (2) and (3) of the Act state the following:

16(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

16(2) A notice under subsection (1) shall state that the person or owner is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the

Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

The “Corporation” referred to in this section is defined, in section 1 of the Act, as the corporation designated under section 2 of the Act. In turn, section 2 of the Act states:

2. (1) The Lieutenant Governor in Council shall designate a non-profit corporation incorporated without share capital under the *Corporations Act* to be the Corporation for the purposes of this Act.

The designation referred to was made in Ontario Regulation 273/04 where it is provided as follows:

1. The corporation known as Tarion Warranty Corporation, formerly Ontario New Home Warranty Program, is designated as the Corporation for the purposes of the Act.

The basis for the position taken by Tarion in this matter is found in its decision letter and has its reliance on section 13(1)(a)(i) of the Act. That section provides as follows:

13 (1) Every vendor of a home warrants to the owner

(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

ANALYSIS OF EVIDENCE

The Applicants have the onus of proof in this Appeal. The standard of proof is proof on a balance of probabilities. The evidence clearly revealed that neither Applicant was very familiar with the building industry or with the Ontario Building Code. The evidentiary focus of their Appeal was the report of Doug Dickinson dated August 24, 2006. Unfortunately, this Tribunal did not have the benefit of Mr. Dickinson’s testimony. His report, therefore, could not be tested by cross-examination.

In response, the Respondent called its inspector, Mr. Sholtanuk, and Mr. Cerasa, a builder of some forty years experience. The oral evidence of, and the photographs submitted by, Mr. Sholtanuk both confirm that there was no cracking or breaking of the floor tiles, which would indicate a problem with the subfloor structure or with the bonding of the mortar. Furthermore, neither Mr. Dickinson’s report nor the three estimates submitted by the Applicants referred to the existence of any broken or cracked tiles or to the need to replace any cracked or broken tiles.

The oral evidence of Mr. Sholtanuk and the photographs that he had taken of the Applicants’ floor tiles also revealed that the problems with the grout were not as widespread as the Applicants would have had this Tribunal believe. Whereas the Applicants stated that the problems affected the entire floor, the observations and photographs of Mr. Sholtanuk indicated that only about 10 to 15 percent of the floor was affected.

The evidence before this Tribunal also indicates that the reasons that the Applicants gave for not allowing workmen to enter their premises to deal with the grout problem unreasonably prevented the Added Party from doing repairs to the grout.

This Tribunal had no cogent evidence before it that there was a problem with the subfloor structure or with the tiles bonding to the mortar. If there were such problems, the evidence is clear that there would have been broken or cracked tiles. However, none had been found, even after more than two years after construction - the house was completed in June, 2004, yet even the photographs taken by Mr. Sholtanuk in October, 2006, revealed no broken or cracked tiles. Nor was there any evidence that, in that period of time, any tiles had been replaced.

Therefore, if there is any conflict between, on the one hand, the evidence of the witnesses who appeared before this Tribunal and whose evidence could be tested by cross-examination and, on the other hand, the report of Mr. Dickinson, this Tribunal prefers the evidence of the witnesses who appeared before it. This Tribunal would place less weight on the written report of Mr. Dickinson who, of course, could not be subject to any cross-examination.

CONCLUSION

Considering all of the matters addressed in these Reasons, this Tribunal concludes that the cash offer settlement of \$5,000.00 made in the decision letter of August 15, 2006, was a reasonable offer that was based on conclusions that were also reasonable, after a physical examination of the flooring. The evidence also permits this Tribunal to conclude that the Applicants could have been more reasonable in allowing the repairs to be made by the builder. They at least would have had a further one-year warranty on the work performed. Now, even that is lost to them.

This Tribunal confirms that the Applicants have not satisfied this Tribunal on a balance of probabilities, with the result that this Appeal must fail.

DECISION

For the reasons stated above, and pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal upholds the decision of Taron Warranty Corporation and disallows the Appeal of the Applicants.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski,
Vice-Chair

RELEASED: April 2, 2007

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



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VICTORIA ENTERPRISE GROUP INC. o/a ONTARIO COLLEGE OF TECHNOLOGY

Appeal under section 19 the *Private Career Colleges Act, 2005*,
S. O. 2005 Chap 28 Sched. L

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: XINXIONG TAN, Agent, appearing for the Applicant, Victoria
Enterprise Group Inc.

IMANTS ABOLS, Counsel, appearing on behalf of the
Superintendent, *Private Career Colleges Act, 2005*

DATE OF
HEARING: September 17 - 19, 2007 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals to this Tribunal from a Notice of Proposal (the "Proposal") of the Superintendent, *Private Career Colleges Act, 2005*, (hereinafter the "Act") dated December 13, 2006, to refuse to grant the Applicant registration. The overriding ground for the Superintendent's position is that the Superintendent cannot be sure that, if registered, the Applicant will operate in accordance with the Act and regulations.

This concern may be further categorized. The first category concerns advertising and current operations. It is the Superintendent's position that the Applicant has breached the Act and regulations by advertising and offering courses in contravention of the Act.

The second category concerns allegations that the Applicant failed to disclose that Xinxiong Tan was involved in the control and direction of the Applicant. Based on Mr. Tan's previous involvement in two private career colleges that had their registrations revoked, the Superintendent is of the view that Mr. Tan is not a fit person to be in a position of control of the Applicant. Mr. Tan generally uses the anglicized first name Sean, and the Tribunal will use Sean when referring to his first name.

FACTS

The Tribunal heard evidence from three witnesses on behalf of the Superintendent and three witnesses on behalf of the Applicant. In addition, approximately fifty documents were filed in twenty-one exhibits.

The Applicant is an Ontario corporation. It was initially incorporated on November 14, 2003. Filings with the Companies Branch show Sean Tan and a Y. L. Zhang were the first directors. Y. L. Zhang ceased to be a director on June 17, 2004. On December 12, 2005, the information on file with the Companies Branch indicated that Mr. Tan had ceased to be a director and officer of the Applicant and Shuzhen Hong was registered as the sole director, officer and shareholder.¹ Between its incorporation date and the date of the transfer to Mr. Hong, the corporation had been inactive. The corporate change of ownership did not involve a change in the address of the corporate head office.² By initial application dated January 10, 2006, and received by the Superintendent's office on January 20, 2006, the Applicant applied for registration as a private career college under the Act. The "Initial Application for Registration" bears the signature of Shuzhen Hong.³ Section II of the Initial Application states "*All Applicants must complete an Applicant Profile and forward with this application.*" Accordingly, accompanying the Initial Application was an "Applicant Profile for Partnerships and Corporations." This document identified Mr. Hong as the President of the college.⁴

The Applicant Profile has a number of statements that were in issue in this matter. Firstly, in bold, across the top of the first page it states:

To be completed by each APPLICANT (each PARTNER in the case of a partnership and each OFFICER and DIRECTOR in the case of a corporation) when applying for a new registration or changing existing applicant information on file with the Superintendent.

It also asks in question 3 a) "*Is the applicant or has the applicant ever been associated with any educational institution in any jurisdiction (including non-PCCs) in Ontario?*" The Applicant answered "No." Question 7 asks: "*Is there any person or corporation whose name is not disclosed above who has any financial interest in the applicant beneficially, or who otherwise exercises control or direction over the applicant?*" This question was also answered "No."

The Applicant took no further steps in the application process until June 22, 2006, when it sent a letter to the Superintendent seeking pre-screening of a number of courses.⁵ No response was received to this letter until March 2007, after the date of the Proposal. At the end of August the Superintendent wrote to the Applicant informing it that if it did not complete the application process by September 15, 2006, the application would be returned. The Applicant completed the application by the deadline.

In the interim, the Applicant proceeded to purchase equipment and enter into a lease for premises on Midland Avenue in Toronto. It moved into the new premises in March 2006. It is not known exactly when the Applicant began to advertise its courses but by

¹ Exhibit 3 Tab 1

² Ex 3 Tab 1 and Ex 10

³ Ex 3 Tab 2

⁴ Ex 3 Tab 5

⁵ Ex 3 Tab 22

the fall of 2006, it was advertising a number of courses in the Chinese press in Toronto and on its website.⁶ On October 31, 2006, the Superintendent received an anonymous complaint concerning the courses that were being advertised.

The Superintendent assigned the file to a Program Consultant, Margot Devlin. Ms. Devlin reviewed the application and conducted Internet searches under the Applicant's operating name, Ontario College of Technology, and found the Applicant's website. She determined that the Applicant appeared to be offering a number of courses that, on their face, would require registration with and approval of the Superintendent. Since the Applicant had not yet been registered she felt the Applicant was already in breach of the Act. She also found, through a link, a website under the name of Ontario Polytechnic. The Ontario Polytechnic website showed that Sean Tan was the Chair and the address was the same address on Midland Avenue as the Applicant. It offered substantially the same courses as the Applicant. Ontario Polytechnic was not a name that the Applicant had registered so Ms. Devlin formed the suspicion that the Applicant might be using an improper name to advertise courses.⁷ She ultimately determined, through consultation with a Chinese speaking colleague, that it was likely that the computer search engine that translated from English to Chinese may have mistranslated the term "College of Technology" to "Polytechnic." The next step in the process was a site inspection.

The site inspection was conducted by Ms. Devlin and Ron Grisbrook on Wednesday, November 29, 2006. Mr. Grisbrook took notes that he transcribed into the computer the next day. Ms. Devlin confirmed that she had read the notes and they do reflect her recollection of the substance of the inspection. Mr. Tan, in his evidence, also confirmed the overall accuracy of the notes.⁸ The only person present at the Applicant's premises was Mr. Tan. Mr. Tan stated in his evidence that he was at the premises on that day was because Mr. Hong had permitted him to use the premises to run an electronics business. He was knowledgeable about the application for registration, however, and proceeded to answer Ms. Devlin's and Mr. Grisbrook's questions. In doing so he chose to tell the two inspectors somewhat less than the complete truth. Mr. Tan was questioned about his relationship with Shuzhen Hong. He stated that Mr. Hong was an old professor of his and a friend but that he had no other relationship to Mr. Hong. In fact, Mr. Tan is Mr. Hong's son-in-law. At the time of the initial application, he and Mr. Hong both lived at the same address and shared a telephone number.⁹ Ms. Devlin asked Mr. Tan if the Applicant also operated under the name, "Ontario Polytechnic." Mr. Tan stated that it had never used that name. Finally Ms. Devlin took copies of fliers on display at the Applicant's premises and a business card. The business card

⁶ Ex 3 Tab 14 is an anonymous complaint made against the Applicant. The complaint was received by the Superintendent on October 31, 2006. It encloses an advertisement from a Chinese newspaper that purports to be dated October 6, 2006. Tab 8 is a printout of the Applicant's website dated November 3, 2006.

⁷ Ex 3 Tab 13

⁸ Ex 3 Tab 15

⁹ The address and phone number are set out in the Initial Application at Ex 3 Tab 2, the Application for Registration to Operate a Private Career College at Tab 4 and the Applicant Profile at Tab 5. The address of the registered head office is shown at Tab 1 and on the Corporate Profile, Ex 10.

indicated that Sean Tan was “President” of the Applicant. Mr. Tan attempted to create a distinction between the corporate name of the Applicant, Victoria Enterprises Group Inc. and its operating name, Ontario College of Technology. He testified that the use of the term President only referred to Ontario College of Technology, and did not make him an officer of the corporation. It is to be noted that Mr. Hong identified himself as President of the “college” in his Applicant Profile.¹⁰ Mr. Tan confirmed that his business card, and hence the identification of him as President, was done with the full knowledge and consent of Mr. Hong.

Following the inspection, Ms. Devlin formed the opinion that Mr. Tan was a person who was in direction or control of the Applicant, and that this had not been disclosed in the application process. She was also of the view that the Applicant was advertising and offering courses that might be vocational courses as defined by the Act without registration and approval. It was her position that, even if these courses were not vocational courses, the Superintendent had not pre-screened the courses that were offered and the Applicant should not have been offering the courses until the pre-screening process was complete.

Her review of Mr. Tan’s background indicated that he had previously been involved as an officer and director in a private career college, QGI Limited (“QGI”), which had its registration revoked by the Superintendent. On appeal, on March 29, 2006, this Tribunal upheld the Superintendent’s decision, no one appearing for QGI at the hearing.¹¹ Indeed, during her inspection of the Applicant’s premises she had found numerous QGI records but few or no records of the Applicant. Further enquiry showed that Mr. Tan had been involved with another private career college, Noredu Enterprise Canada Inc., which had had its registration revoked by the Superintendent on November 12, 2003. No appeal was taken from the Superintendent’s decision.

She recommended to the Superintendent that the Applicant be refused registration.

It appears from the evidence that there was considerable overlap between QGI and the Applicant. Witness #1, called by the Superintendent, stated that she had responded to the Applicant’s advertisement in the Chinese newspaper for a computer course entitled the SAP¹² course. The course covered the use of SAP software that integrated sales, accounting and planning functions for user corporations. Witness #1 had previous experience with accounting software and sought to expand her knowledge. She attended at the Applicant’s premises and signed up for the course. She was given a QGI business card. She paid in part by cash and in part by cheque. She was going to make the cheque payable to QGI but was asked to leave it blank. Subsequently, she received a certificate from QGI dated May 26, 2007, several months after QGI had had its registration revoked.¹³ On cross-examination, she admitted that she could not say

¹⁰ In Ex 3 Tab 5, in response to the enquiry “Position held in college” Mr. Hong has indicated “President” and “active.”

¹¹ A copy of the Tribunal’s order is at Ex 3 Tab 19.

¹² SAP is an international business software company based in Germany

¹³ Ex 3 Tab 20

for sure whether the advertisement had been placed by the Applicant or QGI, but recalls the use of the word “college” in the advertisement. It was subsequently admitted by Mr. Tan that he had signed the certificate. This witness had some difficulty with a tax receipt and it is not clear from the evidence if it was ever fully resolved. In any event, in seeking a tax receipt she dealt with Mr. Tan.

Very much at issue was a course that was offered called “Ultrasound Technologist.” It was the Superintendent’s view that, if any course offered by the Applicant was a vocational course, then Ultrasound Technologist was it. Witness #2 had worked for QGI for a number of years and continued working for the Applicant. She graduated with a degree in medicine in China before coming to Canada in 1999. This witness had worked for QGI from 2001 until its demise. Her duties ranged from manager to being in charge of enrolment and marketing. After the demise of QGI she continued with the Applicant in an unpaid capacity. It was this witness who offered the Ultrasound Technologist course using the facilities of the Applicant. She was also involved in another course on the same basis, the SAP course taken by witness #1. She was to pay a percentage of the fees to the Applicant. There was minor characterization dispute between the evidence of this witness and Mr. Tan about the nature of the payment. This witness stated that it was profit sharing. Mr. Tan stated it was rent. The Tribunal is not sure what turns on this distinction. This witness signed the two certificates as “Chairman of the Board” and identified the signature of Mr. Tan as the other signature. Mr. Tan did not dispute the fact that he had signed the two QGI certificates. The witness also identified the signature on a receipt for fees issued to a student as that of Mr. Tan. At issue with respect to the receipt for fees is that, whereas it is dated in 2006, the tax receipt issued to the student is for the 2005 tax year.¹⁴

There was no complete description of the content of the Ultrasound Technologist course before the Tribunal so it is impossible to determine if it was a vocational course as defined by the Act, or not. The only description of the course was “Examination Preparation.”¹⁵ Witness #2 ultimately left the Applicant and took the course content to a facility run by Mr. Tan’s former associate in QGI. According to the witness, this facility was advised by the Superintendent that they were not approved to offer the course. The facility dropped the course and the witness is now unemployed.

In his evidence Mr. Tan reviewed his past and his current position with the Applicant. He also testified concerning Mr. Hong’s involvement in the Applicant.

Mr. Tan has taught a number of courses in private colleges throughout the years. In January 2003, he incorporated Noredu Enterprise Canada Inc. together with another individual (hereinafter “David”). He was both an officer and director although he held no specific office in the company.¹⁶ Noredu used two operating names, Forester College of Technology and York School of Technology. It sought pre-screening of its courses in February 2003 and was advised by the Superintendent’s office on May 7, 2003, that

¹⁴ The receipt, dated April 2006 is at Ex 3 Tab 25 and the 2005 Tax Receipt is at Ex 3 Tab 24

¹⁵ Ex 3 Tab 22 describes the course as Examination Preparation

¹⁶ Ex Tab 29

none of the courses it offered required registration under the Act. According to Mr. Tan, during the summer of 2003, he discovered that David was doing fraudulent acts. He found a certificate of registration indicating that Noredu was a registered private career college. Since he knew it was not registered, he determined that the certificate was an altered copy of a certificate issued to another school.¹⁷ He found Articles of Incorporation for Noredu that had been altered by whiting out his name. These Articles, of course, could be used by David to take actions without Mr. Tan's knowledge or consent.¹⁸ One action taken by David without Mr. Tan's knowledge or consent was the authorization of an agent to represent Noredu in China.¹⁹ It would appear that recruitment efforts were made in China, as a complaint was received from a student who had been recruited in China.²⁰ Mr. Tan also discovered a cheque where his signature had been forged.²¹ His response to his discovery of these improprieties was two-fold. He sent a letter to the Canadian embassy in Beijing, copied to the Superintendent, stating that Noredu, using the Forester name, was not a registered school but was passing itself off as a registered school. He also contacted the RCMP and Toronto police to report David's activity. The RCMP investigated for about a year, but Mr. Tan is unaware if charges were ever laid.

When Mr. Tan became involved with QGI in May 2004, it was in financial difficulties. It was about \$100,000 in debt. He purchased a fifty percent interest in QGI for a nominal sum and became a director as well as President, Treasurer and Secretary.²² He worked seven days a week to turn it around financially. He was successful. At that point his joint shareholder (hereinafter "Guang") asked Mr. Tan to sell back his interest in QGI for the amount he had paid for it. Not surprisingly, Mr. Tan refused and an impasse developed between the two parties. The impasse came to a head when the Guarantee Company of North America gave notice of its intention to revoke the surety bond that is a requirement for the operation of a registered school. Mr. Tan testified that he had paid the bond but Guang refused to sign the renewal application. The Superintendent issued a proposal to revoke QGI's registration and both Mr. Tan and Guang appealed. The appeal proceeded to this Tribunal but no one appeared for QGI. This Tribunal issued an order revoking QGI's registration on March 29, 2006.²³

As QGI was going through the LAT appeal process, several events were occurring. Firstly, Guang started his own establishment where, according to Mr. Tan, he carried on a course of behaviour specifically designed to harm Mr. Tan and QGI. It was to this establishment that Witness #2 eventually moved. Secondly, Mr. Tan started to deal with Mr. Hong for the establishment of the Applicant. With respect to his involvement in the Applicant, Mr. Tan testified that he has no official involvement. He is a consultant and has spearheaded the application process based on his previous knowledge. He teaches and has designed courses. Mr. Tan's assistance is necessary because Mr.

¹⁷ Ex 12

¹⁸ Ex 13

¹⁹ Ex 14

²⁰ Ex 17

²¹ Ex 15

²² Ex 3 Tab 7

²³ Ex 3 Tab 19

Hong does not speak English very well, although he can read English. Mr. Tan testified that he is in the process of establishing a new business designing radio frequency identification devices. This new business will require him to travel frequently to China for extended periods so he is not in a position to be in direction or control of the Applicant, even if he wanted to do so.

Mr. Hong is a lifelong educator. He was a professor of electronics in China. In 2000 he immigrated to Canada and moved into a basement apartment in Mr. Tan's house. He worked until approximately five years ago in the electronics industry. Forced to retire at the age of 65, he sought to keep himself occupied. The solution was Victoria Enterprise Group, the Applicant. He has designed and he teaches courses. It was Mr. Hong's funds that were used to equip the Applicant and to pay the rent. Mr. Tan testified that Mr. Hong pays the rent and has invested a great deal of money in attempting to get the Applicant up and running. As a result of the difficulties encountered and the financial pressures, Mr. Hong has developed high blood pressure.

Two witnesses, both the holders of graduate degrees and teachers at the school, testified that Mr. Hong was actively involved in the school. One, in answer to a leading question from Mr. Tan, identified Mr. Hong as the owner. The second, not faced with a leading question, identified Mr. Hong as a marketer. Both had seen Mr. Hong active at the school. In support of Mr. Hong's active management of the school, Mr. Tan produced a letter from the federal Human Resources and Skills Development Canada addressed to Mr. Hong certifying the Applicant as an educational institution under the *Income Tax Act*.²⁴

On June 22, 2006, the Applicant forwarded a letter to the Superintendent seeking pre-screening of a number of courses. The letter was signed by Mr. Hong's daughter. This letter was the subject of some debate for two reasons. It indicates the Applicant's belief that courses had to be pre-screened. It is also the precursor for the Applicant's future actions. Mr. Tan testified that there was an understanding in the industry that, where courses have been submitted for pre-screening, if the Superintendent does not respond within two months, it is permissible to advertise and teach any non-vocational courses. Mr. Tan had no particular authority for this position. He felt that it had been followed by entities in which he was involved in the past but was at pains to point out in other testimony that Noredu had received a reply from the Superintendent in approximately three months. QGI was already in operation when he joined that company so presumably it was in possession of any required approvals.

It is clear from a review of his involvement in Noredu and QGI that Mr. Tan is not a stranger to being an officer and director of a corporation. He admitted his familiarity with its requisite obligations in cross-examination. One of those obligations, he recognized, was ensuring corporate compliance with applicable laws and regulations. He stated that he was aware of the provisions of the Act, having read it. When asked about the illegal activity of Noredu, Mr. Tan testified that he had not been in regular attendance. It is interesting to note that he signed the letter to the Beijing Embassy and

²⁴ Ex 20

Superintendent as “Principal” of the Forester College. Despite being principal, it was his evidence that he did not find out about problems at Noredu until late summer 2003, and immediately took the corrective and investigative steps set out above.

ISSUES AND ANALYSIS

The issues before the Tribunal flow from the wording of the appeal registration section of the Act. Registration flows as of right where the Superintendent is satisfied that the Applicant meets the statutory criteria set out in S. 14 in the following terms:

Registration

14. (1) The Superintendent shall register an applicant to operate a private career college and shall renew an applicant’s registration if the Superintendent is satisfied that,

- (a) it is in the public interest to grant the registration or to renew the registration;
- (b) the applicant will operate the private career college in compliance with this Act and the regulations;
- (c) the vocational programs that are provided, or are proposed to be provided, by the private career college meet, or are likely to meet, the requirements of this Act and the regulations;
- (d) having regard to the applicant’s financial position, the applicant can be expected to be financially responsible in the operation of the private career college;
- (e) the past conduct of the applicant or, if the applicant is a corporation, of its officers and directors, provides grounds for the belief that the private career college will be operated in accordance with the law and with integrity and honesty; and
- (f) the applicant is not carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Where the Superintendent proposes to refuse to grant registration s. 19 sets out the procedure for doing so and gives a right of appeal to this Tribunal. The powers of the Tribunal are set out in the Act:

Powers of Tribunal

(6) At a hearing under subsection (5), the Tribunal may, by order, direct the Superintendent,

- (a) to carry out the proposal specified in the notice;
- (b) to refrain from carrying out the proposal;
- (c) to attach such conditions to a registration as the Tribunal considers appropriate; or

(d) to take such other action as the Tribunal considers appropriate.

It was urged on the Tribunal by the Superintendent that the Tribunal should give some deference to the Superintendent's findings. It is now clear law that no such deference should be given. The appeal before the Tribunal is analogous to a court proceeding where the Superintendent is the position of prosecutor. The onus lies on the Superintendent to convince the Tribunal that there are grounds for the denial of registration. In doing so the Tribunal must arrive at its own conclusions notwithstanding that, unlike the prosecutorial analogy, the statute gives the Superintendent a decision-making discretion.²⁵

At issue before the Tribunal is the application of ss. 14 (e) and (f). The Tribunal will review the evidence as it relates ss. (f) first. Is the Applicant operating in breach of the Act by offering vocational programs that have not been pre-screened? The balance of the analysis will focus on Mr. Tan, his past and his current role at the Applicant.

The definition of a "private career college" and a "vocational program" are set out in s. 1 (1) of the Act as follows:

"private career college" means an educational institution or other institution, agency or entity that provides one or more vocational programs to students for a fee and pursuant to individual contracts with the students....

"vocational program" means instruction in the skills and knowledge required in order to obtain employment in a prescribed vocation.

Part III of the Act prohibits a range of activity by non-registered colleges as follows:

Prohibition against operating a private career college

7. (1) No person shall operate a private career college unless the person is registered.

Holding oneself out

(2) No person shall hold themselves out as the operator of a private career college unless the person is registered.

Prohibition against providing vocational programs

8. (1) No person shall offer or provide a vocational program for a fee unless the person is registered and the provision of the vocational program has been approved by the Superintendent....

Prohibition against charging fee

²⁵ See *Brenner v. Ontario (Registrar of Motor Vehicles Dealers and Salesmen)* [1983] O. J. No. 1017 and *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O. J. No. 603

9. (1) No person shall charge or collect a fee in relation to a vocational program unless the person is registered and the provision of the vocational program has been approved by the Superintendent.....

Prohibition against use of credentials

10. No person shall grant to another person a credential set out in a policy directive issued by the Superintendent or represent that such a credential may be obtained from an educational institution or other institution, agency or entity unless the person is registered and both the provision of the vocational program leading to the credential and the granting of the credential have been approved by the Superintendent.

Restrictions on advertising and soliciting

11. (1) Subject to the regulations, no person shall advertise a private career college or the establishment of a private career college unless the person is registered.

Same

(2) Subject to the regulations, no person shall advertise the provision of a vocational program at a private career college unless the person is registered and the provision of the vocational program has been approved by the Superintendent.

Soliciting students

(3) No person shall solicit another person to enrol as a student in a vocational program provided by a private career college unless the person is registered and the provision of the vocational program has been approved by the Superintendent.

Use of term

(4) No person shall make use of the term "private career college" or any derivation or abbreviation of the term in any advertising relating to an educational institution or other institution, agency or entity unless the person is registered.

The Act, then, regulates institutions that offer vocational programs. There are a number of courses which might be considered as vocational programs that do not fall within the definition as set out in the Act. They are defined by regulation. S.9 of O. Reg. 415/06 states:

Exemptions

9. (1) The following classes of programs are prescribed as programs that are not vocational programs for the purposes of the Act and the regulations:

1. Programs that provide instruction for work in a religious vocation, whether or not the program is provided by a religious organization.
2. Programs that are less than 40 hours in duration.
3. Programs for which a fee of less than \$1,000 is charged.

4. Programs that are offered exclusively to persons under the age of 18 years.
5. Programs to which an Act of the Legislature other than the *Private Career Colleges Act, 2005* or an Act of Canada applies, if that Act contains protections similar to those in the *Private Career Colleges Act, 2005* relating to program quality and to student interests.

(2) Paragraph 2 of subsection (1) does not apply to a vocational program that falls within a class of vocational programs in respect of which the Superintendent has issued a directive under section 53 of the Act requiring that such vocational programs be longer than 40 hours in duration.

(3) Subsection (1) applies to a program described in that subsection even though the program may otherwise meet the requirements of a vocational program as defined in subsection 1 (1) of the Act.

The impact of the definitions set out in the Act and Regulations is that there are two broad classes of course that do not require registration with the Superintendent or specific course approval. The first would include courses that are not designed to provide the skills and knowledge required for employment in a prescribed vocation. The second class would include those courses that would otherwise provide those skills but are less than forty hours or cost less than \$1,000.00. It appears from a review of the Act that it does not regulate institutions that do not offer vocational programs. There is no prohibition against offering or advertising non-vocational programs, accepting fees or giving certificates indicating successful completion of a program. In his evidence, Mr. Tan referred to such programs as certificate programs as opposed to diploma programs, which require registration. This designation may have been applicable under earlier legislation but is not the language of the current Act. It does indicate that there has long been recognition of a difference between programs requiring registration and those that do not.

There was no evidence before the Tribunal to indicate that the Applicant has advertised, offered or taught any programs requiring registration and approval. Indeed, the best evidence available would indicate that not only did it not offer such programs, but the Superintendent had pre-screened the programs it offered and determined they were not vocational programs. By letter received by the Superintendent on June 22, 2006, the Applicant identified a number of programs it sought to teach as either professional upgrading or examination preparation.²⁶ These types of program are generally exempt. A response to that letter was not received until March 22, 2007, when counsel for the Superintendent responded identifying six programs that did not require registration but identifying eleven other programs where a pre-screening application had not been received.²⁷ Apparently this list of eleven was augmented because on August 2, 2007, the Superintendent wrote to the Applicant identifying twenty-four programs that were non-vocational.²⁸ It is noted that "Ultrasound Technologist" seems to have dropped from the list, but there was no evidence upon which the Tribunal could conclude that

²⁶ Ex 3 Tab 22

²⁷ Ex 3 Tab 23

²⁸ Ex 11

this course was anything but an exam preparation program, as represented in the June 22, 2006, letter. Exam preparation does not teach a vocational skill, it simply prepares a candidate who has otherwise acquired such skills for what to expect on an upcoming exam.

It was the Superintendent's position that any program that might appear to a prospective student to be a vocational program requires pre-screening. There is great practical merit in this position since it allows the Superintendent's staff to focus their resources in areas that might represent problems. The difficulty in this position is, of course, the fact that the Legislature did not provide for it. The Tribunal was not directed to any legislation to prevent an entrepreneur from offering non-vocational programs to the public without pre-screening. There may be a risk that an offered program is determined to be a vocational program, a finding that may lead to severe consequences, but if the entrepreneur is secure in the knowledge that the programs are non-vocational there is no legal requirement for pre-screening. Seen in this light, it would appear that pre-screening is a service offered to the public to assist in making informed decisions, not an obligation imposed on the public by the Act.

It also flows from the structure of the Act and regulations that Mr. Tan's former company, QGI, was at liberty to offer the SAP program to Witness #1 and the Hazard Analysis and Critical Control Points (HACCP) program it offered to a second student even after its registration was revoked in March 2006. It is common ground that Mr. Tan was an officer and director of QGI so it is not unusual that he should deal with Witness #1's tax questions or sign her certificate. This leaves the issue of misrepresenting the program provider. In this regard, Witness #1's testimony was inconclusive. Other than thinking that the advertisement she responded to contained the word "college," Witness #1 mentioned only dealings with QGI. She intended to make her cheque payable to QGI until told to leave it blank. The Tribunal cannot conclude on the evidence that there was any form of misrepresentation. Similarly, the second QGI certificate was for an HACCP program, a program determined to be non-vocational. There was no evidence to suggest that there was any misrepresentation in the marketing of this program. At issue with respect to this program was the issuance of a tax information form for the tax year 2005, when it was alleged the fee receipt is dated 2006. In the absence of evidence from the student herself, the Tribunal cannot conclude that the two documents are in any manner related or that the student named did not also take the HACCP course in 2005, and repeat in 2006.

The Tribunal concludes that there is no evidence that the Applicant is carrying on activities that would be in contravention of the Act. The provisions of subsection 14 (f) can be of no assistance to the Superintendent with respect to current activity or current activity that will be illegal if registration occurs. The focus must now shift to subsection 14 (e).

The Application Profile²⁹ considers each officer and director of a corporation to be an applicant. In doing so, it reflects the wording of the Act where the past activity of

²⁹ Ex 3 Tab 5

officers and directors is one the areas for review and consideration in the grant of registration. There is no doubt that Mr. Tan is required to fill out an Applicant Profile if he is an officer or director of the Applicant. The Applicant Profile also incorporates a request for information that, it might be suggested, exceeds a strict interpretation of the wording of the Act. The wording of the Act is specifically limited to past actions on the part of officers and directors. Its focus is on the legal control of the corporation. Question 7 goes beyond legal control to control, in fact.³⁰ It asks for disclosure for any person “*who otherwise exercises control or direction over the applicant.*” It is not hard to conceive of numerous ways in which control or direction of a corporation may not reside in the shareholders, officers or directors. For instance, it may be a condition of financing that shares are voted in a certain manner. In such a case the financier would exercise control over the corporation without the necessity of being shown as a director or shareholder. It may be the case that the officers and directors simply agree to act as a front for a third party.

This Tribunal was faced with such a situation in *Re: GR8 Delta Inc., Stelios Stylianou, Aristides Ioannou v. Registrar, Motor Vehicle Dealers Act*, released August 24, 2004. In that case, the Applicants acted as front men for a dealer. Prior to the involvement of the Applicants, the dealer had had his registration revoked for odometer tampering. His wife then applied for and was granted registration. After several years the wife’s registration was revoked for odometer tampering. It was a finding of the Tribunal that the dealer, not his wife, actually ran the dealership notwithstanding that everything was in his wife’s name. Finally, the dealer circumvented the law by operating through front men. Again, the Tribunal found that the dealer actually ran the dealership and the imputed owners were rarely in attendance. The Tribunal had no difficulty piercing the corporate veil to seek the real person in control of the corporate entity. The reasoning in *GR8 Delta* does not specifically distinguish between statutory wording that appears to focus on legal control of a corporation. According to the corporate records, the dealer had no legal position or title nor was he a shareholder. It was found that he did, in fact, run the corporation and this was a significant finding in the revocation proceedings.

The *GR8 Delta* decision is supported by the wording of the Ontario *Business Corporations Act* R. S. O. 1990 Chap B. 16 (“OBCA”). It defines an officer of a corporation as:

“officer” means an officer designated under section 133 and includes the chair of the board of directors, a vice-chair of the board of directors, the president, a vice-president, the secretary, an assistant secretary, the treasurer, an assistant treasurer and the general manager of a corporation, and any other individual designated an officer of a corporation by by-law or by resolution of the directors or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any such office; (“dirigeant”)

Clearly the closing wording of this definition accepts the “control in fact” test as an indication that a person is an officer. There is an obvious ambiguity in the wording of

³⁰ In former times this distinction was designated by two Latin maxims, *de facto* control and *de jure* control. The Application Profile focuses on *de facto* control, the Act appears to focus on *de jure* control.

the definition. It is unclear whether the definition applies to persons who have not been appointed by the directors pursuant to the powers set out in section 133 of the OBCA. By virtue of the *Interpretation Act*, each piece of legislation is deemed to be remedial and shall be given such broad and liberal interpretation as necessary to achieve the purposes of the legislation. Applying this principle, the purpose of the OBCA being the regulation of corporations the Tribunal finds that the definition would apply to any person exercising the functions normally performed by an officer independent of specific appointment by the directors under section 133. In the Tribunal's view, any other interpretation renders it all too easy to circumvent the regulatory scheme of the OBCA.

This principle may be applied to bring the activities of Mr. Tan within the wording of the Act, notwithstanding that he is not shown on corporate records as being a director, officer or shareholder. To do so the Tribunal must find that Mr. Tan is a person who, in fact, exercises direction or control of the corporate entity. If Mr. Tan is such a person, then his past is an issue to be considered by this Tribunal. If he is not, his past is irrelevant.

The evidence concerning Mr. Tan's involvement as a person in direction or control of the Applicant flows from two sources: the investigation and site visit conducted by Ms. Devlin in the fall of 2006, and again by Ms. Devlin recently, and Mr. Tan's involvement in the application process.

Ms. Devlin provided corporate profiles of the Applicant indicating that the Applicant was originally incorporated by Mr. Tan with a head office at Mr. Tan's residence. When the corporate filings were amended in December 2005, to reflect the transfer to Mr. Hong, the corporate head office remained unchanged and the telephone number was that of Mr. Tan. Mr. Tan testified that Mr. Hong no longer resides with him, yet there has been no change in the address or telephone number of the corporate head office. It remains Mr. Tan's home address. Mr. Tan was the only person in attendance when Ms. Devlin and Mr. Grisbrook attended to inspect in November 2006. At the November inspection Ms. Devlin picked up a card that identified Mr. Tan as "President" of Ontario College of Technology. Mr. Tan confirmed that the card had been provided to him by Mr. Hong. The card was still on display on Ms. Devlin's recent re-attendance at the Applicant's premises. It would appear that no one from the Superintendent's office has ever met Mr. Hong. Dealings have been with Mr. Tan or, in the case of one letter, with Mr. Hong's daughter. She is also Mr. Tan's spouse. Ms. Hong is also shown as the contact person in application documents.

Corporations have no ability to act, except through human agency. Neither the OBCA nor the Act provides guidance with respect to the duties and responsibilities that indicate that an individual is exercising the responsibilities of an officer as opposed to simply those of an employee. It is not, for instance, alleged that Witness #2 was an officer of the Applicant or QGI, notwithstanding that she signed agreements with Witness #1 thereby obliging the corporation to perform certain acts. It is said that officers of a corporation carry out the day-to-day management of a corporation, and directors manage the corporation's overall strategy, including appointing and firing

officers. Using this approach, the Tribunal cannot conclude that the evidence advanced concerning Mr. Tan's involvement with the Applicant supports the conclusion that he is an officer or a person who exercises direction or control over the corporate applicant. With the single exception of the business card, none of Mr. Tan's activities have been shown to be anything other than the normal type of service a corporation may expect from those it retains, whether in the capacity of employee, or through contractors or consultants. Mr. Tan does not need to be in direction or control of the corporate entity to have carried out the services he provided. He has previous experience in setting up colleges. It is quite natural that he would assist his father-in-law in applying for registration. The Applicant is a teaching facility. The fact that Mr. Tan has designed and taught programs does not imply direction or control of a teaching facility.

Mr. Tan testified that his new business takes him out of Canada for long periods of time. As a result he is not in a position to carry out the day-to-day management of the Applicant. Witness #2 did state that Mr. Tan was in control of the corporation on a day-to-day basis. The Tribunal prefers the evidence of Mr. Tan in this regard. Witness #2 was evasive with respect to any question that showed her in a bad light. She was quick to place the responsibility for her actions at the feet of others. She was also a long time associate of Guang, a person now operating in competition with the Applicant. She took the Ultrasound Technologist course to Guang after leaving the company that Mr. Tan and Guang had previously operated, QGI, and the Applicant. At QGI she had worked closely with Mr. Tan, and the Tribunal is not sure that her evidence related to her time at QGI where Mr. Tan was in direct control, or to her relatively short time at the Applicant.

The Tribunal is concerned with the business card identifying Mr. Tan as president of the Applicant. Is the effect of having such a business card determinative of the issue? Is Mr. Tan irrevocably created an officer of the company? At the close of submissions, the Tribunal asked the Parties to make further submissions concerning the application of the indoor management rule to these facts. Mr. Tan, on behalf of the Applicant, used this opportunity to make further general submissions and submit further documentary evidence. The Tribunal has not taken any further evidence submitted by Mr. Tan into account. Mr. Abols, on behalf of the Superintendent, made submissions that were on point and of great assistance to the Tribunal. One of the officers set out in the definition in the OBCA is the "president" of the corporation. In everyday dealings between the public and a corporation, it is not practical for members of the general public to conduct corporate searches to determine if the person with whom they are dealing has authority to act on behalf of the corporation. As a result, the law developed a rule known as the "indoor management rule." When dealing with a corporation, the general public is entitled to rely on the ostensible authority of a person representing a corporation. If the person is represented as an officer who can bind the corporation, then the corporation will be bound, notwithstanding that the person is not an officer. This rule has been refined and codified by section 19 of the OBCA:

19. A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

(a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice filed under the *Corporations Information Act*, or named in the articles, whichever is more current, are not the directors of the corporation;

(c) the location named in the most recent notice filed under subsection 14 (3) or named in the articles, whichever is more current, is not the registered office of the corporation;

(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

(e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine; or

(f) a sale, lease or exchange of property referred to in subsection 184 (3) was not authorized,

except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect.

The effect of the indoor management rule and section 19 is not to create officers. It is to deny the corporation the defence that a person who is ostensibly an officer does not have authority to bind the corporation. Further, the section only applies to members of the public who cannot be expected to be sophisticated in their dealings with a corporation. The exception in the closing words of the section makes it clear that simply representing a person as an officer does not make that person an officer and sophisticated parties should conduct due diligence searches to ensure that they are dealing with properly authorized corporate officers and directors.

Applying the indoor management rule to the current facts, the fact that Mr. Tan has, with the knowledge of the corporation, represented himself to the public as the "President," does not make him the president. It does result in binding the Applicant to any agreement Mr. Tan may make with prospective students, suppliers, or others. The Superintendent, however, is a sophisticated party and is well aware from the corporate searches it has conducted that Mr. Tan is not the President. The Tribunal finds that the fact that Mr. Tan has a business card that indicates he is the President of the Applicant does not make him an officer or director of the Applicant, or a person with direction or control of it. Given this finding, it is not necessary to consider the impact of Mr. Tan's past and the impact of the failure to disclose Mr. Tan's involvement with the Applicant in the Application.

DECISION AND ORDER

By virtue of the authority vested in it pursuant to the provisions of section 19 (6) of the Act, the Tribunal directs the Registrar to refrain from carrying out the proposal dated

December 13, 2006, to refuse registration to the Applicant. There may be many reasons why the Applicant permits Mr. Tan to carry a business card identifying himself as President, not the least of which may be a level of prestige that attaches to him when talking to prospective students. Notwithstanding such reasons and in the absence of any evidence at the hearing that anyone was misled, the Tribunal is cognizant of the possibility that this representation has the potential to mislead. Accordingly, it is the Tribunal's view that Mr. Tan should cease forthwith from representing himself to the general public as something he was at great pains to deny before this Tribunal. Accordingly, it is a condition of the Applicant's registration that Mr. Tan cease from representing himself as President of the Applicant, and any and all references to him in that capacity in business cards, websites, flyers or other media issued by the Applicant must be removed. This condition is to continue in effect until such time as Mr. Tan may seek to file an Applicant Profile with the Superintendent to indicate that he has assumed a position of direction or control at the Applicant.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: October 18, 2007

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



CANADIAN COLLEGE OF BUSINESS AND COMPUTERS INC.

APPEAL FROM A PROPOSAL OF THE
SUPERINTENDENT UNDER THE *PRIVATE CAREER
COLLEGES ACT* TO REVOKE REGISTRATION AND
IMMEDIATE SUSPENSION OF CANADIAN COLLEGE OF
BUSINESS AND COMPUTERS INC.

TRIBUNAL: MS. RAJ PANNU, Vice-Chair

APPEARANCES: SHELVAN KANNUTHURAI, Applicant, representing Canadian
College of Business and Computers Inc.

SONAL GANDHI, Counsel, representing the Superintendent under
the *Private Career Colleges Act*

DATES OF
HEARING:

September 5, 6, 7, 8, 2006
November 14, 16, 17, 20, 27, 28, 29, 2006
March 2, 13, 14, 15 2007
June 19, 20, 21, 22, 25, 26, 27, 28, 29, 2007
July 3, 2007

Toronto

DECISION AND REASONS FOR DECISION

BACKGROUND

On January 19, 2006, the Superintendent of Private Career Colleges, issued a proposal to revoke the registration of Canadian College of Business and Computers Inc. ("CCBC"), ("Applicant", in the decision refers to Shelvan Kannuthurai or CCBC) under Section 6 of the *Private Career Colleges Act* (the "Act"). The Superintendent also gave notice of her intention to immediately suspend the Applicant from operating as a Private Career College as of January 19, 2006.

The Superintendent had a meeting with the Applicant and his legal counsel on October 20, 2005. This meeting was to discuss many serious concerns regarding CCBC's non-compliance with the provisions of the Act. No negotiations were initiated by CCBC over the month of December 2005, to achieve voluntary compliance with the Act. Also, no action was taken by CCBC to address the critical issues of responsible financial management and quality of programs.

REFUSAL TO RENEW REGISTRATION

Under subsection 4 (2) of the Act, CCBC's registration expired on December 31, 2005. CCBC reapplied for re-registration for the year 2006. Pursuant to section 6 of the Act, the Superintendent refused to renew the registration of CCBC as a Private Career College for the year 2006.

The following are the reasons for the refusal, summarized from the Notice of Proposal:

- CCBC's financial position and conduct with respect to its obligations to refund unearned tuition monies such that it cannot reasonably be expected to be financially responsible in the conduct of a Private Career College.
- The past conduct of the Applicant, Shelvan Kannuthurai, as an officer of CCBC and/or that of his administrative staff, resulted in CCBC's failure to carry out its legal obligations under the Act. The students were denied their refunds, the quality of CCBC's vocational programs was sub-standard and above all CCBC failed to comply with the provincial law.

The quality of some or all of CCBC's vocational programs is such that the programs do not provide the skills and knowledge which is a prerequisite for employment in such vocations or related vocations. The very content and delivery of these programs violated the terms and conditions of CCBC's registration with the Ministry.

IMMEDIATE SUSPENSION

Subsection 7 (9) of the Act provides that where a Private Career College has applied for renewal of registration, the college's registration is deemed to continue until: 1) it is renewed, or 2) the Licence Appeal Tribunal has heard an appeal of a proposal to refuse renewal and has made its order, or 3) until the time for appealing to the Tribunal has expired. The Superintendent, pursuant to section 9 of the Act, suspended CCBC's registration effective immediately to protect the interests of CCBC's students. Thus, a notice of immediate suspension of the operation of CCBC was issued to the Applicant, Shelvan Kannuthurai, President & Chief Executive Officer.

PRELIMINARY MATTERS

This present appeal commenced by a proposal dated January 19, 2006, by the Superintendent, under the Act. The Superintendent gave a notice of intention to revoke the registration of the Applicant to continue to operate CCBC as a Private Career College. The Applicant responded with a notice of appeal to have a hearing before this Tribunal.

Two pre-hearings were held in this matter on May 1 and June 2, 2006. Both Parties were unable to settle any of the issues. On June 2, 2006, Vice-Chair D. Israel ordered the present hearing on peremptory basis for both Parties. On August 15, 2006, the Applicant filed a notice of motion with the Tribunal. The motion was heard by Vice-Chair J. Weary on August 28, 2006. In this motion, Vice-Chair Weary denied the Applicant's request for a 90-day adjournment of the proceedings to procure further documentation from federal and provincial authorities.

EVIDENCE

1. Documentary Evidence

This appeal was heard during twenty-five full days. The evidence included extensive documentary evidence from both Parties. Many large volumes of documentary evidence were presented to the Tribunal.

The Applicant filed 30 exhibits with the Tribunal. These exhibits included binders of documents related to the "Professeur pour Liberte" ("PPL") program, numerous photographs, correspondence through letters and e-mails. Three audiovisual aids such as DVDs were also shown and presented to the Tribunal to be entered into evidence. The Applicant presented seven bound volumes titled "Application Process and Correspondence with Citizenship and Immigration Canada" ("CIC"). Bound documents of "Two-year Fiber Optics Program Approval", which were divided under 92 tabs were also filed by the Applicant. The Applicant also filed as exhibits three poster-sized articles from a local newspaper, dated October 14, 2005, October 19, 2005, and November 16, 2005.

The Respondent's counsel, Sonal Gandhi, filed 17 documents as exhibits into evidence. These exhibits included registration and course approval documents related to CCBC. Ms. Gandhi also entered the Documentary Evidence of Nancy Shepherd, Ministry Program Coordinator-Supervisor. The names of several witnesses were provided to the Tribunal. Other exhibits included files of CCBC's student information and student refund claims. Documents of N. S., a CCBC student, who testified before this Tribunal were also filed as exhibits. Documentary evidence also included reports from experts witnesses, Professor J. Stewart Aitchison, Director of Emerging Communication, Technology Institute, University of Toronto and Mr. Terry L. Penney, a Professional Forensic Accountant and Internal Auditor. Both experts testified before this Tribunal. The counsel also introduced numerous letters and e-mails exchanged with CCBC and the international students. Other documentary evidence included wire transfer records and banking records..

2. Testimony

The Applicant subpoenaed three witnesses to present his case before this Tribunal:

1. Ms. Susan Hoyle-Howieson, Superintendent under the Act. The Applicant conducted a lengthy 60-day examination-in-chief of the Superintendent.
2. Mr. Phil Rajnauth, a Program Consultant with the Private Career Colleges section of the Ministry of Training Colleges and Universities, who had briefly dealt with CCBC during the years of 1996-2005.
3. Shelvan Kannuthurai, the Applicant also testified as he was not represented by legal counsel. He conducted his own examination-in-chief as a witness at the hearing. The Tribunal took due notice of the lack of representation and ensured that the principles of procedural fairness and rules of natural justice were adhered to during the hearing of this appeal.

The Respondent's counsel, Sonal Gandhi called the following witnesses to testify:

1. Nancy Shepherd – Ministry Program Coordinator - Supervisor.
2. Jerson Joaquin – Ministry Program Consultant – Inspector.
3. N. S. – International Student Seeking Refund.
4. F.C. – Account Manager of a chartered bank.
5. Terry Penney – Forensic Accountant (Expert Witness).
6. Professor J. Stewart Aitchison – University of Toronto, Department of Electric and Computer Engineering.

3. Submissions

Oral and written submissions were provided by the Respondent's counsel, Sonal Gandhi, and the Applicant, on July 3, 2007.

4. Motions

During the twenty-five days of this appeal, the Applicant brought 2 motions: one on November 27, 2006, and one on March 14, 2007, for disclosure of specific documents from the Respondent. Both motions were heard and orders were issued by the Tribunal.

ANALYSIS OF EVIDENCE

The Superintendent and her staff met with the Applicant and his legal counsel on October 20, 2005, to discuss numerous issues with respect to CCBC's compliance with the Act. On November 4, 2005, the Superintendent sent a registered and hand-delivered letter to the Applicant regarding three principal matters of concern.

The three principal areas of concerns were the following:

1. CCBC's solvency. That is whether CCBC's financial position is such that it can, in the words of the Act, *"Reasonably be expected to be financially responsible in conduct of private career college"*.
2. The quality of CCBC's vocational programs.
3. The conduct of the Applicant as an officer of CCBC and/or that of the office administrative staff, and whether that conduct affords, in the words of the Act, *"reasonable grounds for (the) belief that the private career college will not be carried on in accordance with law and with integrity and honesty"*.

These issues are at the core of the Act's fundamental focus, which is the protection of students' financial interest and the quality of Private Career Colleges' programs. Subsequently on January 19, 2006, the Superintendent under the Act issued her proposal under section 6 of the Act refusing to renew the registration of the CCBC to operate as a Private Career College for the year 2006. In this proposal, there was no revocation of the registration of CCBC. In her decision, the Superintendent relied on the various sections of the Act.

THE LAW

The Act provides that:

4. (1) No person shall conduct or operate a private career college unless the person is registered by the Superintendent under this Act.
5. (1) An applicant is entitled to registration or renewal of registration by the Superintendent to conduct or operate a private career college and to be issued a certificate of registration except where,
 - (a) having regard to the Applicant financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the private career college;
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the private career college in accordance with law and with integrity and honesty;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of the private career college, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that the private career college will not be carried on in accordance with law and with integrity and honesty;

(d) it can reasonably be expected that the course or courses of study or the method of training offered by the private career college will not provide the skill and knowledge requisite for employment in the vocation or vocations for which the applicant is offering instruction; or

(e) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

6. (2) Subject to section 7, the Superintendent may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

17. (1) Every person who,

(a) knowingly, furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;

(b) fails to comply with any order, direction or other requirement made under this Act; or

(c) contravenes any provision of this Act or the regulations,
and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or to both.

Regulation 939 of the Act states:

24. Where a private career college is required to refund any money under sections 21, 22 or 23, the private career college shall refund the money to the person entitled within thirty days of the receipt by the private career college of the notice referred to in section 18, 21 or 22, as the case may be.

5. (2) Every teacher at a private career college shall be twenty-one years of age or over and shall,

(a) be the holder of a degree of Bachelor of Arts or Bachelor of Science from a Canadian university or a degree the equivalent thereto from a university other than a Canadian university and have twelve months actual occupational experience in the vocation or occupation for which instruction is to be given by such teacher;

(b) be a graduate of a college of applied arts and technology established under the *Ministry of Colleges and Universities Act* and have twenty-four months actual occupational experience in the vocation or occupation for which instruction is to be given by such teacher;

- (c) be a graduate of a private career college registered under this Act or a predecessor of this Act and have twenty-four months actual occupational experience in the vocation or occupation for which instruction is to be given by such teacher;
- (d) be a graduate of a teachers' college established under the *Education Act* and have twelve months actual occupational experience in the vocation or occupation for which instruction is to be given by such teacher;
- (e) have thirty-six months of teaching experience in the vocation or occupation for which instruction is to be given by such teacher; or
- (f) have forty-eight months actual occupational experience in the vocation or occupation for which instruction is to be given by such teacher.

The powers of the Tribunal are set out in subsection 7(4) and provide:

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 Superintendent at the hearing, may by order direct the Superintendent to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent 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 Superintendent.

FACTS IN SUPPORT OF THE SUPERINTENDENT'S DECISION

SUMMARY OF FACTS

- I. No reasonable expectation of financial responsibility. CCBC has over the past six months failed to pay refunds to at least 50 students who had either withdrawn from CCBC or were unable to attend CCBC because they were unable to obtain visas for Canada. These outstanding refunds now exceed over a quarter of a million Canadian dollars.
- II. Most of these refund claims had been outstanding for over a period of 200 days.
- III. CCBC has, on occasion, issued refund cheques with the prior knowledge that these cheques would not be honoured by its financial institution.
- IV. The Superintendent's office continues to receive student complaints with respect to unpaid refunds. A further 12 refund claims have been submitted to the Superintendent within the last two weeks.
- V. CCBC has incurred outstanding indebtedness to other non-student creditors such that credit-rating agencies have issued reports indicating that CCBC is a "Poor Credit Risk" and is behind on payments to almost all of its creditors.

- VI. On or about September 20, 2005, due to failure to pay rent for its former premises at 130 Bloor Street West, Toronto, Ontario, CCBC was locked out by the landlord. CCBC then resumed its operation in a town house in a facility that does not at present meet the fire code or municipal zoning by-laws.
- VII. Un-audited financial statements provided by CCBC indicate that it is insolvent or virtually insolvent. These statements do not appear to take into account CCBC's indebtedness towards students or un-refunded tuition money. They also inaccurately reflect the current value of CCBC's Bond. This Bond is required under the Act to meet student refund claims and is lodged with The Ministry of Training Colleges and Universities Financial Custodian.

Finally, the financial statements indicate the transfer of considerable sums to undisclosed related companies.

Reasonable belief that CCBC is not carrying on business in accordance with law, integrity and honesty.

- VIII. CCBC has failed and continues to fail to pay student refunds within the time frame prescribed by regulation for paying refunds.
- IX. CCBC has maintained students must submit evidence of a denial of their visa application to claim a refund, a requirement that is not prescribed under the *Private Career Colleges Act*.
- X. CCBC has misrepresented to the students, "full-time scholarships". It offers these by requiring the students to provide services in kind to CCBC in exchange for these scholarship funds.
- XI. CCBC has at times employed its students as instructors at the school despite the fact that they do not meet the qualification for instructors described by sub section 5 (2) of Regulation 939, as made under the Act. Such employment is also contrary to section 14 of the Act, which prohibits a Private Career College from permitting the goods or services of any of its students being sold to the public.
- XII. CCBC has offered Co-op programs that have not been registered or approved by the Superintendent.

Quality of CCBC's Vocational Programs

- XIII. CCBC's labs do not contain the equipment included in the equipment list that forms part of its application for approval of its courses.
- XIV. CCBC has charged tuition fees in excess of those approved by the Superintendent

- XV. CCBC has made misrepresentations to the students that its programs lead to a Diploma in Laser and Fiber Optics, which is operated by or associated with the University of Toronto.
- XVI. CCBC has issued letters of admission, receipts for payments and other correspondence under fictitious and suspicious signatures.
- XVII. CCBC has made statements to its educational partners to disregard the legal rights of its students or maintaining the integrity of the legislative framework governing Private Career Colleges.
- XVIII. CCBC uses its own form for student contract that does not conform to the template for student contract approved by the Superintendent.
- XIX. CCBC has employed at least one individual as an instructor who does not meet the prescribed standards for instructors in a Private Career College.
- XX. CCBC has at times failed to insist upon all admission tests to ensure that entrance or admission requirements were met by students, thereby breaching the terms of its registration and the Superintendent approval of its programs.

Quality of CCBC's vocational programs breach the terms and conditions of its registration and the Superintendent's approval of the programs.

- XXI. CCBC has insufficient numbers and/or unqualified instructors delivering its programs. Currently, CCBC has only two instructors including an individual who does not meet the qualification prescribed by sub section 5(2) of Regulation 939 as made under the Act.
- XXII. CCBC's labs do not contain the equipment included in the equipment list that forms part of its application for approval of its courses. CCBC's labs for its Laser and Fiber Optics program are poorly equipped with substandard equipment determined by the expert witness as a toy suitable for ages 10 and above.
- XXIII. CCBC has at times failed to insist upon or administer tests to ensure that entrance or admission requirements were met by prospective students, thereby breaching the terms of its registration and the Superintendent's approval of its program.

Consequently, the Superintendent issued a Notice of Immediate Suspension under section 9 of the Act dated January 19, 2006. Section 9 of the Act provides that:

- 9. Despite subsection 7 (9), the Superintendent, by notice to a registrant and without a hearing, may provisionally refuse renewal of or suspend registration of the registrant where in the Superintendent's opinion it is necessary to do so for the immediate

protection of the interests of the students of the private career college and the Superintendent so states in such notice giving his or her reasons therefor, and thereafter the provisions of section 7 apply as if the notice given under this section were a notice of a proposal to revoke the registration under subsection 7 (1).

ANALYSIS OF THE FACTS

This Tribunal heard and reviewed numerous documents pertaining to the various reasons that the Superintendent took into consideration in arriving at her decision to order the Immediate Suspension of CCBC as a Private Career College. The Tribunal will review each of these facts that the Superintendent relied on to refuse registration of CCBC as a Private Career College for the year 2006.

1. INTERNATIONAL STUDENT REFUNDS

In the case at hand, CCBC owes, at the present, 116 students refunds for a total of over half a million dollars at the present. The amount of refunds owed by CCBC continues to grow as the Superintendent continues to receive more student refund complaints. The Tribunal took note of the fact that the Applicant did not dispute that the refunds were owed to the students of CCBC. CCBC did not introduce any documentary evidence to dispute any of these refund claims. There were 116 student complaints about non-payment of refunds. These students were from 13 different countries (Nigeria, Nepal, Pakistan, India, Iran, Gambia, Bangladesh, Kuwait, West Africa, Tanzania, Russia, Congo, Ethiopia). The Respondent's counsel provided the Tribunal with proof that established that refunds were owed to all these students. These international students were denied student visas by overseas Canadian Embassies and High Commissions. Extensive evidence was provided to the Tribunal that CCBC owed over half a million dollars to these students. The only issue is: what is the nature of these refunds?

The Tribunal reviewed 116 files of Student Refund Claims. It was an extremely cumbersome and slow process, although Ms. Shepherd had made commendable efforts to organize these files.

From the documentary evidence reviewed by the Tribunal, it is very clear that, at the time the students made these payments, they were advised by CCBC that the deposits were only being made towards "Tuition Fees for CCBC".

The Applicant issued numerous receipts to students for tuition fees. In his testimony, he stated that the payments were made by the international students as "Application Fees", and not as tuition fees.

The Applicant deliberately tried to mislead the Tribunal by intermittently using the term Tuition Fees and Application Fees in order to get some advantage by the confusion that

he was creating by the use of these two terms. All the documents presented to the Tribunal clearly established that these payments were termed as “Tuition Fees” payments, and were made by these international students as tuition fees for the various courses they planned to undertake at CCBC.

A close review of the CCBC’s promotional material contained in various exhibits shows that there is no reference to “Application Fees” in the material, but there is a consistent reference only to Tuition Fees and Registration Fees.

The Tribunal reviewed a document entitled “Offers of Admission” which was provided to these students by the Applicant. This document sets out in detail the amount of fees to be paid and the timeframe for the payment of the fees. The Tribunal did not find any mention of Application Fees in this document. During the hearing, the Tribunal spent a number of days going through student complaint files which contained Offers of Admission, and there was no mention of Application Fees in any of these documents. The Respondent’s counsel also produced numerous e-mails and letters from staff at CCBC including some documents by the Applicant himself, which only refers to these amounts as owed refunds for “Tuition Fees” .

The legislative requirement under Section 24 of the *Private Career Colleges Act* R.R.O. 1990 , Reg . 939 s. 24; o.Reg. 68/03, s. 1. reads

Where a private career college is required to refund any money under sections 21, 22 or 23, the private career college shall refund the money to the person entitled within thirty days of the receipt by the private career college of the notice referred to in section 18, 21 & 22 as the case may be.

No refunds were made to the students within 30 days of receipt of the notice of CCBC. CCBC has not complied with this provision and has thus violated the legislation in all of these 116 cases of refunds to the international students.

This Tribunal also took notice of the fact that the language used in the legislation is not limited to “Tuition Fees” alone. Sections 21, 22 and 23, refer to “Fees for Course of Instruction”. This is the defined term in the legislation. In the definition section of the Act, Section 1, “Fees for the Course of Instruction” means the “total cost of the course of instruction exclusive of the non-refundable registration fee.”

This term defined in the statute is broad enough to include the fees levied by CCBC from these international students.

Ms. N. S., testified before the Tribunal as a student of CCBC. Her family had to take out a bank loan to pay \$1200 CAD to CCBC for her to pursue a course to obtain an “Applied Industrial Diploma in Laser & Fiber Optics”.

The evidence of Ms. N. S. is that she paid this money to CCBC and she provided a copy of the proof of payment to CCBC and a copy of the bank loan taken out by her

family to help her. In her testimony before this Tribunal, Ms. N. S. described the circumstances under which she arrived in Canada. She was fortunate to get a student visa to attend CCBC, and once she attended CCBC for a few days, she changed her mind. She found CCBC to be extremely substandard, and she provided reasons to the Tribunal for her withdrawal from the college. A notice was given by her to the Applicant that she desired to withdraw and she requested her refund on January 6, 2006.

The incontrovertible evidence was that the Applicant advised her that CCBC would be unable to pay the full refund and then offered to pay her a partial refund. At this point, she has not received any money from CCBC.

In this particular case, CCBC has failed to meet the legislative requirement that refunds be made to the students within 30 days of notice of withdrawal from CCBC. CCBC over charged Ms. N. S., and misrepresented the value of scholarship in the program of Laser & Fiber Optics. In 21 student files of those students who had applied for the diploma in Laser & Fiber Optics CCBC had over charged and grossly mis-represented the value of scholarship in the program.

The most crucial issue is honesty and integrity. This is an essential requirement of the legislation and CCBC has failed to act in an honest and ethical manner to refund student claims. The fact is that 116 students from overseas, many of them from very poor and developing countries, gave substantial amounts of money to CCBC in order to pursue a dream of having an education in Canada. Unfortunately, these students were refused visas to enter Canada on study permits. The Applicant simply failed to refund the money these students had paid, even though it was owed to them.

CCBC has blatantly breached its obligation to these students. Apart from violating specific provisions in the legislation, there is also a breach of basic contract law in this case. After CCBC received payment as tuition fees from these students, CCBC issued receipts to these students and these receipts were found in at least 92 student complaint files. All these files were reviewed in detail by this Tribunal.

Forty-one student complaint files were also presented to the Tribunal. These student complaint files provided banking evidence, which proves direct payment to CCBC by these international students. In each of these 41 cases, a refund was sought from CCBC because the students were unable to obtain a study permit to pursue their courses of study at CCBC. The Tribunal was provided with evidence in the form of wire transfer records and other banking documents as well as the testimony of Ms. F.C., a witness employed by a major bank in Canada, revealing that CCBC directly received the money from the students.

The Tribunal also notes that CCBC produced few banking documents regarding CCBC's financial arrangements. The Applicant has tried to establish a fairly complex corporate structure with sister companies, and what would appear to be holding companies.

The Respondent's counsel provided the Tribunal with unequivocal proof of 41 instances of non-payment of refunds to students. By the calculations of the Respondent, the Tribunal heard incontrovertible evidence that CCBC received US \$149,571.55 and CAD \$9,180 based solely on the banking information for these 41 students. The Tribunal was also provided with a list of 23 refund cheques written by CCBC, but which were not honored. The failure of CCBC to refund the students and to honour these refund cheques, demonstrates past conduct that affords reasonable grounds to believe that CCBC will not carry on business in accordance with the law, and with integrity and honesty.

The Applicant tried to show that some of the educational agents, whom CCBC had retained internationally, were responsible for the failure of CCBC to refund fees to these students. He admitted in his evidence before the Tribunal that he and CCBC paid the education partners a commission, and that these agents were given directions by CCBC. The Applicant also stated a number of times on the record that he, as well as CCBC, are ultimately responsible for whatever representations were made by their agents or so called education partners. The Applicant further testified that the educational agents or partners issued the acceptance letters. He further stated that these agents kept the money. This fact is not supported by CCBC's own representation to the federal authorities and in emails with their agents. The assertion made by the Applicant was general and extremely vague. The Applicant further acknowledged that CCBC received direct payment from at least 41 students.

CCBC's policy was to issue acceptance letters only after payment was received by CCBC. Ninety-two student files containing these acceptance letters issued by CCBC were reviewed by this Tribunal. The only conclusion the Tribunal can draw from this evidence is that at least 92 students made payments to CCBC and received acceptance letters after their payments were processed by CCBC.

Section 17 of Regulation 939 requires the Private Career College to pay the student-owed refund within 30 days regardless of any misrepresentation made by the Private Career College's , education partner or sales person.

The Applicant was unable to provide the Tribunal with any evidence to indicate that these agents went beyond the scope of their apparent authority in their dealings with the students. They were authorized to represent CCBC worldwide, and to recruit students for this college. During the hearing the Applicant asserted that CCBC was his own creation, that he was liable for everything that happened at CCBC. The Applicant asserted that he was the owner, the Director, and the CEO of CCBC. It was an institution that solely belonged to him and as such he accepted total responsibility for the mal-functioning of CCBC.

2. THREE OUTSTANDING COURT ORDERS AGAINST CCBC FOR STUDENT REFUNDS

There are three unpaid outstanding Court Orders against CCBC for refund to three students: A., P.O. and W. The Respondent's counsel produced evidence of such proceedings to the Tribunal. There is unequivocal proof of CCBC's failure to comply with the three Court Orders regarding student refund claims. The Applicant indicated to the Tribunal that neither he, nor CCBC has satisfied any of the Court Orders. Two of these orders have been outstanding for a period of one year. Another Court Order has been outstanding for a period of one and a half years. The failure of CCBC to comply with even a single Court Order is sufficient to show past conduct that gives reasonable grounds to believe that the Applicant will not act with honesty or integrity.

Mr. Penney, an expert Forensic Accountant and Financial Analyst, testified before the Tribunal. In his testimony, he stated that CCBC was a business identified as being at the "Highest Credit Risk" according to an Equifax Credit Report. In his evidence, Mr. Penney emphasized that there were serious questions surrounding CCBC's financial viability based on the financial statements he had reviewed. He also pointed out that CCBC had exaggerated the value of its assets, referring to the Bond posted with the Ministry, at almost 300% of the real value. He further stated that the "Only Source" of revenue for CCBC was the tuition fees of the international students.

3. OVER CHARGE FOR REGISTERED COURSES BY CCBC

CCBC overcharged 14 students for registered courses. The Tribunal saw registration material and also heard the Ministry's witnesses testify that CCBC overcharged for the Ministry's approved courses. Each student file was reviewed by the Tribunal to identify the overcharge by CCBC. In these 14 cases, overcharging by CCBC was evident as the scholarships and the tuition fees were combined and were in excess of the approved Ministry fee for those particular courses. It was also very clear that a deliberate attempt to overcharge the students was made through currency conversion. CCBC required the students to make payments of tuition fees in US dollars while the fee was set for the program by the Ministry in Canadian dollars. CCBC gained a substantial amount of money through this planned currency conversion.

4. NON APPROVAL OF CO-OP/WORK PLACEMENT IN APPROVED COURSE OF "DIPLOMA IN LASER AND FIBER OPTICS"

CCBC had not received prior approval from the Ministry to offer a co-op or work placement program in relation to its approved course entitled "Diploma in Laser and Fiber Optics". There is overwhelming evidence in the student complaints files that, in 21 cases, such a course was offered. In its course material for this particular diploma, CCBC represented to the Ministry that certain equipment would be used to deliver this course. On its own, CCBC substituted this equipment list and, instead, only had equipment which was inadequate to deliver this program as designed. CCBC failed to advise the Superintendent that it had departed from the equipment list provided and approved by the Ministry.

The Tribunal heard expert evidence of Professor Aitchison that the program designed on paper was appropriate, but the material and equipment used by CCBC to deliver the program was inadequate to deliver this particular kind of course. Professor Aitchison further testified that a machine called “Maxtironix 500-N-1” was the lab equipment that was being used by CCBC to teach this course. This type of equipment was not appropriate for the purpose of teaching this program. This equipment could only serve one student, and was advertised very commonly in the market as an educational toy suitable for ages 10 and up. The cost of this educational toy was \$149.94. The Tribunal finds that there was a gross misrepresentation by CCBC as to the course if offered for a Diploma in Laser and Fiber Optics, given the inadequate equipment which CCBC was using.

5. UNQUALIFIED INSTRUCTORS HIRED BY CCBC

The Tribunal reviewed exhibits regarding the qualifications of an instructor, Ms. H.J. The qualifications of this teacher/instructor did not conform with the qualifications that were required by the Ministry. The Tribunal reviewed the personal data form and the resume of this instructor, and noticed significant inaccuracies and discrepancies. The instructor obtained a Bachelor of Science degree – Computer Systems within a period of only four months while working full time at other places. It is improbable, if not impossible, for an individual to obtain a Bachelor’s degree in science within four months from November 1999 to February 2000, and no evidence was provided by the Applicant to support this extraordinary achievement. Furthermore, Ms. H. J. did not have the requisite experience as determined by the Ministry to teach the courses as proposed by CCBC.

6. FAILURE TO PAY RENT RESULTED IN LOCKOUT OF FACILITY

The Tribunal was informed in the course of the evidence that the Applicant acknowledged in an article in a local Toronto newspaper on October 14, 2005 that he had a cash flow problem. Further the Tribunal was advised that the newspaper also alleged that CCBC owed \$66,699.00 in rental arrears for its location at 130 Bloor Street West, Toronto, and that as a result of the rental arrears, CCBC was locked out of its premises in September 2005. The allegation was that this lock-out resulted in all operations being stopped, and the student’s program was disrupted. The Ministry’s witness, Jerson Joaquin testified before the Tribunal that he was a Ministry’s consultant and instructor, and on visiting the premises, he learned that there was a lock out which started September 20, 2005. Classes did not resume until September 28, 2005. Thus, CCBC disrupted the programs for a period of eight days due to nonpayment of rent. This substantial amount of rental arrears by CCBC caused the shutdown by the building management.

7. NEW PREMISES VIOLATION OF FIRE CODE

After CCBC's eviction due to nonpayment of rent, CCBC moved its operation to a new location in Toronto. These premises needed modification to meet a basic requirement of the municipal fire code and there is evidence before the Tribunal that, in spite of the Superintendent's repeated written requests to CCBC to resolve this issue, it was not resolved. In particular, in a letter dated November 4, 2005, the Superintendent demanded that CCBC address this issue of lack of fire code compliance. Again in a letter dated December 19, 2005, the Superintendent demanded "IMMEDIATE and URGENT" resolution of this problem. CCBC simply failed to resolve this issue, even when the Superintendent issued her proposal on January 19, 2006. It continued to conduct its operation in premises which were unsafe and dangerous for the students.

8. NEW PREMISES: NON-COMPLIANCE WITH ZONING LAWS OF TORONTO

CCBC also failed to comply with the City of Toronto zoning laws with respect to the new premises.

This information was given to the Superintendent through a letter dated February 6, 2006 from the City of Toronto. The letter was filed with the Tribunal as exhibit R. 3. It read

- a) City of Toronto clearly advises the Superintendent that the premises at <address deleted> cannot be used as a vocational school.
- b) Shelvan Kannuthurai did not provide any evidence from the city of Toronto that <address deleted> could be used by CCBC for the operation of a vocational school.

The lack of proper zoning at the new premises meant that the Superintendent could only conclude that CCBC would have to shut its doors once again, thus disrupting the students' program.

In his testimony, the Applicant informed the Tribunal that the new premises were a residential property owned by his wife. He further went on to state that they had two residences in Toronto. A house that he lived in with his family in Scarborough, and the school that is located at the new premises. The Applicant also stated that the facility at the new premises was now being used for yoga instruction. He also emphasized the fact that he was penniless, and that both these houses were owned by his wife.

9. MISREPRESENTATION TO THE SUPERINTENDENT REGARDING REFUND OF FEES TO STUDENTS

CCBC misrepresented to the Superintendent the status of refunds, specifically that numerous refunds had been made to the students. This fact was asserted by CCBC in

a letter to the Superintendent dated November 23, 2005. The Superintendent later learned that the refund cheques returned to over one-third of the students who were identified as being refunded by CCBC, were in fact not honoured. In the testimony of the bank employee, it was stated that there were six cheques that were dishonored and were returned. The total amount of the dishonored cheques issued by CCBC was \$179,000 CAD and \$139,080 USD. The Tribunal noted that all six non-sufficient funds ("NSF") cheques were issued on one date, November 10, 2005. The originals of the NFS cheques were presented to the Tribunal to review.

10. PLANNED DILUTION OF CONSUMER PROTECTION SECURITY BOND WITH MINISTRY

CCBC continued to take substantial tuition fees even after it was clear that this private college was not in a position to pay the refunds owed to international students. In the documentation sent to the Superintendent on November 23, 2005, CCBC attached documents to show that it was continuing its recruitment efforts. It is clear to the Tribunal that the Applicant deliberately continued recruitment efforts, and took money from prospective international students despite the fact that he was aware of the financial crisis of CCBC to the extent that he was reported in a local newspaper to have made such a statement regarding his financial position. Disregarding his desperate financial situation, he made well-planned efforts to recruit more students for his college, as he was very well aware that this action of his would inevitably dilute the security bonds that were with the Ministry solely for the purpose of protection of the interests of the students. These actions of the Applicant alarmed the Superintendent and an immediate halt had to be put on CCBC's foreign recruitment of students. Meanwhile, a steady stream of complaints was coming into the Ministry, and it was obvious that new students were making more deposits to CCBC. The Superintendent's immediate suspension of the registration of CCBC on January 19, 2006, saved an amount of the security bond that each complaining student could be refunded.

The Superintendent's order of immediate suspension was required to stop the willful depletion of the bond by CCBC. Even now, it appears that the students may only get 25 to 30 percent of what they originally deposited with CCBC after the proceeds of the bond are distributed.

11. FICTITIOUS NAMES ON RECEIPTS ISSUED BY CCBC

The Tribunal is concerned about the use of fictitious names on the receipts issued by CCBC. It was evident that CCBC deliberately tried to deceive its international students by using a fictitious name in its operation, for the purposes of its financial transactions. The Tribunal examined numerous receipts of payments which were issued to the students, and most of the receipts were signed by using a fictitious name. The Applicant admitted during the hearing that there is no person with the name that was given. It was only a fictitious name created by him in order to maintain a fiction between

him and his staff and the students. He further stated that, when worried students would call asking for assistance from that person, he and his staff would deceive the student, and tell them that the person was too “busy” and could not come to the phone. The students were advised to call back later. The Tribunal is very concerned that a Private Career College which claims to be recognized and registered with the Ontario government, would use a fictitious name to escape the inquiry from international students who were desperately looking for some answers regarding their courses and fees to the college.

The only obvious reason that a college would take such extraordinary measure is that the people who were working in that institution, including the Applicant who is the Director and CEO of CCBC, wished to shield and protect themselves from the students who were innocent victims of the well-planned scheme to deprive them of their tuition fees. CCBC and its administrative staff refused to take personal responsibility for their actions and tried to hide themselves behind a fictitious name. The Applicant proudly informed the Tribunal that it was a standard business practice in the corporate sector to use fictitious names. This statement from the Applicant reveals his motives and intention to deceive the international students. These were victims of a well planned scheme devised by the Applicant to deprive them of their money.

TESTIMONY OF SHELVAN KANNUTHURAI

The Applicant testified that the order of the Superintendent, dated January 19, 2006, immediately suspended the operations of CCBC. It halted what he described as “Canada’s dream for the African Continent, a dream of hope for Africa”. CCBC was a reputable institution, which gave birth to a humanitarian program in Africa called “Professeurs Pour La Liberté” (“PPL”). He made allegations that the Ministry had acted out of bad faith to suspend CCBC as a result of a lawsuit, which he commenced in 2003. The Applicant commenced OSAP litigation against the Ministry more than two years prior to the present issues in this case. He further alleged that the Ministry was tainted, and it had conspired with the federal authorities to shut down his operations. He referred to the immediate closure of CCBC as the “Systemic Destruction of CCBC”. The Tribunal was not provided with any evidence to substantiate the Applicant’s allegation of a deep-rooted conspiracy, intentional wrongdoing and systemic destruction of the Applicant by the Ontario Government or the Federal Authorities. The Superintendent denied singling out the Applicant for special treatment as she informed the Tribunal that she had issued at least 12 other proposals for revocation of licenses for Private Career Colleges since January 19, 2006.

The Tribunal finds that the allegations made by the Applicant are frivolous, vexatious and without a shred of evidence to support them. The Tribunal repeatedly admonished the Applicant to control himself and act appropriately during the proceedings. As the Applicant was unrepresented by legal counsel, the Tribunal gave some leeway to this witness in order to ensure that the principles of fairness were not jeopardized or compromised during this hearing. Procedural protection was provided to the Applicant,

as the Tribunal has the authority to order the Superintendent of Private Career College to revoke or cancel the registration of a College.

During his entire testimony, the Applicant refused to answer any questions asked of him in cross-examination regarding the evidence that he had presented through his testimony. He was evasive and adversarial during his entire testimony. During questioning of Ministry witnesses, he tried to intimidate them, particularly the Superintendent, during a lengthy five-day examination period. He was extremely hostile and non-responsive. The Tribunal continuously endeavored to keep him in order. His testimony was inconsistent and lacked overall credibility. He continually tried to mislead the Tribunal from the issues of compliance with the legislation applicable to the college by talking at great length about “PPL”, a CCBC initiative in Africa with political support. In his testimony, he stated that CCBC focused on the success of PPL, and not on the financial accounting of the college.

The main issue of CCBC’s conduct, specifically its failure to act with honesty with respect to its students and in accordance with the Act was clouded by Shelvan Kannuthurai’s deliberate attempt to twist and distort language. He tried to confuse the terminology of a “Student” and an “Applicant”. He emphatically asserted that all the students were not CCBC’s “students”, but merely “applicants”. The Tribunal noted that in all of the CCBC documents there was no mention of any students as “Applicant”. All these people were clearly identified as “Students”. Many “Acceptance Letters” in the students’ refund complaint files were reviewed, and each of these letters started with a statement which read “It is our pleasure to confirm that you have qualified and been accepted as a **“Student”** [emphasis added] at CCBC for our course”. All these students were issued student ID numbers that were printed on all acceptance letters. On the basis of these acceptance letters, the students were instructed to obtain study permits from Canadian authorities overseas. These Acceptance Letters were signed in the name of a fictitious non-existent individual.

The Tribunal is extremely concerned that CCBC was issuing fictitious and fraudulent documents for individuals to use, in order to obtain study permits to enter Canada. These documents were issued in return for exorbitant sums of money from international students. It is clear to the Tribunal that these actions of the Applicant were to circumvent and violate the immigration laws established in Canada under the *Immigration Refugee Protection Act, 2001* and some students were able to get student’s permit to enter Canada.

Shelvan Kannuthurai also put forth an argument regarding the obligation of students who signed an “Enrollment Contract”. He took the position that the legislation, if properly read, required that an “Enrollment Contract” **must** be signed in order for the legislation to apply. The Tribunal notes that there was no such requirement under the legislation. The legislation only speaks of a contract in general terms between the students and the Private Career College.

The Applicant also suggested that the students were PPL students and not CCBC students. The Ministry does not regulate PPL programs. The promotional material of CCBC filed with the Tribunal clearly indicates that all students were considered to be CCBC students. The material emphasizes the fact that CCBC is regulated by the Ministry. The Applicant also stated that this fact in itself instills great confidence in international students when they are applying to a school that is recognized by the Canadian Government.

The documents also indicate that payments were made by the students as "Tuition Fees" and "Registration Fees" to CCBC. The Applicant tried to convince the Tribunal that the fees paid by these students were called "Application Fees", and, as a result, any refund issues fall outside the legislation. The offers of admission set out in 18 of the student claim files were closely reviewed by the Tribunal. There was no mention of any "Application Fee". The witness was unable to produce any evidence to support his assertion that students paid "Application Fees" prior to making their payment for Tuition Fees.

The Superintendent issued written warning to the Applicant regarding non-compliance of CCBC with the Act. The Tribunal also found that the witness was willfully blind to the obligations to abide by the Act in the daily operations of CCBC. He continued to operate his school by offering courses, which required the approval and registration of the Superintendent. He received payments from prospective foreign students, and continued to offer courses to these students without the approval and registration of the Superintendent. He continued to do so until November 2005, despite written warning to him by the Superintendent.

Shelvan Kannuthurai also agreed that he was actively involved in a scheme to manipulate the currency conversion of student payments to US Dollars entirely for profit. This also resulted in overcharge by CCBC for various courses. He also acknowledged that he used fictitious names to sign the receipt of payments that were sent to the students. All this was done for his personal gain.

In April 2005, CCBC received a deposit of \$1.2 million USD wire transferred by Nigeria's Akwa Ibom State. This money was sent on behalf of 66 students to pursue their courses at CCBC, and was a partial payment of a promised amount of \$4,140,000.00 USD to CCBC. In June 2005, these 66 students were abruptly transferred to Ottawa's Algonquin College, due to the poor quality of instruction and facilities at CCBC. The Tribunal finds that the Applicant failed to refund students in the amount of over half a million dollars when he had received \$1.3 USD from the Nigerian Government. The witness informed the Tribunal that the money was spent on his promotion of PPL by organizing a number of political events in Canada & Overseas.

Another serious concern of the Tribunal is the deliberate and malicious actions of the Applicant to deplete the Ministry's Security Bond by continuing to recruit new students even after he was notified on November 7, 2005, that CCBC had failed to refund its students, and was not in compliance with the Act.

In his closing submission, the Applicant requested the Tribunal grant his appeal, and a reprieve of 60 days. Within this 60 days, he would be able to obtain over half a million dollars, and he was confident that he would be able to establish CCBC financially. He further informed the Tribunal that many agents in the corporate sector were willing to invest in his future projects. The Tribunal firmly rejects this request.

CCBC's past conduct and its egregious failure to refund money owed to vulnerable students from poor, developing countries establishes reasonable grounds that the Applicant will not act in accordance with the law and with honesty and integrity.

THE TRIBUNAL'S JURISDICTION

The Tribunal's jurisdiction is very clearly set out as "The Trier of Fact". The Registrar is treated as the investigator in these matters. The Tribunal has considered two cases binding on this Tribunal. The leading decision is *Brenner v. Ontario (Registrar of Motor Vehicles and Salesman)* [1983] O.J. No. 1017. This particular case dealt with the interpretation of legislation, which was identical in all relevant provisions to the Act. In the *Brenner* decision, Southey J. stated 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.

In referring the matter back to the Tribunal for a re-hearing, the Court went on to state that:

The proper question at the re-hearing remained, however, whether the past conduct of the applicant provides reasonable grounds of 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 its proposals.

The Tribunal also refers to *Shine Car Sales and Omar Hassan Rahim v. Registrar, Motor Vehicle Dealers Act, 2003 CanLII 11437 (ON S.C.D.C.)*. This case also dealt with the Tribunal's jurisdiction, and the Registrar's proposal to revoke the registration of both respondents. This case reiterated the principle stated in the *Brenner* case, and affirmed the principle that the Tribunal does not owe deference to the registrar. The Registrar is not a Trier of Fact whose conclusions are based upon the evidence heard at a hearing.

Reference is also made to two decisions of Licence Appeal Tribunal. The first case is *Toronto Institute of Technology Inc. 2002*. It was decided in this case that the Superintendent had proven his case, and that the past conduct of the applicant afforded reasonable grounds for the belief that such applicant would not carry on business in

accordance with law and with integrity and honesty. The Superintendent was directed to carry out the proposal.

In another case, of *St. George College of Business and Language Limited, 2004*, the Tribunal ordered the Superintendent to carry out her proposal to revoke the registration of the Private Career College. In this particular case, the college had failed to refund 14 students approximately \$89,000 dollars owed to them. The college had also offered three unapproved programs by the Ministry.

In the present case, CCBC owe 116 students refunds for a total of over half a million dollars. This amount of refunds, owed by CCBC, continues to grow as the Ministry receives more student refund complaints.

ORDER

Accordingly, pursuant to the authority vested in it under Section 6(5) of the *Private Career Colleges Act*, the Tribunal directs the Superintendent to proceed with the Proposal dated January 19, 2006, to revoke the registration of Canadian College of Business and Computers.

SECURITY BOND OF CCBC

The order is based upon the overwhelming and ample evidence before the Tribunal which indicates that the Superintendent has proved the case. The past conduct of the Applicant Shelvan Kannuthurai affords reasonable grounds of belief that CCBC will not operate in accordance with “law”, “integrity” and “honesty”.

The Tribunal has the authority to “direct the Superintendent to take action in accordance with the Act and regulations”. Given the Tribunal’s concerns for the protection of international students and the protection of consumers, the Tribunal directs the Superintendent to forfeit the Security Bond of CCBC. The Tribunal refers to Section 10 (1) of PCCA which gives the Superintendent the discretion to declare any bond mentioned in section 9 forfeited. The Superintendent can then work out the details of the distribution of the proceeds of the Bond on a pro rata basis to the individual student claimants. It is not the Tribunal’s mandate to work out the calculations of the distribution of the proceeds of the Bond.

The Tribunal believes it is appropriate that the Superintendent takes some additional remedial steps to protect the international students who might otherwise be misled by the Applicant. These steps can be developed by the Superintendent’s staff and could include all reasonable steps to notify the affected students directly of the revocation of registration of CCBC as a Private Career College.

R7 - RESTRICTED ACCESS

The Tribunal orders under Rule 7.2(2) restricted access to the student files which contain personal information on the students, as well as restricted access to any of the documents submitted to the Tribunal containing such personal information of students and, as well, to any portions of the tapes which recorded the evidence in which the personal information of the students is given. The student files were presented to the Tribunal and as noted in the reasons were reviewed by the Tribunal in reaching its decision. These files and other documents presented to the Tribunal contain confidential personal information. Therefore it is appropriate to restrict access to these files and other documents, and the oral evidence dealing with that personal information, and order that these documents are not accessible to the public.

COSTS

Ms. Sonal Gandhi, Respondent's counsel made submission on costs. Shelvan Kannuthurai made two very serious allegations against the Ministry. The first allegation was that this matter was a retaliatory measure taken by the Ministry, as the Applicant had commenced an OSAP lawsuit in 2003. The Tribunal finds that this lawsuit was initiated three years prior to the present case. It has no relevance to the issues which have emerged in the present case. Regarding the second allegation that he was the victim of a well-planned Ministry conspiracy and intentional wrong doing of "Systemic destruction of CCBC", no evidence was presented by the Applicant to substantiate his allegations against the Ministry and the Superintendent.

The Tribunal takes a very serious view of the Applicant's frivolous, vexatious and baseless allegations. The Applicant should be extremely careful in making such allegations, as in the court of law he would be severely sanctioned if such allegation were made, with an award of solicitor – client full indemnity costs against CCBC.

The Applicant deliberately and willfully presented misleading evidence to the Tribunal throughout the hearing (Rule 14.2(b), 14.2(d) & 14.3). He deliberately used delaying tactics and prolonged the proceedings by raising irrelevant issues and filing redundant motions on the same issue.

Upon the request of the Respondent's counsel, the Tribunal makes an order of cost under Rule 14.3 of the Tribunal's Rules of Practice. The Respondent incurred heavy costs. Several boxes of student files, numerous documents, voluminous binders prepared by the Respondent over a period of more than 12 months have raised the cost of this hearing. As the preparation of this hearing was based on the 116 international student refunds from 13 different countries, the costs escalated.

The Tribunal conducted 25 full hearing days in this matter, frequently sitting beyond the normal hours. For each day of the hearing, the Tribunal has authority to order the sum of \$800 per day under Rule 14.4(2)(b). Consequently, the Tribunal awards costs in the sum of \$20,000 to the Respondent. The Applicant is to pay the amount of \$20,000 to

the Respondent by December 1, 2007, failing which, the Respondent can commence legal action for recovery of these hearing costs.

LICENCE APPEAL TRIBUNAL

Raj Pannu
Vice-Chair

Released: September 28, 2007

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



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: March 14, 2007

Toronto

ORDER

BACKGROUND

On March 14, 2007, 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 give full and complete disclosure of the following documents:

NO.	RECORD	COUNSEL FOR RESPONDENT
1	Disclosure of material regarding meetings that took place between Ms. Nancy Shepherd and the Government of Canada to discuss the case of Canadian College of Business and Computers, Inc. (C.C.B.C.).	Two meetings were held between Ms. Nancy Shepherd and the Government of Canada. These meetings were inter-jurisdictional meetings between federal and provincial authorities on consumer protection issues. At the meetings with Canadian Border Security Agency (C.B.S.A.), there were specific discussions relating to C.C.B.C. and some compliance issues regarding refunds. No documents relevant to these meetings have been located by the Respondent. The Applicant has been provided with a three-

		page document of emails between Lee Roni of C.B.S.A. and Ms. Nancy Shepherd. Five emails were exchanged dated February 7, 2006, March 6, 2006, and March 7, 2006, respectively. The subject of these emails was the "TRAIN-OUTS" of two C.C.B.C. students. The importance of these emails was categorized as "High".
2	On August 28, 2006, the counsel representing the Respondent submitted to the Tribunal that no such communications ever took place with the Government of Canada.	This point should be struck down as it pertains to the pre-hearing of a motion before another Vice-Chair of this Tribunal, Ms. Jane Weary, on August 28, 2006.
3	In June, 2005, C.C.B.C., on behalf of the Professeurs Pour La Liberté (P.P.L.) program, scheduled a meeting for the Commissioner of the Ministry of Economic Development of the Government of Akwa Ibom, Nigeria, with the Superintendent, Ms. Susan Hoyle-Howieson. The Ontario Ministry of Training, Colleges and Universities (O.M.T.C.U.) has yet to produce any documents pertaining to this meeting.	No documents have been located by the Respondent regarding this meeting. The meeting between the Commissioner of the Ministry of Economic Development of the Government of Akwa Ibom, Nigeria, and Ms /Susan Hoyle-Howieson of O.M.T.C.U. has no relevance in the hearing of this appeal by the Tribunal.
4	In addition, the Respondent opted not to disclose relevant information between the Ontario government and her office.	The request of the Applicant to provide all relevant information between the Ontario government and the Superintendent's office to him is vague and confusing. The Applicant has been provided with a two-page document of emails exchanged between Ms. Hoyle-Howieson and the administrative staff of O.M.T.C.U. regarding the lockout of C.C.B.C. by their landlord due to non-payment of rent. This document is dated September 21, 2005. The Superintendent is a representative of the Minister and the Ontario Government and is not obliged to disclose any information which is not relied on by the Respondent's counsel during the hearing of this appeal. Even if such documents exist, their disclosure is irrelevant.

The Tribunal derives its authority from the *Statutory Power Procedures Act*, R.S.O. 1990, c. s.22. The Tribunal heard arguments based on law relating specifically to

Section 23 (1)(2) of the *Statutory Power Procedures Act*, R.S.O. 1990, from Ms. Sonal Gandhi, Counsel. The Licence Appeal Tribunal's Rules Of Practice, number 6.3 and 6.6 dealing with Disclosure, were referred to by Counsel. The Tribunal was provided with the Respondent's affidavit and factum for this motion. The factum provides the citations of the following two cases and a book upon which Counsel relied in her arguments:

1. Counsel Gandhi made reference to *Madhur Lata Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, Paragraph 16, "Powers of the Adjudicator", which, in part, reads "As a general rule, these tribunals are considered to be masters in their own [page569] house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."
2. *1423391 Ontario Inc. (c.o.b. Supreme Car Sales)* [2005] O.L.A.T.D. No. 125.
3. *The Trial Of An Action* (2nd Edition) [1998] by John Sopinka (Late Justice of the Supreme Court of Canada), Donald B. Houston, Melanie Sopinka, (LexisNexis Canada), pp.312.

The Applicant's Motion is confusing and non-specific. He acknowledged that he has already received some of the documents mentioned in his Motion Record. These include the emails referred to in Item 1, above, exchanged between Ms. Nancy Shepherd and C.B.S.A.

Regarding the Motion Record referred to in Item 2, above, the Motion was heard at a pre-hearing before another Vice-Chair of this Tribunal, Ms. Jane Weary, on August 28, 2006, and has no relevance to this hearing and is hereby struck down.

In Item 3, above, the Tribunal does not see any relevance of the meeting held between the Respondent and the Commissioner of the Ministry of Economic Development of the Government of Akwa Ibom, Nigeria. For the purpose of the hearing of this appeal, the Tribunal sees no relevance in either the information arising from the meeting, or any documents pertain to this meeting, should they exist.

The Applicant has acknowledged receipt of the emails referred to in Item 4, above, exchanged between Ms. Susan Hoyle-Howieson and administrative staff of O.M.T.C.U. The Respondent is a representative of the Ministry of Training, Colleges and Universities and is not required to disclose information irrelevant to this hearing. The Tribunal hereby deems such information to be irrelevant to this appeal.

In the Applicant's Motion Record, the Applicant alleges that the Respondent has failed to disclose "vital" and "relevant" material, which is "crucial" to his appeal. The Tribunal finds no evidence to substantiate the Applicant's allegations that the Respondent has failed to provide him with full disclosure. The three pages of emails referred to in Item

1, above, between Ms. Nancy Shepherd and the Government of Canada regarding C.C.B.C. were categorized by C.B.S.A. as of “High” importance and were given to the Applicant, and receipt of it has been duly acknowledged by the Applicant. This fact contradicts the Applicant’s allegations of non-disclosure on the part of the Respondent.

ORDER:

Accordingly, the Tribunal denies this Motion.

LICENCE APPEAL TRIBUNAL

Raj Pannu
Vice-Chair

RELEASED: June 14, 2007

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



VICTORIA ENTERPRISE GROUP INC. o/a ONTARIO COLLEGE OF TECHNOLOGY

Appeal under section 19 the *Private Career Colleges Act, 2005*,
S. O. 2005 Chap 28 Sched. L

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: X. SEAN TAN, Agent, appearing for the Applicant, Victoria
Enterprise Group Inc.

IMANTS ABOLS, Counsel, appearing on behalf of the
Superintendent, *Private Career Colleges Act, 2005*

DATE OF
HEARING: May 2, 2007 Toronto

ORDER

At the commencement of the hearing on May 2, 2007, the Applicant sought an adjournment. The Superintendent opposed the adjournment. The Superintendent was ready to proceed, had witnesses present and had retained an interpreter to assist witnesses lacking in English fluency.

The grounds advanced by the Applicant were two-fold. The Applicant had one witness in the hearing room but asserted that it had only recently received a will say statement from another witness it intended to call, and needed more time to prepare. It also stated that it was seeking documentation from Quebec that had not yet arrived. In answer to questions from the Tribunal concerning the failure to marshal this evidence earlier, despite having been served the Notice of Proposal almost six months earlier, the Agent for the Applicant advised that for some of the time he had been out of the country. His efforts prior to leaving the country had not been successful in garnering the necessary evidence.

In argument it became clear that it is unlikely that the hearing can be concluded in one day. The Applicant's original estimate of three hours appears woefully inadequate, given the scope of the evidence that both the Superintendent and the Applicant intend to call. It is inevitable that the hearing will require further hearing dates at some time in the future. Given that it is preferable to hear evidence in one sitting, rather than spread over two or more days, several months apart, the Tribunal orders that the hearing be adjourned on terms, as follows:

1. The hearing shall commence at 9:30 a.m. on September 17, 2007, at the Tribunal's Chambers, 1 St Clair Avenue West, 12th Floor, Toronto, Ontario and continue, if necessary, on September 18 and 19, 2007.
2. By 11:59 p.m. on May 9, 2007, the Applicant shall cease from advertising or operating any educational program not yet screened by the Superintendent and shall remove reference to any such program from its web site.
3. By 4:30 p.m. on May 17, 2007, the Applicant shall provide the Superintendent and the Tribunal with copies of all documents in its possession that it intends to rely on at the hearing. Should further documents that it intends to rely upon come into its possession after the expiration of this fifteen-day disclosure period, the Applicant shall immediately deliver copies of such documents to the Superintendent and the Tribunal.
4. The recent documentary disclosure made by the Superintendent on the Applicant shall be deemed to have been made in accordance with the Tribunal's Rules of Practice.
5. There shall be no order as to costs for the day. Given that the basis of the adjournment is for the Applicant to produce further witnesses and receive documentation from out of the Province, should the Applicant fail to produce this further evidence at the hearing in September, the Tribunal may revisit the issue as to costs for the day in accordance with the provisions of Rule 14.
6. The adjourned hearing dates are peremptory on the Applicant. Should the Applicant seek to retain counsel, it shall ensure that counsel is aware of and available for the adjourned hearing dates. The Applicant shall retain counsel in a timely manner, to provide sufficient time for counsel to prepare for the hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: May 10, 2007

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



IN THE MATTER OF A

AND IN THE MATTER of the PROPOSAL BY THE
SUPERINTENDENT
UNDER THE PRIVATE CAREER COLLEGES ACT, 2005

TO REVOKE REGISTRATION – PROPOSAL DATED JANUARY 9,
2007

TRIBUNAL: LYNDA C.E. TANAKA, Acting Chair

APPEARANCES: HARRIS ROSEN, Counsel, representing A, the Applicant

IMANTS ABOLS, Counsel, representing the Superintendent,
Private Career Colleges, Respondent

Toronto

INTERIM CONSENT ORDER - ABRIDGED

A, Applicant, and the Superintendent under the *Private Career Colleges Act, 2005*, Respondent, have applied to the Tribunal for issuance of an Interim Consent Order of the Tribunal without a hearing pursuant to Section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990 c. S.22 as amended. The parties have filed with the Tribunal agreed Minutes of Settlement, an Agreed Statement of Facts, and the terms of an interim consent order including the terms of reference of a monitor put in place under the terms of the Minutes of Settlement.

Further the parties have applied by way of written Motion on consent and Request for written disposition of the Motion, for an Order pursuant to Rule 7 of the Tribunal's Rules of Practice deleting the name of the Applicant from any published documents and the appropriate use of acronyms or letters, because of the potential damage to the students of the Applicant and the prejudice that would result from publication of an unabridged form of the documents filed with the Tribunal or the unabridged Order. The parties are agreed that disclosure of the unabridged documentation filed with the Tribunal or the unabridged interim consent order is not in the public interest because of the potential damage to the students. The parties are also agreed that there is no prejudice to the Superintendent if

the motion for restricted access is granted, given the terms of the Minutes of Settlement and consent order filed. In support of the motion the parties have filed one unabridged copy of the materials in support of the issuance of the Interim Consent Order, and one abridged copy of the said materials.

The Tribunal has reviewed both abridged and unabridged copies of the Minutes of Settlement dated March 6, 2007, signed by the Applicant and the Respondent as to the disposition of these proceedings, along with the Agreed Statement of Facts, known as Schedule "2", and the Monitor's Terms of reference known as Schedule "3".

On the basis of the review of the said documents, and the written submissions with respect to the exercise of the Tribunal's power pursuant to Rule 7 of the Rules of Practice of the Tribunal, and the consent of both parties received to the issuance of an order for restricted access to documents and on terms and conditions acceptable to both parties and satisfying the requirements of the Rules of Practice for the exercise of the discretion by this Tribunal, the Tribunal agrees that it is in the public interest to order restricted access to the documents and to publish only abridged versions in the form agreed to by the parties.

Therefore the Tribunal orders:

1. The unabridged copies of the written Motion material including a cease and desist letter filed in support of the motion, all correspondence between the parties and between the parties and this Tribunal, the Minutes of Settlement, the Agreed Statement of Facts including all Schedules attached thereto, and the Interim Consent Order will be suppressed from the public record.
2. An abridged copy of the Minutes of Settlement, the Agreed Statement of Facts including all Schedules attached thereto and the Interim Consent order, in the form filed with the Motion material and utilizing letters and acronyms as agreed by the parties will be the only documents available for public review.
3. The file number of the Tribunal file for these proceedings shall not be referred to in any public documents in any way that would allow A to be identified by any member of the public.
4. The unabridged, unedited file disclosing names of the parties, shall only be made available to the parties to this dispute upon written request for same by either party and may be reviewed only at the Tribunal's offices.
5. Nothing in this Order will preclude the parties from relying upon or citing the unabridged unedited version of any document or thing in the Tribunal file for the narrow purpose of a future proceeding before the Tribunal or any subsequent appeal from any order of the Tribunal. For greater certainty, nothing in this Consent Order will restrict reliance by the Tribunal, the Superintendent or A on the unabridged unedited version of all documents or things contained in the file,

including reliance for the purpose of any right of enforcement in a subsequent Tribunal proceeding in which the Superintendent claims as against the Applicant (flowing from the alleged breach of the terms of the Consent Order, at any time in respect of any proceeding under the authority of the *Private Career Colleges Act, 2005* or pursuant to any of those documents or things filed).

6. The proceedings in this matter are for an interim period disposed of without a hearing on the following terms:
7. Pursuant to Subsection 19 (6) of the Private Career Colleges Act, 2005 ("PCCA, 2005"), the Tribunal directs the Superintendent to refrain from carrying out the Proposal subject to the terms herein.
8. To oversee that A's operations are conducted in compliance with the PCCA, 2005 and the regulations made under the Act, B, operating as C, will be appointed as Monitor of A and will undertake as of the date of this Order the responsibilities and exercise of the power set out in the Monitor's Terms of Reference found in Schedule 3 hereof.
9. The Monitor's term of appointment will end on a day that is six (6) months from the date of this Order.
10. The Monitor will be retained by A at its expense.
11. The Monitor will report to the Superintendent in accordance with the Monitor's Terms of Reference.
12. A will provide the Monitor with an indemnity against any claims by A or its officers, provided the Monitor acts in good faith and in accordance with the Monitor's responsibilities and the powers as set out in the Monitor's Terms of Reference.
13. In addition to the Monitor's oversight of A's operations, A will be subject to spot inspections by the Superintendent's delegate during the Monitor's term.
14. A will immediately cease offering, advertising or delivering any non-approved vocational programs, including, but not limited to: Medical Office Administration, Medical Office Assistant, Dental Office Assistant Level 2, Global Entrepreneurship, Registered Massage Therapy, Hospitality Management, International Trade, Human Resources Management, Global Entrepreneurship & E-commerce, Certificate in Management, Network Security Specialist, Website Management, Law Clerk and Paralegal, TESL, Payroll Administration and System Administration, Dental Office Radiography Certificate Course, Physiotherapy Assistant Program, Early Childhood Assistant Diploma program, International Travel and Tourism Management Diploma, and FITF International Trade Diploma.

15. Within seven (7) days of the issuance of this Order, A will provide the Superintendent with personal data forms for each instructor at each campus.
16. Within seven (7) days of the issuance of this Order, A will provide the Superintendent with a list of students enrolled in any non-approved vocational programs.
17. Within seven (7) days of the issuance of this Order, A will refund any monies collected from students enrolled in a non-approved vocational program and provide the Superintendent with evidence of such refunds or written confirmation that no such monies have been collected.
18. Within seven (7) days of the issuance of this Order, A will provide evidence satisfactory to the Superintendent that it has provided students in its Dental Hygiene program with the disclaimer referred to in paragraph 46 of the Agreed Statement of Facts that informs students that graduating from A's Dental Hygiene program will not guarantee their eligibility to write the National Dental Hygiene Certification Examination.
19. Within seven (7) days of the issuance of this Order, A will submit a copy of the Commission on Dental Accreditation of Canada's (CDAC) report on the A Dental Hygiene program to the Superintendent, requested by the Superintendent in a letter dated January 9th, 2007 and delivered to A on January 9th, 2007.
20. Within seven (7) days of the issuance of this Order, A will confirm that A has contacted the National Association of Career Colleges (NACC), with whom it has a contract to deliver the NACC's Early Childhood Assistant and Personal Support Worker programs, to request an audit. A will request that NACC report directly to the Superintendent on whether or not A is delivering the NACC programs as contracted. If there are corrective actions to be implemented, A will request that NACC report directly to the Superintendent on A's corrective action plan and subsequent completion of the corrective action plan.
21. Within seven (7) days of the issuance of this Order, A will confirm in writing to the Superintendent that it has standardized the content of its student files and included a checklist inside each student file for staff use. The check list and file contents should include at a minimum for each student: Full Name, Sex, Date of birth, Residential address and Permanent Address, Residential and permanent phone numbers and cell phone number, Email address, letters of acceptance, results of academic evaluations by A, copy of a contract signed by the student and A, verification (documentation) that the student has met admission requirements, copies of any withdrawal or expulsion letter, refund calculation and refund cheque if the student has withdrawn or been expelled from the program, copies of receipts issued to students for payment of fees, and a copy of the credential issued and student transcript if the student graduated.

22. Upon the issuance of this Order, A will commence providing the Superintendent on a monthly basis with copies of receipts and disbursement journal entries and updated lists of international students currently enrolled in A's programs.
23. Within fourteen (14) days of the completion of extensions to A's Dental Hygiene facilities, A will submit to and pay for a review of its renovated facilities by Dr. Ross Barlow of Hamilton Ontario
24. Should the Monitor or the Superintendent's delegate report during the term of the Monitor's appointment any breach of the terms of the Order or any other violation of the PCCA, 2005 and the regulations made thereunder by A, its officers, directors or employees, A will have fifteen (15) days to remedy the breach.
25. If A fails to remedy the breaches reported by the Monitor or the Superintendent's delegate or to comply with any term of the Interim Consent Order, the Superintendent may bring a motion before the Tribunal on seven (7) days notice to A for a Final Order directing the Superintendent to carry out her Proposal, but nothing in this paragraph shall operate to waive A's right to a hearing.
26. If at the end of the Monitor's term, A is in compliance with the PCCA, 2005 and the regulations made thereunder and has complied with the terms of the Interim Consent Order, the Tribunal will issue a Final order concluding the Proceedings without a hearing, on motion by either party, with notice to the other party.
27. The pre-hearing scheduled for April 4, 2007, and the hearing schedule for May 29, 30, 31 and June 1, 2007, are cancelled.

LICENCE APPEAL TRIBUNAL

Lynda C. E. Tanaka
Acting Chair

Released: April 4, 2007

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

SCHEDULE "3"

PRIVATE CAREER COLLEGES ACT
Statutes of Ontario 2005, Chapter 28
Schedule 3

A

IN THE MATTER OF

A

AND IN THE MATTER of the PROPOSAL

by the Superintendent under the
Private Career Colleges Act, 2005
TO REVOKE REGISTRATION
- Proposal dated: January 9, 2007

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

A

Applicant

- and -

SUPERINTENDENT UNDER THE PRIVATE CAREER COLLEGES ACT, 2005
("Superintendent")

Respondent

Monitor's Terms of Reference

WHEREAS the Superintendent and A hereby acknowledge that B, carrying business as C, and located at yyyy, is a person with the requisite knowledge and expertise with respect to the operation of a private career college and the legislative requirements under the Private Career Colleges Act, 2005 (the "PCCA, 2005") and the regulations made thereunder

governing such schools;

WHEREAS the Superintendent and A also acknowledge that B does not presently operate a private career college, has no current or prior relationship with A and is not in any way in competition with A;

AND WHEREAS the Superintendent and A have agreed to the appointment of B as Monitor of A for the purpose of overseeing A's compliance with the terms and conditions of the Tribunal's Interim Consent Order and A's compliance with the PCCA, 2005 and the regulations made under thereunder, generally;

NOW THEREFORE in accordance with the Tribunal's Terms of Interim Consent Order, B will undertake the following duties and exercise the following powers:

1. Prior to the publication of any advertising by A in whatever form and media, review the advertising to ensure that it complies with the prescribed requirements and guidelines issued by the Superintendent under the PCCA, 2005.
2. Once every week during the term of her appointment, attend all of A's campuses on an unannounced basis during normal business hours for the purposes of reviewing all or any of A's student files, refund files, financial ledgers and instructor data files. The Monitor will have unrestricted access to these files and will be able to copy any information that may be relevant for purposes of reporting to the Superintendent on A's compliance. A, its directors, officers and employees will produce any document, record or thing relevant to the Monitor's review of the files.
3. The Monitor may generally audit classes and speak to students attending A.
4. Complete after each visit a report in accordance with the attached template (see *attachment "A"*) and submit the report to the Superintendent. The Monitor will provide A with a copy of the report.

Attachment "A"

[C letterhead]

REPORT TO: Susan Hoyle-Howieson
Superintendent, Private Career Colleges

AND TO: Margot Devlin
Program Consultant

WEEK ENDED:

CAMPUS:

SUBJECT: A

The following report identifies areas of examination and issues of concern. Any issues were raised with A.

Areas of Examination and comment:

- Advertising – flyers, newspapers, website
- Programs offered – approved?
- Student files – compare content to X's checklist
- Refund files – refund correct?
- Student complaints to school – format ; process
- Instructor Qualification forms for any new instructors
- International student files – trust funds, contracts?
- Dental Hygiene student files – contract, disclaimer?
- Audited classes
- Internal administrative controls
- Management practices

Table of Files Reviewed

Student Name	Program	Date of Contract	Tuition Amount	Start and End Date	International or domestic student	Method of funding

Issues of Concern:

- 1.
- 2.
- 3.

Discussion with A:

Corrective Action:

Confirmation that Corrective Actions Completed from former visit:

C Signature and date

C

XXXX XXXX XXXXX, .
 Toronto, Ontario
 XXX XXX
 e-mail: xxxxxxxxxxxx.xx

Telephones:
 Res: xxx-xxx-xxxx
 Cell: xxx-xxx-xxxx

Private Career College owner with over ten years experience in policy, administration, admissions, program design and government relations. Excellent communications, leadership and team building skills both at the College level and as a Board member of Ontario Association of Career Colleges.

CAREER HISTORY**PRIVATE CAREER COLLEGE 2**

April to October 2006

- Fulfilled contractual arrangements from sale of college with integration, Ministry requirements, financial aid and administrative duties

PRIVATE CAREER COLLEGE 1

Owner

1995 to April 2006

- Responsible for all admissions to the college including foreign students and O.S.A.P. applications
- Management of the daily functions of the college
- Provided all marketing and sales support including advertising
- Designed training across most business and graphics programs leading to Ministry of Training, Colleges and Universities registration
- Arbitrated student disputes
- Responsible for Key Performance Indicators and liaison with the Auditor.
- Completed all government re-registrations and was the college's spokesperson for the Ministry and public
- Designated Financial Aid Officer for O.S.A.P.
- Developed policies and procedures for the college and students
- Worked with OACC and MTCU on the new Private Career Colleges Act and its regulations

GOLF CLUB 1

1993-1994

President

- Provided leadership to a private golf club
- Revamped the marketing and financial programs

LARGE CORPORATION

Director of Marketing Services

1990-1992

- Responsible for all market research, media, consumer relations, French translation and consumer sales promotion
- Managed the transition of the merged xxxxx companies, implementing single systems for all the departments' major functions
- Played an integral part in the total marketing planning process as part of the Senior Marketing Management Team including a media budget of \$17 million
- Hired, trained and developed subordinates
- Managed three sub-departments of 11 employees
- As part of New Products Team, developed new products to launch

LARGE CORPORATION

1985-1990

Director of Marketing Services

- Participated in the presentation of major marketing launches of new products both locally and at corporate headquarters in the U.S.
- Managed a \$3 million yearly budget
- Developed policies and procedures for the department

Other positions held at Bristol-Myers:

- Director Market Research
- Product Manager
- Market Research Assistant

EDUCATION/PROFESSIONAL DEVELOPMENT

University of British Columbia

- Secondary Teacher's Certificate (Guidance and Business)
- BA. Psychology and Political Science
- M.B.A. (Marketing) Completed 1 year of 2 year program

LARGE CORPORATION.

- Management Training Program

Various management and leadership courses including:

Sandier Sales Method Management Grid
 Levinson Institute "On Leadership" Two Minute Manager
 Environment Compression Laboratory Synectics Leadership

PROFESSIONAL AFFILIATIONS

Board Member Ontario Association of Career Colleges
 Co-Chair Membership and Conference Committee
 Co-Chair Service Canada Committee
 Member of KPI and Compliance Committee with M.T.C.U.
 Member of Student Protection Committee with M.T.C.U.

INTERESTS

Golf, sailing, travel, spectator sports and theatre

REFERENCES AVAILABLE UPON REQUEST

XXXXXX

XXXX XXXX XXXXX, .
 Toronto, Ontario
 XXX XXX

e-mail: XXXXXXXXXXXX.XX

Telephones:
 Res: XXX-XXX-XXXX
 Cell: XXX-XXX-XXXX

C was recently formed by B, former owner of XXXXXXX, to help both new and existing Career Colleges across a broad range of administration, instruction, marketing & advertising, and government compliance issues.

Background

B owned XXXXXXX for eleven years, selling it in 200X. She has been a Board member of the Ontario Association of Career Colleges for five years, co-chairing the Membership and Conference Committee for the past two years. She has been on the TCAF, Student Protection, and Key Performance Committees, working with the Ministry of Training, Colleges and Universities to build regulations in these areas.

Prior to owning a Career College she was Director of Marketing Services for both LARGE CORPORATION and LARGE CORPORATION where she was responsible for Market Research, Advertising, and Consumer Relations. She was also heavily involved in Strategic Planning and New Product Development.

Her educational background includes a B.A. in Psychology and Political Science, 1 year of M.B.A. and a high school teaching certificate in guidance counseling and business.

Areas of Expertise

1. Staffing (On contract to help with leaves, vacations etc.)
 - Campus Director
 - Financial Aid Officer
 - Administration/Admissions
 - Instructors
 - Soft skills -. resume writing, interviews, dress for success
2. Ministry of Training Colleges & Universities Compliance
 - Interpreting the PCC Act 2005 (eg. contracts, refund policies etc)
 - School and course registrations
 - Re-registrations
 - Interacting with Ministry personnel on school's behalf
 - OSAP applications
3. Student Communications for Ministry compliance
 - Design or assess the Student grievance process
 - Design or assess the school's expulsion policy and complaint process
 - Design or modify the Student Hand Books

XXXXXX

XXXX XXXX XXXXX, .
 Toronto, Ontario
 XXX XXX

e-mail: XXXXXXXXXXXX.XX

Telephones:
 Res: XXX-XXX-XXXX
 Cell: XXX-XXX-XXXX

4. Marketing and Advertising
 - Assess current advertising for content and compliance
 - Build strategic marketing plans
 - Design or amend Web Sites
5. Course Design
 - Design course content (Business, Multi-media and Graphics)
 - Assess the content and completeness of course design packages before they are sent to the Ministry
 - Design testing materials and assessment of student progress
6. Data Bases
 - Provide frameworks for student data bases to include information for the transcript retrieval regulation.
7. Pre-audit file review
 - Prior to the auditor, we will check your files to be sure that they are complete.
8. International Students
 - Helping colleges with the new regulations
9. Employment and Tax regulations
 - Employee relations and compliance with employment law
 - Tax regulations for employees and students

Pricing

C can work on an hourly or project basis, depending on the scope of the work

Contact

For more information, please contact B at the coordinates above.

February 12, 2007



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PRE-HEARING

BILLY WING-YU CHOW AND ROYALAND REAL ESTATE LTD. – PRE-HEARING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE REAL ESTATE AND BUSINESS BROKERS
ACT, 2002 S.O 2002, C.30 SCHEDULE C (THE "ACT").

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: LORNE LEVINE, Counsel, appearing on behalf of BILLY
WING-YU CHOW and ROYALAND REAL ESTATE LTD.
(the "Applicants")

IAN DALEY, Counsel, appearing on behalf of the Registrar,
Real Estate and Business Brokers Act

DATE OF
PRE-HEARING: March 11, 2008 Toronto

ORDER

The Parties attended at a pre-hearing before this Tribunal on March 11, 2008. The Tribunal makes the following order with respect to the hearing:

1. The hearing shall commence at 9:30 a.m., on May 1, 2008, at the Tribunal's Chambers, 1 St. Clair Ave West, 12th Floor, Toronto, Ontario and continue as necessary on May 2, 2008;
2. The Applicants admit the factual allegations as set out in the following paragraphs in Part B – Particulars of the Notice of Proposal (the "Particulars"):

Paragraphs 1, 2, 3, and 4, as amended to reflect the charges set out in the indictment, 7, and 13.

3. With respect to paragraphs 5 and 6 of the Particulars, the Applicants deny that the Applicant, Billy Wing-Yu Chow, was convicted of trafficking of any controlled substance, but admit that he was convicted of possession of controlled substances for the purposes of trafficking;
4. The Applicants deny or have no knowledge of the allegations in paragraphs 8 through 12 of the Particulars;
5. With respect to the documentary disclosure by the Applicants of a number of medical reports from attending physicians, the Registrar has stated a desire to cross-examine the physicians on their reports. The Applicant shall take appropriate steps to ensure the attendance of these physicians at the hearing, unless advised by the Registrar that their attendance is not required for the purposes of cross-examination.
6. In accordance with the provisions of Rule 6 of the Tribunal's Rules of Practice, the Applicants shall deliver any experts' reports and curricula vitae upon which they intend to rely to the Registrar by April 1, 2008, and the Registrar shall deliver any responding experts' reports and curricula vitae by April 11, 2008, and each party shall deliver any further documents not yet disclosed at least ten days before the hearing.

LICENCE APPEAL TRIBUNAL

David Gregory Flude
Vice-Chair

Released: March 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

FRANK WILLIAM MAGYAR- PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: FRANK WILLIAM MAGYAR, the Applicant

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: March 6, 2008

Toronto

ORDER

WHEREAS a second pre-hearing was commenced in this matter on March 6, 2008 before this Tribunal, in the presence of Frank William Magyar (the "Applicant") and George P. Drametu, counsel for the Registrar, Real Estate and Business Brokers Act (the "Registrar");

AND WHEREAS upon the commencement of this pre-hearing it was noted that the Registrar had made disclosure in terms of the Rules of the Practice of the Tribunal, but that the Applicant had failed to make disclosure and was not represented at the pre-hearing, despite having informed the Tribunal at the previous pre-hearing on February 1, 2008 that he was retaining the services of counsel, J. Randall Barrs;

AND WHEREAS the Tribunal's pre-hearing order pursuant to the February 1, 2008 pre-hearing was issued by the Tribunal and was served by facsimile on both parties on February 12, 2008;

AND WHEREAS the Applicant informed the Tribunal at the pre-hearing on March 6, 2008 that he was advised on or about March 4, 2008 by a secretary in the office of J. Randall Barrs that the latter was not able to appear on the behalf of the Applicant on March 6, 2008 due to Barrs' required attendance at a criminal trial on that day and that the Applicant should appear personally at that pre-hearing;

AND WHEREAS the Tribunal's order pursuant to the February 1, 2008, pre-hearing that:

- (I) such adjournment was peremptory against the Applicant,
- (II) that whomsoever was retained by the Applicant should be fully informed as to the time, date and place of the adjournment, and
- (III) the Applicant was to inform whomsoever he was to retain, that such person was not to accept the retainer if he was not able to represent the Applicant at the March 6, 2008 pre-hearing as well as the subsequent hearing;

AND WHEREAS counsel for the Registrar objected to a further adjournment of the pre-hearing, as he contended that the Applicant retains the right to continue as a salesperson until he is deregistered by an order of the Tribunal, and that his continued registration poses a threat to the public interest;

AND WHEREAS the Tribunal deemed it desirable that the Applicant should be represented, but that it was equally desirable that the public interest should be protected by ensuring that the hearing proceeds expeditiously and is held at an early date;

AND WHEREAS counsel for the Registrar moved for an order that the Applicant pay the abortive costs occasioned by the delay in this matter;

NOW, THEREFORE, THE TRIBUNAL ORDERS that:

1. The pre-hearing shall not be proceeded with, and the matter proceed directly to hearing.
2. The hearing shall take place at the Tribunal's Chambers at 1 St. Clair Avenue West, Suite 1200, Toronto, commencing on June 12, 2008 at 9:30 a.m., and shall continue, if necessary, on June 13, 2008.
3. The Applicant shall make full and timely disclosure as required by Rule of the Tribunal's Rules of Practice.
4. That J. Randall Barrs, counsel, or whomsoever is retained by the Applicant

to represent him is made fully aware of the Tribunal's order of February 12, 2008 and is able to adequately prepare for and represent the Applicant at the hearing.

5. The dates of the hearing, namely, June 12 and 13, 2008, are peremptory against the Applicant.
6. The Applicant shall pay the sum of \$400 to the Registrar in terms of Rule 14 of the Tribunal's Rules of Practice. Such payment is to be made by certified cheque and is to be received by the Registrar by no later than March 12, 2008.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: March 17, 2008

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

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Appeal
Tribunal

Tribunal
d'appel en
matière de permis



ELIZABETH GOULART

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*,
2002

TO REFUSE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: SUSAN PENNYPACKER, Counsel, representing the Applicant

GEORGE DRAMATU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act 2002*

DATE OF
HEARING: January 30 and 31, 2008

Toronto

REASONS FOR DECISION AND ORDER

FACTS

The facts of this case are not in dispute, although different interpretations of the facts were urged on the Tribunal on behalf of each party. The Applicant applied for registration as a real estate salesperson. At the time she submitted her application, she was living in a half-way house while on day parole. Her crime, committed in 2001, was to import a suitcase containing approximately 15 kilograms of cocaine into Canada from St. Lucia. At her trial in 2003, she pleaded not guilty but was convicted. She was sentenced to eight years and four months imprisonment. She appealed the conviction but her appeal was dismissed and she started to serve her sentence. In 2006, she was released on day parole and was granted full parole on June 24, 2007.

The Applicant disclosed her criminal conviction to the Registrar, as required, in her application. Following a request from the Registrar, she provided a transcript of the Court's reasons with respect to sentencing. A reading of the reasons indicates that she did not testify at the trial or lead any evidence on her own behalf. Counsel, on her behalf, attacked the Crown's case on the basis that there was no evidence to establish beyond a reasonable doubt that the suitcase was imported by the Applicant. The jury rejected that defence and, in sentencing, the Court treated the Applicant as a drug courier and sentenced her accordingly. Further, the honourable trial judge accepted the Crown's submission that the Applicant must be a trusted courier to be charged with importing such a significant quantity of cocaine.

There was no evidence before the Tribunal to indicate that the Applicant had previously been involved in criminal activity. In her evidence she testified that she had never even had a ticket under the *Highway Traffic Act*. Following her conviction, she seems to have been a model prisoner. While there is no direct evidence of her prison record, she was released on day parole, early in her sentence. From this fact the Tribunal may infer that she did not commit serious disciplinary offences while incarcerated. During the period of her day parole she was subject to a very strict compliance regime. She was under an obligation to interact with staff and other inmates in a respectful manner. She was required to attend a weekly house meeting to identify and defuse any mounting tensions. While out of the facility, she was required to call in several times during the day. She was also subject to a very strict curfew. On weekdays she had to be back in the facility by 11:00 p.m. and on weekends by 1:00 a.m. If she was as little as two minutes late, the facility was required to report her to the duty parole officer, and an incident report would be filed by noon the following day. The Applicant committed no infractions of any kind while in the half-way house and was ultimately permitted to stay out of the facility overnight each weekend.

In June 2007, the Applicant's day parole expired. While the documentation indicates a need to report back to the correctional facility, it is the Tribunal's understanding that, in fact, the Applicant was not re-incarcerated but that she was granted full parole. She will remain on parole until January 2013. Initially, she was required to report twice each month to her parole officer. The reporting requirement has now been reduced to once per month. Her parole officer testified before the Tribunal that she has had dealings with many offenders over her twenty-one year career. She stated that the Applicant was always punctual in attending appointments. Surprisingly, lack of punctuality is not grounds for a negative report that may result in the revocation of full parole. She feels that the Applicant has fully integrated herself back into the community and that there is no further need for her to actively supervise and provide guidance to the Applicant. Notwithstanding this feeling, it is part of her duty, and an obligation of the Applicant while on parole, that she review the Applicant's record and that the Applicant continue to report monthly. This supervision is not limited to passively accepting what the Applicant might say at the reporting sessions. The parole officer conducts independent checks to ensure that there has been no unreported contact between the Applicant and the police and she speaks to family members about the Applicant's behaviour and progress. She stated without hesitation or reserve that, based on her experience, she was of the opinion that the Applicant was one of those individuals who will not re-offend.

Not surprisingly, given the seriousness of the offence committed by the Applicant and the fact that she was on day parole at the time, the Registrar had concerns about the Applicant's application. In addition to requesting reasons for judgement and sentencing, the Registrar asked the Applicant to attend a meeting to review her application. The notes of the meeting were reviewed by Brian Schlotzhauer, the Deputy Registrar. Mr. Schlotzhauer attended the meeting but admitted that he did not have an independent recollection of everything that was discussed. He confirmed that there were three employees of the Registrar's office present. The Applicant attended alone. The Applicant had previously provided the Registrar with the judge's reasons and it does not appear that there was any discussion of the facts behind the Applicant's conviction beyond those disclosed in the reasons. The Applicant informed those present that she

had maintained her innocence but was convicted and that she had appealed unsuccessfully. She went on to state that she now wished to put the whole episode behind her and get on with her life. Following the meeting, the Registrar wrote to the Applicant giving her two options. The first option was the withdrawal of the current application and a reapplication by August 2007. Mr. Schlotzhauer stated that the August 2007 date was chosen for two reasons. Firstly, the Applicant had taken the necessary real estate courses and had achieved an 85% average. The results were valid for one year and would expire in August 2007. The second reason addressed the day parole issue. As stated above, the Applicant's day parole certificate indicates that she would have to return to the correctional facility by June 24, 2007. In practice, where full parole is granted, a return to the facility is not required and there is simply a transition to full parole, as happened in this case. By August 2007, this issue would have resolved itself and the Applicant's status would be more clearly defined. Mr. Schlotzhauer stated that the invitation to re-apply at that time did not carry any guarantee that registration would be granted. When pressed on the point, Mr. Schlotzhauer did not concede that the change from day parole to full parole was a significant factor for the registrar's consideration. He, however, did concede that it was a factor. A review of the record indicates that no other significant change was likely to occur with respect to the Applicant's character and record between the interview and August 2007. Either day parole would be completed successfully and full parole granted or the Applicant would be re-incarcerated.

In setting out the Registrar's concerns, Mr. Schlotzhauer enumerated two major areas. In arriving at the decision, the Registrar was concerned about the seriousness of the offence and the fact that the Applicant was still serving her sentence. Secondly, the Registrar was concerned about protecting the image of the real estate profession in the eyes of the public and the public confidence in dealing with realtors. Mr. Schlotzhauer was of the view that confidence in the profession would suffer damage if vendors or purchasers, having reposed a considerable amount of trust in their real estate professional, were subsequently to discover that that professional was currently on parole for a very serious criminal offence. Having said that, Mr. Schlotzhauer stated that the fact of being on parole was not an automatic bar to registration and that each case was considered on its merits.

In testifying on her own behalf, the Applicant expressed her deep shame at being involved in drug smuggling. She stated that while she was on remand, and again while serving her sentence, she saw the impact of drug addiction on numerous individuals. She was glad that her particular shipment was intercepted. She re-affirmed the version of events set out in a psychological assessment she had commissioned following the pre-hearing of this matter. While that particular version of events might suggest the affirmative defence of coercion, the Applicant did not rely on that defence at trial and accepts that she knew she was carrying something illegal when she entered Canada.

The Applicant's interest in real estate began while she was out on bail awaiting trial. She was asked to take over from a friend as an assistant in the sales office of a new housing development. She loved the work. She handled agreements of purchase and sale and she dealt with purchasers with respect to changes to the agreements and with respect to their choices of finishes and options in the home. She was generally involved

in all aspects of the sales transactions that did not require the intervention of a salesperson. She was of the view that she had more face-to-face dealings with purchasers than the sales staff. From that time on she formed a desire to work in real estate as a registrant. She has formed a working relationship with an experienced real estate agent who is prepared to coach her in the business and provide her with assistance. She has also met with a real estate broker who is prepared to employ her should she become registered. She provided letters from the agent and broker outlining their knowledge of her past and their willingness to assist her in the future. She also provided letters from previous employers and other references attesting to her on-the-job performance and her general good character. The Applicant has not been idle while awaiting the hearing before the Tribunal. She continued her studies of the courses required to become a fully-fledged real estate agent and passed them with high marks.

The Applicant also spoke with some pride about her charitable efforts. She has been actively involved in raising money for charity since her release on day parole. She was involved in the Weekend to End Breast Cancer in 2007. She was asked to raise \$4,000.00. Together with a friend, she organized a two-day garage sale, a car wash and participated in a two day sponsored walk. In total she raised \$4,400.00. She has also worked with the CHUM Christmas Wish Fund, donating her time to sort out toys. She already has plans to participate in both events in 2008.

THE LAW

The statutory scheme covering the entitlement of applicants to registration is set out in the *Real Estate and Business Brokers Act, 2002*, section 10 of which states as follows:

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, or
 - (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;

The statute then sets out appeal rights to this Tribunal and grants this Tribunal the right to order the Registrar to carry out the Registrar's proposal or substitute its own opinion for that of the Registrar, and may attach conditions (Section 14(5) of the Act).

THE ISSUE

Based on the past conduct of the Applicant, are there reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?

ANALYSIS

In considering the past conduct of the Applicant, the Tribunal owes no deference to the deliberations of the Registrar. It must arrive at its own conclusion in an unfettered manner. As was recently stated by the Divisional Court in *First Place Fine Car Sales Inc. and Dominic Cerullo v. Ontario (Motor Vehicle Dealers Act)*, [2007] O. J. 1043, it is clear that the Registrar believes there are such reasonable grounds; otherwise there would be no proposal. The question to be decided is, in light of all the evidence, does the Tribunal find there are reasonable grounds for this belief.

The Applicant submitted that the Registrar's concern about the overall reputation of the real estate profession and the public perception are not proper considerations for the Registrar in reviewing the Applicant's application. She pointed out that there is no public interest provision in the Act. The focus is the past behaviour of the Applicant as an indication of future behaviour. The Tribunal agrees with this submission. While public perception is, of course, a concern of the Registrar, as is the protection of the public from unscrupulous operators, the statute defines how that concern is to be taken into account. The statutory starting point for all applicants is entitlement to registration. Only if one of the delineated exceptions applies, can registration be denied. Future public perception is not one of the grounds, nor is there a catchall phrase such as "any other grounds the Registrar may wish to consider." It would have been a simple matter for the Legislature to add such language. Its omission underscores the statutory intent to limit the Registrar's discretion to deny registration within strict guidelines. Accordingly, the Tribunal has not considered future public perception or loss of confidence as a valid ground of denial of registration.

The Tribunal is left with the Applicant's past behaviour. In reviewing past behaviour, it is the whole of the past behaviour that must be taken into consideration, both good and bad. Only when considering the whole picture can the Tribunal determine if there are reasonable grounds for a belief that the Applicant will not carry on business in accordance with law or with integrity and honesty.

In 2001, the Applicant committed a serious criminal offence, the consequences of which will live with her for many years to come. Some consequences, such as travel restrictions to certain countries, may even be with her for life. Prior to this event, she had no involvement with lawbreaking. Since the event, she has had no involvement with lawbreaking. Further, since the event she has been a model prisoner. There was no evidence of breach of bail conditions or any pre-trial or pre-sentencing irregularities. There is evidence concerning her model behaviour

while on day parole and on full parole. The Registrar urges the Tribunal to accept that it is easy to be good when being watched and there are serious consequences for backsliding. Further, the Registrar urges the Tribunal to find that the Applicant has been untruthful when discussing her conviction.

According to the Registrar there are four occasions when she was less than truthful. The Applicant did not assert a positive defence at her trial. The Court found that there was evidence that the Applicant imported a suitcase with a large quantity of cocaine and that she was a trusted courier. It specifically rejected the defence argument that there was insufficient evidence to connect the Applicant to the suitcase. At the meeting with the Registrar's staff, the Applicant failed to assert any positive explanation for her conviction. She had previously provided the Registrar with the transcript of her sentencing hearing. She stated that she had maintained her innocence and now wanted to put the matter behind her and move on with her life. She gave the psychologist an extensive version of events which she re-iterated under oath on the stand. On the stand, she added the fact that she is deeply ashamed of her earlier behaviour and has difficulty talking about it.

In the Registrar's view the Applicant has implicitly adopted the findings of the Court by failing to actively deny them. Her more recent story, setting out a more detailed factual background, shows fabrication, according to the Registrar. The Tribunal can find no inconsistency in the Applicant's story. At trial she had an absolute right to remain silent and to have counsel test the Crown's evidence. Failing to assert a positive defence is not a positive assertion of fact or a version of the story. At the meeting with the Registrar's staff, there is no evidence that the Applicant was asked about the facts underlying her conviction. This was a meeting controlled by the Registrar's staff. They called it, they outnumbered the unrepresented Applicant three to one, and they set the agenda. Again, the Applicant did not give a version of the story nor was she asked to. The first time the Applicant told her story was to the psychologist. There is no inconsistency between what she told the psychologist and her evidence before this Tribunal. The addition of her deep shame over her conviction does not add a single fact to the events. It simply provides emotional depth which goes a long way to explaining her subsequent behaviour.

This Tribunal has confronted the issue of registration while an applicant is still serving a sentence, either on probation or parole, in a number of regulated industries. From those cases a general principle has crystallized. The Tribunal will generally deny registration of individuals while they are still serving some portion of their sentence. The typical fact situation confronting the Tribunal is one where a repeat offender appears to have arrived at that time in his or her life when there is a realization that past activities have resulted in a worthless life and there is a desire to change. Confronted with a lengthy period of wrongdoing and an avowal from the applicant that this time he or she is going to "go straight", tribunals, not surprisingly, have asked to see proof of a change of heart in the form of an extended period of good behaviour in a position of trust at work or in the community. It is not that the tribunals do not accept the *bona fides* of the

change of heart in each case; it is simply that there must be some record of acceptable behaviour to offset a lengthy career of wrongdoing. In the words of Vice-Chair Hiley in *Lanchbury (Re)* [1997] O.C.R.A.T.D. No. 128: “...*the Tribunal...must consider the conduct of the Applicant and not look at what might be good intentions for the future.*” These cases do allow for exceptions to the rule, although none have enumerated what those exceptions may be.

The oft-cited case of *Ripani* 18 C. R. A. T. 356 was reviewed by Vice-Chair Reade in *Rubin (c.o.b. Affordable Auto Sales) (Re)* [2000] O.L.A.T.D. No. 337 where, at paragraph 16, the following quotation was cited:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then, certain terms and conditions will be imposed.

Mr. Rubin had a criminal record extending back 18 years at the time of the hearing. Commencing with impaired driving in 1982, he had a fraud conviction in 1988, a trafficking conviction in 1993 and conviction on six counts in 1998, four of trafficking plus possession of a prohibited weapon and possession of property obtained by crime. No reliance was placed on the impaired driving conviction. What is of note is the Tribunal’s comment at paragraph 6: “*Mr Rubin pleaded guilty to all of the convictions on his record, but gave evidence admitting responsibility for none of them.*” Mr. Rubin was denied registration. His long record of repeated criminal activity and lack of acceptance of his responsibility for his actions stand in stark contrast to the qualities of the Applicant currently before the Tribunal.

Without attempting to set out exhaustively a list of exceptions, the Tribunal is of the opinion that the Applicant’s criminal act is an aberration. Without diminishing the seriousness of her actions, it was a single act of gross stupidity in a life that is otherwise without serious blemish. She lacks an ongoing record showing that she is inherently untrustworthy. Indeed, her serious attempts to rehabilitate herself through exemplary behaviour at the half-way house and on full parole indicate an individual for whom the shock of punishment has had the desired effect, and who is well on the way to rehabilitation. While the Tribunal does not completely reject the Registrar’s submission that it is easy to be good when you are being watched, the Applicant’s post conviction record indicates a strong desire to succeed. She has provided to the Tribunal a record of trustworthiness that suggests that her criminal past is behind her, and will remain so. The Applicant has traveled a long way down the road of converting future intentions into acceptable conduct.

Cases have discussed the advisability of the application of terms and conditions of registration. This issue was also raised in argument. The Applicant has provided a letter indicating that the broker with whom she hopes to work is happy to supervise any terms and conditions the Registrar, or now this Tribunal, may wish to impose. The Registrar is of the opinion that it is in the nature of the real estate industry that terms and conditions are not workable. Agents work outside

the office seeking or selling listings. There is little opportunity for supervision. Indeed, the Registrar advised the Tribunal that in at least one case, *Gatrall (Re)* [2005] O.L.A.T.D. No. 3, where the Tribunal ordered the imposition of a term of registration that Mr. Gatrall work in the presence of a licensed salesperson at all times, the term was found to be unworkable, and was abandoned. The Tribunal accepts the Registrar's position with regard to terms and conditions and will not impose terms and conditions on the Applicant.

Decision

By virtue of the authority vested in it pursuant to the provisions of the *Real Estate and Business Brokers Act, 2002*, the Tribunal directs the Registrar to grant the application for registration.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

Released: March 5, 2008

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

PRE-HEARING

AMBROZINE A. GRANT – PRE-HEARING

APPEAL FROM A DECISION OF THE REGISTRAR, *REAL
ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: AMBROZINE A. GRANT, Applicant, representing herself

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: February 22, 2008

Toronto

ORDER

During the pre-hearing, no settlement was agreed to and the parties agreed that the hearing would proceed on June 25, 26 and 27, 2008. The parties did agree on several procedural matters.

Accordingly, the Tribunal orders and stipulates that:

1. The parties agreed to proceed under the Licence Appeal Tribunal Rules of Practice effective January 1, 2008, with the specific variations on these rules that relate to disclosure and that are ordered below.

2. By March 14, 2008 the parties shall disclose to each other the list of witnesses they will call at the hearing. To preserve the privacy of the witnesses, the addresses of the witnesses need not be disclosed.
3. By March 31, 2008 the Registrar shall produce and disclose to Ms. Grant, the Applicant, all documents relating to the applications made by Ms. Grant for registration prior to 1998. If the Registrar intends to rely on any documents or things during the hearing that have not been previously disclosed to Ms. Grant, he shall disclose them by March 31, 2008.
4. By April 15, 2008 Ms. Grant shall disclose to the Registrar any documents or things on which she intends to rely at the hearing. Ms. Grant shall make a copy of this disclosure to give to the Licence Appeal Tribunal panel at the hearing.
5. The hearing in this matter will commence on **June 25, 2008 at 9:30 AM** at the offices of the Licence Appeal Tribunal, and will continue on June 26th and 27th if necessary.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: February 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MICHAEL N. ELMENHOFF

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: CATHERINE DI MARCO, Counsel, representing the Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: February 14, 2008 Toronto

ORDER

At the commencement of the hearing, Counsel for the Parties advised the Tribunal that a settlement of all outstanding issues had been reached. A copy of the executed settlement was filed with the Tribunal.

Counsel for the Applicant advised that the appeal was withdrawn.

Upon consent of the Parties, this Tribunal orders that the proceedings in this matter are concluded and 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

Jane Weary, Vice-Chair

RELEASED: February 20, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

FRANK WILLIAM MAGYAR – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: FRANK WILLIAM MAGYAR, the Applicant

GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: February 1, 2008

Toronto

ORDER

A pre-hearing was commenced in this matter on February 1, 2008, before this Tribunal, in the presence of Frank William Magyar (the “Applicant”), and George P. Drametu, counsel for the Registrar, *Real Estate and Business Brokers Act, 2002* (the “Registrar”);

AND WHEREAS upon the commencement of the pre-hearing it appeared that neither the Applicant nor the Registrar had made timely disclosure in terms of the Rules of Practice of the Tribunal, and that the Applicant was not represented by either an agent or counsel;

AND WHEREAS both the Applicant and counsel moved for an adjournment of the pre-hearing to enable them to better prepare and, in the case of the Applicant, to have counsel present to represent him;

AND WHEREAS, due to timely disclosure not having been made by the Applicant or the Registrar, as well as the Applicant not having retained counsel or an agent to represent him.

AND WHEREAS, the Applicant advised the Tribunal that he is desirous of, and intends to, retain counsel for the hearing and the pre-hearing;

AND WHEREAS, it is both fair and reasonable that the parties should be adequately prepared for the pre-hearing, and that the Applicant should be adequately represented;

AND WHEREAS, the Applicant and counsel for the Registrar both indicated that they are available and able to attend at the Tribunal's Chambers, located at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Thursday, March 6, 2008, at 9:30 a.m., to which date they have consented to the adjournment of this pre-hearing;

NOW THEREFORE THE TRIBUNAL ORDERS that the pre-hearing is adjourned on a peremptory basis against the Applicant until Thursday, March 6, 2008, at 9:30 a.m., at the Tribunal's Chambers;

AND IT IS FURTHER ORDERED that the Applicant hand to the counsel who he retains as his representative, a true copy of this order so as to fully inform such representative of the time, date and place of the adjourned pre-hearing, and to further inform counsel that he should only accept the retainer if he is able to adequately prepare for and represent the Applicant at the adjourned pre-hearing on March 6, 2008, and at the subsequent hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: February 12, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

REALTYSELLERS (ONTARIO) LIMITED
STEPHEN MICHAEL MORANIS – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATIONS

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: THOMAS McRAE, Counsel, representing the Applicants

CHRIS BREDT, Counsel, representing the Registrar, *Real Estate
and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: January 7, 2008 Toronto

ORDER

A pre-hearing was held in this matter on January 7, 2008, in the presence of Thomas McRae, counsel representing Realtysellers (Ontario) Limited and Stephen Michael Moranis (the “Applicants”), the Applicant Stephen Moranis, Allan Spivak, a person assisting Mr. Moranis, Chris Bredt, counsel representing the Registrar, *Real Estate and Business Brokers Act, 2002* (the “Registrar”), Tim Snell, counsel employed by the Real Estate Council of Ontario and Nicole Koteft, counsel employed by the Real Estate Council of Ontario.

Matters discussed at the pre-hearing included: a motion brought by the Applicants, whether any additional procedural issues were outstanding in respect of the upcoming hearing and whether the Tribunal would order costs under Rules 14.3 and 14.4(2)(a) of its Rules of Practice in respect of the pre-hearing conducted on December 17, 2007.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to the hearing are the Applicants and the Registrar;
2. Based on the agreement of the Parties, the Rules of Practice, 2007 apply to these proceedings, subject to further order of the Tribunal;
3. Based on the agreement of the Parties, the motion brought by the Applicants, as set out in a Notice of Motion dated January 4, 2008, shall be heard on the first day of the hearing in this matter - February 4, 2008;
4. All Parties and the Tribunal shall make efforts to be available for an additional hearing day on February 11, 2008;
5. To the extent that the Registrar obtains new information regarding the non-payment by the Applicant of a rebate, that information will be disclosed to the Applicant; and
6. There will be no order as to costs as against the Applicants in respect of the pre-hearing of December 17, 2007. The Registrar has failed to meet the test for such costs.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

Released: January 10, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



STEVEN STOJADINOVICH

APPEAL FROM A PROPOSAL TO REVOKE REGISTRATION
ISSUED BY THE REGISTRAR, *REAL ESTATE AND BUSINESS
BROKERS ACT, 2002*.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: No one appearing for Steven Stojadinovich

MARKUS KREMER and CATHERINE MOREAU, Counsel for the
Registrar

DATES OF
HEARING:

November 26, 27 and 28, 2007

Toronto

REASONS FOR DECISION AND ORDER

On December 19, 2006, the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Act") issued a Notice of Proposal to revoke the salesperson's real estate licence of Mr. Steven Stojadinovich (the "Applicant"). The Applicant consequently filed a Notice of Appeal to the Licence Appeal Tribunal in January 2007. On March 21, 2007, a scheduled pre-hearing took place at the Tribunal with both the Applicant and the Registrar in attendance. The pre-hearing Order confirms numerous allegations contained in the Proposal as being conceded by the Applicant, and adjourns the dates set for the hearing from May to July 2007. In July, on consent of both Parties, the Tribunal granted a further adjournment to November 26, 2007. On November 12, 2007, a Supplementary Notice of Proposal to Revoke was issued by the Deputy Registrar. Affidavit evidence established, to the Tribunal's satisfaction, that this document was served upon the Applicant on November 13, 2007.

The Applicant was not present at the commencement of the hearing on the morning of November 26, 2007, despite having been duly served with notice of the time and place of the hearing. The Tribunal's Hearings Co-ordinator with carriage of the file testified that he had telephoned the Applicant on November 23, 2007, at the phone number provided to the Tribunal and left a voice message reminding the Applicant of the hearing date and time. He further testified that he had called the Applicant at both the home and office phone numbers provided to the Tribunal, on the morning of November 26, 2007, and again left a voice message. At 10:00 a.m., the hearing proceeded in the absence of Mr. Stojadinovich.

BACKGROUND

The reasons provided by the Registrar in his Notice of Proposal to Revoke Registration are as follows:

1. In the Registrar's opinion, Stojadinovich is not entitled to be registered under section 10(1)(a) under the *Act* because:
 - a. Having regard to Stojadinovich's financial position, he cannot reasonably be expected to be financially responsible in the conduct of business; and
 - b. The past conduct of Stojadinovich affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.
2. For greater particularity, Stojadinovich has participated in fraudulent activity and conducted trades in real estate unknown to his employer and therefore ought not to be registered under the *Act*.

These are added to by the Supplementary Notice, which stipulates as its reasons:

1. In the Registrar's opinion, Steven Stojadinovich ("Stojadinovich") is not entitled to be registered under Section 10(1) of the *Act* because:
 - (a) Having regard to Stojadinovich's financial position, he cannot reasonably be expected to be financially responsible in the conduct of business;
 - (b) The past conduct of Stojadinovich affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and
 - (c) Stojadinovich provided false statements in applications for registration.

EVIDENCE

In response to a consumer complaint regarding a real estate transaction involving the Applicant's professional services, Ms. Carolyn Wade of the Real Estate Council for Ontario ("RECO"), the Agency designated to administer the *Act*, uncovered evidence of the Applicant's misrepresentations concerning two other properties. It is these three real estate property transactions involving the Applicant that form the basis of the information upon which the Registrar relied in producing the Proposal.

Ms. Wade has been an Inspector with the Investigations and Inspections department of RECO since 1998. In her investigation into the complaint, she interviewed the Applicant, Mr. D, the Applicant's Broker's principal Bruce Taylor and a number of involved consumers. She also reviewed numerous documents presented in evidence before the Tribunal. Her report was completed in 2006, and triggered the eventual decision by the Registrar to issue the Proposal.

M Street

This was the property at issue in the consumer complaint. The Ms alleged that the Applicant had informed them that the property was available, notwithstanding the Ms financial situation. The transaction would be done through the Applicant's "buddy, Mr. D" who could purchase and obtain a bank mortgage which the Ms could then assume. The Ms issued the Applicant a personal cheque for \$5,300.00 in June 2005, as the Applicant instructed.

Testifying before the Tribunal, Mr. M stated that the Applicant had advised that this sum was required to pay closing costs for both the initial purchase of the property by Mr. D, as well as closing costs in the Ms assumption of the mortgage.

When the deal fell through at the last moment during the Labour Day weekend, Mr. M and his family of six were left homeless. Mr. M stated that the Applicant explained the failure of the transaction was due to the Ms not qualifying, despite the Applicant's earlier assurance that the purchase was "well within their means". Their money was eventually returned to them by the Applicant, but not without significant distress and perseverance. The receipts which they signed acknowledging return of the \$5,300.00 are dated September 10, 2005. They were written out by the Applicant who named Mr. D as the Receiver (Exhibit 3, Tab 19, p.18).

In his interview with Ms. Wade in July 2006, the Applicant stated that Mr. D had already initiated the purchase of the M Street property when the Ms approached him to request assistance in locating real estate. He had advised the Ms to deal with Mr. D for assuming the mortgage. He had continued to act as a liaison however, as neither the Ms nor Mr. D wanted to meet the other party, and both trusted his expertise in the area and requested he act for them. He had not deposited the funds received from the Ms in his Broker's trust deposit account as he had not held or provided any Agreement of Purchase and Sale in the matter and had only taken the money from the Ms in order to give it to Mr. D.

Documents provided by the Broker to Ms. Wade include an Agreement of Purchase and Sale for the property noting Mr. D as purchaser and another "M" as vendor. The completion date is September 2, 2005. The document was allegedly signed by Mr. D on June 6, 2005, and witnessed by the Applicant, whose signature also appears as Buyer's Representative and verifies the commission trust agreement for the co-operating broker, being Homelife Neighbourhood Realty ("Homelife"), the Applicant's Broker of record (Exhibit 3, Tab 19, pgs 44-52).

A subsequent interview with Mr. D, in August of 2006, revealed a different story. In sum, it was repeated by Mr. D during his testimony at the hearing. The M Street transaction followed a prior similar property "flip" he had participated in at the Applicant's suggestion for a property on C Street. It was Mr. D's evidence that he had not bought M Street prior to the Ms interest in purchasing the property. Rather, the Applicant had approached him asking if he would buy the property in order that a client,

whose credit rating was insufficient to be granted a mortgage, could later assume the mortgage and thereby obtain the home. The Applicant advised Mr. D that he would receive a payment of \$1,000.00 and be helping out the purchaser who really wanted the house. As the C Street transaction had taken place successfully, Mr. D testified he had no qualms in going along with the Applicant's request.

Mr. D testified that he had never signed any documents for his purported purchase transaction of M Street, contrary to those held by the Broker. When showed the Agreement of Purchase and Sale he recognized the signature of the Applicant. He noted that the address attributed to him was incorrect, and that the Applicant would have been aware of his proper address at the time. The night before the deal was to close, the Applicant informed him that the sum of \$13,000.00 was required from him in order for his purchase to be completed. As Mr. D did not have this amount of money, the Applicant advised him to take the sum from his line of credit. The bank refused to accept this funding, however, and the deal therefore failed to close. Mr. D was required to pay legal fees and other disbursements, for which he is still out of pocket despite the Applicant's assurances to him of compensation. Mr. D was later sued by the vendor. Again, the Applicant reassured him that everything would be taken care of. Despite this, he was required to settle the civil action. He testified he had never received any funds from the Ms or the Applicant in reference to this transaction and had no knowledge of the cheques and receipts provided to Ms. Wade for \$5,300.00.

C Street

Ms. Wade testified that she became aware of the details concerning this property when interviewing Mr. D in August 2006. Mr. D's testimony revealed that this was the first property deal he entered into with the Applicant.

Mr. D had no prior knowledge of real estate matters and was living in his first home at the age of 24 when he first met with the Applicant in regards to purchasing a new home. At the time the Applicant was in his forties and appeared very experienced in real estate matters. He and his family were welcoming and friendly to Mr. D who, with time, came to look upon the Applicant's family as his own. When, a year later, the Applicant suggested Mr. D participate in a house flip whereby he stood to share a \$25,000.00 commission with the Applicant, and provide a family with poor credit a home, Mr. D queried how such easy money was possible. The Applicant advised him everything was legitimate and people "do this all the time". Mr. D agreed to the deal. As far as Mr. D knew, the deal went through as he received a cheque for \$25,000.00 from the purchasers, \$12,500.00 of which, he paid to the Applicant (p. 194). He knew nothing further regarding this property.

In Ms. Wade's investigation, a Geoware Sales History Report retrieved from the Broker in August 2006, reveals that the C Street property was sold by "S" to Mr. D on August 15, 2005 for \$160,000.00 and then sold by Mr. D to "H" on October 28 that year for \$172,500.00 (Tab 19, p. 37). The sale documents obtained from the Broker include: (i) a Listing Agreement dated July 13, 2005, showing Homelife as acting Broker for the

Vendor "S" (p. 88); (ii) an Amendment whereby the Vendor "S" is replaced with Vendor "D" also on July 13, 2005; and, (iii) an Agreement of Purchase and Sale signed on August 6, 2005 between "S" as Vendor and "H" as purchaser for \$172,500.00 closing October 28, 2005 (pages 88, 80 and 83). All documents contain the signature of the Applicant, consistent with that signature recognized by Mr. D and by Ms. Wade from the Applicant's signed interview statement. There was no Agreement of Purchase and Sale for the transaction between "S" and Mr. D. The Broker principal, Bruce Taylor, testified he had not been able to locate any such deed.

W Street

Mr. D testified that he signed an Agreement of Purchase and Sale for this property on September 6, 2005. He entered into this transaction at the suggestion of the Applicant, who told him that there was a buyer interested in assuming a mortgage on the property and recommended he participate in this "flip". It would also assist him in recouping some of the funds he had lost on the aborted M Street transaction. The Applicant acted for both Mr. D as vendor as well as the purchasers and he signed in such capacity and as witness on four sections of the document (p. 131). A later waiver, dated September 30, 2005, purports to be signed by Mr. D. He denied having done so, and stated he did not recognize the alleged signature; he did, however, recognize the witness signature as that of the Applicant.

Mr. D stated he had queried the Applicant with regard to the transaction on a number of occasions, but was always told that everything was above board and being dealt with. He trusted the Applicant.

In her investigation Ms. Wade received the Broker's file for this real estate transaction. Among the documents were a copy of the trust deposit cheque dated September 20, 2005, for \$1,000.00 as well as the Broker's Commission Form showing that the Applicant received commission of \$2,388.82 for the sale. A further document in the Broker's records shows that \$2,312.50 of this was remitted to Revenue Canada under an outstanding garnishment arrangement (p.124). The Broker file also contained the Geoware Sales History Report. It reveals the property was transferred to Mr. D on October 31, 2005 and remains held by him.

This was not, however, Mr. D's understanding. He stated in his evidence that it was not until he attended at a car dealership in June of 2006, that he learned his credit rating was unacceptable – there being a lien held by the Bank of Montreal in the amount of \$180,000.00. Mr. D had no relationship with the Bank of Montreal and was nonplussed by this information. He contacted the Bank to be told that the mortgage on his house on W Street was significantly in arrears, and that the Bank had allegedly written him by registered mail on numerous occasions concerning the matter, with no response from him. He advised he had never heard anything from the Bank.

Documents from the Bank, obtained by Ms. Wade, are purportedly signed by Mr. D (Exhibit 6). Witnessed by the Applicant, the first letter was written to the Bank advising

it that all information and matters relating to the property were to be passed to the Applicant as agent for Mr. D. A second letter, bearing Mr. D's alleged signature and witnessed by the Applicant, was sent to the Bank in June 2006. It advises that Mr. D intends to put the mortgage "in good standing." The Bank also provided Ms. Wade with a photocopy of the Agreement of Purchase and Sale, which records the same signature for Mr. D. In his evidence, Mr. D said he had never seen, let alone signed, any of these documents. The Bank's actions to foreclose later that summer confirmed no efforts had ever in fact been made to put the account in good standing, as promised.

It was after receipt of Ms. Wade's investigation Report in September 2006, that the Registrar's office received a letter from a law firm representing clients "E" (Exhibit 3, Tab 17). According to this letter, the Es had responded to an advertisement placed by the Applicant for an assumable mortgage with no need for pre-approval, the idea being that the Es would purchase a property by assuming an existing mortgage. Attached to and forming part of the lawyer's letter was a copy of an Agreement of Purchase and Sale listing the Es as purchasers and Mr. D as vendor of W Street. The amount of the sale was \$189,900.00, some \$4,900.00 more than the apparent purchase price paid for the property by Mr. D one month earlier. Mr. D stated that it was not his signature that appears on the document. While purportedly signed by the parties on August 21, 2005, the transaction was to close on November 30, 2005. No cooperating Broker is listed and the Applicant's signature appears as witness for both the vendor and the purchasers.

In furtherance of their supposed purchase, the Es furnished the Applicant with a money order for the \$1,000.00 deposit referenced in their Agreement. A copy of this is attached to the lawyer's letter. It is written to the Applicant personally. A search of the Broker's files reveals that neither the Agreement nor the trust funds were ever remitted to Homelife. The lawyer also attached a copy of a cheque written by his clients to S (the vendor in the C Street property sale to Mr. D the preceding August) in the amount of \$10,000.00, as they had been directed to do by the Applicant prior to taking possession of the home.

Finally, the lawyer's letter informs the Registrar that, since December 1, 2005, the Es have been making what they thought were mortgage payments in the amount of \$1,286.00 monthly in cash to the Applicant. They were rarely given any receipt for the amount. In April 2006, the Es were informed by the Bank of Montreal that the mortgage on the property was in arrears. In July they were forced to vacate the home. They have lost their home, \$11,000.00 and whatever equity they assumed they may have acquired in their tenure at W Street.

The lawyer attached a copy of the Registry Office Title Search for the property on October 11, 2006, which reveals that there has been no transfer of the property since it was purchased by Mr. D for \$185,000.00 on October 31, 2005.

Mr. D denied having ever borrowed money from any of the individuals named in these various transactions. He did testify to the Applicant having borrowed over \$3,000.00

from him, however, on Thanksgiving of 2005, when their kitchen appliances apparently failed and they were required to purchase new ones for the festivities. Mr. D used his credit card to make the purchases. Despite numerous efforts to have this money repaid, Mr. D testified he is still owed the bulk of the funds. The Applicant refused to sign an IOU drafted by Mr. D's fiancée claiming that such was unnecessary "between friends".

Mr. D has not communicated with the Applicant since first calling him when Ms. Wade began to make inquiries, at which point the Applicant had told him not to talk with Ms. Wade as "they're always after me".

The effect of his relationship with the Applicant on Mr. D has been immense: his wife experienced premature labour with their first child; he was required to declare bankruptcy; his credit rating remains negative; he lost his home and vehicle. The experience has been extremely disturbing.

The Deputy Registrar's evidence included the observation that the Applicant was only able to perpetuate his behaviour due to having found someone as young, trusting and naive as Mr. D. New to town and therefore vulnerable, and with a great credit rating, Mr. D was the perfect dupe. He was a responsible individual with a car, house and steady job at the age of 24. The Applicant was a registered and experienced professional on whom Mr. D felt he could rely for counsel and advice. He did so to his detriment. The purpose of the Act, being consumer protection, is enacted to ensure that this type of consumer exploitation does not occur.

Disclosure issues

Yvonne Nandalall testified. She is a RECO employee working as a Registration Officer. Part of her duty is to review registrants' compliance and assist in the preparation of documentation for Tribunal hearings. In her role, Ms. Nandalall was asked to become involved in the Applicant's file. She met with the Registrar and Deputy Registrar, conducted searches, participated in the interview held with the Applicant at the Registrar's office, and notified the Applicant of the issuance of the Proposal.

In July 2007, RECO received information about the Applicant's bankruptcy. Ms. Nandalall conducted a search with the Superintendent of Bankruptcy in Ottawa on July 24, 2007. The result was notification of a \$12,000.00 bankruptcy registered against the Applicant in 1986, which had been discharged in 1987. Further searches revealed a second bankruptcy for \$441,000.00 on July 20, 2007, which had not been discharged (Exhibit 5, Tabs 10 and 12). Ms. Nandalall wrote to the Applicant and requested that he provide copies of the assignment and list of creditors to the Registrar in accordance with section 10 of the Act. To date the Office has not received any response to this request.

Searches under the Canadian Police Information Centre ("CPIC") system revealed the Applicant has been criminally charged with three counts of fraud over, and six counts of uttering forged documents arising from the transactions being considered in this

hearing. Ms. Nandalall wrote to the Applicant on August 28, 2007, requesting that he furnish the Registrar with particulars of these charges, but, again, no response has been received.

Finally, Ms. Nandalall testified she had conducted searches of the Applicant's prior applications for registration with RECO going back to his original application as a real estate salesperson under the Act in 1992 (Exhibit 5). In all cases, the Applicant responded in the negative to the question on the application form asking

Are you now or have you been involved in personal bankruptcy and/or been an officer, director, majority shareholder of a corporation which has been declared bankrupt or insolvent, or is presently a party to bankruptcy or insolvency proceedings?

Registrar's Conclusions

Mr. Brian Schlottzhauer has been the Deputy Registrar under the Act since it was brought into effect last spring. He testified that the Act is consumer protection legislation, the purpose of which is to establish rules for registered traders in real estate in their licensed role of guiding often inexperienced consumers through the complex process of property transactions. One of the effects of the new legislation was to bring into law what had hitherto been a RECO Code of Ethics, voted in by all registrants in 2000. It appears as Regulation 580/05 under the Act. Mr. Schlottzhauer explained that, as a Code of Ethics, the expectations and requirements were mailed to all registrants and also formed part of mandatory continuing education courses that all registrants are required to complete prior to every renewal of their license under the Act.

In his interview in November 2006 with the Applicant, concerning the results of RECO's investigation into the complaints, the Deputy Registrar testified the Applicant was evasive. He provided very little detail with regard to the M Street property; he claimed cheques provided in both the C Street and W Street transactions were to repay certain personal loans which either he or Mr. D had provided the various payers. Although requested to supply information on the transactions in issue and sent letters the following summer from Ms. Nandalall asking for further disclosure, at no time since the interview has the Applicant communicated with RECO. The Applicant advised that he had failed to disclose his prior bankruptcy in applications for registration renewal since 1986, as he had not understood the question on the application form.

The Deputy Registrar testified that, while assumable mortgages are not in themselves a contravention of the law, they do carry certain risks to both the assignee and to the original mortgagor, the latter of whom remains liable to the lending institution in the event of any subsequent default in the assignees' payments. Generally, these deals are only suitable in a situation where parties are familiar with one another and are informed as to the type of risk the strategy involves. The lending institution should also be informed. Such considerations are contained in educational requirements which the Applicant would have completed during his 16 years as a registered real estate sales person.

The concept of “flipping” properties is not legitimate and, although almost common parlance in today’s market, a registered real estate professional acts improperly if counseling an inexperienced individual to participate in such activity.

Mr. Schlotzhauer was primarily disquieted by the Applicant’s actions as an experienced realtor with the vulnerable and unsophisticated consumers involved in the three transactions in issue. He noted that both the Ms and the Es were prospective purchasers without strong credit and thus should not be trading in the types of deals that the Applicant encouraged them to pursue. By relying on his counsel, they both suffered not only financial loss, but significant emotional distress. Mr. D was also inexperienced and unsophisticated in the real estate market and relied on the professionalism and “friendship” which he believed the Applicant tendered. All of these consumers relied on the Applicant, to their sorrow, in large part because he was licensed, educated and held the seeming benefit of regulatory approval.

The Deputy Registrar concluded that the Applicant’s past conduct established clear grounds for belief he was not conducting his licensed activity within the requirements of the law. Further, particulars as to bankruptcies and garnishment orders had not been successfully explained to the Registrar, although opportunity had been given Mr. Stojadinovich to do so. Such information would address the Registrar’s belief that the Applicant’s financial situation was such that he could not reasonably be expected to be financially responsible in conducting business.

THE LAW

The *Real Estate and Business Brokers Act, 2002* provides in part:

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 with respect to 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 the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty, or
 - (iii) the applicant or an employee of the applicant makes a false statement or provides false statement in an application for registration or renewal of registration.

13(1) Subject to section 14, the registrar may refuse to register an applicant or may suspend or refuse 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 10.

Section 14 sets out the requirement of the Notice of Proposal and the rights of the applicant/registrant to a hearing before this Tribunal.

31. (1) No broker or salesperson shall trade in real estate on behalf of any brokerage other than the brokerage which employs the broker or salesperson
- (2) No broker or salesperson is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the brokerage which employs the broker or salesperson.
- 34 No registrant shall falsify, assist in falsifying or induce or counsel another person to falsify or assist in falsifying any information or document related to a trade in real estate.
- 35 No registrant shall furnish, assist in furnishing or induce or counsel another person to furnish or assist in furnishing any false or deceptive information or documents relating to a trade in real estate.

The RECO *Code of Ethics* provides, in part:

Rule 1 - Ethical Behaviour

A Member shall:

- (1) endeavour to protect and promote the best interests of the Member's Client,
- (2) endeavour to protect the public against fraud, misrepresentation or unethical practice in connection with real estate Transactions,
- (3) maintain and enhance the Member's degree of skill and competence,
- (4) render services, including giving advice and opinions, based on the Member's knowledge, training, qualifications and expertise,
- (5) deal fairly, honestly and with integrity with the public, other Members and third parties,
- (6) cooperate with the Council in fulfilling its duty to serve and protect the public interest,
- (7) comply with the Real Estate and Business Brokers Act and the regulations under it and the by-laws of the Council.

Rule 2 - Primary Duty to Client

A Member shall endeavour to protect and promote the best interests of the Member's Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each Transaction.

Rule 3 - Disclosure of Role

At the earliest practical opportunity, but no later than when the Member Accepts an Agency, a Member shall fully disclose in writing the role and nature of the service that the Member shall be providing to the Person. The Member shall also disclose the Member's role to others involved in the Transaction when appropriate.

Rule 5 - Financial Disclosure

A Member shall disclose the financial aspects of a Transaction and any personal interest of the Member in a matter to the Parties sufficient to enable them to make an informed decision.

Rule 6 - Written Transaction Agreements

A Member shall ensure that Agreements regarding Transactions are in writing, expressing the specific terms, conditions, obligations and commitments of the Parties to the Agreement. A copy of each accepted Agreement shall be furnished to each Party upon its final acceptance.

Rule 10 - Misrepresentation or Falsification

A Member shall not make any statement or participate in the creation of any document or statement that the Member knows or ought to know is false or misleading.

Rule 30 - Cooperation with the Council

A Member shall cooperate fully with any representative of the Council carrying on the Council's regulatory functions and duties including investigations and discipline. A Member shall give due consideration to the Member's duty of confidentiality in a Member's responses to any such representative of Council.

ANALYSIS

The Registrar bears the burden of proof in proceedings before the Tribunal under the Act. This is so as section 10 provides the Applicant with a right of registration unless the Registrar has reasonable grounds to believe that registration is not appropriate. In such a case the applicant can then appeal to this Tribunal. The Divisional Court in a series of cases most recently articulated in *Ontario (Motor vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. No.63, has established the principal that the Tribunal owes no deference to the Registrar's decision, but rather makes its own determination "uninhibited in any way by the Registrar's view" (para. 9). If it concludes, after a full hearing, that the Applicant's past conduct gives reasonable grounds to conclude he will not carry on business in accordance with the law, integrity and honesty or that the Applicant cannot reasonably be expected to be financially responsible in conducting the business or that he has made false statements in an application for registration, then the Tribunal may "direct the registrar to carry out the proposal, or substitute its opinion for that of the Registrar and the Tribunal may attach conditions..."(s. 14 (5) of the Act)

The evidence presented to the Tribunal by articulate, able and credible witnesses establishes repeated violations of the legislation and the Code of Ethics to which the Applicant is bound by virtue of being licensed to practice real estate in the province. The Tribunal is convinced that the Applicant signed real estate documents as a witness to signatures he never did witness. Further, it accepts the testimony of both Ms. Wade and Mr. D that the Applicant falsely signed as Mr. D in numerous documents presented

at the hearing. The contention, if it had been advanced, that a number of these were signed with the consent of Mr. D who had, after all agreed to participate in the scheme, does not exonerate the Applicant or justify the action taken by this licensed professional. Rather, his having advanced the suggested “flip” to Mr. D as well as to both the Ms and the Es as eventual purchasers, thereby inducing their participation, only serves to establish further evidence of unethical and dishonest behaviour.

It was clear from Mr. D and Mr. M that, rather than explain to the concerned individuals the possible risks for them in this form of mortgage financing, the Applicant induced their participation by reassuring them that their actions were perfectly legal, and would entail no further obligation or legal responsibility other than what he had advised. Mr. D, the Ms and the Es all discovered such was not the case at much economic and emotional disruption and – in the case of Mr. D – involving significant long-term consequences. The fact that these consumers, no less than the Bank accepting the falsely completed documents, all relied upon the Applicant as a result of his being licensed under the Act makes such dishonest representations even more despicable. It is precisely this sort of impropriety that the Act is designated to prevent.

Specific contraventions of the Act have been established by the testimony of the witnesses including the drafting of Agreements of Purchase and Sale that were not disclosed to his Broker, accepting deposit funds not deposited with his Broker and receiving payments for transactions from a person other than his Broker.

The evidence further shows that, when he was given an opportunity to explain his actions to the office of the Registrar, the Applicant chose instead to lie by describing the improper payments as return of personal loan funds. He also chose to neglect to provide information, which the Regulator required that he disclose. As a consequence, rather than assisting the Registrar to determine whether or not the Act has been complied with, the Applicant deliberately chose not only to not cooperate, but actually mislead the licensing authority to which he is responsible. Such action is not merely unethical and dishonest. It also demonstrates such fundamental ungovernability that continued registration of this individual would be a mockery.

Even if this Tribunal were not convinced that the Applicant had seriously breached his legal and ethical duties as a real estate salesperson in the misleading and improper activity placed into evidence, it is beyond doubt that he misled the Registrar concerning his past bankruptcy on no less than eight different applications requiring that he disclose such between his 1992 initial registration and the current date. As noted by Counsel, the first such application was only five years after his discharge, and it is beyond reasonable belief to accept that the Applicant would not have remembered being made bankrupt so recently. It is also beyond the credibility of this Tribunal that the Applicant did not understand the question concerning previous bankruptcies. Letters and statements prepared by the Applicant in the material before the Tribunal show him to be an articulate and literate person. The question is clear, and very simply drafted. He chose to respond with a “No” rather than a “Yes”. It is clear that he deliberately chose to misrepresent the truth.

This failure to be truthful in the applications is important as it demonstrates a propensity in the Applicant for dishonesty going back many years. The Tribunal was concerned that the Applicant chose not to present any evidence in his defence, and that the matters brought against him largely concerned the summer and fall of 2005 which, after almost 16 years working in the field, is a small slice of time. In responding to questions placed to him by the Tribunal on this point, the Deputy Registrar referenced this ongoing deceit. He also noted the use made by the Applicant of relatively naive and unsophisticated consumers in all three properties and concluded that earlier false transactions may well have been perpetrated by the Applicant. However, given their inexperience, possible embarrassment and uncertainty as to the legality of the deal, prior consumers may not have felt able to lodge a complaint with RECO.

COSTS

At the conclusion of the hearing, Counsel for the Registrar requested costs be awarded to his client, pursuant to section 14 of the Tribunal's Rules of Practice. Notice of such a Motion for Costs was made to the Applicant in both the original Proposal as well as the Supplemental Proposal of the Registrar. No responding material was filed with the Tribunal by the Applicant.

In considering the issue of costs, the Tribunal under section 14.2 of its Rules must consider all of the circumstances to determine whether it can conclude that the party against whom the order is sought acted "unreasonably, frivolously, vexatiously or in bad faith". In doing so it may consider, amongst other matters, the failure of a party to attend a hearing or send a representative when properly given notice, without contacting the Tribunal and other parties. It may also consider failure by a party to comply with a procedural order or direction of the Tribunal, including disclosure requirements.

In this case the Applicant, although properly notified of the hearing dates and, indeed, reminded by telephone on two occasions – once prior to those dates and the other at the commencement of the hearing, chose not to contact either the Registrar or the Tribunal to say that he would not be attending. Nor did he advise that he wished to withdraw his appeal. Moreover, despite being directed by the Pre-hearing Order to make disclosure to the Registrar, as required by the Rules, the Applicant did not do so. In the result, the Registrar had no option but to proceed with the Appeal, requiring substantial preparation of documents, over two days of hearing, and the calling of a number of witnesses. The consequent cost to the taxpayers of Ontario is significant.

The Tribunal agrees with Counsel's submissions that costs are in order when an unreasonable applicant doesn't properly and courteously advise that he does not intend to pursue his appeal. Costs will therefore be awarded against the Applicant in the amount of \$800.00 per day for the two and half days of the hearing, for a total of \$2,000.00.

ORDER

Pursuant to the authority vested in it under section 14 of the Act, this Tribunal orders the Registrar to carry out his Proposal of December 19, 2006, to revoke the registration of Steven Stojadinovich as a real estate salesperson. It is also ordered that Steven Stojadinovich pay costs in the sum of \$2,000.00 to the Registrar under the Act.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

Released: January 8, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

REALTYSELLERS (ONTARIO) LIMITED
STEPHEN MICHAEL MORANIS – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATIONS

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: ARTHUR O. JACQUES, Counsel, representing the Applicants

MARKUS KREMER, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF

PRE-HEARING: December 17, 2007

Toronto

ORDER

A pre-hearing was held in this matter on December 17, 2007, in the presence of Arthur O. Jacques, Counsel, representing Realtysellers (Ontario) Limited and Stephen Michael Moranis, (the “Applicants”), and Markus Kremer, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002* (the “Registrar”).

This was the third pre-hearing held in this matter, pursuant to Orders of the Tribunal dated August 28, 2007 and December 5, 2007.

Counsel for the Applicants advised the Tribunal that he had been retained by the Applicants only the day before the pre-hearing and requested that the pre-hearing be rescheduled. He further advised the Tribunal that he was prepared for the hearing to proceed on the scheduled date of February 4, 2008, peremptory on his clients. Counsel for the Registrar noted that the Applicants had had ample time to obtain counsel and comply with the previous orders of the Tribunal and requested that the Tribunal award costs to the Registrar with respect to the current proceeding.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicants and the Registrar.
2. All Parties to the hearing shall comply with the disclosure requirements set out in the Rules of Practice of the Tribunal. In particular, the Applicants shall provide a detailed response to the Registrar's Proposal to Revoke Registration dated March 13, 2007 and the Supplementary Proposal to Revoke Registration dated July 31, 2007, no later than January 4, 2008.
3. The Applicants will file any motions and supporting documentation relating to the hearing with the Tribunal and provide copies to Counsel for the Registrar no later than January 4, 2008.
4. A further pre-hearing in this matter is scheduled to take place on January 7, 2008, commencing at 1:30 p.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
5. The Tribunal at the rescheduled pre-hearing will consider the request of Counsel for the Registrar for an order of costs against the Applicant with respect to the pre-hearing held on December 17, 2007.
6. The hearing in this matter remains scheduled to commence, peremptory on the Applicants, on February 4, 2008, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and will continue on February 5, 6, 7, and 8 if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer,
Member

Released: December 18, 2007

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



JANET BENNETT-COX

Appeal from a Proposal of the Registrar under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.C.30, Schedule "C", to Revoke registration as a Salesperson.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: JANET BENNETT-COX, the Applicant

RONALD FOERSTER, Counsel, representing the Registrar

DATE OF
HEARING: October 24 and 25, 2007

Toronto

RECISIONS FOR DECISION AND ORDER

BACKGROUND

Janet Bennett-Cox the Applicant, appeals from the Registrar's Notice of Proposal dated March 23, 2007, to revoke her registration as a real estate salesperson. The Applicant's Appeal was filed with the Tribunal April 10, 2007. Counsel for the Applicant appeared before the Tribunal at the pre-hearing into the matter held at the Tribunal offices in June 2007.

PRELIMINARY MOTION

At the commencement of the hearing, the Applicant requested an adjournment. She advised the Tribunal that her solicitor had told her in early September that he would no longer represent her at this proceeding. A letter filed with the Tribunal from the said solicitor and dated September 12, 2007, is to the same effect. The Applicant stated that she has not been able to secure sufficient funding to retain alternative counsel, nor did she feel capable of representing herself before this Tribunal. She has sought Legal Aid available to her for related criminal proceedings currently scheduled to commence in April 2008. Such funding is not, however, available to her for the Tribunal hearing. She requested additional time be provided to allow her to sell her home, currently listed, or procure a loan from family members. Her solicitor has undertaken to represent her at the Tribunal once his retainer is assured.

The Applicant further stated that, until recently, she had been unable to collect her disclosure material from her solicitor due to inconvenient office hours despite Vice-Chair Flude's pre-hearing Order that such be served upon the Registrar on or before

September 12, 2007. The Applicant advised that such materials were complex and she required additional time to review them. She noted that she had advised Counsel for the Registrar of these concerns by letter dated October 10, 2007.

The Registrar opposed the Motion. It was his position that the Applicant had many months notice of the scheduled hearing dates, and has been aware of the allegations against her contained in the Registrar's Proposal for over seven months. She further had over six weeks since her solicitor advised he could no longer act for her to find sufficient funding for his service or retain alternative counsel. She has done neither. Nor has she provided reasonable grounds to conclude that she will be able to do so in a reasonably short time period. Her home has been listed for over two years without a sale suggesting that it is unlikely to be sold in the immediate future. Mr. Foerster reminded the Tribunal of the public protection mandate of the Registrar, noting that the Applicant currently has a registration application pending.

The Tribunal denied the Applicant's request for an adjournment. While the right to counsel is of importance, like any right it is subject to reasonable limits. This Tribunal has long recognized that parties appearing before it have obligations to ensure retained counsel is available to proceed on their behalf on the dates set for the Hearing. The Applicant is a professional businesswoman who had the benefit of counsel for six months since receiving the Notice of Proposal. Such Counsel represented her at the pre-hearing and clearly assisted in the gathering of her disclosure material. Despite this, she made no effort to request an adjournment on a timely basis, choosing instead to petition for such at the commencement of the hearing when a number of days had been set aside and witnesses for the Registrar, including those under subpoena, were present, available and ready to proceed. To grant an adjournment at this date would come at no insignificant cost in time and money to the other side as well as to the Tribunal.

Further, there was no credible evidence that, if a brief adjournment were granted, the Applicant would be in a better position to proceed. In response to questioning by the Tribunal, the Applicant allowed that her property had already been listed for some time period without any sale, and she was unable to provide any details as to other potential funding being made available to her sufficient to retain counsel at any certain time in future. While she stated that she hoped to procure a loan within one or two months, the Tribunal notes that she has had this time period since September 12, 2007, with no evidence as to her having taken any concrete steps to gain the funds required.

Finally, the Tribunal recognizes the concerns raised by Counsel for the Registrar based on the allegations upon which the Proposal is based. The Act is a public protection statute which provides for revocation of a sales licence only where a risk to that public is established. The public has an interest, therefore in the Tribunal proceeding in a timely and optimum manner.

The Applicant was advised to either withdraw her appeal or prepare to proceed. She elected not to withdraw, but to have the matter proceed in her absence and removed herself from the proceeding.

ISSUE

The Registrar's grounds for the Proposal appear on page 2 of his Proposal as follows:

1. In the Registrar's opinion, Bennett-Cox is not entitled to be registered under section 10(1)(a) under the Act because
 - a. She provided or participated in providing false employment letters to a mortgagee;
 - b. She created false transaction documentation with respect to [number deleted] D.[name abbreviated] Avenue, Pickering; [number deleted] B. [name abbreviated] Street, Whitby; [number deleted] B.[name abbreviated] Street, Whitby; [number deleted] FF.[name abbreviated] Drive, Brampton; and [number deleted] C. Crescent, Brampton all for the purpose of mortgagee deception;
 - c. She failed to report transactions to her broker;
 - d. She participated in fraudulent schemes aimed at defrauding mortgagees.
2. Bennett-Cox has not acted in accordance with the Act. Nor has she acted in accordance with law or integrity or honesty.

The issue for this hearing is whether the past conduct of Ms. Bennett-Cox affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty.

EVIDENCE

Blaine Wilkinson

Mr. Wilkinson has been an Investigator of Corporate Security for the Bank of Montreal (the "Bank" or "BMO") for the past six years since retiring as a Detective Constable from the Toronto Police Services Fraud Squad, where he served for thirty years.

It was his evidence that he came across the Applicant while performing his current duties for the BMO, being investigating potential fraud risk, an area of increasing concern with regard to mortgage lending. His research led to his April 2006 filing of a written complaint against the Applicant with Ms. Swain of the Real Estate Council of Ontario ("RECO"), the entity which administers the Act (Exhibit 3, Tab 3A).

BMO sought Mr. Wilkinson's involvement when a high-end mortgage property held by the Bank went into default. The property located on S. Crescent, is currently in power of sale proceedings. The mortgager is the Applicant, and two other related individuals, her husband and her cousin. Mr. Wilkinson noticed that three other properties where BMO mortgage payments were at risk or in arrears involved similar pivotal individual players: the Applicant as a real estate salesperson, Mr. W.M. as a solicitor and Ms. R.B. a

mortgage broker. These three properties are Sh. Crescent; DiM. Drive and C. Crescent. The documentation pertaining to all four properties is canvassed below and was submitted by Mr. Wilkinson as forming part of the BMO files which he investigated.

a. S. Crescent

Mr. Wilkinson submitted documentation provided to the Bank in the spring of 2005 for mortgage approval for the Applicant as purchaser of this expensive property, valued at \$1, 690,001.00 (Exhibit 3, Tab 3b). The Agreement of Purchase and Sale was signed by the Applicant acting in a dual capacity as agent for both the buyer (herself) and the seller. Mr. M. was listed as solicitor. The completion date for the Agreement was June 15, 2005, and the document was executed on May 12, 2005. No listing broker is named, although the bottom of the document references one *Kijana Enterprise* under the designation "Broker's Name".

Investigation by Mr. Wilkinson determined that the mortgage broker arranging the transaction was one R. B. of Alpha House Mortgage Corporation. It was this individual who forwarded to BMO the documents the Bank requested as pre-conditions to its provision of mortgage funding to the Applicant in the amount of \$1, 267, 500. These documents included apparent employment letters for the co-applicants, the Applicant's husband and the Applicant's cousin, as well as a copy of the Agreement of Purchase and Sale for the mortgage demonstrating a purported sale of the Applicant's property at B. St., the proceeds of which she advised BMO were to provide the down payment for S. Crescent property of \$422,501.00 (same Tab, pages 11 and 12).

Documents provided by Ms. R.B. included a copy of the S. Crescent real estate MLS listing which Mr. Wilkinson testified was required by BMO to establish the true selling price. This appears on page 8 of Tab 3, and displays the name of the Applicant's Broker, All-City Real Estate, as where it was printed on June 13. While it does not include the agent's name, Mr. Wilkinson concluded the Applicant had supplied the listing to the mortgage broker to provide to the Bank.

The letter of employment supplied for the Applicant's cousin is dated June 8, 2005 (same Tab, page 21). It is on *Kijana Enterprise* letterhead, and includes an address with postal code, a telephone number and states that the Applicant's cousin is a "senior accountant" earning an annual salary of \$82,000.00. Mr. Wilkinson was not able to find any such business or suite number located at the address as given. The toll free number included on the letterhead was one digit too short (1-800 kijana), and attempts to contact the letter's writer at the local telephone number given were unsuccessful.

Similar findings occurred when Mr. Wilkinson attempted to follow up on the employment letter provided the Applicant's husband. Searches revealed no evidence of the supposed employer, Lorenzo's Industries. A Federal Revenue Office was located at the letterhead address, which Mr. Wilkinson was advised had been at the site for five years. The letter was signed by a K.S., Human Resource Manager. The Tribunal notes that the same name appears as VP for RL Management, the alleged employer of the purchaser in the Sh. Crescent transaction and the purchaser in the DiM. transaction who never returned Mr. Wilkinson's call request.

An Agreement of Purchase and Sale was provided to BMO evidencing the sale by the Applicant of a property at D. Ave for \$298,000.00 with a purported completion date of June 30, 2005 (Tab 3C page 1). The Applicant has signed the document in a dual agent capacity. The listing broker is disclosed as All-City Real Estate and the Commission Trust Agreement, attesting the deposit funds of \$2,000.00 to the broker are to be held in trust, has been signed by the Applicant. The bottom of the document again discloses the name of *Kijana Enterprise* as broker.

Mr. Wilkinson testified that his searches of Registry Title revealed that the property remains registered in the name of the Applicant with no transfer being recorded at any time before or after December 8, 2005.

A second Agreement of Purchase and Sale provided to BMO in furtherance of the S. property mortgage application purports to document the sale of B. Street property for \$339,000.00. The Applicant is disclosed as Vendor and R.S. as purchaser. The completion date is June 28, 2005. It too references *Kijana Enterprise* as Broker in small print at the bottom of the document. All-City Real Estate is disclosed as the Listing Broker representing both buyer and seller. The Applicant's signature appears in both capacities, and she has signed the Commission Trust Agreement for a supposed deposit of \$2,000.00 in her Broker's trust account.

Mr. Wilkinson's title search on December 8, 2005, revealed that the Applicant has never been listed on the property title documents maintained by the Land Registry office for the property, and no transfer to R.S. has ever been recorded (Exhibit 3, Tab 3D, pages 7 and 8).

b. Sh. Crescent

The Bank received an Alpha House Mortgage Corporation application for a property on Sh. Crescent for a Mr. and Ms. E.D. The Agreement of Purchase and Sale provided to the Bank referenced a purchase price of \$355,000.00. The Agreement was on a form noting the broker as *Kijana Enterprise* with a completion date of June 1, 2005. The Applicant signed as real estate agent for the buyers (Tab 3E, pages 16 et seq). On May 16, 2005, BMO approved the mortgage for \$295,001.00 based on a down payment provided by the purchasers of \$60,000.00 (Tab 3E page 29). The down payment funds were to be realized by the sale of property owned by Mr. and Ms. E.D. at B. Street. The Bank required that a firm sale for that property be confirmed as a condition to it advancing the mortgage funds (see Schedule "A" to Mortgage Approval page 30).

In compliance with the condition, BMO was faxed an Agreement of Purchase and Sale for B. Street. The Agreement was between Mr. and Ms. E.D. as Vendors and one J. S. as Purchaser. It, too, had a completion date of June 1, 2005, and was on a form purportedly prepared by *Kijana Enterprise*. The Applicant again appears as agent for both the Buyer and the Seller, and has signed the document in such capacities. The Agreement disclosed a sale price of \$349,000.00 and was executed May 25, 2005. It contained the notation that \$3,000.00 deposit funds were to be provided to the Applicant's Broker All-City Real Estate in trust and the Applicant's signature appears as

verification of such on the Commission Trust Agreement section of the document (page 24).

A title search conducted by Mr. Wilkinson for the B. Street property in March 2006 revealed no reference to any sale or property transfer to a J. S. (page 51).

c. DiM. Drive

For a purchase price of \$499,000.00, this property was purchased from a developer by D.L. with a closing date of December 15, 2005. The BMO approved a mortgage loan to D.L. and Ms. F. in the amount of \$322,190.00 based on their meeting certain conditions, one of which was proof of the sale of their other property ("FF") to demonstrate sufficient funding for the down payment required on DiM. Drive ((Exhibit 3, Tab 3G, page 48 et seq.). The solicitor acting for the mortgagor was the same solicitor as acted for the mortgagor in the S. Crescent property application to BMO¹.

The Applicant acted as dual agent for the alleged sale of FF, and signed the Agreement of Purchase and Sale in those capacities. The Agreement is between D.L. and Ms. F. as sellers and H.B. as purchaser for a purported \$449,000.00. A \$10,000.00 deposit is referenced as being placed in the Listing Broker's (being All-City Real Estate, the Applicant's broker) for which the Applicant has signed the Commission Trust Agreement. The contract was executed by both parties on December 10, 2005 (Tab 3H pages 1-7).

A title search undertaken by Mr. Wilkinson (Exhibit 6) demonstrated no sale of the FF property ever took place between these parties. A transfer from D.L. and Ms. F. was registered to K. and R. S. for \$389,000.00 on March 15, 2006 (Exhibit 4, Tab 4U) - \$60,000.00 less than the amount represented to BMO three months prior.

d. C. Crescent

BMO provided a mortgage loan of \$377,815.60 to Mr. L.S. and Ms. E.-B. for this property purchased in October, 2004. The solicitor for the transaction noted on BMO files was W.M. (see BMO Mortgage Commitment Tab 3I page 36). Ms. R.B. of Alpha House Mortgage Corporation was the broker.

A Bank condition for the advancement of the funds was proof that property owned by the mortgagor had been subject to an unconditional sale. Consequent documentation provided to the Bank consisted of an Agreement of Purchase and Sale, on a standard form disclosing *Kijana Enterprise* as broker, for a property on S. Court to purchasers W. and L.S. for a price of \$465,000.00. The Agreement was executed by the parties on July 30, 2004. The Applicant acted as dual agent representing both the buyers and sellers. She has signed the Sales Agreement in such a capacity and has executed the

¹ The Tribunal notes that the employment letter provided for D.L., as required by the Bank, is written on RL Management letterhead as was the employment letter for the purchaser in the Sh. Crescent transaction. It is signed by L. S. as VP Finance, whose name appears as seller in the C. Crescent mortgage transaction (page 36).

Commission Trust Agreement acknowledging that the deposit funds of \$5,000.00 were deposited into her broker's Trust account.

Jo-Ann Swain

Ms. Swain has been employed by RECO as an Investigator since February 2002. Prior to this, she worked with RECO as an Inspector for four years. Ms. Swain testified that her role as an Investigator is to ascertain a registrant's fitness for registration under the Act wherever an occurrence is believed to have taken place which impacts the individual's continued suitability for registration. She became responsible for the Applicant's file when the complaint from Mr. Wilkinson was brought to RECO at the end of April, 2006. Following her investigation, she compiled a Report which she submitted to the Registrar which, in turn, led to the Registrar's Proposal.

Ms. Swain arranged for her staff to review all the documentation and files contained in BMO records as supplied by Mr. Wilkinson. She had this information cross-checked with a "Purview Sales History" being a data base from the Land Registry Office available to RECO which lists title holders per property address.

Ms. Swain testified that she had cross-referenced the signature of the Applicant, as it appears on the Agreements of Purchase and Sale contained in BMO files provided in Mr. Wilkinson's complaint, with the signature on RECO files in the Applicant's registration applications. Although not an expert in handwriting, Ms. Swain found the two to be consistent.

One of her first acts was to contact the Applicant's broker, All-City Real Estate. She spoke with the registered broker and arranged to meet with him at his office to review the Agreement of Purchase and Sale files provided to her by Mr. Wilkinson. She testified that All-City Real Estate had no record of the executed Agreement of Purchase and Sale for the D. Avenue sale, nor did it ever hold the deposit funds of \$2000.00 in trust contrary to that Agreement. This property had been represented to BMO as having been sold by the Applicant at the end of June 2005; however, All-City Real Estate had listed the property for sale from April 2005 through June 2005 and then from September 20, 2005 through to December 30, 2005 for lease. In both listings the Applicant is shown as both owner and agent (Tab 4G).

There was also no record at All-City Real Estate of the executed Agreement of Purchase and Sale and deposit funds for B. S., being the second property represented as sold by the Applicant on June 28, 2005, in her application for mortgage funding with BMO for the S. Crescent property. All-City Real Estate did however have on file prior listings for the second property held by the broker with the Applicant listed as sales agent. The first such listing discloses K. S. as owner of the property and the listing agreement runs from July 4, 2005 through to September 4, 2005. The last discloses GMIC as owner and runs from March 16, 2006 through to June 23, 2006 (Tab 4M). Ms. Swain pulled Land Registry documents for the property which disclose that the Applicant was never an owner, that the second property passed from K. S. to GMIC in May, 2006 (Tab 4J). There was, however, a separate Agreement of Purchase and Sale signed by the Applicant as dual agent in March 2006, and held in All-City Real Estate

records for the property representing a transfer from K. S. to a L. F. for the same amount as that allegedly sold by the Applicant in the documentation supplied to BMO, being \$339,000.00. This transaction was never completed as GMIC took over the property for power of sale proceedings. Ms. Swain found that the real estate salesperson for this later sale advised her the property was actually worth some \$80,000.00 less than that represented in the Sales Agreement provided by the Applicant to BMO.

Ms. Swain testified that All-City Real Estate records did reveal the sales documentation for the Sh. Crescent were held by the broker and that the Applicant, as agent, received her commission payment for the transaction. However, there was no record of any sale or deposit monies held by the Broker for B. Street, the property represented to BMO as having been sold to supply the required down payment funds for the Sh. Crescent mortgage financing. Ms. Swain's title search of the second property in November 2006 discloses that Mr. and Ms. E.D. continued to be the registered owners. There is no mention of a J. S. (Tab 4R). All-City Real Estate did have listings for the property with the Applicant as sales agent. The first listing had listed the property at \$359,000.00 and expired in July 2005; the second had a price of \$329,000.00 and expired on January 30, 2006. Both listings disclose Mr. and Ms. E.D. as owners and neither records any sale having occurred (Tab 4S), and no deposit of trust funds placed in the Applicant's broker's trust account.

With regard to the DiM. Drive transaction Ms. Swain stated there were no records evidencing this sale with All-City Real Estate. Despite the Agreement of Purchase and Sale for the related FF property being witnessed by the Applicant as dual agent for the transaction, All-City Real Estate had no record of the sale, nor the \$10,000 deposit funds the Agreement verified was held in trust. The broker did, however, have a number of listings for the property, all of which show the Applicant as sales agent responsible (Tab 4V). Further, All-City Real Estate documents reveal the property was eventually sold to a K. and R. S. in March 2006 for \$389,000.00 (\$60,000.00 less than had been represented to BMO the previous December). The Applicant received her commission funds for the later sale (Tab 4W).

The C. Crescent property mortgage was predicated on an apparent sale by R.S. to L.S. of S. Court property. All-City Real Estate had no record of this transaction, nor of the alleged trust funds it supposedly held for this transfer in the amount of \$5,000.00. It did however have a prior listing with the Applicant as sales agent for the same property which listing had only commenced the day after the alleged sale to L.S. This listing expired in September 2004 with no sale reported. The Tribunal notes that the Land Registry search undertaken by Ms. Swain revealed that the property had indeed been transferred for \$465,000.00, but this had taken place on October 7, 2004 – some three months after the Agreement of Purchase and Sale had been provided to BMO for mortgage funding for the C. purchase by R.S.

In July, Ms. Swain contacted the Applicant to advise her of the concerns, the material files and to arrange for a meeting. While the Applicant did attend RECO's offices and met with Ms. Swain, she rejected the opportunity to discuss the complaint without first

consulting her lawyer. At no time since has she contacted RECO to review the concerns.

In searching the name "*Kijana Enterprise*" with the Ontario Ministry of Consumer and Business Services, Ms. Swain found it to be a registered partnership in the business of "wholesale and retail of local and imported". The partners' names disclosed are those of the Applicant and her husband (Exhibit 4, Tab 4N). It was not registered as a Real Estate broker on the RECO database. The Director's Certificate disclosing all brokers to whom the Applicant has been registered since she was first licensed in 1989 reveal she has never been associated with a broker operating under the name of *Kijana Enterprise* (Exhibit 3, Tab 2). Ms. Swain's inspection of RECO documentation supplied by the Applicant further revealed the Applicant's interest in this business had not been disclosed in her most recent application for registration as a salesperson (Tab 4I). Ms. Swain testified she attempted to contact the partnership at the phone number provided in the employment letter provided to BMO for the Applicant's relative but received no answer.

A CPIC search request in the Applicant's name was undertaken by Ms. Swain during her investigation into these matters. She submitted documentation verifying the Applicant was charged with fraud over and eight counts of uttering on October 19, 2006, Ms. Swain testified that she had been informed by the police that these charges were related to the S. Crescent matter and were still before the court (Exhibit 4, Tab 4A).

Gino Mancini

Mr. Mancini is a registered real estate broker with Sutton Group. He has been a registered broker since 1982, and a licensed salesperson since 1976. Mr. Mancini had been the agent for the GMIC sale of the B. Street property. Mr. Mancini testified that part of his normal business practice is to appraise properties for foreclosure sales and he was approached by GMIC to provide this service in 2006 for the B. Street property.

Having researched other recent sales of same properties in the area and examined the property itself, Mr. Mancini concluded a fair market value for the property was between \$252,000.00 to \$255,000.00. He confirmed the property did indeed sell on April 4, 2006 for \$251,000.00. When asked, Mr. Mancini was vehement that the asking price of \$359,000.00 to \$379,000.00 contained in the Listings held by the Applicant for this property and the nearby B. Street property the year prior, were unjustifiable as nothing comparable was being sold for that price range. He noted that both properties were two storey rowhouses on a major thoroughfare (See Mancini Report to GMIC dated March 14, 2006 – Exhibit 5, Tab 4).

Brian Schlotzhauer

Mr. Schlotzhauer has been the Deputy Registrar for RECO since last March. Prior to becoming Deputy Registrar, he was Assistant Registrar and Manager of Registration from 1999 through to March 31, 2006. His duties as Deputy Registrar are to assist the Registrar in his administration of the Act. Mr. Schlotzhauer testified that the main purpose of the Act is consumer protection. It aims to ensure that those guiding

consumers through real estate trades are properly qualified and subject to licensing controls. In light of this, registrants are subject to numerous educational and compliance conditions set out in the Act and regulations. They are also subject to the legislative requirements to act with honesty and integrity and in accordance with the law in the discharge of their professional duties. It is essential that the real estate agent who, in effect, guides the whole real estate transaction process, acts within the requirements set out in the legislation. It is not just the consumer, but also institutions, including mortgagees, who rely on the representations of that agent. Mr. Schlotzhauer noted such agents operate with a significant degree of independence: although attached to a broker, in effect most of their day-to-day activity is performed with little direct hands on management of them by that Broker. The Act thus provides that the Registrar should be of the opinion that a registrant is failing to meet these conditions of registration, he can propose the revocation of that individual's registration.

In this case the Applicant's registration automatically terminated at some point since the issuance of the Registrar's Proposal by her broker based on her failure to pay the Toronto Real Estate dues. She has, however, since applied for renewal of registration. She has her broker's support. The Registrar's office is only waiting her payment of the administrative fee before the application will be completed. Once completed, the Applicant will again be licensed as a real estate salesperson unless this hearing determines otherwise.

The Registrar is of the opinion that the Applicant should not be licensed based on the evidence contained in the four mortgage transactions before this Tribunal. He noted that the S. Crescent property mortgage received from BMO was predicated on two alleged sales made by the Applicant – D. Avenue and B. Street – neither of which ever occurred. Moreover, the evidence demonstrated the Applicant never owned the B. Street property despite her having held out she did in the Agreement of Purchase and Sale provided to the Bank. Neither Agreements of Purchase and Sale for the two properties were ever recorded with All-City Real Estate, the Applicant's broker, as is required under the legislation, nor were the supposed deposit funds ever maintained in the broker's trust account as is also required under the Act. Mr. Schlotzhauer testified that the Registrar thus concluded that both of these representations were in fact fabricated in order that the Applicant would be approved for a significant mortgage on the expensive S. Crescent property, which mortgage she has since defaulted upon.

As concerns the Sh. Crescent, the Registrar believes that the property sale was legitimate; however, the representation made to BMO for advancement of mortgage financing to the purchasers Mr. and Ms. E.D. was based on a false Agreement of Sale purporting to represent that sufficient equity funds were available to the lender through the sale of B. Street. Not only was the purported sale price of this property severely inflated, but the evidence demonstrates that this sale never did take place. The Applicant's broker had no record of the Agreement, nor of the deposit funds, in contrast to what was attested to by the Applicant in the Agreements of Purchase and Sale, and in direct violation of requirements under the legislation.

Furthermore, as with the S. Crescent property, the dubious Agreement of Purchase and Sale was printed on a form attributed to *Kijana Enterprise*, a partnership wholly owned

by the Applicant and her husband and never registered in the jurisdiction as a legitimate real estate broker. Further, D. Avenue, and the two B. Street properties as well as FF and S. Court all involved the Applicant acting in a dual capacity as agent for both the alleged seller and buyer. They all included the services of W. M. as lawyer and all involved the mortgage broker R. B. Mr. Schlotzhauer testified that for such complex mortgage fraud to be successful, all three players are necessary.

The DiM. Drive property mortgage financing was approved by BMO based on representations it received that a FF property held by the mortgagors had been sold. The documentation provided to establish this sale was prepared and signed by the Applicant in her capacity as a registered real estate agent. As with the other questioned transactions, she acted as agent for both the buyer and the seller. Further research demonstrated however that no such sale ever did take place. A title search reveals a separate sale to a separate purchaser at a later date in time. And, as with the other cases, it was her broker All-City Real Estate which had earlier held the sales listing for the property

Finally, as concerns the C. Crescent mortgage, the Registrar stated the transaction upon which it was predicated, being the alleged sale of the S. Court property, was again negotiated by the Applicant in her capacity as dual real estate agent. She also signed the Commission Trust Agreement verifying the deposit funds were maintained by her broker in a trust account, required under the legislation. In fact, future investigation revealed the broker never had a record of the deal and never held deposit funds in trust for the seller.

Mr. Scholtzhauer noted that the Act and Regulations mandate the salesperson to keep the trade record sheet of any sale transaction and require that trust funds provided by a consumer pertaining to any real estate transaction be maintained in the broker's trust account.

The Deputy Registrar also concluded that the Applicant was dishonest and demonstrated a lack of requisite integrity in the evidence put forth concerning the apparently false employment letters utilized to support her mortgage application for S. Crescent property.

FINDINGS OF FACT

In light of the evidence before it the Tribunal finds the following facts:

- 1 In all four mortgage approvals provided by BMO, reliance was placed by the Bank on untrue representations it received, aimed to encourage within the BMO the false belief that sufficient equity was available to the mortgagor.
2. In the four transactions placed into evidence, five false Agreements of Purchase and Sale were provided to BMO for this purpose. In each case, the Applicant was the real estate agent named for both the buyer and seller, and it was her signature which attested to the execution of each deal.

3. In each Agreement, the Applicant signature also attested to her broker All-City Real Estate as holder in trust of the deposit funds supplied by the purchaser for the transaction. In all cases, however, further investigation revealed the Broker had no record of the trade sheets for each of these sales and didn't hold the related trust funds.
4. In all cases, the properties were never transferred in accordance with these signed Agreements.
5. In all but one transaction (FF), *Kijana Enterprise*, is named as the Broker for the Agreement in small print at the bottom of the form. *Kijana Enterprise* is a registered Ontario business consisting of the Applicant and her husband as the only partners. It has never been licensed as a real estate broker under the Act.
6. In those deals where the property eventually did sell, the selling price was significantly lower than that relied upon by the Bank in the false Agreements provided to them.
7. In the mortgage application for property the Applicant herself was purchasing, the Applicant participated in the Bank receiving false employment letters on which it further relied to advance her the funds she required.

THE LAW

The Act provides in part as follows:

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,

(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

13. (1) Subject to section 14, 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 10

14. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(b) suspend or revoke a registration

(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

35. No registrant shall furnish, assist in furnishing or induce or counsel another person to furnish or assist in furnishing any false or deceptive information or documents relating to a trade in real estate.

DECISION AND ORDER

The issue for this Tribunal is to determine whether the evidence provides reasonable grounds for belief that the Applicant will not carry on her business of real estate sales with honesty, integrity and in accordance with the law.

The Tribunal is mindful of the perimeters of its jurisdiction as determined in the *Brenner* (1983) and *Shine* (2003) decisions of the Divisional Court. In the latter Lane J. held as follows:

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 para. 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 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 our view, properly read, this Court in the subsequent case of... (*Faccenda*)...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 the trier of fact whose opinion is based upon a hearing and so entitled to deference.

In reaching its decision, the Tribunal is further mindful of the very nature of the Act that is at issue in this proceeding. As noted in the recent Tribunal decision of *Singh* (March, 2006), also concerning a Proposal of the Registrar to revoke a salesperson's registration, the *Real Estate and Business Brokers Act, 2002*:

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.

Based on the facts found by the Tribunal from the evidence presented during the hearing, this Tribunal has no hesitation in concluding the Applicant has shown by her conduct that there are reasonable grounds to believe she will not act professionally within the law and with honesty and integrity. The evidence demonstrates to the Tribunal's satisfaction that the Applicant has participated in the provision of false Agreements of Purchase and Sale upon which the Bank relied in advancing mortgage

funds to her and others. Such Agreements represented sales which did not occur, between parties which were never registered as owners or purchasers and at prices which did not reflect the correct value of the properties. Her partnership, not registered as a real estate broker, represented itself as such in those documents. It also issued misleading information on letters it supplied to the Bank purporting to support employment income information of a mortgagor.

Despite having requested the opportunity to do so, the Applicant failed to present any defence or evidence as to why these facts should not be accepted by this Tribunal against her continued fitness for registration under the Act.

ORDER

Accordingly, this Tribunal, pursuant to the authority vested in it under section 14(5) of the Act, directs the Registrar to carry out his Proposal dated March 23, 2007, to revoke the registration as salesperson of Janet Bennett-Cox.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

Released: December 14, 2007

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

SEPIDEH MOAZZANI

APPEAL FROM A DECISION OF THE REGISTRAR UNDER
THE REAL ESTATE AND BUSINESS BROKERS ACT TO
REFUSE TO RENEW A REGISTRATION

TRIBUNAL: WILLIAM MCINTOSH, Vice Chair

APPEARANCES: SYMON ZUCKER: Counsel, for the Applicant
RONALD FOERSTER, Counsel for the Registrar

DATE OF
HEARING: November 18, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Registrar issued a Notice of Proposal (the “Notice”) dated July 27, 2005, informing the Applicant that her application for renewal of registration as a salesperson under the *Real Estate and Business Brokers Act*, R.S.O. c. R4 (the “Act”) had been refused. The Applicant appealed the Proposal, and a hearing was scheduled. Until the disposition of the matter before the Tribunal, the Applicant is free to continue as a real estate salesperson.

The grounds for the Registrar’s refusal to renew the Applicant’s registration, and thereby her right to earn a living as a real estate salesperson, were set out in the Notice. In essence, the Registrar asserted that the Applicant’s conduct as a registrant fell below the required standards set by the Act.

The hearing of the Applicant’s appeal commenced on March 14, 2006. Several days of hearing followed until June 2007, when counsel for the Registrar could no longer serve, and new counsel had to be instructed. New counsel was appointed, and the matter recommenced on November 15, 2007.

Prior to the commencement of the matter on November 16, 2007, counsel for the Registrar requested an adjournment in order to bring a motion before the Tribunal. It transpired that counsel for the Registrar had been served with a summons issued by the Tribunal. Counsel for the Registrar sought leave to have the summons quashed. Counsel for the Applicant objected, and a hearing on the matter was scheduled for November 19, 2007.

ISSUES

Upon return of the Motion, the parties agreed that it was within the power of the Tribunal to quash a summons issued under its authority, leaving the grounds for any such relief as the remaining matter in issue.

BACKGROUND

This matter has taken some time to arrive at its present state. The delays are through a combination of circumstances such as an unavoidable change in counsel and are not to be attributed to either party.

The immediate instance was brought as a result of matters arising out of the cross-examination of a witness called by the Registrar. Counsel for the Applicant had queried the witness regarding her contact with the investigator for the Registrar. That contact as is the usual course consisted of an interview with the witness, who was also a person who had lodged a complaint with the Registrar regarding the Applicant. That interview, again in the usual course, was reduced to a "will say", actually entitled "Anticipated Evidence" of the witness. It was not a signed statement and there is indication that it was reviewed and verified as between the Investigator and the witness. As part of the duty of disclosure the "will say" was produced to the Applicant as a document intended to be relied upon at the hearing. The investigator who was the maker of the "will say" has yet to be called.

Under cross-examination by counsel for the Applicant, the witness was asked whether she recalled the interview with the Investigator to which she replied in the affirmative. She was then asked whether from her recollection the "will say" of the investigator accurately reflected the interview. She stated that certain portions of the "will say" were in fact not as she recalled events relayed to the investigator during the interview. She was then asked if she had brought these differences to light, and she replied that she had spoken to counsel for the Registrar prior to her testimony and brought certain differences to his attention. At this point Counsel for the Applicant sought production of any notes taken by counsel for the Registrar on the grounds that these changes to the "will say" had not been put to the witness in direct. The "will say" itself was not put to

the witness in direct presumably as it was not a document produced by her. It had, as it transpired, been put to her own counsel with written corrections. Her counsel did accompany the witness to the hearing, introduced herself and through counsel for the Registrar had sought *Evidence Act* protection for her client's testimony. Questions as to why the protection was being sought were ruled out of order by the Tribunal. As well, the Tribunal stated that no inferences negative or positive were to be drawn from the fact of this or any witness asserting the *Evidence Act* protection.

The version of the "will say" corrected by the witness and given to her own counsel was in turn given to counsel for the Registrar prior to the commencement of the proceedings on November 16, 2007. In turn, it was proffered to the Tribunal in order to satisfy the concerns of counsel for the Applicant regarding his ability to carry out an adequate cross-examination as was his due. This was not accepted by the Applicant's counsel, and he insisted upon placing counsel for the Registrar on the stand as a witness under summons. The Tribunal presumes that in such an eventuality, although counsel would be his witness, the right to have him treated as adverse in interest would have been sought.

This brought the matter to the stage where counsel for the Registrar moved to have the summons quashed.

The eventuality of the Registrar's counsel being a witness raised the issue of his ability to remain as counsel, and the further consequence of instructing new counsel.

FACTS AND LAW

As both counsel agreed as to the Tribunal's jurisdiction, the remaining issue was the grounds upon which that jurisdiction should be exercised.

The first consideration was the question of onus. As the moving party it, was the responsibility of counsel for the Registrar to satisfy the Tribunal that quashing the summons was more consistent with the proper conduct of the hearing than allowing the Applicant's counsel to place him on the stand.

To this end counsel for the Registrar directed the Tribunal to the *Statutory Powers and Procedures Act*, R.S.O. 1990, c S. 22 section 12.

12(1) A tribunal may require any person, including a party, by summons,

(a) to give evidence on oath or affirmation at an oral or electronic; and

(b) to produce in evidence at an electronic hearing documents and things specified by the Tribunal, relevant to the subject matter of the proceeding and admissible at a hearing.

Counsel argued that any information he has is information that can be elicited through the continued cross-examination of the witness. He has no personal knowledge of the events in issue as he only has the information relayed to him, and which is now part of his brief. He has no notes relating to the pre-hearing conversation he had with her. In addition, the information can be continued with reference to the “will say” written upon by the witness, indeed as it is a summary put to her for comment and or correction, it can now stand as it is the essence of her statement. Any prior inconsistencies are there for all to see. Any inconvenience to counsel should rightly go to the issue of costs. Counsel referred the Tribunal to cases:

R. v Sungalia [1992] O.J. No. 3718

This case was a decision of Campbell J. on the issue of the opposing counsel being compellable as a witness. Campbell J. first stated that counsel are not immune from the process of the court. He did however say that there is a persuasive burden upon the lawyer seeking to place the opposing counsel on the stand thereby abandoning his position as counsel. By this, the Tribunal takes the meaning that while onus to establish grounds for quashing a summons remains with the moving party, there is, in the case of compelling counsel, a concomitant burden upon opposing counsel to show necessity and relevance.

The case involved utterances of a witness during an interview at which counsel, in this case a Crown, was present. A police officer, also present, reduced the interview to a written record. The court held that on the presumption that the reduction to writing could be classified as a statement, that reduction was a basis for cross-examination only, and could not itself be considered evidence. On that basis, any interchange between the witness and counsel similarly could not be considered evidence. The Court went on to hold that in the absence of any impropriety during the interview, an evidentiary inquiry was not called for. As a practical matter, compellability of counsel as a witness subsequent to preparatory interviews would render proper trial preparation impossible.

In the present case, counsel for the Registrar spoke to the witness prior to her appearance, and she apparently noted some changes in the “will say” produced by the investigator. The “will say” was not gone through in direct. The fact of the changes came out in cross-examination. It was the revelation of these changes and the right of counsel to be made aware of any further changes now in the possession of the Registrar’s counsel that became the impetus behind the issuance of the summons and the present motion to quash.

The question according to *Sungalia* becomes whether or not to satisfy the right of the Applicant’s counsel to make full answer and defense, it is necessary to call opposing

counsel; or more particularly whether such testimony would meet the test of “relevance and necessity”.

Registrar’s counsel submitted that the production of the “will say” as corrected, goes as far as required to satisfy the test as set forth by the court. As well there being no property in a witness it was within the bounds of counsel to interview the witness prior to the hearing. It would not be an unreasonable assumption that any discrepancies in the “will say” would have been pointed out by the Applicant and therefore available for purposes of cross-examination or clarification.

R. v. Kyling [1996] Q.J. No. 1566

This case involved an application to quash subpoenas served upon Crown counsel. The court referred to *Sungalia* with approval. Specifically Cote J. quoted Campbell J.’s opinion that while counsel are not immune from court process it would render litigation impossible if there was an unrestricted right to compel them as witnesses. Any such right must be subject to the test of relevance and necessity.

Cannon v. Canada [1997] F.C.J. No. 1552

This matter before MacKay J. involved an application for judicial review of the quashing of a subpoena by the RCMP adjudication board. The Applicant believed the prosecuting officer had conspired against him throughout the process and served a summons upon him. The Court referring to *Sungalia* decided, inter alia, that the burden upon the Applicant to show the required relevance and necessity of the sought after evidence had not been met.

R. v. Brown [1996] O.J. No. 5319

The Tribunal was directed to this matter by the Applicant’s counsel for the purposes of indicating the appropriate course of conduct by prosecuting counsel by way of disclosure. The decision of Trafford J. was that the party seeking the removal of counsel on the basis of compellability failed to discharge the burden regarding relevance and necessity. In coming to that decision, the Court reviewed the lengthy pre trial procedural arguments and the basis of the defense contention that the Crown by its failure to disclose had become in fact a witness in possession of necessary information, a material witness. The actual application to remove the assigned Crown came after the issuance of a preferred indictment by the Attorney General, and the subpoenaing of all those involved in the issuance as witnesses. The crown moved to quash the subpoenas and the defense moved to have the Crown replaced. The underlying issue involved an ex parte discussion between the Crown and the judge seized of the preliminary inquiry. The fact and details of the conversation were disclosed to the senior defense attorney but only him. The defense applied to have the preliminary inquiry struck upon the grounds of a “reasonable apprehension of bias”. While finding no bad faith, Then J.

decided that the prohibition against such ex parte communications being virtually absolute he had to accept the position of the defence and a new preliminary hearing in front of a new judge was ordered.

The application as it refers to the Crown involved an interview with an identity witness at which the Crown was present and at which she and the police officer accompanying her took notes. In a letter to the defense, the Crown outlined the substance of the witness's upcoming testimony at the inquiry, and gave copies of the police officer's notes. Due to concerns for the witness's safety he remained inaccessible as a "confidential" witness whose identity would be revealed at the preliminary hearing. During cross-examination of the witness, the defense asked for production of the crown's notes made during the interview.

In reviewing the burden placed upon counsel seeking to uphold a summons in a hearing to quash, the Court stated that the removal of counsel should be done sparingly and only upon grounds of personal interest, conflict of interest or being in possession of material evidence. Material evidence should be both relevant and necessary.

The Court found that the crown had not acted inappropriately, and that there were no behavioral grounds for her recusal. In the event, any material evidence in the possession of the Crown was reasonably available through alternative sources such as the attending police officers.

Counsel for the Applicant takes the position that the "will say", actually entitled "Anticipated Evidence of [...]" is the equivalent of a police statement in a criminal proceeding and any changes prior to a witness testifying must, similar to the obligation imposed upon the Crown, be brought to the attention of opposing counsel prior to the witness taking the stand. He went on to state that the seriousness of the consequences to a person denied registration and thereby the right to make a living demands that utmost scrutiny and fairness be applied to the process through which that decision is arrived at.

DECISION

The issue of the compellability of counsel in any matter before the Tribunal must be cast against both the rights of the parties before it and its overall purpose. The legislature in its wisdom has seen fit to regulate certain industries in the furtherance of the public interest. To this end, statutes are enacted to better ensure orderly marketplaces, consumer safety, protection of children and any number of other ends. To achieve these objectives participants in the designated industries become registrants under standards of professional competence. A designated official, in the present case a Registrar, is empowered under the governing legislation to grant, revoke and refuse registration to operate in the business of real estate sales. He also sets professional standards and is

granted a range of enforcement options to ensure compliance from suspension to refusal and revocation.

If exercised, these options result in the inability of the registrant to make a living in his or her chosen profession. To ensure that such bureaucratic authority is appropriately carried out, affected registrants are granted an automatic right of appeal to the Tribunal.

The Tribunal's task on the hearing of such appeals is to find the appropriate balance between the legislative intent of protecting the public interest in a properly regulated real estate industry, and ensuring that the hearing, the disposition of which is potentially very serious, is conducted within the bounds of procedural fairness.

In the present appeal, the Tribunal must weigh the effect of having counsel take the stand with the resultant fall out of delay in the disposition of the matter, and the necessity of such testimony in ensuring the Applicant's ability to make her case.

The subject "will say" is a document produced to the other side as a matter of course in order that counsel representing Applicants can achieve this end. Administrative Tribunals do not have the discovery process available under the rules of civil procedure through which counsel can explore further details of matters disclosed in documents. Indeed one of the principal reasons for the establishment of Tribunals is to avoid these usually lengthy pre-hearing proceedings. Therefore, counsel states that accuracy of productions is essential. Again, the balance between timeliness of disposition and procedural fairness must be considered.

Counsel for the Registrar argues that the disclosure requirements under the rules have been met, and counsel's ability to know the case the Applicant has to meet and his rights of cross-examination are protected. Here we have testimony that a document, the "will say", contains some discrepancies between the recollection of the witness giving the interview, and what was written by the maker of the document. The maker, the investigator, has yet to testify. Any discrepancy can be adequately covered by rights of recall, use of the now amended version of the "will say" and further cross-examination of the witness.

Counsel for the Registrar further asserts that the extraordinary step of involving opposing counsel as a witness in the full knowledge that such a eventuality would result in further delay while new counsel was being instructed is an abuse of process. Such delay would allow the Applicant the opportunity to continue to remain a registrant thereby thwarting the overall public interest purpose of the Act. The burden of showing necessity and relevance particularly in light of the now produced corrected "will say" has not been discharged. As such, the ability of counsel for the Applicant to make full answer and defense has not been prejudiced.

The Tribunal thanks both counsel for their well-presented submissions. While mindful of the fact that the corrections to the “will say” could have been more appropriately adduced, the Tribunal accepts the argument of Counsel for the Registrar that the burden of necessity and relevance placed upon Counsel for the Applicant by the precedents has not been met.

Therefore, the calling of counsel for the Registrar will not be ordered and the summons will be quashed.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

RELEASED: December 10, 2007

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

PRE-HEARING

FRANK COLATOSTI – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT, S.O. 2002, CHAP
C. 30, SCHEDULE .C. AND REGULATIONS, AS AMENDED, TO
REFUSE TO GRANT REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: ROSS D. ROLLO, Counsel, representing the Applicant

TIM SNELL, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act, 2002*

DATE OF
PREHEARING: November 9, 2007 Toronto

ORDER

Following attendances on November 9, 2007, at a pre-hearing before this Tribunal of Ross D. Rollo, counsel on behalf of Frank Colatosti (the “Applicant”), and Tim Snell, counsel on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the “Registrar”);

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Wednesday, December 19, 2007, and thereafter, if necessary, to continue at 9:30 a.m. on Thursday, December 20, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties recorded that there had been no resolution of any of the issues in this matter.
2. The parties to the hearing are the Applicant and the Registrar.

3. Mr. Rollo, Counsel for the Applicant, advised he expected to call 4 witnesses while Mr. Snell, Counsel for the Registrar, proposed to also call approximately four witnesses.
4. Both parties to the hearing shall fully comply with Rule 6 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, both parties undertake at this time to disclose every document and thing now in their possession or under their control that they will refer to or tender in evidence at the hearing, and to deliver a copy of such document(s) to the other party by or before December 7, 2007.
5. The Parties agreed that, as there may be additional time required to complete the hearing, the hearing dates are adjusted and hereby scheduled to commence at 9:30 a.m., on Monday, December 17, 2007, and thereafter, if necessary, to continue at 9:30 a.m. on each of Wednesday and Thursday, December 19 and 20, 2007, respectively, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: November 16, 2007

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

MOTION

DUGAL-DAN McDONALD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: LYNDA TANAKA, Acting Chair

APPEARANCES: PELLEGRINO CAPONE, Counsel for the Applicant

RON FOERSTER, Counsel representing the Registrar, *Real Estate
and Business Brokers Act, 2002*

DATE OF
HEARING: November 28, 2007 *by teleconference*

ORDER

A motion was brought by the Applicant for a re-hearing of the motion he brought earlier to have the matter dismissed and in the alternative to have evidence expunged. The original motion was argued before the Tribunal on August 28 and September 4, 2007. An oral disposition was made of some of the relief requested, followed by written reasons on the motion released September 12, 2007.

Since the release of the written reasons, the Registrar, *Real Estate and Business Brokers Act, 2002* ("the Registrar") has disclosed three further documents which the Applicant says bear on the issues determined in the motion. The Applicant requests a re-hearing of items 3 and 4 of his original motion based on this disclosure. The motion was heard by teleconference with counsel for both Parties participating. Counsel for the Registrar raised at the outset the issue of whether or not the Tribunal had the power to re-hear the matter and if it did, the test to determine whether or not that power should be exercised.

For reasons given orally, the Tribunal rejected the request for re-hearing of the motion. There is no power under the Rules of Practice of the Tribunal to re-hear matters, but the Tribunal has the power to control its own process. The Parties agreed that the three documents constituted fresh evidence and that the test to be applied where there was fresh evidence was that the Tribunal should use its power to control its own process in this context of re-hearing a matter sparingly and only in the clearest of circumstances to prevent a miscarriage of justice. The Tribunal ruled orally that those circumstances did not exist in this case, given the timing of the motion and the protection set out in the reasons for decision on the original motion concerning the Applicant's entitlement to bring forward his arguments concerning procedural fairness and the admissibility of evidence.

To be consistent with the previous motion ruling the affidavit material and Notice of Motion will be filed separately with the motion material from the original motion. This material will not be provided to the panel hearing the matter prior to the hearing. This Order will be included in the material provided to the panel hearing the matter.

The motion to re-hear was therefore dismissed.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

Released: November 29, 2007

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



MOTION

MICHAEL N. ELMENHOFF

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: JAMES MCGRATH, Counsel, 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: October 9, 2007 Toronto

DECISION AND ORDER

At the commencement of the hearing, counsel for the Applicant brought a motion for an adjournment. The matter had originally been scheduled to be heard in July, 2007 but at the pre-hearing conference the matter was adjourned to be heard in September. On his return from the pre-hearing conference, counsel for the Registrar discovered that one of his major witnesses was unavailable and immediately contacted counsel for the Applicant. They agreed to adjourn until October 9 and 10 and this Tribunal issued a consent order to that effect. The Applicant now seeks an adjournment on the basis that two of his witnesses are unavailable. Having reviewed the affidavit evidence submitted by the Applicant and heard submissions from counsel, the Tribunal has determined that it is in the interests of ensuring that the Applicant has the ability to make full answer and defence to the allegations to grant the adjournment. The Tribunal is concerned that, in the face of such serious allegations the public are protected pending the hearing. Therefore, the adjournment is granted on terms as follows:

1. The hearing is adjourned to commence at 9:30 a.m. on February 14, 2008 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto and to continue, if necessary, on February 15, 2008, preemptory on all parties.

2. By October 23, 2007 the Applicant shall provide to the Registrar;
 - a. A copy of the monthly trust bank account statements and trust bank account reconciliations from the period commencing for the month of September, 2005 up to and including September, 2007.
 - b. Commencing on October 30, 2007 and continuing until the release of the decision of this Tribunal, by the 30th day of each month the Applicant shall provide trust bank account statements and trust bank account reconciliations for transactions in the Applicant's trust bank account for each of the immediately preceding calendar months, and
 - c. A will say statement summarizing the evidence of each witness the Applicant intends to call.
3. The Parties shall consult and attempt to produce an Agreed Statement of Facts and Issues by October 23, 2007. Nothing in this paragraph limits the rights of either or both Parties to agree, concede or withdraw facts or issues at any time up to the conclusion of the hearing.
4. Notwithstanding that the Applicant has advised the Tribunal that he does not intend to rely on any documentary evidence or an expert's opinion, in the event that the Applicant determines that he wishes to rely on documentary evidence or an expert opinion, he shall deliver copies of any such documents or opinion forthwith to the Registrar and, in any event, no later than the deadlines set out in Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: October 19, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



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: ALLEN PHILLIP WELMAN, Counsel, representing the Applicant
until February 26, 2007, and thereafter the Applicant represented
himself

TIM SNELL, Counsel, representing the Registrar under the *Real
Estate and Business Brokers Act*

DATES OF
HEARING: February 6, 7, 13, May 16, 29 & 30, September 25, 26, 2006
January 30, 31, 2007, February 26, April 18,
May 4, May 14 and 15, 2007 and July 12, 2007
Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises from a written Notice of Proposal (the "Proposal") dated August 15, 2005, issued by the Registrar under the *Real Estate and Business Brokers Act* (the "Act") to revoke the registration of Rahaman Subadar (the "Applicant") as a salesperson under the provisions of the Act.

THE ISSUES

The Registrar basis his proposal to revoke the registration of the Applicant under sections 6.(1)(a) and 6.(1)(b), and 8.(2) of the Act, which read as follows:

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

(a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

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

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 Proposal goes on to state under the heading "A. REASONS" that it is the Registrar's opinion that the Applicant is not entitled to registration because:

1. The past conduct of the Registrant affords reasonable grounds for belief that the Registrant will not carry on business in accordance with law and with integrity and honesty.
2. For greater particularity, the Registrant has provided false information, about his past criminal record and civil judgments outstanding at the relevant times, on a number of application forms submitted to the Registrar.
3. For greater particularity, the Registrant caused to be made documents in respect of real estate transactions that misrepresented the identity of one of the parties to those transactions.
4. For greater particularity, the Registrant advertised properties for sale at offering prices unreasonably in excess of fair market value. In doing so, he participated in a dishonest scheme whereby money was obtained from lenders on the false premise that the properties in question, in which the lenders took a mortgage interest as security, had a value greater than the amounts advanced.
5. For greater particularity, the Registrant did not inform the broker to who he was registered at the relevant time, Century 21 Royal Windsor Realty Inc., formerly known as Realty World Royal Windsor ("Royal Windsor Realty"), about transactions in respect of real properties, which transactions occurred within the terms of listing agreements the Registrant ostensibly made on behalf of Royal Windsor Realty with respect to those properties.

The Proposal then proceeds in some 85 paragraphs to give particulars of the Registrar's allegations under the heading "B. PARTICULARS." In the Proposal the Registrar refers to the Applicant as the Registrant.

THE EVIDENCE

The evidence introduced by the parties consisted of the testimony of various witnesses who are later identified in this decision, as well as documentary evidence introduced through the parties or witnesses. At the commencement of the hearing an Order was made

excluding witnesses. Counsel of the Registrar made a short opening statement while Counsel for the Applicant declined to make an opening statement.

Testimony of Daniel Passante

Passante testified that he is a registered broker under the Act and operates as Century 21 Royal Windsor Realty Inc. ("Royal Windsor" or "the brokerage"). He has been registered as a broker since 1990. Royal Windsor presently employs some 40 salespersons as well as eight support staff. Royal Windsor has operating policies and procedures in place which require all salespersons to comply with such policies and procedures and to report transactions effected by them to Royal Windsor with 24 hours of the transaction coming into existence. The reporting of transactions by the salespersons to Royal Windsor includes handing in to the latter all paperwork regarding the transaction including the agreement of purchase and sale that had been executed, any deposit cheques received by the salesperson as well as the trade sheet relative to the transaction and the listing agreement. All such information is required so as to inform Royal Windsor of the real estate transaction entered into by the parties to the transaction. The trade record sheet lists details of the transaction from which Royal Windsor can gather all information regarding the transaction that is needed to be known by the latter. The trade record sheet is prepared by the salesperson responsible for the transaction.

Passante went on to state that salespersons are paid by Royal Windsor after the closing of a transaction when the latter and the salesperson become entitled to their respective commissions.

Passante further stated that Royal Windsor maintains a database of all past transactions including transactions handled by salespersons in their employ. A file folder is also maintained respecting each and all transactions.

The Applicant was a salesperson employed by Royal Windsor from January 29, 1999 to September 7, 2000 (Exhibit 3, tab 2). Passante when reviewing files, became suspicious concerning certain transactions handled by the Applicant (Exhibit 4(a), page 4). Passante referred to a memo sent to him by an employee of Royal Windsor, Witness B, dated August 8, 2002 and to which memo was attached a "listing history" of the Applicant (Exhibit 4(a), pages 3 and 4). This memo and attached listing history read as follows:

TO: Daniel Passante

FROM: [name deleted] Witness B

DATE: August 8, 2002

RE: Subadar Rahaman
PRIVATE SALES

I have reviewed the property assessments and listing history for Subadar Rahaman.

There are a total of 16 listings. Please note that the vendor for 12 out of the 16 listings was Naleenie Persaud and/or Majeed Ghanie.

Six of the properties were sold privately while still listed with our office. We were not advised by Subadar that the properties were sold - the offers did NOT go through the office, and, we were unable to confirm any appointments for these properties.

Property Address	Listing Date	Sold thru office	Date	Expired	Date	Sold private	Date	Vendor	Solicitor
26 Derrydown Road	April 4/99					YES	April 26/99	M. Ghanie	J. Poonai
25 Coronado Court	May 10/99			YES	July 15/99				
56 Gravenhurst Avenue	May 10/99					YES	July 15/99	N. Persaud	J. Poonai
10 Marchbank Court	June 21/99			YES	Feb. 10/00				
118 Lomar Drive	October 5/99					YES	Feb. 29/00	N. Persaud	J. Poonai
81 Townsgate Drive #303	October 5/99	YES	Oct. 7/99						
643 Lansdowne Avenue	January 25/00			YES	Mar.30/00				
43 Lindylou Road	April 19/00			LISTED UNTIL	Dec. 31/00				
3485 Dundas Street W.	July 11/00			LISTED UNTIL	Dec. 31/00				
75 Lanyard Road	July 12/00			YES	Sep. 30/00				
25 Yellowstone Street	July 12/00					YES	July 31/00	M. Ghanie	J. Poonai
58 Davelayne Road	July 12/00					YES	July 31/00	M. Ghanie	J. Poonai
46 Fletcherdon Crescent	August 22/00			YES	Oct. 30/00				
79 Snowood Court	August 22/00			YES	Oct. 30/00				
9 Four Winds Dr. #313	August 28/00			YES	Oct. 30/00				
5 Chalkfarm Drive	August 28/00					YES	CANCELLED	M. Ghanie	J. Poonai

Passante further testified in reference to this "listing history" that 6 properties listed in that document as having been "sold private" were properties "being handled" by Royal Windsor. If, during the term of the listing, a property is sold, then the selling brokerage would be entitled to commission on that sale. Passante then went on to refer to specific properties more fully referred to in the Registrar's proposal as hereunder.

643 Lansdowne Ave. (Exhibit 3, tab 4)

Passante referred to the listing of this property with the Multiple Listing Service ("MLS"). (page 2014) This listing indicates that the property was listed for sale by Royal Windsor at \$259,900.00. It also indicated that the Applicant was the salesperson and the seller was noted as Majeed Ghanie. The MLS data information sheet (pages 2008/9) indicates the latter person to be the Vendor and the Applicant to be the listing salesperson. The data information sheet contents, according to Passante, were authored by the Applicant.

A further document regarding "listing information and appointments" was, according to Passante, also authored by the Applicant (page 2013) and indicates all appointments are to be made through the Applicant.

The transfer of this property (page 2015) was recorded in the Toronto Registry on March 24, 2000, and the Deed of Transfer records the transferors to be Naleenie Persaud and Majeed Ghanie. The consideration disclosed on the Deed was 255,000.00. The assessed value of the property was \$110,000.00 (Exhibit 4(a), page 35).

26 Derrydown Road (Exhibit 3, tab 8)

Passante stated that this property was listed for sale through Royal Windsor on April 4, 1999 (page 6007). The listing was to expire on June 3, 1999 and was signed by Majeed Ghanie as Vendor at an offering price of \$239,900.00. Passante also referred to a MLS listing print-out (page 6014) and pointed out the words "Holdover: 60" on that listing. He explained that this related to a clause in the agreement of purchase and sale of this property that if a buyer was introduced during the listing period and subsequently purchased the property within 60 days of date of expiry of the listing, the listing agent would still be entitled to full commission on the sale.

Passante referred the Tribunal to a document from the database of the Toronto Real Estate Board that indicates that this property had an assessed value of \$161,000.00 (Exhibit 4(a), pages 5 and 7).

He further stated that he complained to RECO after he discovered deals that the Applicant had done and had not reported to Royal Windsor; further, that upon investigation he observed what he considered to be irregularities and inconsistencies in deals handled by the Applicant. Upon reviewing deals handled by the Applicant he considered that there were commissions still owed to Royal Windsor by certain sellers.

Judgment Claim 45154 – Superior Court of Justice

Passante was shown a copy of a Notice of Assessment issued against the Applicant. This assessment was issued on August 3, 2001, in the Small Claims Court, Richmond Hill, Ontario, in which Royal Windsor claimed an amount of \$10,000.00 from the Applicant (Exhibit 4, tab 13B). Passante claimed the amount of \$10,000.00 was due for expenses the Applicant owed to Royal Windsor for "office space – desk fees". This claim was settled by the Applicant paying Royal Windsor "a few thousand dollars."

Upon cross-examination by the Applicant's Counsel Passante confirmed that Royal Windsor addressed and signed the letter of August 20, 2002 to RECO (Exhibit 4(a), page 1). Attached to this letter was Witness B's memo to him dated August 8, 2002 and the "Listing History." All this was sent to RECO. The municipal assessed value of the property situate at 26 Derrydown Road was \$161,000.00 although Passante could not say when this assessment was made (Exhibit 4(a), page 5). This property had been purchased by the previous owners, according to the Registry information, for \$234,500.00 on April 26, 1990.

Passante went on to state that on occasions he is asked by clients of Royal Windsor as to his opinion of market values of certain properties. His opinions are based upon

comparable property prices in the same area. By way of example he went on to state that when properties had been sold on the same street with similar features and style he could come up with "a reasonable estimate" of a property's value. The "assessed value" of a property informs Passante at what price the municipality assessed the property's value. This is not the only value to follow. Improvements to a property are also looked at in assessing the value of a property.

Again referring to the property situate at 26 Derrydown Road, Passante stated that a mortgage of \$231,129.06 was registered on March 26, 1999 in favour of the Royal Bank of Canada (Exhibit 3, tab 8, page 6018). This property was not one of the properties he was referring to in the first paragraph on the second page of Royal Windsor's letter of complaint to RECO dated August 20, 2002.

Referring to the transaction concerning the property at 643 Lansdowne Avenue (Exhibit 3, tab 4) he found no irregularity. Passante confirmed that he authored Royal Windsor's letter to the Applicant dated January 20, 2000, in which he compared this property to that situate at 645 Lansdowne Avenue and gave his opinion that 643 Lansdowne Avenue's listing price of \$259,000.00 would be in order (Exhibit 5, Tab 5 page 58). Passante confirmed that Royal Windsor had listed 645 Lansdowne Avenue in April 1999 at \$239,000.00 (Exhibit 5, page 59). When addressing his letter of January 20, 2000, he had "not come across" either of the two latter letters.

Passante went on to state that what he was interested in arising out of his investigation were those properties listed as "Private Sales" on the "listing history" sent to RECO with Royal Windsor's letter of August 20, 2002.

In respect to properties at 58 Davelayne Road (Exhibit 3, tab 5) and 25 Yellowstone Street (Exhibit 3, tab 6), the Applicant, according to Passante, inflated those properties' prices. In reference to Royal Windsor's letter of July 7, 2000 addressed to the Applicant relative to the above and comparable properties (Exhibit 5, tab 6, page 61), Passante contended he "was set up by the Applicant" who had given Passante information for inclusion in the letter, which he had merely signed.

Passante stated further that he had a contract of employment with the Applicant. The judgment Royal Windsor obtained against the Applicant was based on the contract and the Applicant's failure to keep to it.

Shown Royal Windsor's claim brought in the Richmond Hill Small Claims Court against the Applicant (Exhibit 5, tab 3, pages 25, 26, 27 and 28), Passante confirmed the contents of the documents covered by those pages. The Applicant's Counsel informed the Tribunal that on August 24, 2001, Royal Windsor obtained a default judgment against the Applicant for \$10,000.00 and that on January 25, 2002, a writ was filed in respect of that default judgment. Further, the Applicant made a motion to the above court on November 19, 2002, and the matter was settled between the parties in terms of Minutes of Settlement dated

January 8, 2004 in which the Applicant agreed to pay Royal Windsor the sum of \$2,500.00 in full settlement of the latter's claims and costs.

Passante continued to state under cross-examination that the Applicant left the employ of Royal Windsor in September 2000, but did not recall why the Applicant left and that he was "getting along with him just fine." Passante confirmed that by letter dated March 20, 2001, demand was made to the Applicant for payment of \$14,570.48. This demand made by Royal Windsor's solicitor had attached to it details of the latter's claim against the Applicant for \$10,000.00, which would be brought should the Applicant not respond to the demand (Exhibit 7). Royal Windsor's claim was for \$13,300.00 reduced to \$10,000.00 in order to bring it within the jurisdiction of the Small Claims Court. The claim of Royal Windsor dated April 11, 2001, that was subsequently issued out of the Small Claims Court when the amount of \$10,000.00 was not received from the Applicant (Exhibit 8), differed from the letter of demand above not in the amount claimed, namely \$10,000.00, but in certain details set forth in Schedule "A" to the claim of April 11, 2001. These details increased the claim of Royal Windsor by some \$11,000.00 but did not affect the reduced amount claimed of \$10,000.00.

Passante went on to state that when the Applicant left the employ of Royal Windsor he did so "on good terms" with Passante. The only quarrel was over the money owed to Royal Windsor. When the Applicant left in September 2000, Passante stated he was unaware of the amount the Applicant owed to Royal Windsor. Passante stated that the "Final Statement" detailed how the Applicant came to owe Royal Windsor the sum of \$14,124.00 before that sum was reduced to bring Royal Windsor's claim within the court's jurisdiction (Exhibit 8, page 6). Passante denied that he forged the Applicant's signature that appears on the contract he signed (Exhibit 8, page 4). Passante, when shown a letter dated September 7, 2000, addressed to Royal Windsor by the Applicant's counsel, upon perusing the letter, stated he did not recall seeing such letter. This letter stated as follows:

I have been retained by Mr. Rahaman Subadar to represent him in an action involving another agent at our Real Estate office. As a result of the incident Mr. Subadar will be required to transfer his services to another broker.

Mr. Subadar trusts that you will co-operate in transferring all his listings to his new Real Estate brokers (sic) office.

(Exhibit 11)

The incident to which reference is made in the above letter was explained by Applicant's Counsel to Passante as involving a death threat made to the Applicant by another agent. Passante was not able to confirm or deny the incident but may have called the Applicant to ask him to return to Royal Windsor and reiterated that he could not recall any quarrel he had with the Applicant. Passante was shown Minutes of Settlement entered into between Royal Windsor and the Applicant in regard to the settlement of the former's court action against the Applicant in the Small Claims Court and concedes that the following statement was part of the Minutes of Settlement:

Plaintiff further agrees not to pursue any complaints or be a part thereof with respect to TREB or RECO or other authorities.

(Exhibit 10)

Testimony of Sheila Wilson

Wilson testified that she is employed by Royal Bank of Canada in the Corporate Investigation Department (the "Bank"). She has been in that department for the past 6 years.

Wilson stated that she has professional training in mortgage fraud investigations and in dealing with clients and assessing mortgages. Her duties relate to mortgages and fraud detection. Typically a file would be sent to the Bank for investigation regarding suspected mortgage fraud. The file sent to the Bank would contain the MLS listing, the Agreement of Purchase and Sale, and other details.

Wilson went on to state that where conventional mortgage financing is required, the Bank would do the appraisal of the property and the mortgage. Generally, when a high-ratio mortgage is envisioned such as where the lender would be C.M.H.C. or G.E. Capital, the insurer would do the appraisal. A conventional mortgage would be in relation to financing where not more than 75% of the property's value is to be advanced. A high-ratio mortgage is where 95% or today even 100% of the property's appraised value is to be advanced.

Wilson stated that RECO contacted the Bank in this matter in relation to a property at 643 Lansdowne Avenue. RECO furnished the Bank with various documents, including the Agreement of Purchase and Sale of the above property, and Amendment Agreement to the closing date of the transaction and the MLS Listing Agreement.

From the various documents that the Bank received from RECO and which were reviewed by her, Wilson noted that the Vendor in the Agreement of Purchase and Sale was Majeed Ghanie and the purchase price was \$255,000.00, with the purchasers being Sohan Udit and Michael Stephenson. The agreement was dated January 26, 2000. Based upon the agreement an application for mortgage financing was made to the Bank indicating that Majeed Ghanie was the Vendor of the property for \$255,000.00 (Exhibit 6). By Deed of Transfer the above property was registered into the names of Sohan Udit and Michael Stephenson as transferees, the transferors being Naleenie Persaud and Majeed Ghanie. On the same date, namely March 24, 2000, a mortgage was registered in favour of the Royal Bank of Canada in the sum of \$235,237.50, the chargors being Udit and Stephenson (Exhibit 3, page 2018). This is a high-ratio mortgage according to Wilson.

Subsequently the mortgage was defaulted upon and the Bank, pursuant to a Power of Sale, sold the property for the sum of \$142,000.00, which amount approximated to the market value of the property (Exhibit 3, tab 4, pages 2015 to 2023). The assessed value of the property was \$110,000. The Bank sold the property at a loss to it for some \$93,000.00.

Testimony of JoAnn Swain

Swain stated that she presently holds the position of investigator with RECO and that prior to that she was an inspector with RECO. Before working for RECO she was an assistant with a law firm for some four and a half years and prior thereto worked for twelve years with a real estate broker. While with the law firm she was an administrator regarding real estate matters being handled by the firm. Her duties, when employed by RECO as an inspector, included ensuring brokers' compliance with the Act and brokers' obligations to comply with section 19 of the Act to keep trade record sheets and proper books and accounts regarding trades including the maintenance of a trust account. In her capacity as an investigator she conducts investigations to ensure there are no contraventions of the Act.

Swain went on to state that she prepared and signed an affidavit dated October 21, 2002, regarding her investigations regarding the Applicant (Exhibit 4, tab 11). This affidavit dealt with her concerns regarding properties situate at 26 Derrydown Road, 58 Davelayne Road, 56 Gravenhurst Avenue, 10 Marchbank Court and 3485 Dundas Street, all in Toronto.

Swain also referred to certain information from the Metropolitan Toronto Police Force regarding an impaired driving charge laid against the Applicant in 1987 according to a C.P.I.C. report received by RECO. The Applicant was found guilty of the charge and was fined \$300.00 and prohibited from operating a motor vehicle for a one-year period (Exhibit 4, tab 15). In June 1989, the Applicant filed a written and signed application for renewal of his registration as a salesperson under the Act and in answer to question #6 therein, which asked whether he had ever been convicted or found guilty of an offence under any law, he answered "No" (Exhibit 4, tab 16A). Again, when asked the same question in subsequent renewal applications in June 1991, September 1993, December 1994, December 1996, January 1999, September 2000 and January 2002 the Applicant answered "No" (Exhibit 4, tab 16 B, C, D, E, F, G and H respectively.)

Swain further referred to a Sheriff's certificate of September 2002 that listed seven writs of execution registered in 1997 at the Land Titles Office against the Applicant pursuant to judgments entered against the Applicant (Exhibit 4, tab 14A). When in applications for renewal of registration in January 1999, September 2000 and September 2002, the Applicant was asked the question whether there were any unpaid judgments outstanding against him he answered "No" (Exhibit 4 Tabs 16 F, G, and H respectively).

25 Derrydown Road

Turning to the property situate at Derrydown Road, Swain stated that the Agreement of Purchase and Sale ("A.P.S.") was between Naleenie Persaud as purchaser and Sharon B. Melvin as Vendor, the purchase consideration being \$181,500.00 (Exhibit 3, page 6000/6001). The transfer deed of January 29, 1999 (page 2004), indicates that the consideration, according to the original typed deed, to be \$181,500.00, altered in ink to

read \$249,000.00. The Applicant represented the purchaser in the above transaction while he was employed by First National Homestead.

In terms of the multiple listing agreement dated March 29, 1999, Majeed Ghanie agreed to list the above property with Royal Windsor for whom the Applicant then worked as an agent. The price at which the property was listed was \$239,900.00 (page 6007) and the listing agreement was to expire on June 3, 1999. The Applicant was listed as the listing salesperson (page 6010). On April 26, 1999, the property was transferred from Majeed Ghani, for a recorded consideration of \$234,500.00 (page 6015). The name of the transferor was spelt "Ghani" in the deed of transfer while on the multiple listing agreement it was spelt "Ghanie". The property was mortgaged in favour of Royal Bank of Canada for \$231,129.06 on April 26, 1999 (page 6018).

56 Gravenhurst Avenue

Turning next to Gravenhurst Avenue, Swain stated that an A.P.S. was entered into on January 22, 1999, regarding this property between Majeed Ghanie as purchaser and Kevin Seow as vendor, the consideration being \$185,000.00 (Exhibit 3 page 5000/ 5001). The Vendor's listing broker acknowledged receipt of the \$5,000.00 deposit from the Applicant by way of a written receipt (Exhibit 3, page 5002). The vendor's listing broker was Royal Windsor and the vendor's agent was the Applicant. By transfer deed dated May 3, 1999, Seow transferred the above property to Naleenie Persaud for a consideration of \$185,000.00 (page 5010) and on the same date a mortgage was registered in favour of Bank of Montreal for \$120,000.00. By a multiple listing agreement dated May 10, 1999, Naleenie Persaud gave Royal Windsor sole and exclusive authority until July 15, 2005 to offer the property for sale at \$239,900.00 some \$55,000.00 higher than the week earlier sale price. The Applicant was the listing salesperson (page 5015).

By transfer deed dated June 7, 1999, the property was transferred by Persaud to Amoako and Sarpong for \$234,000.00 and on the same day a mortgage was registered in favour of Pafco Insurance Company for \$230,635.25.

25 Coronado Court

Swain turned next to the property situate at Coronado Court (Exhibit 3, tab 10.) This property was purchased by Naleenie Persaud from Scott and Scott under an A.P.S. dated February 12, 1999, for \$186,500.00 (pages 8000/ 8001.) The Purchaser's broker was Royal Windsor and the Purchaser's agent was the Applicant. By Transfer deed dated April 9, 1999, the property was transferred to Majeed Ghani by the transferors Scott and Scott for \$186,500.00. A mortgage was registered in favour of Bank of Montreal against the property for \$110,000.00 on the same date (pages 8009 – 8011.)

Swain stated further that on May 10, 1999, Majeed Ghani signed a Multiple Listing agreement with Royal Windsor in respect of this property. This agreement was to expire on July 15, 1999 and the offering price was to be \$249,900.00 (page 8016). By a price change agreement dated June 22, 1999, the price was changed to \$259,900.00, some \$73,400.00 more than the sale price six weeks earlier. Swain contended that there was difference in the spelling of Ghani's name on pages 8011 and 8020 as well as in the actual signature on the documents.

118 Lomar Drive

Swain next referred to the property situate at Lomar Drive (Exhibit 3, tab 9). She went on to refer to the A.P.S. between Naleeni Persaud as purchaser of this property and the vendors Frediani and Frediani. This agreement provided for a sale price of \$191,500.00 and bears the date of February 15, 1999 (pages 7000 and 7001). The Applicant was the Purchaser's salesperson and the Purchaser's Broker was Royal Windsor. By deed of transfer dated June 7, 1999, transfer was registered in Persaud's name and a mortgage in favour of MCAP Service Corporation was registered (pages 7003 and 7005). The amount of the mortgage was \$143,625.00. Swain drew the Tribunal's attention to what she stated was an inconsistency in the signatures of Persaud on page 7001 (the second page of the A.P.S.) and page 7004 (being the affidavit of Persaud.)

Swain also referred to the Multiple Listing agreement between Persaud and Royal Windsor dated June 21, 1999, regarding the sale of this property which agreement was to expire on August 30, 1999 (page 7006) and the extension of this agreement until September 30, 1999. On October 5, 1999, a new listing agreement was entered into reducing the price to \$259,900.00 from \$269,900.00 under the June 21, 1999 agreement. This new agreement was to expire on December 31, 1999 (page 7012). This agreement was extended to February 10, 2000 and the price was once again changed to \$269,900.00 (page 7015.)

By deed of transfer dated February 29, 2000, Persaud transferred her title to Achow and Achow, the consideration being \$268,000.00 (page 7021) and a mortgage was registered on that date in favour of Scotia Mortgage Corporation for \$7,000.00 (page 7024.) Some nineteen days after the last listing expired, a deed of transfer was registered on February 29, 2000 for \$268,000.00, which is \$78,400.00 greater than the June 1999 sale price.

643 Lansdown Avenue

Swain next referred to the property situate at Lansdowne Avenue (Exhibit 3, tab 4). In terms of a deed of transfer dated October 8, 1999, this property was registered in the name of Raymond Alley for a purchase consideration of \$122,000.00 (page 2000). On the same date Alley transferred ownership in this property to Naleenie Persaud and Majeed Ghani for a purchase consideration of \$195,000.00 (page 2003) a difference of some \$73,000.00 compared to the Alley deed of transfer of the same date. On October 8, 1999, a mortgage in the sum of \$192,196.87, about 98% of the purchase price, was registered in favour of Royal Bank of Canada. The documentation in respect of the Alley transfer to

Persaud and Ghanie as well as the mortgage documentation was prepared by the same person on behalf of Persaud and Ghanie.

On January 25, 2000, Ghanie signed a listing agreement with Royal Windsor in terms of which the latter was authorized to offer the property for sale at \$259,900.00 with the listing to expire on March 30, 2000 (page 2008.) The Applicant was the listing salesperson.

On March 24, 2000 by deed of transfer, Persaud and Ghanie transferred ownership to Sohan Unit and Michael Stephenson, the purchase consideration being \$255,000.00 (page 2015.) Despite the listing being in existence when the above transfer took place, the Applicant failed to report the transaction to the listing broker, 21 Royal Windsor.

75 Lanyard Road

Swain turned next to property situated at Lanyard Road (Exhibit 3, tab 3.) By agreement of purchase and sale Naleenie Persaud purchased this property from an estate for \$216,000.00. A trade record sheet was prepared by Royal Windsor and was signed by the Applicant as sales agent and Passante on behalf of the broker (page 1002.) Persaud was represented by the Applicant in the above sale and the Applicant also represented the seller as its agent. Swain pointed out to the Tribunal that the Applicant's commission cheque for \$5,078.22 was picked up and signed for by Persaud (page 1007) By Deed of Transfer dated March 29, 2000 ownership of the above property was registered in the names of Persaud and Majeed Ghanie (page 1009) On March 29, 2000, a mortgage in the sum of \$193,744.48 was registered in favour of Royal Bank of Canada, the chargors being Persaud and Ghanie (page 1013) On July 12, 2000 a Multiple Listing Agreement was granted by Persaud in favour of Royal Windsor authorizing it to offer the property for sale at \$269,000.00 with the agreement set to expire on September 30, 2000 (page 1014) Swain further pointed out that the Multiple Listing Agreement provided for a 90-day holdover following the expiry date of the agreement (page 1014) This listing expired on September 30, 2000, but the property was subsequently transferred to purchasers Bangura, Bangura and Bendu for \$268,000. A mortgage was registered in favour of the Toronto Dominion Bank on October 27, 2000, in the sum of \$247,230.00 the chargors being Bangura, Bangura and Bendu who subsequently defaulted in their obligations to the bank pursuant to which the property was sold under power of sale (page 1027).

58 Davelayne Road

Swain further testified regarding a property situate at Davelayne Road (Exhibit 3, tab 5). In this instance, Swain stated, Naleenie Persaud entered into an agreement whereby she purchased the property for \$211,000.00 from Giuseppe Russo (page 3001). By Deed of Transfer of ownership of this property was registered in Persaud's name on February 18, 2000 (page 3007). The "consideration" of \$211,000.00 was stroked through in ink on the deed and replaced with the figure \$249,000.00. In addition, the purchaser on that document was noted as Majeet Ghanie.

The sales agent in this transaction was the Applicant and the broker was Royal Windsor (page 3004). A multiple listing agreement was signed by Majeet Ghanie on July 12, 2000 at a selling price of \$269,900.00, the agreement to expire on September 30, 2000 (page 3011). The listing agreement and listing itself indicate a 90-day holdover on expiration of the agreement (pages 3011 and 3018). By Deed of Transfer dated July 31, 2000, ownership to the property was registered in the name of Bangura, the consideration being \$249,000.00 (page 3019).

Swain stated that during the existence of the valid listing agreement there was the sale of this property and the Applicant failed to inform the broker of such sale. On July 31, 2000 a mortgage in favour of the Laurentian Bank was registered against the property for the sum of \$245,420.62 (page 3022) and subsequently pursuant to a power of sale, the bank transferred the property to new owners for \$234,100.00 (page 3025).

25 Yellowstone Street

In her evidence in chief Swain finally dealt with a property at Yellowstone Street (Exhibit 3, tab 6).

Under an agreement of sale, dated April 4, 2000, the Vendor Bochove sold the property for \$182,000.00 to Raymond Mohammed (page 4000). The Applicant was the Vendor's sales agent and Royal Windsor was the Vendor's broker (page 4004). By Deed of Transfer dated June 1, 2000, Bochove's ownership passed not to Mohammed but to Majeet Ghanie (page 4009) and a mortgage was registered for \$136,500.00 against the property in favour of Investors Group Trust Co. Ltd. (page 4011.) Ghanie was the chargor under the mortgage.

On July 12, 2000, a Multiple Listing Agreement was signed by Majeet Ghanie in terms of which Royal Windsor was authorized to offer the property for sale at the sum of \$259,900.00 with the agreement to expire on September 30, 2000 (page 4012).

By Deed of Transfer dated July 31, 2000, ownership to the property was registered in the names of Beenaly and Beenaly, the transferor being Ghanie and the consideration being \$249,000.00. On July 31 a mortgage was registered in favour of the Laurentian Bank of Canada for the sum of \$245,420.62. At the time of registration of the above deed on July 31, 2000, there was a valid listing in regard to the property. The sale of the property was not reported to the broker and the listing expired.

In cross-examination, Swain stated that she had been an investigator for about four years and an inspector for about three and a half years. She was also a registrant as a salesperson under the Act, as well as a broker, but is not active at this time. She has taken courses through the Appraisal Institute of Canada and completed all educational requirements. She has been registered under the Act to a number of real estate brokers for whom she worked in the past. She has also worked in a law office prior to joining RECO

where she worked in an administrative capacity and she is familiar with real estate practice.

Swain went on to describe her role in RECO's investigation of the Applicant. She stated that RECO received a letter of complaint regarding the Applicant from Royal Windsor's president Daniel Passante (Exhibit 4A.) She, as was standard practice, contacted Passante and met with him on September 26, 2002 at his office. The purpose of the meeting was to speak with Passante and generally to access documents of the brokerage. Passante provided Swain with documents the former had referred to in his complaint and they discussed the properties involved in general terms. Passante told Swain that Naleenie Persaud is the wife of the Applicant and that Persaud had actually attended at the brokerage to pick-up commission cheques for the Applicant.

Swain went on to refer to her affidavit of October 21, 2002 (Exhibit 4, tab 11) and confirmed the contents other than pointing out to the Tribunal that there is a typographical error in the last sentence to paragraph 4 which she had discovered some two weeks before giving testimony before the Tribunal in this matter. She stated that the allegations of Passante include allegations against the Applicant that the latter had procured several listings to properties that were sold outside the brokerage during the listing period that was still then active. Further allegations were that the Applicant had fraudulently inflated the purchase price of certain properties.

Swain was cross-examined on the 26 Derrydown Road matter (Exhibit 3, tab 8). She stated that in the course of her investigation she did not interview the lawyer for the vendor of the property but analyzed the documents, which was where her concern lay. She went on to say that if there is a change in the name of the purchaser of a property, this information should be in the trade file by way of an amendment. She stated that the MLS data information sheet described the property as upgraded (page 6010). She also stated that the list price of vendor Majeed Ghanie (page 6007) was \$239,900.00, some \$54,000.00 greater than the price of \$181,500.00 at which it was bought by Naleenie Persaud in November 1998. The sale of the property at \$239,900.00 was not reported to the Applicant's broker. In referring to the increase in purchase price of the property, Swain stated that when viewed in conjunction with other properties handled by the Applicant, there appears to be the inflating of the prices. Swain stated she had no issue regarding this property with its value being \$181,500.00.

Counsel for the Applicant then referred to the judgment obtained by Passante against the Applicant.

Swain stated that she understood that the judgment in favour of Passante had been satisfied by the Applicant by the payment of \$2,500.00. She was not however provided with the agreement of settlement between Passante and the Applicant.

Swain also went on to state that the Applicant has worked for other brokers none of who have complained to RECO.

Swain was next referred to the property at 118 Lomar Drive, Toronto. Naleenie Persaud purchased this property from Frediani and Frediani for \$191,500.00 under an agreement of purchase and sale dated February 15, 1999. The Applicant was Persaud's agent (Exhibit 3, tab 9, page 7000/01). The Applicant's commission due on the sale was \$4,787.50 (page 7002). The transaction closed on May 28, 1999.

Swain conceded she has never visited the property. She confirmed that the data information sheet (pages 7003/4) confirms the Applicant as the listing salesperson on the sale by Persaud of the property and that the information sheet reflects improvements having been made to the property. She also confirmed that the listing agreement shows it as extended from December 31, 1999, to February 10, 2000, but such extension was not valid as it lacked the vendor's signature (page 7015). The listing agreement terminated in December 1999. On expiration of the listing agreement there was a 90-day holdover clause in favour of the brokerage during that 90-day period (page 7007).

Swain was next referred by Applicant's Counsel to the property situate at 25 Yellowstone Street. (Exhibit 3, tab 6). She confirmed that the vendor of the property acted under power of attorney when signing the A.P.S. (page 4000). The trade record sheet was not dated and that constitutes an irregularity according to Swain (page 4004). Swain conceded that the MLS data information sheet completed by the Applicant on July 12, 2000, when Royal Windsor listed the property for sale on behalf of Ghanie, indicated significant renovations to the home.

Testimony of Diane Margaret Kruger

Ms. Kruger testified that she prepared and authored a forensic examination report dated May 3, 2006 regarding certain documents relating to the Applicant and his appeal to the Tribunal (Exhibit 18).

She stated that she had been requested to speak as to the signatures that appeared on three letters, copies of which had been submitted to her and are dated January 20, 2000, January 28, 2000 and July 7, 2000. These three letters were annexed to her forensic report and were identified in that report and were produced in cross-examination of Passante as Exhibit 5, Tab 5.

Ms. Kruger went on to deal with her experience and background, which is contained in her curriculum vitae and is part of her report. She dealt with her academic background, her forensic training, her professional expertise in examination and comparison of handwritings and signatures, her employment in the field of forensic document examination since 1983, her membership of some six professional bodies including the Law Society of Upper Canada and the American Bar Association, the publications and papers she has authored and which have been published. She also referred to the continuing education she has undertaken, the numerous forensic conferences she has attended both in North America

and in Europe and the organizations in which she has been a special lecturer including the Ontario Police College, insurance companies, Canadian Bankers Association, Department of National Defence and the Rotman School of Management. Additionally, she has testified on sixty-five occasions in the provincial and superior courts as well as administrative tribunals and has been qualified as a forensic expert in examination and comparison of handwriting and signatures on each and every occasion in which she testified. At the conclusion of her testifying as to her qualifications, background and expertise as a forensic expert in handwriting and signatures, Counsel for the Applicant advised the Tribunal that he had no objections to Ms. Kruger being qualified as an expert. Ms. Kruger was accordingly qualified as an expert in handwriting and signatures.

Ms. Kruger went on to explain that she made transparencies of the three letters above and compared the signatures on those three letters (which purported to be the signatures of Passante). She concluded that all three signatures reflected a high degree of similarity having regard to their features of slant and slope, the common size of all three signatures, and the letter formation. She emphasized that no two signatures of a person are the same and it is to be expected that differences and natural variations occur. When signatures appear to be identical an explanation is sought as to why. Identical signatures could result from a signature being traced or a signature stamp having been used or the “cut and paste” method being used where the original signature is scanned. Ms. Kruger stated that her conclusion, pursuant to her examination of the three letters, was that the signatures on all three letters were most consistent with “cut and paste” fabrications, wherein a genuine signature has been copied and pasted onto other documents and then scanned or copied” (Exhibit 18, page 2).

Her examination of the three signatures on the three copies of the letters above led her to the conclusion that all three signatures were identical as no discrepancies were found in those signatures. She had been advised prior to her examination of Passante’s purported signatures on the three letters that there was no signature stamp utilized by Passante in his business. She also explained that the examined signatures were not tracings due to the fact that her examination revealed all signatures reflect that they are fluid and contain no variations.

The Testimony of Daniel Passante, on recall

Passante was recalled to the witness stand by the Respondent’s Counsel and in direct evidence he stated that when he made his complaint to RECO subsequent to his initial testimony before this Tribunal, such complaint related mainly to three letters dated of January 20 and 28, 2000 and July 7, 2000, which were presented to him by the Applicant’s Counsel during cross-examination (Exhibit 5, Tab 5, pages 55, 60 and 61). When looking at those letters he noticed irregularities in them.

Insofar as the letter of January 20, 2000, is concerned he noted that the brokerage used Roman font for its letters whereas the font used in this letter was Courier font. Also, that the letterhead logo on the top left side of the letter is further to the left and higher than the

logo on the brokerage's letters. Furthermore, the date on this letter was on the right whereas the brokerage's letters have the date on the left side. That the full name and address of the addressee is always used by the brokerage on its letters; that the (capitalized) "RE" used on the letter in question is not used by the brokerage but "Re" is used; that the grammar used in the letter was "incorrect"; that he does not end his letters with the words "good luck" and finally that his name is misspelt as "Passente" whereas his name is correctly spelled as "Passante"

Insofar as the letter of January 28, 2000 is concerned, he went on to state that the math calculation therein is incorrect; that what he has already stated regarding the letters' logo has the same inconsistency he noted in the letter of January 20, 2000 and that he never uses the words "yours truly" when ending a letter and only uses the words "yours sincerely".

Insofar as the July 7, 2000 letter is concerned, Passante stated that the address of the brokerage on that letter was no longer the address of the brokerage as it had moved to 7777 Keele Street, Suite 208, Concord, in March 2000 and had destroyed all old letterheads upon moving. Again he noted that his name was misspelt, and stated that he does not do market analysis for his agents as they are expected to do their own analysis. He further stated that he does not use a signature stamp for his signature.

Passante stated that what appeared at the end of the letter dated August 20, 2002 (Exhibit 4(a) page 2) addressed to RECO is not his signature but is merely produced by the word processor.

Passante stated further that he had his office reproduce the letter of January 28, 2000, on the present letterhead of the brokerage (Exhibit 20) and noted that the logo on the letterhead was larger and to the left when compared to the original letter of January 28, 2000.

On cross-examination Passante stated that the letter found at Exhibit 20 was generated after this matter was part heard in February 2006.

He went on to state that on February 8, 2006, he called RECO's counsel and requested copies of the letters of January 20 and 28, 2000 and July 7, 2000. He told RECO's counsel that he did not think he was the author of those letters and that he had no copies of such letters and wished to verify such letters. He stated that he had briefly seen the letters when he was on the witness stand earlier in the hearing. After receiving copies of the three letters from RECO's Counsel on February 9, 2006, he wrote to that counsel (Exhibit 21). When he spoke with RECO's counsel on February 8, 2006 he had informed him that he did not write the letters in question.

In reference to his affidavit of April 5, 2006 (Exhibit 23), he confirmed the correctness of paragraphs numbered 15 and 16 therein and stated that he does not spell his name as used on the three letters. He confirmed that the brokerage does have a stamp with the

words "FAXED" as found, for example, at Exhibit 3, tab 3, page 1005. His affidavit of April 6, 2006, was prepared by his lawyer and subsequent to sending it to RECO's counsel he does not recollect having a conversation with the latter. He does recall that RECO's counsel did at some stage ask him about the brokerage having a signature stamp. Some letters are not signed by him and if his name is typed underneath the letter it is possible it could be signed by another person. The brokerage does not have an automatic signature machine nor does it have a digital stamp. He went on to confirm that all regular correspondence addressed to solicitors regarding real estate transactions, invoicing and general correspondence are typed by the administrator in the brokerage and that Witness B would have been the administrator who would have typed letters when she was with the brokerage from 1999 to 2002.

Passante went on to state that in 1999 and up to 2003, he had a number of managers in the brokerage whose duties were managing salespersons as well as recruitment and training but they did not write letters for the brokerage as salespersons had no reason to do so.

In reference to the letter of July 7, 2000, Passante confirmed that he at no time visited the properties headlined in that letter nor did he, as a general rule, work or sell properties in the specific area.

Questioned again regarding the three letters, he confirmed that in all three letters the date of such letters "was on the wrong side" and that only letters that "have to do with accounting" have the date on the right hand side of such letters. The three letters are the only letters on the brokerage's letterheads in that particular font. The three letters of January 20 and 28, 2000 and July 7, 2000, according to Passante, could not have been generated by the brokerage's accounting program although they could be generated "by any computer in the world".

The Testimony Of Witness A

Witness A testified that she is employed by the brokerage as a secretary and Passante's assistant. She has been with the brokerage for about six years and is familiar with the file records and files. She described to the Tribunal the nature of the various files maintained by the brokerage in the course of its business and the various documents contained in files, including a trade record sheet. She explained that a "deal" file is opened when a deal is made, in other words when an agreement of purchase and sale is signed. The sales agent responsible for a deal then fills out an information sheet regarding the deal. She further stated that the deadline for the "supply" of the deposit to the brokerage is two to three days after execution of the agreement. If a deal falls through or terminates the trade record sheet in the brokerage files will reflect this fact. The files of the brokerage are kept "indefinitely" after a deal closes.

Witness A stated she was shown copies of the three letters of January 20 and 28, 2000 (Exhibit 5, Tab 5, pages 55, 60 and 61) and July 7, 2000 and was instructed to search for files in the brokerage relative to the deals referred to in those letters.

In relation to all three letters she searched the brokerage's records for the years 1999, 2000 and 2001. She found no documents or copies of documents in her search relative to the matters referred to in the letters. Nor did she find either the original or copy of the three letters. She found no records under the addresses of the relative properties in the administration room, the storage room or the computer records. Her searches were carried out in March/April 2006.

She noted that all letters have a trade reference number of the brokerage but there was no such reference number found in the brokerage's records pursuant to her searches.

She also stated that Passante uses no signature stamp. Referring to Passante's letter of August 20, 2002, to RECO (Exhibit 4(a), pages 1 and 2) in which he originally reported the Applicant to RECO, she noted that the script or words at the end of the letter "Daniel F. Passante" – is produced by Microsoft Word. In reference to the January 20, 2000 letter, there is no program that would generate the purported signature of Passante. The font used on all three letters would be in the brokerage's accounting program but the accounting program would not generate the three letters. The brokerage's letters in the accounting program are all templates.

In cross-examination, Witness A stated that she was not with the brokerage when the letters were generated. General or miscellaneous letters are not sent out by Passante.

She concluded her cross-examination by stating that when she made her searches relative to the three letters, she could find no files in the brokerage's records relative to 643 Landsdown Avenue, 75 Lanyard Road, 25 Yellowstone Street or 58 Davelayne Road.

The Testimony of Witness B

Witness B testified that she is presently with a brokerage other than Passante's. She has worked for about 20 years with real estate brokerages.

She worked at Passante's brokerage, namely Royal Windsor, from February 1999 for about four years. While there, she worked as administrator and she typed all Passante's correspondence. The program she used was the Lone Wolf program, which generates cover letters and invoices, as opposed to the FOXPRO program used in the accounting section of the brokerage.

Shown the January 28, 2000 letter she had the following comments:

- Passante's name was misspelt

- Passante's name lacked his initial
- If she had typed this letter for Passante it would have reflected the initials DFP before her initials and this is basic knowledge of how a letter is set up.

She also stated that she knew and was aware that Passante did not have a signature stamp or other type of mechanical stamp.

Shown Exhibit 3, tab 3, page 1007, which she described as a commission cheque in favour of the Applicant from the brokerage, Witness B stated that this cheque was "picked up" by M. Persaud on behalf of the Applicant and that Persaud signed that she had received the cheque on April 5, 2000. She made a recording of the cheque having been received by Persaud. The latter's name is familiar to Witness B as she sometimes picked up commission cheques for the Applicant as well as mail that had accumulated in the Applicant's mailbox at brokerage. She also stated that she was familiar with the name because the Applicant was doing private listings that he was not reporting to the brokerage or that were taken off the market.

In cross-examination Witness B stated that she was employed at the brokerage during the entire year 2000. Staff, such as persons who answered telephones and the receptionist, did not type letters for the brokerage although they could have typed letters for a sales representative. Passante had his own office at the brokerage and his own computer. Referring to the letter of January 28, 2000, she stated that this was not a standard letter of the brokerage and the Lone Wolf program would not produce this letter although any computer could produce such a letter.

She went on to state that she remembered that Passante took \$500.00 per sale with the Applicant but this type of deal did not apply to other sales representatives. The Applicant had an unusual arrangement with Passante. She was not aware that Passante was taking cash from agents.

Witness B was shown by Applicant's counsel a document styled "100% Commission Package" (Exhibit 5, tab 3, page 28) and she stated that the signature thereon appears to be that of Passante although she did not prepare the document.

Referring to the three letters, Witness B stated that Passante contacted her and requested her to come to the brokerage to see if she recognized the letters, which he showed her when she went to the brokerage "earlier this year". The letters shown to her by Passante "meant nothing" to her and she subsequently signed an affidavit. She denied Passante is either a relative of hers or has "a hold over" her.

Questioned by Applicant's counsel regarding the letter of January 28, 2000, she stated that had she prepared that letter, she would have put Passante's initials first then her initials as that is standard practice whereas if it was her letter "only", then only her initials would appear.

She further stated that when enquiries were received from other agents as to the status of properties the brokerage could never "get hold" of the Applicant to give them information so as to update the brokerage. Witness B stated that she was at the brokerage when it moved offices to 7777 Keele Street and none of the old documents of the brokerage were disposed of. She also remembers advising Passante what was happening in the various properties that were mentioned in the original report to RECO and gave him the information she gathered together.

Following the conclusion of Witness B 's testimony, the Registrar's case was closed and the following is a summary of the testimony of the various witnesses in support of the Applicant.

The Testimony of Joseph Bozzo

Bozzo testified that he has been in the real estate business for about the last 25 years and he presently conducts a real estate brokerage in Woodbridge, Ontario. He stated that he is a past director of the Toronto Real Estate Board and was a member of that Board's Ethics Committee. He testified as to general real estate practice between brokers and salespeople as well as his employment of the Applicant from 1989 to 1992.

Bozzo went on to state that he hired agents who were employed on a commission basis and that there are several different types of commission remuneration. The basis of remuneration of agents differed from agent to agent. Bozzo further stated that during the period of January 3, 1989 to July 31, 1989, he employed the Applicant as an agent in his brokerage as well as from July 28, 1992 to September 1992. The Applicant, to the best of Bozzo's recollection, tried to negotiate "a good commission split" with Bozzo. Bozzo went on to explain his understanding of a holdover clause that may appear in real estate contracts. During the Applicant's employment with Bozzo's brokerage he did not recall there having been "any serious issues" with the Applicant.

In cross-examination, Bozzo stated that he was not involved in managing his brokerage and he recollects that during the Applicant's employment with Bozzo, his remuneration arrangements frequently changed. He concluded by saying it is of importance that a salesperson keep the brokerage "alive to all deals", and report the position on all deals to the brokerage.

The Testimony of Witness R

Witness R testified that he has been in the real estate business for the past 17 or 18 years. He worked for Royal Windsor, Passante's brokerage when the latter's office was situated on Highway 7.

Witness R testified as to his remuneration agreement. He stated that his arrangement with Passante was that he was to receive \$500.00 per deal plus "something like \$200.00 to \$300.00 per deal" for what he termed a "franchise fee".

Witness R was shown the document as to remuneration arrangements between the Applicant and Passante (Exhibit 8, page 4) and pointed out that this contract does not have Passante's brokerage's name on it.

He also stated that he started with Passante by sharing an office in the brokerage and then had his own office in the brokerage at which stage his monthly fee payable to the brokerage increased.

Witness R further stated that he left Passante's brokerage on January 31, 2000, and at that time, the brokerage's offices were situated on Highway 7 and Jane Street, Toronto.

Witness R stated further that the procedure in Passante's brokerage was for the salesperson to give a new listing to a secretary, who then posted it on a board in the office. On one occasion, a commercial property came in "cold" to the brokerage and he took that call when the seller initially brought it to the brokerage. He did not handle the transaction at all, apart from taking the initial call. Witness R was not able to handle commercial properties on behalf of the brokerage and only dealt with residential properties.

The reason that he left Passante's brokerage was that he came in to the office one day in 2000 and found someone occupying his office. When he asked the manager why this was occurring he was told that the manager had moved Witness R's "things" to a back office, as "a builder" required Witness R's office. Witness R assumed that Passante had given such instructions and he immediately packed up and left the brokerage. When he left there were pending transactions of Witness R and his commissions on three such transactions were paid by the brokerage on closings taking place. He went on to state that he had "no problem" with Passante while working at the brokerage and Passante always maintained that his door was open to staff.

On cross-examination, Witness R stated that all listings "belong to" the brokerage. On occasion, a broker may "release" a listing to a salesperson when that salesperson leaves the brokerage. Passante communicated the policies and procedures of his brokerage to the staff and always wanted to see the new listings that come into the brokerage.

On re-examination Witness R was shown a "Notice of Employee Change," dated January 31, 2000, signed by Passante and which contained the handwritten words that stated Witness R's conduct while in the brokerage's employ was "unprofessional" (Exhibit 24, page 2). The notice was signed by Passante. Witness R denied that he was unprofessional at any time.

The Testimony of Witness C

Witness C stated that he does home renovations and mostly renovates washrooms and does plumbing as well as some framing and drywalling. He met the Applicant at Witness R' home while he was doing renovations. The renovations took six weeks to do. Witness

C further stated that it was the Applicant who referred him to Melanie Persaud and Mohammed Ghani.

Yellowstone Street

This was the first property he renovated for Persaud and Ghani who had purchased that property. The home on the property was in “real bad shape” when he saw it. He commenced to do renovations at the request of Persaud and Ghani, “gutted” the basement and “rebuilt” it to contain three rooms, a washroom and kitchen. He had “a crew” of three or four persons working for him on the renovation. The upstairs of the home required a new kitchen and washroom. The cost of the two kitchens was \$3,000.00 to \$4,000.00 per kitchen, and the cost of the two washrooms was \$5,000.00 per washroom. The entire renovation including material and labour was about \$30,000.00. The materials were supplied by Ghani. The renovated rooms could be rented. Subadar came at times to inspect the renovations. Ghani paid the “crew” weekly in cash.

25 Lansdowne Drive

The renovations to this home were done by Witness C and the same crew as employed on the Yellowstone Street renovation.

The renovations were done at the request of Persaud and Ghani. The home contained three floors. The basement required “gutting”. New frames were installed in the basement as well as new drywall and ceramic floor tiles. There was no basement bathroom. On the first floor, the drywall was removed and replaced and a new kitchen was installed. On the second floor, a new kitchen was installed as well as a new washroom. The third floor was also “worked on” and the entire duration of renovations was “five to six weeks”. In addition to the foregoing, a new balcony was installed and the backyard was cleaned up. Persaud and Ghani supplied all materials and he estimated the cost of renovations including labour and materials at about \$25,000.00.

On cross-examination, Witness C stated he cannot remember all the properties he worked on and whether he did renovation at Yellowstone first or Lansdowne first. There were a total of four to five bedrooms in this home to be used as rental rooms. During the renovations, various real estate agents were coming to see the home. There was a “for sale” sign on the property and he thinks it was a Century 21 sign.

118 Lomar Avenue

This home, according to Witness C, is a bungalow style home and he was contacted to do the renovations by Ghani who owned the home. He and his renovations’ crew did all the work on the home.

In the home’s basement, he “put in” three new bedrooms, a new washroom and new ceramic tiles on the floor. He did the necessary framing and drywall as well as plastering

and sanding. The basement ceramic tile was 700 square feet in area and the labour charge for this was \$3.00 per square foot. All materials were supplied by Ghani.

In addition to the basement, there was a new washroom installed in the home's upstairs as well as a new kitchen. Including materials, Witness C estimated the renovation costs to be about \$30,000.00.

In cross-examination, Witness C stated the renovations took some five to six weeks to complete. Ghani employed Witness C to do the renovations and supplied the materials.

56 Gravenhurst Avenue

Witness C stated that Ghani and Persaud contacted him to do renovations to the home at this address. When he first saw the home, it was in a run down state. The home is a three-bedroom bungalow style house.

Renovations consisted of "breaking out" the basement, reframing, drywalling, plastering and painting as well as new tiles and a new kitchen being installed.

All the homes he renovated had a separate entrance to the basements.

In addition, the upstairs' floor of the home had a new washroom installed as well as a new kitchen and hardwood floors. The total cost for the renovations were estimated by Witness C at \$25,000.00 to \$30,000.00.

Witness C stated that currently, he is working for Ghani and Persaud doing some home renovations.

In cross-examination, he stated that he does five to six home renovations per year for Ghani and Persaud to whom he was introduced by Subadar in June 2000. Ghani is also known to Witness C as "Majeed". Persaud is a female.

Witness C stated that the renovations to his home were done in 1999 over a period of six to seven weeks. This was one of four properties he renovated for Ghani and Persaud, other than the two properties he is currently renovating for them at 155 and 157 Driftwood and another property that he renovated for them at Chalkfarm.

The testimony of Witness D

Witness D testified that he does painting, ceramic tile installation, drywalling, taping and plastering. He has done this work since 1986 and mainly does private home.

643 Lansdowne Avenue

Witness D stated that he received a telephone call from a Melanie or "Maleeni" Persaud when the latter enquired if he could do a "job" for her and he then met her at the above

address where she explained what she required regarding the home. At the time people were living in the home, and when some two or three weeks later the home became vacant, he commenced renovations.

In regard to the basement, he laid ceramic tile on the floor and also on the washroom walls. In the two rooms in the basement, he replaced drywall and painted. There was no kitchen in the basement.

On the upper floor, he repaired the drywall and painted and also did some work on the floor. On the main floor, there was no kitchen but there was a living room. He "did" the ceramic tile and the backsplash in the kitchen. There was also painting to be done.

The brickwork on the outside of the home had mildew on it and he replaced the front of the outside of the home with stucco, which he then painted. He estimated that the work he did on the home, including materials, would amount to \$15,000.00 to \$25,000.00.

25 Derrydown Road

Persaud called Witness D to do renovations on the home at this address. Its condition was not good when he saw the home for the first time. In the home's basement, he laid ceramic tiles in the bathroom, on the backsplash in the kitchen and painted the interior of the home.

On the main floor, he laid ceramic tiles in the bathroom. There was also a new driveway laid.

He estimated the cost of materials and labour would have totaled about \$18,000.00.

25 Coronado

Witness D stated that Persaud called him regarding the above property he proceeded to look at the home, measure it, and estimate what materials would be necessary for renovations. The home needed repair. He subsequently worked on the home making renovations.

Two new washrooms were installed in the basement, although he only did the washrooms, flooring and tiling. He "boarded up" three bedrooms in the basement as well as laying ceramic tile and plastic tile.

In the upstairs of the home he did the tiling, the kitchen flooring as well as painting on that floor. Electrical work was done by another person and plumbing by another individual. All materials were supplied by the owner and Witness D completed his work in about three and a half to four weeks. He declined to estimate the amount of materials used on the home or cost of materials used. The home, after renovations, was in good condition.

58 Davelayne Road

Again Persaud called Witness D to ask him to do renovations at the above home. After inspecting the home Persaud ordered the required materials. The home was not in good condition when he first saw it.

Insofar as the basement was concerned it had a side entrance from the exterior and three bedrooms plus kitchen and washroom were installed. Witness D did the drywalling, and taping and painting in the basement and that area then became rentable.

In the upstairs he laid the ceramic tiling in the kitchen floor and repaired the walls and painted. There were four bedrooms upstairs which had hardwood floors on which he did no work.

All electrical work on the home was done by an electrician, who came to the home only on some evenings and some weekends. Witness D worked in the home for about 3 to 4 weeks and on completion of the renovations, the home was in good condition. Witness D returned to the home to "touch up" certain work he did in the home. Naleeni Persaud paid him for his work.

56 Gravenhurst

Once again he obtained this job when Persaud called him. He saw the property, which was in need of repair, and estimated what materials he needed to do his repair work. Materials were delivered to the home.

Insofar as the home's basement was concerned he did the drywalling as well as framing, taping, sanding and painting. There were two bedrooms and a separate entrance from outside. He also installed ceramic tile on the bathroom's floor and no further work in the basement.

On the main floor he did no work. His work took him three to four weeks to do and he was paid by Persaud.

118 Lomar Drive

Persaud called Witness D as he did regarding the other homes. He observed the home's basement was in "bad condition." He and others spent three weeks stripping out the basement. Witness D did no framing in the basement but put in the drywall after the electrician had done his work. He taped and finished drywalling in the basement in which there were three bedrooms installed, two kitchens and a washroom. He tiled the washroom floor with ceramic tile and applied plastic tile on the bedrooms' floors.

In the upstairs he did ceramic tiling on the bathroom floor and kitchen floor. He also "did" the stairs that lead to the basement from outside. There was a kitchen upstairs and when he left after some six weeks, the home was in good condition. Although there was no garage on the home, there was a driveway that could accommodate four to five cars.

Witness D was paid for his work by Persaud.

75 Lanyard Road

Here again Persaud called Witness D to offer him the renovation job. He was required to do the drywall and floors, and he estimated what materials would be required.

Insofar as the basement was concerned there were three bedrooms that required drywalling which Witness D installed, as well as flooring. There was a side-door entrance to the basement.

Regarding the upstairs Witness D did painting and tiled the kitchen's floor and the backsplash. In the bedroom he repaired and stained the hardwood floor.

The electrician did all electrical work necessary in the home and upon completion of all work, the home was in good condition. While working in the home no one lived in it and no one visited it. Persaud paid Witness D for his work after completion.

25 Yellowstone Ave.

Ghanie delivered materials that were required for the home. Persaud hired Witness D.

Insofar as the home's basement was concerned, Witness D stated he did the drywalling and painting as well as tiling the bathroom and kitchen floor.

In the home's upstairs, which was not in good condition, he did painting, put in ceramic tile on the two floors of the two kitchens. He also "did" the drywalling and worked for three to four weeks on the property. Electrical work was done by the electrician who spent about two to three evenings at the home doing the electrical. On completion the home was in good condition.

On cross-examination Witness D stated, in summary, as follows.

25 Yellowstone

Persaud hired Witness D to do this job and Ghanie delivered the materials. Persaud paid Witness D for his work although "sometimes" Ghanie paid him in cash.

Witness D went on to state he did painting, drywalling and tiling and was, at times, assisted his brother-in-law.

He went on to state that Witness C never called him to do work on any of the homes. In this particular home, Ghanie dropped off the materials at the home.

Insofar as the home's upstairs is concerned, Witness D "did" the bathroom floors, while in the basement he did not do the framing.

There were three persons who worked on renovating this home, one of whom only worked 2 to 2½ days. In addition, the electrician worked in the home.

This was the last property that Witness D worked on for Persaud and he worked on it during summer and early spring.

Witness D went on to state that the appliances that were in the home were changed after he finished his work in the home.

Witness D recalled that an individual bought this property the same year that renovations were done and he then lived in the upstairs floor and rented out the basement rooms.

Witness D was paid \$5,000.00 when his work was done on the home. He dealt with both Ghanie and Persaud in regard to this work.

58 Davelayne Road

Witness D recollects working on this home and that Ghanie dropped off materials with his car when needed. Witness D worked on the basement when rooms were added. Others did plumbing and framing. There were also 3 bedrooms upstairs.

75 Lanyard Road

He had no dealings with Ghanie on this property. He was paid about \$4,500.00 for his work. When he went into the home he saw that the wooden wall panels were damaged.

118 Lomar Drive

Witness D dealt with Ghanie on this property. Ghanie went to pick up material for him but did no work on the home. He knew Ghanie through "the lady" (referring to Persaud) and he paid Witness D on occasions. The Applicant was not around during renovations and it was the Applicant that introduced Witness D to Persaud. Persaud called Witness D "always" and no other trade called him. The entire house took Witness D more than four weeks.

25 Coronado

Witness D's part in regard to the renovations took three to four weeks and he was paid about \$5,000.00 for this work. The only tiling he did was to tile over the washtub. He did no framing. He remembered three bedrooms in the basement.

56 Gravenhurst Street

Persaud called Witness D to do renovations at this home and he worked for three and a half to four days on the property. He did not work upstairs and did no plumbing or electrical work. He does not remember when he did work on the property.

643 Landsdowne Ave.

This property was "all mashed up" according to Witness D. Lots of people lived there at the time he first saw the property. He was called by Persaud to go to the property to see it and estimate what materials he needed. This was in 1998. He "did" the washroom downstairs.

In re-examination Witness D stated that when he referred to a tradesperson by name "Virgil" he was also referring to "Berger."

The Testimony of Witness E

Witness E stated that in 1998 through 2000 he did renovations together with another person and Witness C. Witness C lives on Yellowstone Street. Together with Witness C they did general renovations.

25 Yellowstone Street

Witness E stated he started with Witness C as a helper "taking out garbage."

There was a lot of work to be done on this property, which had a "messy basement" that they gutted. They took out the walls in the basement as well as the subfloor which was above the concrete floor. They did some work on the upstairs hardwood floor and bedroom, although most work was done to the basement.

There were six other persons were involved in the renovations, including Witness D and the electrician previously referred to by other witnesses.

Referring to the above property Witness E stated that there was a side entrance to the basement as well as an entrance from the front of the house.

After the clean-up of the home, the basement was reframed and a washroom was installed. A new bathroom was also installed. Two kitchens and four bedrooms were installed in the

basement. The upstairs was repainted and new hardwood floors were put in three bedrooms and the living area. Ceramic tile was laid in the upstairs kitchen.

The owner of this property was "Majeed". The electrician rewired the basement, the kitchen and room lights. Drywalling was also done. Once the basement was complete, it looked "classy."

The upstairs floors were sanded, varnished and the walls painted. There were three bedrooms upstairs.

643 Landsdowne

This property, according to Witness E, needed a lot of cleaning regarding garbage in the kitchen and back yard.

The basement of this home had no concrete floor, only sand. He framed in two rooms in the basement and laid a concrete floor, which was then tiled. Painting was done by Witness D, who also worked on this home.

Besides the basement, work was done on sanding and varnishing the wood floors of the home's two bedrooms. Renovations were also done on the front porch of the home. After renovations the house was "pretty good." Electrical work was also done on the home.

In cross-examination, Witness E stated that the first property he worked on for Persaud and Ghani was 25 Yellowstone. This was in the fall of 1998. Ghani paid Witness E \$10.00 per hour and he averaged about 50 hours of work per week for some three to four weeks.

The "same crew" worked on the Landsdown property as did on the Yellowstone property. Witness D was part of the "crew" and Witness C was the leader.

The Testimony of Witness F

Witness F was called as a character witness for the Applicant. In view of the Tribunal's findings, his name is deleted. He stated in his testimony that he has been in the real estate business for 31 years, of which 29 years have been as a broker.

As a broker he assisted his father, who then was also in the business of real estate.

In 1987 Witness F's brokerage employed some 25 to 35 persons and between May 1985 and May 1987 the brokerage employed the Applicant as a salesperson. From time-to-time the Applicant was a "top producer" in the brokerage. During the period May 1985 to May 1987 Witness F stated that he was not aware of any complaints against the Applicant and considered the Applicant to be energetic and active. When the Applicant left the brokerage in May 1987 he did not leave on a "bad note" and in August the Applicant returned to work for Witness F's father as manager. At some point in time Witness F's father left the

brokerage and Witness F then carried on the business. Witness F stated further that he recalls the Applicant was selling single-family residential homes when he worked for the brokerage. Witness F further stated that the Applicant dealt with people who were speculators or investors in buying and selling residential properties. The Tribunal notes that the Applicant's association with Witness F precedes the events in question by over ten years.

FACTS FOUND PROVEN

The following facts have been found proven by the Tribunal:

1. The Applicant was initially registered as a salesperson under the Act on or about May 13, 1985.
2. The Applicant was registered as a salesperson with various brokers from May 13, 1985, to date.
3. From January 1999 until September 2000, the Applicant was employed by Royal Windsor, as a salesperson.
4. Daniel Passante was at all relevant times during the Applicant's employment with Royal Windsor, the owner/operator of the latter and is a registered broker under the Act.
5. The Applicant was, on June 13, 1987, found guilty of operating a motor vehicle while having alcohol in excess of 80 milligrams of alcohol in 100 milliliters of blood, thereby contravening section 237(b) of the Criminal Code of Canada.
6. On or about June 30, 1989, the Applicant submitted an application to the Registrar for renewal of his registration as a salesperson under the Act. The Applicant, in answer to a question in his renewal application, falsely answered that he had never been convicted or found guilty of an offence under any law. Subsequent to the June 30, 1989, application, the Applicant, in his renewal applications, submitted to the Registrar in 1991, 1993, 1994, 1996, 1999, 2000 and 2002, when asked the same question as in his June 1989 application for renewal, falsely answered that he had never been convicted or found guilty of an offence under any law.
7. In or about April/May 1997, six court orders were issued against the Applicant in respect of costs awarded in favour of Canada Trustco Mortgage Company, and one further court order issued against the Applicant in favour of Re/Max Home Centre Inc. The above orders of court totaled in excess of \$32,000.00.
8. In January 1999, September 2000, and September 2002, the Applicant submitted written applications to the Registrar for renewal of his registration and in each of

such renewal application, the Applicant when asked whether any unpaid judgments were outstanding, answered "no".

9. The three copies of letters dated January 20, 2000, January 28, 2000, and July 7, 2000, purporting to bear the signature of Daniel Passante, were not authored by Passante, and the purported signatures of Passante that appear thereon were not affixed to those letters by Passante.
10. Royal Windsor moved its offices to 7777 Keele Street, Suite 208, Concord, in March 2000.
11. The Applicant, while in the employ of Royal Windsor as a salesperson, caused certain property situated on Derrydown Road, Toronto, to be listed for sale on April 3, 1999, with such listing to remain in force and effect until June 3, 1999. This property was sold on April 26, 1999 (the agent for the vendor being the Applicant), without the knowledge of Royal Windsor, the Applicant having failed to advise the latter of the sale.
12. The property situated at Derrydown Road was sold under an agreement of purchase and sale dated November 28, 1998, for a purchase consideration of \$181,500, the purchaser's agent being the Applicant. On April 3, 1999, the Applicant, listed the property for sale at \$239,900, and title to such property was registered to the purchasers of the property on April 26, 1999, for a recorded purchase consideration of \$234,500, with a mortgage registered on that date in favour of the Royal Bank of Canada for \$235,237.
13. The property situated at Lansdowne Avenue, Toronto, was registered in the name of Raymond Alley on October 8, 1998. The purchase consideration was \$122,000.00, and on the same date, the property was registered in the names of Persaud and Ghanie, with a declared purchase consideration of \$195,000.00, and with a mortgage registered in favour of Royal Bank of Canada for \$192,196.00. The Applicant listed the property for sale for \$259,900, which listing was in force and effect from January 25, 2000, to March 30, 2000. On March 24, 2000, during the existence of the listing agreement, the property was sold and title transferred to new owners for \$255,000.00, and with a mortgage in favour of Royal Bank of Canada for \$235,237. The Applicant failed to report the sale to the listing broker, namely Royal Windsor. The Property was sold under Power of Sale by Royal Bank of Canada, on November 1, 2001, for \$142,000.00.
14. The property situated at Gravenhurst Avenue, Toronto, was purchased by Persaud, for \$185,000.00 and title to that property was registered in Persaud's name on May 3, 1999. Persaud's agent, the Applicant, listed the property for sale under a listing agreement effective and in force from May 10, 1999, to July 15, 1999, and such agreement listed the price of the said property as \$239,900.00. During the term of the listing agreement, the property was sold to purchasers who obtained title to the

said property on June 7, 1999. The purchase consideration of the said property was, according to the Deed of Transfer, the sum of \$234,000.00, and on June 7, 1999, a mortgage in the sum of \$230,636.00 was registered in favour of PAFCO Insurance Co. The latter sale was not reported to the Applicant's broker by the Applicant and the listing subsequently expired.

15. Persaud attended at the offices of Royal Windsor on April 5, 2000, and there and then picked-up on behalf of the Applicant a cheque drawn by Royal Windsor and payable in favour of the Applicant in respect of the Applicant's earned commission respecting the sale of 75, Lanyard Road, Toronto.
16. The Applicant was the listing agent in respect of 643 Lansdowne Avenue, Toronto, which property was listed by the Applicant for sale by Majeed Ghanie under a listing agreement in force and effect from January 25, 2000, to March 30, 2000. The listing broker was Royal Windsor, and the property was sold by the Applicant on behalf of Ghanie on March 24, 2000, during such time that the listing agreement was in force and effect and which sale the Applicant failed to report to the listing broker.
17. The Applicant was the listing agent in respect of 25 Yellowstone Street, Toronto, which property was listed by the Applicant for sale by Majeed Ghanie at the sum of \$259,900. The listing agreement was in force and effect from July 12, 2000, until September 30, 2000, and the listing broker was Royal Windsor. The property was sold by Ghanie through the agency of the Applicant on July 31, 2000, when title to the property was transferred to Ghanie's purchaser. The Applicant failed to report the sale to the listing broker, Royal Windsor.
18. The Applicant was the listing agent in respect of 56 Gravenhurst Avenue, Toronto, which property was listed for sale by the Applicant on behalf of the vendor, Naleenie Persaud for \$239,900.00. The listing agreement was in force and effect from May 10, 1999, to July 15, 1999, and the listing broker was Royal Windsor. The property was sold by Persaud on June 7, 1999, through the agency of the Applicant when title was passed to Persaud's purchaser and the Applicant failed to report such sale to the listing broker.
19. The Applicant was the listing agent in respect of 26 Derrydown Road, Toronto, which property was listed for sale by the Applicant on behalf of the vendor, Majeed Ghanie, for \$239,900.00. The listing agreement was in force and effect from April 3, 1999, to June 3, 1999, and the listing broker was Royal Windsor. The property was sold by the Applicant on behalf of Ghanie on April 26, 1999, during such time that the listing agreement was in force and effect and which sale the Applicant failed to report to the listing broker.

THE LAW

The *Real Estate and Business Brokers Act, 2002*, states as follows:

- 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, or
 - (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;
 - (2) A registration is subject to such conditions as are consented to by the applicant or registrant, as are applied by the registrar under section 13, as are ordered by the Tribunal or as are prescribed.
- 13.** (1) Subject to section 14, 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 10.
- 14.** (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,
- (a) refuse under subsection 13 (1) to grant or renew a registration;
 - (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 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.
- (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.

The Rules of Practice of the Licence Appeal Tribunal state:

- 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.

DECISION AND REASONS

The onus of proof rests upon the Registrar to prove his case on a balance of probabilities.

The issues involved in this matter are analyzed and dealt with hereunder. The Tribunal is required to make an independent decision as to whether the criteria for depriving the Applicant of his registration have been proven, showing no deference to the decision made by the Registrar. The Tribunal bases its decision on the evidence placed before it at the hearing, and whether on that evidence the past conduct of the Applicant persuades the Tribunal, on a balance of probabilities, that the Applicant will not act in accordance with the law and with honesty and integrity. The Tribunal, in coming to its decision, is cognizant of the decisions in *Brenner v. Registrar of Motor Vehicle Dealers and Salesmen*, 1983 O.J. No. 1017 Ontario High Court of Justice, Divisional Court and *Registrar, Motor Vehicle*

Dealers Act and Shine Car Sales and Omar Hassan Rahim, a Divisional Court decision released on February 19, 2003.

Non-Disclosure of Conviction

The Applicant was found guilty on June 15, 1987, of operating a motor vehicle having consumed alcohol in such quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 milliliters of blood, contrary to section 237 (b) of the Criminal Code of Canada. The Applicant was represented by counsel when the matter was heard, and he was present when he was found guilty on the above charge (Exhibit 4, Tab 15). The Applicant's aforesaid counsel confirmed in his letter of January 19, 2006, that the Applicant was convicted as above (Exhibit 5, Tab 2).

The Applicant's appeal to the above conviction was dismissed on February 17, 1988, as is clearly apparent in the appeal court's order dismissing the Applicant's appeal (Exhibit 5, Tab 2, page 18).

Subsequent to this conviction, the Applicant made written application dated June 19, 1989, for renewal of his registration, and in this application, he denied, in answer to a question in that application, that he had ever been convicted or found guilty of an offence under any law (Exhibit 4, tab 16A).

On the Applicant's subsequent seven applications, which he submitted when applying for the renewal of his registration, the same question was posed in each renewal application, and, in each instance, was answered by the Applicant when he denied that he had been convicted or found guilty of any offence (Exhibit 4, Tab 16B through 16H).

On all applications, the Applicant's answers given in his renewal applications were false. The Applicant failed to testify at the hearing, and no evidence was placed before the Tribunal disputing or explaining the answers given by the Applicant. Due to the vast number of applications received, the Registrar cannot reasonably be expected to check each and every detail of answers given in applications, and consequently relies on the honesty and integrity of applicants and registrants. The Tribunal is satisfied that the repeated denials by the Applicant in his applications were not caused by inadvertence or oversight, but were deliberately made so as to mislead the Registrar that he was conviction free. The conduct of the Applicant in repeatedly denying his convictions is reflective of deceit on the part of the Applicant. These repeated and ongoing falsehoods must understandably destroy the Registrar's confidence in the honesty and integrity of the Applicant and such repeated falsehoods are supportive of and afford reasonable grounds for belief that the Applicant will not, in the future, carry on business in accordance with law and with integrity and honesty, and is a clear breach of section 10 (1)(a)(ii) of the Act.

Non-Disclosure of Judgments

In the Applicant's written applications for renewal of his registration dated January 20, 1999, September 14, 2000, and September 17, 2002, he was asked whether he had any unpaid or outstanding judgments against him (Exhibit 4, Tabs 16F, G and H). In each application, he stated that there were no unpaid or outstanding judgments.

In fact, there were as of April 1997, four executions registered against the Applicant (Exhibit 4, tab 14A). The four executions relate to four judgments against the Applicant for costs totaling \$10,150.00, in favour of Canada Trustco Mortgage Company (Exhibit 4, Tab 14(a)). In addition, there was an execution showing \$19,500.00, in respect of costs awarded to Re/Max Homecentre Inc. against the Applicant (Exhibit 4, Tab 14A, last 2 pages). The Applicant, although he did not testify at this hearing before the Tribunal, did file a book documents indicating an appeal was noted by the Applicant. However, this appeal was not perfected and was dismissed by the Court of Appeal dated April 3, 1998 (Exhibits 26 and 27).

In his closing submissions, counsel for the Registrar correctly submitted that the questions asked of the Applicant in his above three renewal applications were whether or not there were unpaid or outstanding judgments. In each application, the Applicant falsely answered "no" and gave no explanation or comment to explain or amplify his answer. The Registrar was clearly misled by this answer, just as he was in relation to the Applicant's answers regarding convictions. The Applicant chose not to testify at the hearing and his silence lends credence to the allegations made by the Registrar, which were left uncontradicted. The evidence submitted by the Registrar called for the Applicant to give a reasonable explanation for his denial. This could have been attempted by the Applicant taking the stand and explaining his denials. The information is predominantly if not solely within his knowledge and control. However, he chose not to do so.

It is the Registrar that is the gatekeeper to all those who seek registration as a broker or salesperson. The Legislature formulated and passed into law the Act, which Act is for the protection of the general public and the good governance of the real estate industry. For these reasons, the honesty and integrity of brokers and salespersons is paramount and should be jealously guarded. The Applicant's denial of the judgments that lead to the executions and the non-disclosure of these facts, affords reasonable grounds for the belief that the Applicant will not carry on business with honesty and with integrity and within the law. In the Tribunal's opinion, the Applicant's conduct demonstrates that his past conduct, as manifested, affords grounds under section 10.(1)(a)(ii) of the Act to deny his registration.

The Evidence Surrounding the Letters of January 20, 2000, January 28, 2000, and July 7, 2000.

The above three letters were introduced by the Applicant during his cross-examination of Passante. These three letters (Exhibit 5, Tab 5, pages 58, 60 ad 61, respectively) were disclosed by the Applicant in his Book of Documents, and were put to Passante when he was cross-examined by the Applicant's counsel on February 6, 2006.

Passante, upon being shown these letters by counsel for the Applicant, was asked whether such letters bore his signature, which he answered in the affirmative, but did state that he did not come across copies of these letters when he wrote to RECO setting out his complaint against the Applicant. However, on completion of his testimony on February 7, 2006, Passante, unable to find any trace of these letters, called for copies of the three letters from RECO's counsel. When he received copies of the three letters from RECO's counsel, he noticed "irregularities" in them as he described in his testimony on recall to the witness stand. Consequently, Ms. Diane Kruger was given copies of the letters by RECO with the request that she examine the letters, and report on her examination and findings. She duly examined the letters and furnished her written report as to her findings and subsequently appeared before the Tribunal, and testified as to her qualifications, background and expertise as a forensic expert in handwriting and signatures. Counsel for the Applicant raised no objection to her being qualified as an expert, and Ms. Kruger was duly qualified as a forensic expert in handwriting and signatures. The Tribunal did so as her qualifications were impressive and extensive as appears from her testimony and report.

No evidence or testimony was introduced by the Applicant to dispute Ms. Kruger's findings nor to contradict her opinion, which the Tribunal accepts in their entirety.

The Tribunal, furthermore, accepts the testimony of Witness B and Witness A, as supported by Passante, that the latter did not use a signature stamp, either mechanical or electronic, as a means of creating a facsimile of a handwritten signature.

On all three letters, Passante's name is incorrectly stated as "Passente" and the July 7, 2000, letter contained an address of Royal Windsor that was no longer in use as that brokerage had, prior to that date, moved to 7777 Keele Street, at which time all old letterheads containing its old address were destroyed. Witness A, as well as Witness B, firmly support the testimony of Passante in his testimony on recall that he was not the author and had not signed these three letters.

Witness B, who no longer works for Passante, in commenting on the letter of January 28, 2000, pointed out amongst other irregularities she noted, that the letter did not correctly show Passante's initials and her initials as "D.P.:km", but merely "km". If she had produced the letters, she would have used the initials "D.P.:km". The format and the set up and positioning of the letters routinely generated by the brokerage do not, in the opinions of Passante, Witness A and Witness B, accord with the letters found at exhibits 19 A, B and C.

Having had the opportunity to observe both Witness A and Witness B when they testified, and having listened to their respective testimonies, the Tribunal has no hesitation in accepting the veracity of their testimony, insofar as it accords with Passante's testimony, and the opinions expressed by Ms. Kruger. The testimonies of all these persons leaves no doubt whatsoever in the Tribunal's mind that the three letters are false and a fabrication by the Applicant who tendered them in evidence knowing the letters to be false. If any one of those three letters were genuine, and were produced by the brokerage under Passante's signature, the Tribunal believes that a copy would have existed in the files or records of the brokerage, more particularly having regard to the testimony of Witness A and Passante who independently described the filing and storage systems existing at the brokerage.

The Tribunal finds the allegation that Passante authored and produced these three letters to be particularly disturbing, more so when the Applicant chose not to testify at the hearing and support his allegations that these letters were genuine. Only he could provide that evidence. His conduct of having his counsel produce these three letters in cross-examination of Passante, and then choosing to not take the stand and to not testify in support of his allegations, indicates a total lack of honesty and integrity, which, in and of itself, would justify the denial of registration.

The various properties dealt with in this matter

Ms. Swain testified at length during the hearing. Her testimony was clear, lucid and compelling. Her experience concerning which she testified was impressive and was undisturbed in cross-examination. The Tribunal has no hesitation in accepting her testimony, all the more so in that the Applicant himself did not testify or dispute the testimony.

The evidence introduced by Ms. Swain at the hearing disclosed that the Applicant, outside of the brokerage with which he was employed and during active listing periods, privately sold certain properties. The Applicant failed to report such sales to the brokerage, as he was obliged to do. These repeated failures reflect negatively on the Applicant's integrity and honesty.

An inordinately lengthy period of time was spent on listening to the testimony of various trade persons who the Applicant placed on the witness stand in an attempt to prove the nature and extent of the renovations that were purportedly made to the various properties by Persaud and Ghani. These trade persons' testimonies were merely a generalization of renovations. Their testimony made it clear that they were employed by Persaud and Ghani and that all materials were ordered by the latter and were paid for by the latter. They had no knowledge of what the cost of the materials were. They gave no testimony as to cost of materials, quantities of materials ordered or used in the renovations. In each instance, whatever work they may have done was done approximately six years ago and this lapse of time speaks to their vagueness, which evidenced itself during the hearing. No documents were produced to support their statements made to the Tribunal and little reliance is placed upon such vague, general and unsubstantiated evidence.

What was particularly striking to the Tribunal was the fact that neither Persaud nor Ghani took the stand. It was they who were the central and most important individuals in this matter and who could have given testimony as to cost of materials and labour in respect of the various houses besides other relevant aspects. There was no explanation offered as to why they did not appear and testify at the hearing. If they were reluctant witnesses, they could have been summoned to appear. In the absence of their testimonies, the Applicant's reliance on the renovations to explain the price increase is immeasurably weakened. The repeated evidence of the trade persons was that they were not able to testify as to the cost of renovations and they merely related to the Tribunal what they thought was an estimate of such costs. No evidence was placed before the Tribunal as to what qualified them to estimate the overall cost of renovations and they were, in the Tribunal's opinion, not capable or able to make accurate estimates.

The Tribunal noted that Passante, in his testimony, stated that he believed there was a spousal relationship between the Applicant and Persaud. Witness B, the secretary of Passante, testified that Persaud called at the brokerage to pick-up the Applicant's commission cheque in the matter of 75 Lanyard Road. Whatever is or was the actual relationship between the Applicant and Persaud, it is clear to the Tribunal that a business relationship did exist between them and that this relationship was relative to the various real estate transactions. The relationship was an ongoing one when the evidence surrounding the various real estate transactions is considered. It is clearly apparent that the Applicant acted as agent for Persaud and/or Ghani in a number of transactions when Persaud and/or Ghani purchased or sold properties. Having regard to this relationship that clearly existed between the Applicant and Persaud, the Tribunal is of the opinion, and so finds, that the Applicant was well aware of the substantially inflated prices that were being asked for in respect of the various properties and the proportionately inflated mortgages that were being applied for. In many instances, the mortgages were high-ratio mortgages where they were insured by C.M.H.C. The many transactions in which the Applicant was involved as agent for Ghani and/or Persaud, initially as their agent upon purchasing and then as agent for them as vendors of the same property all in a very short space of time, leads the Tribunal to find that the Applicant knew or ought to have known of the substantial and inflated consideration at which the properties were sold. The extravagant values placed upon various properties was misleading to other property owners in the vicinity as to the true and realistic value of their properties, and was also misleading insofar as other agents or mortgagees were concerned, as well as the general public. The result in at least the case of 75 Lanyard Road was that the new purchasers lost their equity and the mortgagee sold the property under power of sale.

COSTS

The Registrar seeks costs in this matter having given notice to the Applicant at various times when the Applicant sought adjournments of the hearing.

May 16 and May 17, 2006, hearing

The father of the Applicant's counsel passed away and the latter did not appear on February 13, 2006, due to his father's passing. The hearing on February 13, 2006, did not proceed in the absence of the Applicant's counsel and, in the presence of the Applicant who was present and did appear, the hearing was adjourned to May 16 and May 17, 2006, as well as May 29 and May 30, 2006. The Tribunal's adjournment order was sent to and was received by both the Applicant's counsel and the Registrar's counsel. By letter dated February 16, 2006, the Applicant's counsel's office wrote to the Registrar of the Tribunal stating that the Applicant's counsel would return to his office on February 27, 2006, and further stated in that letter "at which time he will contact your office to confirm the dates that he is available". On February 20, 2006, the Registrar's counsel wrote to the Applicant's counsel asking him "to kindly confirm, as soon as practical, your availability in respect of the continuation in this matter scheduled for May 16, 17, 29 and 30, 2006". Nothing was heard from the Applicant's counsel until, by letter dated May 10, 2006, he wrote to the Registrar's counsel as follows:

I have a three day criminal trial on May 12, 16 and 17, 2006, set in January this year and therefore I am not available on those dates to continue this matter. The dates in this matter were set in my absence while I was preoccupied with a death in the family. I am available to continue in this matter on May 29 and 30 2006.

On May 11, 2006, the Registrar's counsel wrote to the Applicant's counsel stating:

This is in reply to your letter indicating that you are unavailable for the hearing on May 16 and 17 because you have a trial on those dates, which was scheduled in January.

The Registrar, REBBA does not consent to not proceeding in this matter on May 16 and 17.

When the dates were set on February 13, 2006, Mr. Subadar undertook to inform you or your office of the new dates and to instruct you, or your office, to advise the Tribunal of your availability as soon as possible. Furthermore, I wrote to you on April 17, 2006, asking you to confirm your availability on the dates in question.

Therefore, you have clearly known about this conflict, or potential conflict, for some time. However, you did not provide notice until less than 10 days prior to the hearing date, thereby requiring the Parties, pursuant to Rule 12 of the Tribunal Rules (unless waived by the Tribunal) to attend to deal with this issue, and to be prepared to proceed if your request is not granted.

This will serve as notice that, if the Tribunal requires the Parties to attend on May 16 and your request is then granted, the Registrar will be seeking costs as a result.

To this letter, counsel for the Applicant replied on May 11, 2006, as follows:

I am surprised at the position of Mr. Snell.

My understanding was this matter only had one further day to proceed when I had an unexpected death in my family. My understanding was the matter had been assigned four

possible dates to complete the matter not a further 4 days in any event. It is unfair that the Tribunal chose to set the dates in my absence without the benefit of my input.

I note in the past week I have been served with new material and new affidavits from witnesses in this matter and that Mr. Snell intends on recalling witnesses and adding to the allegations against Mr. Subadar.

If the Tribunal insists on proceeding on May 16 and 17 I will be unable to attend because of a prior scheduled criminal trial; in any event I would have sought to adjourn the matter in light of all the new disclosure only presented in the last few weeks.

I have advised Mr. Subadar to seek the adjournment in my absence.

When, on May 16, 2006, the matter was called, the Applicant's counsel was not present although the Applicant was present. Counsel for the Registrar was also present and the matter was adjourned by the Tribunal to May 29 and May 30, 2006. The parties' respective counsel were required to address the question of costs on May 29, 2006.

On May 29, 2006, upon resumption of the hearing, the Registrar's counsel moved for costs relative to May 16 and May 17, 2006, being the dates the Applicant's counsel failed to attend. Counsel for the Applicant, in reply to the Registrar's motion for costs, stated that sometime in March, he observed that dates had been fixed for the matter to continue, that he was not able to explain "how it got lost in the shuffle", that he thought the criminal matter would be settled and that it was "inadvertence" on his part that the delay was caused. The Tribunal advised counsel that its decision on costs would be dealt with and incorporated in the Tribunal's decision at the conclusion of the hearing.

Under the Rules of Practice of the Tribunal (Rule 14), the Tribunal is entitled to order costs where a party has acted unreasonably, frivolously, vexatiously, or in bad faith.

Insofar as the motion for costs in respect of the May 16 and May 17, 2006 hearing dates are concerned, the Tribunal finds that the delay in the hearing on those two days was occasioned solely by the Applicant's counsel's unreasonable and unacceptable attitude. The adjournment order was served upon the Applicant's counsel's office in early February 2006, at which that date, he already knew of the criminal trial dates "set in January this year" according to his letter of May 10, 2006. Despite this knowledge, he allowed the Registrar's counsel, as well as the Tribunal, to remain in complete ignorance of this fact until May 10, 2006, some six days before the May 16, 2006, date to which the hearing had been adjourned. The Tribunal does not accept as a reasonable excuse "inadvertence" on the part of the Applicant's counsel, but finds his conduct to be unreasonable and grossly lacking in timely attention to the adjournment order issued by the Tribunal. He gave no reasonable explanation for his failure to inform the Tribunal, in a timely manner, of his possible inability to attend on May 16 and May 17, 2006. Accordingly, the Tribunal orders costs of \$1,600.00 against the Applicant for the two days the hearing was delayed on May 16 and May 17, 2006.

February 26, 2007

The hearing continued on various further dates in 2006. On September 26, 2006, the hearing was adjourned to January 30 and January 31, 2007. On January 30, 2007, the Applicant's counsel appeared without the Applicant being present. The Applicant's counsel informed the Tribunal that he was not able to proceed in the absence of the Applicant who he stated was "sick". The Registrar's counsel did not oppose the adjournment to the following day, but required verification as to the Applicant's inability to attend on January 30, 2007. The Applicant's counsel advised the Tribunal that "something" had been faxed to his office by the Applicant, and handed to the Tribunal a handwritten note from a medical practitioner. The handwriting on the note could not be deciphered by the Tribunal, and the Tribunal was unable to determine the medical condition that prevented the Applicant's attendance. The matter stood over until the next day, namely January 31, 2007. On the latter date, when the matter was called, the Applicant's counsel was in attendance, but not the Applicant who, according to his counsel, was still ill and "has gone to his half-brother's funeral". The matter did not proceed on January 31, 2007, and the Tribunal issued the following 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 expeditiously 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;

Pursuant to this order, the Applicant's counsel wrote to the Registrar's counsel as follows on February 19, 2007:

Please find enclosed a copy of a synopsis of witnesses and death certificate pursuant to the Order January 30 and 31, 2007.

Mr. Subadar does not consent to the release of his medical records.

Please be advised that I will not be representing Mr. Subadar at the hearing any longer.

I wish to caution you not to read anything into the end of my representation.

Mr. Subadar and I have reached this conclusion mutually.

I have advised Mr. Subadar to obtain a copy of the transcripts and he will be seeking alternate counsel. He also will be seeking an adjournment to accomplish this.

Counsel for the Registrar replied as follows to the Applicant's counsel above letter:

I acknowledge receipt of the names and synopsis of anticipated evidence of the witnesses you plan to call. I also confirm receipt of the Death Certificate attached to Mr. Welman's letter.

With respect to your "medical records", it is my understanding that what was requested of you was some independent confirmation of the initial reason you gave for not attending the hearing on January 30, which was you were too sick. Therefore, substantially all that is requested of you is confirmation of what you have already disclosed.

Respecting your seeking a further adjournment to order transcripts and obtaining new counsel, this hearing commenced February 6, 2006 and continued February 7, May 29, 30 and September 25, 26, 2006, when the Registrar's case closed. You have had many months to deal with any representation issues, order transcripts and prepare full answer and defence.

In the circumstances, your actions one week before the hearing is scheduled to continue, to which dates you consented, is an abuse of process and the Registrar, REBBA 2002 does not consent to adjournment of this matter.

On February 26, 2007, the Applicant appeared before the Tribunal without representation, and moved for an adjournment in order to obtain new counsel. Despite the objections of the Registrar's counsel, an adjournment was granted to the Applicant and the Tribunal issued the following order

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.

The hearing continued on April 18, 2007, as well as May 14, 2007, with the Applicant being unrepresented. However, on May 15, 2007, at approximately 9:00 a.m., a voicemail message was received by the Tribunal. The message was assumed to be from the Applicant, although it did not say it was the Applicant who was calling. The message indicated the Applicant had been unable to sleep the previous night due to pain. The message stated, therefore, that the Applicant would not attend the hearing on May 15, 2007. As the Tribunal staff were not able to speak with the Applicant, the matter was adjourned to July 13 and July 14, 2007, when the witnesses for the Applicant completed their testimonies.

Upon the Applicant's counsel's withdrawal as representative of the Applicant in February 2007, the Applicant explained to the Tribunal that he required the adjournment in order to retain fresh counsel and obtain a transcript of the hearing. The Applicant, however, did neither. He did not retain replacement counsel nor did he obtain the transcript.

The Applicant, the Tribunal finds, has dealt with the hearing of this matter in a cavalier and frivolous manner. His unreasonable refusal to disclose the illness from which he claimed to be suffering, as ordered by the Tribunal, is an abuse of process. The order was reasonable, and the Tribunal was entitled to the information so as to determine whether the illness, of which he complained, justified the granting of an adjournment. The Applicant's refusal to provide this information is obstructive, and is deserving of censure in an award of costs against him.

Accordingly, the Tribunal orders costs in the sum of \$800.00 for the delay in the hearing on February 26, 2007, which order is in addition to the Tribunal's order for costs relative to the aborted hearings on May 16 and May 17, 2007.

SUMMATION

In summary, and after considering the totality of the evidence as presented by the Registrar, the Tribunal finds that the Registrar has discharged the onus upon him and that the Applicant's past conduct, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, and finds that his registration should be revoked.

ORDER

Accordingly, pursuant to the authority vested in it by section 14(5) of the *Real Estate and Business Brokers Act, 2002*, as amended, the Tribunal directs the Registrar to carry out his proposal dated August 15, 2005, to revoke the registration of Rahaman Subadar as a real estate salesperson and orders Rahaman Subadar to pay costs in the sum of \$2400.00 to the Registrar, under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: October 4, 2007

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



PRE-HEARING

GREGORY CRISP – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002* AS
AMENDED, TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DOUGLAS J. SPILLER, Counsel, representing the Applicant,
Gregory Crisp

GEORGE DRAMETU, Counsel, representing the Registrar, under the
Real Estate and Business Brokers Act, 2002, as amended.

DATE OF
PRE-HEARING: September 5, 2007

Toronto

ORDER

A pre-hearing was held in this matter on September 5, 2007, before this Tribunal in the presence of Douglas J. Spiller, counsel for the Applicant and George Drametu, counsel, for the Registrar.

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no settlement of any of the issues although the Parties' respective counsel have agreed to possible discussions in an effort to resolve or simplify the issues.
3. The Parties have through their respective counsel made disclosure of documents in terms of Rule 6.3 of the Rules of Practice of the Tribunal.
4. Counsel for the Applicant advised that his client intends to raise a question concerning the constitutional validity or applicability of legislation at the hearing of this matter and Applicant's counsel's notice was drawn by the Tribunal to rule 8.1 of the Tribunal's Rules of Practice and the requirement to comply with that Rule.

The Tribunal Orders as follows:

In the event of the Registrar having in his possession or under his control relevant documents that relate to the four properties referred to in paragraph 8 of the Notice of Proposal, and which documents have not been included in or disclosed to the Applicant's counsel, then, and in such event, the Registrar's counsel shall by no later than September 28, 2007, provide the Applicant's counsel with true copies of such documents. In addition, the Registrar shall disclose true copies of notes made by the Registrar's investigator at the meeting with the Applicant on November 1, 2006.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: September 10, 2007

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

MOTION

DUGAL-DAN McDONALD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: LYNDA TANAKA, Acting Chair

APPEARANCES: PELLEGRINO CAPONE, Counsel for the Applicant

RON FOERSTER, Counsel representing the Registrar, *Real Estate
and Business Brokers Act, 2002*

DATE OF
HEARING: August 28 and September 4, 2007

Toronto

ORDER

A motion was brought by the Applicant pursuant to the Tribunal's Rules of Practice and heard on August 28 and September 4, 2007. The Applicant requested the following relief:

- a) particulars of several paragraphs of the Notice of Proposal issued by the Registrar,
- b) an order striking out certain paragraphs of the Notice of Proposal,
- c) an order for disclosure of certain documents,
- d) an order to expunge documents or other evidence obtained by one of the investigators with respect to two of the three properties,
- e) an order to expunge documents or other evidence obtained by one of the investigators during interviews with the Applicant and relating to two of the three properties,

- f) an order that in the event of non-compliance with any disclosure order made, the Registrar shall not refer to the document,
- g) in default thereof, an order striking out the Notice of Proposal, and
- h) an order for costs.

Introduction

The proceedings before the Tribunal were commenced by a Notice of Appeal by the Applicant filed with the Tribunal on April 10, 2007, with respect to a Notice of Proposal to Revoke the registration of the Applicant as a real estate salesperson (the "Proposal") pursuant to the Registrar's powers under the Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30 (REBBA 2002). The allegations in the Proposal relate to three properties, one in Toronto ("Property EGR"), one in Tweed ("Property VSN") and one in Ajax ("Property WD"). A pre-hearing had been held in the matter on August 10, 2007 and, pursuant to paragraph 2 of the Order issued following the pre-hearing, the Applicant served and filed a notice of motion as noted above, supported by the affidavit of the Applicant (Exhibit 3M). Also as required by paragraph 3 of the pre-hearing order, the Registrar provided a response to the Notice of Motion by way of a letter dated August 20, 2007 (Exhibit 4MA) and the affidavit of Brian Prendergast sworn August 20, 2007 (Exhibit 4MB).

At the opening of the motion hearing, the parties each filed additional affidavit material, Exhibit 5M being a further affidavit of the Applicant sworn August 28, 2007 and Exhibit 6M being a further affidavit of Mr. Prendergast sworn August 28, 2007.

The disclosure brief of the Respondent already provided to the Tribunal and to the Applicant was marked Exhibit 7M.

The Tribunal issued oral decisions during the course of the hearing of the motion on each of the several applications described above. This Order and Reasons records those orders.

Issues related to the Pre-hearing Order

The order issued after the pre-hearing provided in paragraph 5 that the Applicant provide to the Registrar a written response to the allegations in the Notice of Proposal by September 11, 2007.

In view of the orders made orally during the course of the motion brought by the Applicant, the Tribunal orders that the date for filing of the Applicant's position as provided in paragraph 5 of the pre-hearing Order be changed from September 11 to September 24, 2007.

The pre-hearing Order also provided for disclosure in accordance with the Rules of Practice of the Tribunal, that is ten days prior to the hearing, which is set for December 3, 4, 6 and 7, 2007. In view of the orders made concerning disclosure and concerns

raised as to what material should be seen by the hearing panel prior to the hearing, the Tribunal orders that:

- 1) Both parties will provide to each other copies of their disclosure documents and make available the things disclosed to be viewed, on or before October 15, 2007.
- 2) The parties shall not provide copies of their disclosure to the Tribunal prior to the commencement of the hearing.

Request for further particulars

The Tribunal has the power to order further particulars to be provided, under Rule 6 of the Rules of Practice. "Particulars" are defined in the Rules as:

"facts required to ascertain or clarify the nature of a party's allegation and on which that party is relying, but does not mean that the evidence which that party may use to prove such allegation, is true."

The Applicant relied on Rule 25.06 of the Rules of Civil Procedure R.R.O. 1990, Reg. 194 as amended ("Rules of Civil Procedure") to obtain further and better particulars such that reasonable information of the allegation is provided for the issues pertaining to good character, propriety or conduct or competence of the Applicant. Since the Tribunal has its own Rule that provides for particulars, Rule 25.06 is of limited assistance.

The Applicant had made a request for particulars in a letter from his counsel Mr. Capone dated August 8, 2007, which was marked as Exhibit C to the Applicant's Affidavit sworn August 14, 2007, part of Exhibit 3M. Exhibit 4MA provided the Registrar's response and the affidavits of Mr. Prendergast have also provided additional information.

Therefore the parties advised on the first day of the motion that the Applicant was seeking no further particulars than had already been given with respect to certain items, using the numbering of paragraphs used in Mr. Capone's letter of August 8, 2007:

- Para. 2 (with respect to paragraph 8 of the Notice of Proposal),
- Paras. 4 (b), (d), and (e) (with respect to paragraph #18 of the Notice of Proposal),
- Paras. 5 (a) and (b), (l) to (q) inclusive, and (s) (with respect to Property VSN), and
- Paras. 6 (a) to (c) inclusive, (f) to (k) inclusive (with respect to Property WD).

With respect to Para 1, the Tribunal ruled that the Registrar has provided the particulars and the further requests by the Applicant constituted evidence, not particulars.

With respect to Para. 3, Paras. 4(c), and 4(g), Paras. 5 (c), (d) and (e), (i), (j), (r) and (t), the Tribunal ordered that no further particulars need be provided.

With respect to Para. 4(a) the Registrar stipulated that he had provided all the particulars.

With respect to Para. 4(f), the Registrar agreed that if any further information as to a greater knowledge and involvement in the financing by the Applicant than that alleged in the Notice of Proposal comes to the Registrar's attention, that information is to be provided to Mr. Capone when it becomes available to the Registrar.

With respect to Para 6(e) the request for particulars related to paragraph 49 of the Notice of Proposal, which deals with an amendment to an agreement of purchase and sale relative to Property WD. The paragraph 49 is quite lengthy and includes allegations of the mortgagee being misled as to the value of the property. The Applicant requested particulars of his knowledge of whether or not the amendment to the Agreement of Purchase and Sale alleged in the paragraph was provided to the Mortgagee or "was failed to be provided to the Mortgagee". Counsel for the Registrar stipulated that there was no allegation of knowledge on the part of the Applicant in this paragraph as to whether or not the amendments to the agreement of purchase and sale were actually provided to the mortgagee or "failed to be provided".

The Registrar agreed to provide further particulars with respect to item 6(d) with respect to Property WD.

Except as set out above, the Tribunal, having heard the submissions on behalf of the Applicant and the Registrar, dismissed the remaining requests for further particulars made in Mr. Capone's letter of August 8, 2007.

Request to Strike the Notice of Proposal

The Applicant brought a motion to strike out the Notice of Proposal seeking the same relief as would be available under Rule 25.11 of the Rules of Civil Procedure to a party with respect to pleadings, that is, to strike portions of the Notice of Proposal as being prejudicial to the fair trial, scandalous, frivolous, or an abuse of process of the court, and under Rule 25.06(2) to strike out portions of a pleading that plead a conclusion of law without the pleading of the supporting material facts.

The Notice of Proposal is not a pleading and the Tribunal is not included in the definition of "court" in the Rules of Civil Procedure. Further the Tribunal's Rules of Practice do not incorporate the provisions of the Rules of Civil Procedure, as do some tribunal rules. There is no Rule of Practice of the Tribunal permitting the Tribunal to strike out portions of a Notice of Proposal. The jurisdiction in the Tribunal that most closely resembles that provision in the Rules of Civil Procedure is Rule 2.10(1) which gives the Tribunal the power to dismiss proceedings without a hearing under certain situations, and Section 23 of the Statutory Powers Procedure Act, R.S.O. 1990 c. S. 22 as amended ("SPPPA") which permits the Tribunal to prevent abuse of its process.

The Tribunal ruled orally on August 28, that it had no jurisdiction to grant the relief requested under the Rules of Civil Procedure, but the Applicant was invited to reconsider his request for relief bearing in mind the power set out in Rule 2.10 of the

Rules of Practice and Section 23 of the SPPA. On September 4, the Applicant revised his request for relief to strike the Notice of Proposal and to expunge certain paragraphs (specifically paragraphs 17, 18, 42 and 46) of the Notice of Proposal under Rule 2.10 of the Rules of Practice and Section 23 of the SPPA. The Tribunal refused to grant the relief requested and dismissed that portion of the motion for the reasons given orally.

Request for Disclosure

The Applicant required disclosure of:

- a) documents or notes from conversations between the Applicant and Dave Tredrea, Jo Ann Swain, Dave Andrew, Maureen McDaniels, Brian Prendergast or agents thereof ("agents" meaning inspectors of the Registrar's office);
- b) a list of the persons interviewed with the corresponding dates, by Dave Tredrea, Jo Ann Swain, Dave Andrew, Maureen McDaniels, Brian Prendergast or agents thereof, for the purpose of or related to the investigation of the Applicant;
- c) documents or notes from conversations between any party interviewed by Dave Tredrea, Jo Ann Swain, Dave Andrew, Maureen McDaniels, Brian Prendergast or agents thereof for the purpose of or related to the investigation of the Applicant;
- d) documents or notes from conversations between Ms. Jennifer J. Katsoulis, inspector for the Real Estate Council of Ontario and assigned to investigate the Applicant, and a bank mortgage representative which apparently occurred in early 2004, according to her affidavit of March 15, 2004, Tab 4, Exhibit 7M;
- e) documents or notes from conversations between the Applicant and Dave Tredrea that occurred prior to the closing of the transactions related to the EGR property on December 2, 2004;
- f) documents or notes relating to the outcome or conclusion of the 2004 investigation of the EGR property; and
- g) such other documents or notes that are relevant to the investigation of all three properties.

The Registrar's counsel agreed, on the basis that his agreement was without prejudice to his position that he was not obliged to disclose the material requested, to produce the documents in items a), c) and d) above on or before September 18, 2007, whether or not he intended to rely on those documents. He reserved the right to assert privilege or a claim of confidentiality on the documents that would otherwise be disclosed under this agreement. The Tribunal orders that those documents will be produced by September 18, 2007, in accordance with counsel's agreement.

The Registrar's counsel also agreed to advise the Applicant's counsel of any objection by the Registrar with respect to providing the list of persons interviewed as requested in item b) above, together with the grounds for the objections. If counsels are unable to resolve the issue after this discussion, then a further motion appointment may be arranged.

With respect to item e), the Registrar's counsel has stipulated that he is unaware of any such documents.

With respect to items f) and g) above, the Registrar will disclose those documents or notes that are in the possession of the Registrar, subject to claims of privilege and confidentiality, that relate to the Notice of Proposal. Disclosure of the documents under f) and g) shall be on or before October 15, 2007.

Request to expunge

The Applicant's final request for relief was for an order expunging certain documents, as noted in paragraphs referred to above

- d) an order to expunge documents or other evidence obtained by one of the investigators with respect to two of the three properties,
- e) an order to expunge documents or other evidence obtained by one of the investigators during interviews with the Applicant and relating to two of the three properties,

No specific rule was referenced in the argument in support of the order to expunge. The Applicant referred to Sections 19 and 22(1) of REBBA 2002 on the basis that the investigators who undertook the investigation may have been properly authorized under the predecessor Act to REBBA 2002 to undertake an investigation with respect to Property EGR and obtain documents and conduct interviews in that regard. The Applicant's position was that no such authorization existed under REBBA 2002 and therefore the investigation with respect to Properties WD and VSN were without proper authorization and should not proceed. The argument with respect to the statutory authorization was in essence withdrawn when the Director's order appointing the investigator under REBBA 2002 was tendered in the affidavit of Mr. Prendregast of August 20, 2007 (Exhibit 4MB). With respect to the remaining arguments as to procedural fairness and natural justice, the Tribunal delivered an oral ruling addressing the arguments related to those issues. A transcript of the oral ruling dismissing the request for relief has been ordered and will be available in the file.

The Tribunal specifically made no ruling on the admissibility of the statement of the Applicant taken in an interview with one of the RECO investigators and reserved the right of the Applicant to bring forward any objections to the interview statement as part of the evidence in the case, as it may evolve. The Tribunal ruled that it had no evidence of prejudice arising to the Applicant at this stage of the proceedings but specifically did not wish to tie the hands of the panel hearing in the matter to ensure that procedural fairness and the Applicant's entitlement to natural justice with respect to his own statements, whether inculpatory or exculpatory, are protected. Any concerns with

respect to prejudice arising from the hearing panel seeing the disputed material in advance is addressed by ensuring that the hearing panel does not review the documents that were disclosed by the Registrar until such time as the panel rules on the admissibility and relevance of the documents.

The Tribunal therefore orders that the hearing panel shall be provided prior to the hearing with the Notice of Proposal (Exhibit 1M), the Notice of Appeal (Exhibit 2M), the pre-hearing Order of Member Spencer dated August 10, 2007, and this order and the transcript of the ruling made September 4, 2007, and no other documents. The exhibits from this motion will be kept in as separate file from that provided to the hearing panel.

There are three further requests for relief in the motion, being items f, g, and h, listed at the outset of this decision. With respect to the requests for orders contingent on non-disclosure or non-compliance, it is premature to make such an order. With respect to costs, the Tribunal ruled that it was not appropriate to order costs at this stage in this case.

The Tribunal thanks counsel for their efforts to narrow the issues to be addressed in this decision.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

Released: September 12, 2007

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



PRE-HEARING

STEPHEN MICHAEL MORANIS – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: MAHMUD JAMAL, Counsel for the Applicant

TIM SNELL, Counsel representing the Registrar, *Real Estate and
Business Brokers Act, 2002*

DATE OF
PRE-HEARING: August 28, 2007

Toronto

ORDER

A pre-hearing was held in this matter on August 28, 2007, in the presence of the Applicant, Stephen Michael Moranis; Mahmud Jamal, counsel representing the Applicant; and Tim Snell, counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar").

The issues to be addressed at the hearing were not discussed in detail. Counsel representing the Applicant and the Registrar indicated their preparedness to enter into discussions regarding potential settlement. Counsel for the Applicant also indicated that motions relating to the hearing may be filed.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6.3 of the Rules of Practice of the Tribunal. In particular, Counsel for the Registrar will provide further disclosure to Counsel for the Applicant by September 17, 2007, and Counsel for the Applicant will provide a written

response to the Proposal to Revoke Registration dated March 13, 2007, and the Supplementary Proposal to Revoke Registration dated July 31, 2007 no later than December 5, 2007.

3. The Applicant will file any motions and supporting documentation relating to the hearing with the Tribunal and provide copies to Counsel for the Registrar no later than December 5, 2007.
4. A further pre-hearing in this matter is scheduled to take place on December 5, 2007, commencing at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
5. The hearing scheduled to begin on September 17, 2007, is adjourned to February 4, 2008, commencing at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and will continue on February 5, 6, 7 and 8, 2008, if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: August 31, 2007

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



PRE-HEARING

DUGAL-DAN McDONALD – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: PELLEGRINO CAPONE, Counsel for the Applicant

RON FOERSTER, Counsel representing the Registrar, *Real Estate
and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: August 10, 2007

Toronto

ORDER

A pre-hearing was held in this matter on August 10, 2007, in the presence of the Applicant, Dugal-Dan McDonald; Pellegrino Capone, counsel representing the Applicant; and Ron Foerster, counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar").

The issues to be addressed at the hearing were not discussed. Counsel representing the Applicant provided copies of two letters he had sent to the Respondent's Counsel, the first of which requested further particulars related to the Respondent's Notice of Proposal to Revoke Registration, and the second of which indicated his intent to file a number of motions relating to the proceedings.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The Applicant, by August 15, 2007, will file the following three motions with the Tribunal and provide copies to Counsel for the Respondent:

- (1) to obtain disclosure of particulars with respect to the Notice of Proposal to Revoke Registration dated March 23, 2007;
 - (2) to strike certain particulars set out in the Notice of Proposal to Revoke Registration dated March 23, 2007; and
 - (3) to exclude evidence with respect to 530 Victoria Street North, Tweed, Ontario and 103 Wilce Drive, Ajax, Ontario.
3. The Respondent, by August 20, 2007, will file its written response to the Applicant's motions with the Tribunal and provide the copies to counsel for the Applicant.
 4. The above-noted three motions will be heard on August 28, 2007, commencing at 1:30 p.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
 5. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6.3 of the Rules of Practice of the Tribunal and the disclosure requirements relating to expert witnesses set out in Rule 6.4. In particular, the Applicant will provide a written response to the Proposal to Revoke Registration dated March 23, 2007, no later than September 11, 2007.
 6. The hearing scheduled to begin on October 11, 2007, is adjourned, peremptory on the Applicant, to December 3, 2007, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue on December 4, 6 and 7, 2007, if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: August 15, 2007

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



GEORGE CHRISTOPHER SZANTO

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O.
2002, CHAPTER C. 30, SCHEDULE "C".

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GEORGE CHRISTOPHER SZANTO, was neither present nor
represented at the hearing

GEORGE DRAMETU, Counsel, representing the Registrar under the
Real Estate and Business Brokers Act, 2002

DATES OF
HEARING: April 4, 2007, and July 30, 2007 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal to the Licence Appeal Tribunal ("LAT") by George Christopher Szanto (the "Applicant") from a written Notice of Proposal dated November 20, 2006 (the "proposal") issued by the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Registrar" and the "Act" respectively). The proposal proposed to refuse the registration of the Applicant as a salesperson under the Act.

The reasons given by the Registrar in his proposal are as follows:

1. 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;
2. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business;

3. For greater particularity, the Applicant has a past criminal conviction of Fraud Over \$5,000 under the Criminal Code as recent as 2004, wherein the Applicant was ordered to pay restitution of \$46,893.20, which remains outstanding;
4. The Applicant agreed to Registrar's imposed Terms and Conditions since 2000, due to a history of outstanding judgments;
5. For further particularity, the Applicant has numerous outstanding judgments, in excess of \$200,000.00, which the Applicant has not satisfied and/or made any efforts to pay or establish a re-payment schedule.

(Exhibit 3, Tab 1)

The Registrar bases his proposal to refuse the Applicant's registration on section 10 of the Act, which states as follows:

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, or
 - (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;

THE EVIDENCE

The evidence presented by the Registrar at the hearing consisted of the oral testimony of James Sturino, Catherine Marie Step, Leo Corsetti and Yvonne Nandallal.

THE TESTIMONY OF JAMES STURINO

In summary, Sturino stated in his testimony as follows:

He operates a real estate brokerage under the name Sturino Realty Limited in Etobicoke, Ontario, and has operated as such since May 1974. During 1998/1999, the Applicant worked as a salesperson at Sturino's brokerage. In April 1999, the Applicant's employment with the brokerage was terminated by Sturino (Exhibit 3, Tab 4).

By letter dated April 26, 1999, addressed to the Real Estate Council of Ontario ("RECO"), Sturino gave his reasons for terminating the Applicant. The letter stated as follows:

I have my doubt's that George Szanto should continue to have a Real Estate licence. He is not financially stable and owes significant monies to many people.

George Szanto owes his 2 previous Broker's significant monies. He owes Coldwell Banker Sturino Realty in excess of Twenty Thousand Dollars, he borrowed over Four Thousand Dollars from various agents in my office that I was not aware of until I dismissed him on April 16, 1999. He owes Agents Equity from previous companies \$22,250.00. He owes Realty Commissions \$19,255.00 on a proposed firm deal that did not close. He also owes many past clients monies who have called my office for help. I am upset with Mr. George Szanto's previous Broker's because they did not write you and describe his Real Estate ethics and financial mismanagement. I got stung on a firm deal with a Real Estate commission of EIGHTY THOUSAND dollars (\$80,000.00) with a FIFTY THOUSAND dollar (\$50,000.00) deposit that did not close.

I believe but have no proof, he did this in the past but the previous Brokers did not have the "BALLS" to report him to RECO or at least call a fellow Real Estate Broker about Mr. Szanto, business practices.

I have been in business for twenty-five years and I knew Mr. Szanto Senior who was a respected Real Estate Broker for many years, but something must be done about George Szanto's methods, his borrowing of monies from clients, friends, Brokers, finance companies and not paying these debt's back. His deception of producing firm deals and then do not close has hurt many people, and has made a bad name for the Real Estate Industry.

I strongly urge you to investigate his past employer's and get some feedback from these Broker's.

I am always available if you need any further information for your file. (Sic.)

(Exhibit 3, Tab 6)

Sturino went on to testify further that when the Applicant joined his brokerage, he was working on a deal with commission due to the Applicant, on closing, of \$75,000.00. Sturino lent the Applicant \$20,000.00 by advancing him part of his commission and the Applicant also obtained \$22,500.00 as a further advance on his commission from Agent's Equity, a corporation that advances funds to salespersons prior to a deal closing and who are due commission on the deal closing. After advancing the Applicant \$20,000.00, on what Sturino had been told by the Applicant was a firm deal, Sturino discovered by speaking with the vendor that there was never a firm deal and that the deal was a conditional one. The deal did not close and the brokerage was obliged to return the \$50,000.00 deposit to the purchaser. Sturino ascertained that the Applicant had altered the agreement of purchase and sale by falsely making the agreement appear to be a firm deal when in fact it was a conditional deal. A portion of the \$20,000.00 advance was recovered by the brokerage from the Applicant. However, when he was terminated by Sturino in 1999, the Applicant still owed the brokerage \$8,300.00 and despite legal steps taken, the balance of \$8,300.00 is still owing by the Applicant (Exhibit 3, Tab 52).

THE TESTIMONY OF CATHERINE MARIE STEP

Step testified that she is the credit manager at Agent's Equity, which she described as a factoring company that enters into agreements with salespersons to purchase up to 90% of

their sales commissions. The salespersons who enter into such agreements assign to Agent's Equity, as security for their loan, up to 90% of their commissions due.

In the course of her employment with Agent's Equity, Step came to know the Applicant. Step commenced to work for Agent's Equity in 1998 and at that time, the Applicant was already "delinquent". Agent's Equity had six contracts with the Applicant under which it had made six advances to the Applicant.

Step produced for the Tribunal a statement of account relative to the Applicant's contracts with Agent's Equity and which statement reflects a balance owing by the Applicant as at April 3, 2007 of \$92,307.98. Since September 2000, the Applicant has made no repayments to Agent's Equity and interest continues to accrue on the unpaid balance (Exhibit 4).

Step went on to state that not one of the six real estate transactions closed in respect of which Agent's Equity made advances of commissions to the Applicant. Steps were taken in attempts to recover what is owing to Agent's Equity, but such steps did not produce results despite judgments and garnishees issued. The Applicant chose to ignore the court orders for payment and was never cooperative and did not make efforts to settle his obligations (Exhibit 3, Tab 51).

Step concluded her testimony by stating that Agent's Equity does not make advances to salespersons where the deal is conditional.

THE TESTIMONY OF LEO CORSETTI

Corsetti stated in his testimony that he is a paralegal and has operated as such since 1998. He is familiar with the Applicant, as Sturino had contacted him in 2001 with the request that he pursue recovery of the amount the Applicant owes to Sturino.

Corsetti went on to state that, on behalf of Sturino, he instituted a Small Claims Court action against the Applicant for \$10,000.00 and although he obtained a judgment against the Applicant, he has only been successful in recovering \$823.67. Since 2003, he has not recovered anything from the Applicant.

As recently as July 14, 2006, Corsetti exchanged e-mails with the Applicant in which the Applicant undertook to pay \$100.00 per month as from August 2006, in reduction of his indebtedness to Sturino. Despite this undertaking, the Applicant has paid nothing to reduce his liability to Sturino. The Applicant was required to attend an inquiry in the Brampton court in July 2006, but failed to attend and a warrant for the Applicant's arrest was authorized and issued. Despite ongoing attempts to recover, the Applicant remains in default and presently owes \$11,784.23 including interest.

THE TESTIMONY OF YVONNE NANDALALL

Nandalall testified that she works for RECO as a registration officer. Her duties entail ensuring compliance by registrants with the Act. Registration is conditional on financial responsibility and good conduct.

Nandalall commenced dealing with the Applicant's file in 2005, and in so doing, she became familiar with details concerning the Applicant's conduct leading to the Registrar's Proposal.

In the course of her testimony, Nandalall dealt with the allegations in the Proposal. She stated that the Applicant ceased to be registered under the Act as of September 2005, after having been registered as a salesperson since May 1983. He worked for various brokers during the period of his registration.

In June 2000, the Registrar became aware of two judgments registered against the Applicant. One such judgment was for \$462.39 in favour of Mississauga Hydro-Electric Commission, and the other in favour of Realty Commissions for \$24,107.26. These judgments, effective June 17, 1996, and July 12, 1999, were still outstanding and when the Registrar inquired of the Applicant regarding these outstanding judgments, he did not deny their existence.

In September 2000, the Applicant's registration lapsed and during that month, Sturino's complaint was received by RECO. When, in July 2001, the Applicant applied for reinstatement of his registration, he was registered on the following terms and conditions, to which he agreed:

- a) I agree to notify the Registrar in writing within 10 days of any new judgments filed against me and to provide copies of said judgments along with a repayment schedule;
- b) I agree to use my best efforts to ensure that the judgments outstanding against me held by Mississauga Hydro-Electric Commission and Realty Commission are satisfied within the next 2 year registration period ending in 2003;
- c) I agree to provide to the Registrar's Office at my cost a current Execution Certificate for myself from the Sheriff's office at Brampton and the municipality where I live (if different), at the time of my next renewal;

In May 2002, the Applicant's registration under the Act expired due to his failure to meet RECO's Mandatory Continuing Education Policy. When the Applicant applied for reinstatement in February 2003, the Registrar agreed to the Applicant's reinstatement subject to the revised terms and conditions, which included the following:

- a) I agree to provide the Registrar a full report in every six months as to the progress made on the repayment plan or the settlement offer on each of my outstanding judgments; which includes any documents and correspondence with my creditors in satisfying all outstanding judgments;
- b) I agree to notify the Registrar in writing within 10 days of any new judgments filed against me and to provide copies of said judgments along with a repayment schedule;

- c) I agree to provide to the Registrar's Office at my cost a current Execution Certificate for myself from the Sheriff's office at Brampton and the municipality where I live (if different), at the time of my next renewal.

In addition to the Mississauga Hydro-Electric Commission judgment and Realty Commissions judgment, the Applicant had sent the Registrar information regarding a further creditors and indebtedness to those creditors as follows:

- Revenue Canada	\$140,000.00
- Commission Advance	\$ 20,000.00
- Equirex Leasing	\$ 2,000.00
- Prudential Realty	\$ 3,000.00

The Applicant was reinstated on revised terms and conditions in March 2003.

In July 2004, the Registrar learned of an amount of \$10,199.88 being due and owing by the Applicant in respect of commissions advanced to him in relation to transactions that did not close.

In March 2005, the Applicant applied for renewal of his registration and in answer to a question asked in that application, he disclosed that he had a criminal conviction for fraud to which, on April 27, 2004, he had pleaded guilty. The sentence following the conviction required the Applicant to make restitution of \$41,000.00 to the Government of Canada. Upon obtaining the judge's reasons for conviction and sentence, the Registrar learned that the Applicant had been convicted of a welfare fraud involving some \$46,893.00. He was ordered to pay restitution of the aforementioned amount and was sentenced to 23 months imprisonment in the community. The restitution order required him to repay the aforementioned amount at the rate of \$2035.00 per month. The monthly amount of restitution ordered by court was, on July 10, 2006, reduced to \$500.00 per month. The restitution orders have not been complied with by the Applicant.

In November 2005, the Applicant disclosed to the Registrar a list of his creditors totaling \$235,600.00. As a result of this disclosure, the Registrar wrote the Applicant requesting his attendance at a meeting scheduled for January 5, 2006. The Applicant attended this meeting and it was explained to him that the Registrar viewed his conviction for fraud in a serious light as it also did regarding his outstanding judgments. Pursuant to this meeting, the Registrar confirmed in a letter to the Applicant dated January 9, 2006, that he required proof of any payments made by the Applicant to his various creditors. Despite further letters addressed to the Applicant dated February 9, 2006, and March 9, 2006, the Registrar did not receive the required information from the Applicant. The Applicant however verbally promised the required information by March 31, 2006. Such information was not received from the Applicant, and when administrative action was threatened, the Applicant wrote to the Registrar on April 25, 2006, that "there have been no arrangements made" and that he "will make arrangements for repayment A.S.A.P."

On May 12, 2006, the Registrar wrote to the following creditors or their agents/solicitors:

- Coldwell Banker Sturino Realty
- Agents Equity Inc.
- Royal LePage Real Estate Services Ltd.
- Realty Commissions

In each of the above letters, the Registrar posed the following questions regarding recovery of amounts owed by the Applicant:

- i) Did this Execution arise from a real estate transaction? If yes, please provide details.
- ii) Has this Execution been fully or partially satisfied? If yes, what are the details?
- iii) Is the above-named applicant currently negotiating a repayment schedule with the Creditor? If yes, what are the details?
- iv) Has the above-named applicant entered into a repayment schedule with the Creditor? If yes, what are the details and has the above-named applicant honoured such repayment schedule?
- v) What other steps, if any, have the Creditor taken to collect the money owing under the Execution?

In regard to Coldwell Banker Sturino Realty, the latter's agent informed the Registrar that no monies have been repaid by the Applicant and no schedule of repayment negotiated or established.

Insofar as Agents Equity Inc. is concerned, the Registrar was advised that "no payment has been received" and that the Applicant had never been cooperative and "has made no efforts to retire this debt or make a settlement of the balance. His handling of the account was to simply ignore it, which is what he has done."

THE TESTIMONY OF BRIAN SCHOLTZHAUER

Schlotzhauer stated in his testimony that he is the Deputy Registrar under the Act and his duties include the administration of the Act and registration of applicants as well as their compliance with the Act. He went on to state that the Act is intended to regulate the real estate industry and operations relating to real estate transactions. An applicant who meets the requirements under section 10 of the Act, is entitled to registration or renewal of registration.

Schlotzhauer went on to state that the past financial responsibility of an applicant or registrant is important in the registration or renewal process. Similarly, past or previous conduct is important and this latter aspect would encompass the cooperation the Registrar receives from applicants or registrants, their honesty and integrity and whether they have suffered convictions.

Schlotzhauer referred the Tribunal to the reasons stated by the Registrar in his Proposal for refusing the Applicant's registration. These reasons are as follows:

1. 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;
2. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business;
3. For greater particularity, the Applicant has a past criminal conviction of Fraud Over \$5,000 under the Criminal Code as recent as 2004, wherein the Applicant was ordered to pay restitution of \$46,893.20, which remains outstanding;
4. The Applicant agreed to Registrar's imposed Terms and Conditions since 2000, due to a history of outstanding judgments;
5. For further particularity, the Applicant has numerous outstanding judgments, in excess of \$200,000.00, which the Applicant has not satisfied and/or made any efforts to pay or establish a re-payment schedule.

Schlotzhauer went on to state that insofar as the Applicant is concerned, the issues are financial responsibility and past conduct. In regard to the former, he contended that the Applicant's continual promises to pay his obligations have repeatedly come to nought and that the Applicant has persistently failed to deal with judgments and his debts. Not only has the Applicant failed to deal with his past debts and judgments, but he is repeatedly incurring new debt, which is reflective of irresponsible conduct.

The criminal conviction for fraud is viewed by Schlotzhauer in a serious light. The Applicant blatantly defrauded the welfare system. The record of the Judge's reasons for conviction and sentence show that the Applicant actively, deliberately and over a period of time defrauded the welfare system of large sums none of which have been repaid under the restitution Order. The Applicant's conduct is indicative of his drive for acquiring money that has today resulted in his owing over \$200,000.00. His reckless and ongoing conduct shows, according to Schlotzhauer, a non-caring attitude and this conduct should not be permitted in the real estate industry.

He further stated that all attempts made by the Registrar to accommodate the Applicant have been completely exhausted. The Applicant continues to disregard his creditors and his promises made to them. The Registrar, as Schlotzhauer pointed out, attempted to assist the Applicant by entering into terms and conditions in order for him to continue as a salesperson. Despite these efforts to accommodate the Applicant, it is quite apparent to Schlotzhauer that the Applicant is ungovernable and the integrity of the industry would be jeopardized if he were permitted to be registered.

FACTS FOUND PROVEN

The following are the facts found proven by the Tribunal.

1. The Applicant was registered as a salesperson under the Act in May 1983.
2. In or about June 1996, Mississauga Hydro-Electric Commission obtained a judgment against the Applicant in the sum of \$462.39, which judgment remains unpaid.
3. In or about July 1999, Realty Commissions obtained a judgment against the Applicant in the sum of \$24,107.26, which judgment remains unpaid.
4. As at April 3, 2007, the Applicant remained indebted to Agent's Equity, a commission financing concern, in the sum of \$92,307.28, in respect of commission advances made by Agent's Equity to the Applicant since April 3, 1997.
5. The Applicant has failed to pay any amount to Agent's Equity since December 2000, in reduction of his indebtedness to Agent's Equity.
6. The Applicant, while employed as a salesperson by Sturino Realty Limited, a real estate brokerage, obtained an advance on commissions in the sum of \$20,000.00, which advance was made pursuant to the Applicant falsely informing the brokerage that a deposit of \$50,000.00 received by the brokerage was made pursuant to a transaction without any conditions attached to the transaction, whereas in truth and in fact, and to the knowledge of the Applicant, the transaction was subject to a condition or conditions, which condition or conditions were not fulfilled resulting in the brokerage having to refund the \$50,000.00 deposit to the proposed purchase.
7. The \$20,000.00 advanced by Sturino Realty Limited has not been repaid by the Applicant who, despite a judgment in favour of Sturino Realty Ltd., still owes that brokerage the sum of \$11,783.00. No payments have been made by the Applicant since 2003.
8. The Registrar permitted the Applicant to continue to be registered under the Act as a salesperson subject to terms and conditions to which the Applicant agreed and consented.
9. Despite the Applicant having agreed to the terms and conditions of July 2001 and thereafter on amended terms and conditions of February 2003, the Applicant failed to abide by such terms and conditions, and is in breach of same.

10. On April 27, 2004, the Applicant was convicted of fraud over \$5,000.00, under section 380(1)(A) of the Criminal Code of Canada, which conviction related to the Applicant having defrauded the Government of Canada in respect of welfare monies unlawfully obtained by the Applicant.
11. On April 27, 2004, the court, upon convicting the Applicant, ordered under section 380(1)(A) of the Criminal Code of Canada the Applicant to make restitution in the sum of \$46,893.00 at the rate of \$2,035.00 per month. The Applicant failed to make payments as ordered, nor did he make payments under a variation of the order made on July 10, 2006, in terms of which his monthly restitution payments were reduced.

THE LAW

The *Real Estate and Business Brokers Act, 2002*, states as follows:

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, or
 - (iii) the applicant or an employee or agent of the applicant makes a false statement or provides a false statement in an application for registration or for renewal of registration;
13. (1) Subject to section 14, 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 10.
14. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,
 - (a) refuse under subsection 13 (1) to grant or renew a registration;
 - (2) The notice of proposal shall set out the reasons for the proposed action and 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.
 - (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.

APPLICATION OF LAW TO FACTS

The onus of proof is upon the Registrar in this matter. The issue is whether or not, on the evidence placed before the Tribunal at the hearing, the Applicant's past conduct persuades the Tribunal on the balance of probabilities that the Applicant will not act in accordance with law and with honesty and integrity.

It is noted and recorded that the Applicant did not attend at the Tribunal's hearing nor was he represented. The Tribunal is satisfied that the Applicant was aware of the dates of hearing having been duly served with the Notice of Hearing. Additionally, the Applicant had been verbally advised by a member of the Tribunal's staff of the dates and time of the hearing and the venue of such hearing.

The evidence presented by the Registrar, including the testimony of various persons who appeared before the Tribunal on the Registrar's behalf, was uncontested by the Applicant. Having listened to the various persons' testimony, the Tribunal finds no reason to reject their testimony.

Insofar as the Applicant's financial position is concerned, there was an abundance of evidence placed before the Tribunal that points to an unflattering picture of the Applicant's financial conduct.

The evidence shows two judgments against him dating back to 1996 and 1999 (Mississauga Hydro-Electric Commission and Realty Commissions). These judgments remain unsatisfied. The evidence further shows that the Applicant is indebted to Agent's Equity in over \$92,000.00 in respect of monies advanced on his undertakings to Agent's Equity to repay those advances. Over a period of some ten years, he has allowed the sum owed to Agent's Equity to increase and, since December 2000, he has seen fit to make no payments whatsoever in reduction of this debt. The repayment of his debt obligation to Sturino Realty Limited, which dates back to 1999, remains unpaid and his various promises to liquidate the amount owing have been broken time and time again with no payments in the last four years. Following his conviction for fraud, the Applicant was ordered to pay restitution in the amount of some \$47,000.00, and since that order in April 2004, he has not reduced that debt.

Presently, his total debts are in the vicinity of \$236,000.00.

All of the above is reflective of an individual who is ungovernable and without a sense of obligation to his creditors. Judging from his past conduct in relation to his financial responsibilities, there can be little or no doubt in the Tribunal's mind that his future conduct in his financial dealings will follow the same pattern as his past conduct. The duty and obligation imposed upon the Registrar by the Act is to safeguard and protect the interests of the public in their dealings with registrants under the Act. To permit the Applicant to be registered under the Act by the Registrar would be an abrogation of the latter's duties and obligations. Accordingly, on the basis of the Applicant's demonstrated, recent and ongoing

irresponsibility in relation to his financial affairs, the Tribunal finds that the Registrar's proposal is well founded.

Insofar as the second issue is concerned, namely the past conduct of the Applicant, the Tribunal finds that the criminal conviction of the Applicant for fraud over \$5,000.00 is, in and of itself, sufficient grounds for the Registrar to deny the Applicant's registration. The conviction involved fraud, which involves the element of deceit or dishonesty. The Applicant pleaded guilty to the offence and, by so doing, impliedly conceded that his conduct involved dishonesty. To have defrauded the welfare system is theft from the public purse, and offends against public policy.

As far back as 1999, the Applicant had embarked upon an act of dishonesty or fraud when he deliberately misled his employer, Sturino Realty Limited, to advance commission to him. He altered an agreement of purchase and sale that resulted in his employer being misled into believing that a deal was a firm deal whereas the Applicant knew it was a conditional deal. Had his employer known that the transaction was not firm but only conditional, the employer would not have advanced commission to the Applicant. Such dishonest conduct as exhibited by the Applicant in regard to this transaction is, in the Tribunal's opinion, sufficient to deny registration to the Applicant.

In an overall analysis of the Applicant's conduct, including both the financial aspects and the clearly dishonest recent past conduct of the Applicant, the Tribunal finds that the Applicant is not a suitable candidate for registration under the Act, and that his application should be denied.

DECISION

Accordingly, pursuant to the authority vested in it by section 14. (5) of the *Real Estate and Business Brokers Act, 2002*, the Tribunal directs the Registrar to carry out his proposal dated November 20, 2006, to refuse George Christopher Szanto's registration as a salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: August 10, 2007

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



PRE-HEARING

ELIZABETH GOULART – PRE-HEARING

AN APPEAL FROM A DECISION OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE REGISTRATION AS A SALES PERSON UNDER
THE ACT.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: GEORGE DRAMETU, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act, 2002*

SUSAN PENNYPACKER, Counsel, representing the Applicant
Elizabeth Goulart, Applicant

DATE OF
PRE-HEARING: July 13, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on July 13, 2007, in Toronto before this Tribunal.

Pursuant to the submissions and agreements made during the pre-hearing this Tribunal makes the following Order:

- 1) The Parties to this matter are the Applicant and the Registrar.
- 2) In the event a Settlement Agreement is reached by the Parties, notice of such will be delivered to the Tribunal promptly indicating whether the Hearing is required.

- 3) In the event such an agreement is not reached, the Parties have been reminded of their obligation to fully comply with Rule 6 of the Tribunal's Rules of Practice regarding disclosure of evidence.
- 4) Should a Preliminary Motion concerning the admission of certain evidence be required, the Parties are to comply with section 11 of the Tribunal's Rules of Practice.
- 5) The main issues identified by the Parties for the Hearing concern the Applicant's past conduct; in particular its currency and implications on her propensity to act with honesty and integrity as required under s.6(1) of the Act.
- 6) The Registrar intends to rely on one witness: the deputy Registrar; the Applicant intends to rely on three witnesses, being the Applicant's intended employer broker, parole officer and the Applicant but retains her right to call further witnesses if necessary.
- 7) The dates needed for the Hearing have been modified from those earlier set aside to October 22 and 23 only. The time and place have been confirmed as 9:30 a.m. commencement at the Tribunal Chambers located at 1 St. Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

RELEASED: July 26, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MARCUS BREKKER

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: NICHOLAS XYNNIS, Counsel, representing the Applicant

TIM SNELL, Counsel, representing the Registrar under the *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: June 28, 2007 Toronto

DECISION AND REASONS FOR DECISION

BACKGROUND

The Applicant filed this Appeal after receiving a Notice of Proposal to Refuse Registration dated January 22, 2007, refusing to grant to the Applicant a licence under the provisions of section 10 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, Chapter 30 Schedule C ("the Act"). The appeal is brought pursuant to the provisions of section 14 of the Act.

The Registrar who administers the Act refused the Applicant's application for a licence on the ground that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Registrar based his decision on two factors. One was that the Applicant gave false information on the application form that he filled out to be registered as an agent. The second is that the Applicant has a long history of convictions under the *Criminal Code* of Canada.

The Applicant responded by saying that he had no intentions of lying on the application form and that, even though alcohol had been a significant factor in his past convictions, he has now rehabilitated himself and had not been charged with any new offence for almost two years as of the date of his application.

ISSUE

The issue that this Tribunal has to decide is whether or not the Applicant's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty?

DECISION

On examining all the evidence presented to this Tribunal, and upon reviewing the submissions of Counsel for the Registrar and for the Applicant, this Tribunal finds that, in fact, the Applicant's past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

EVIDENCE

The facts in this Appeal were not significantly in dispute. Only two witnesses, both called by the Registrar, presented oral testimony. The Applicant chose neither to testify himself nor to call any witness to testify on his behalf.

Evidence of Maria Paolercio

Ms. Paolercio has worked for the Real Estate Council of Ontario ("RECO") for 10 years. Before she worked for RECO, she worked for 18 years with the Ontario Ministry of Consumer and Commercial Relations.

RECO administers the *Real Estate and Business Brokers Act, 2002* and associated regulations on behalf of the Ontario Ministry of Government Services. It regulates the activity of trading in real estate in the public interest.

With RECO, she reviews complex applications and reviews complaint files. She reviews the registration of applicants under the Act and occasionally performs criminal record checks. It is significant, for the purposes of this Decision, to note that Ms. Paolercio specifically stated in her evidence that such background checks are done occasionally. Criminal record checks are not done on all applicants who apply under the Act. Therefore, it is important that each applicant complete the application form as fully and as honestly as he or she can.

When an applicant fills in, for the first time, the necessary application form to be registered as a new real estate salesperson, Ms. Paolercio contacts the applicant if an answer on the form is incomplete. Such was the case in this matter. On the Application form, found at Tab 3 of Exhibit 3, that the Applicant sent in on September 12, 2006, the Applicant, in section B of the form, said that he had worked as an excavator operator for the period 1999 to 2006. Then, in answering Question 2 in section C of the form, he answered "Yes" to indicate that he would be engaged or employed in some other business, occupation or profession. But, although he answered "Yes" to this question, the Applicant failed to comply with the completion instructions found on page three of the application form; that is, the Applicant did not provide the full name of the business as well as the position held and the nature or description of the business, occupation or profession. He was also required to provide a complete job description if his other employment came within the definition of "trade" in the Act.

Because the Applicant failed to provide those necessary details, a registration clerk at RECO sent a letter dated September 20, 2006, to the Applicant. A copy of that letter is found at Tab 4 of Exhibit 3. The letter asked the Applicant to provide details about his second occupation. The Applicant faxed the letter back to RECO the next day, September 21, 2006, and attached a page that contained such details. A copy of that page is found at Tab 5 of Exhibit 3.

At this point in time, RECO had not yet been made aware of any criminal record of the Applicant. In fact, on the application form itself, Question 7 of Section C required him to inform RECO whether there were any charges currently pending, or whether he had been found guilty, pleaded guilty to, or had been convicted of any offence under law. The Applicant answered "No" to that question. This answer was subsequently discovered to be totally incorrect.

Then, on September 21, 2006, the same day that the Applicant faxed the letter back to RECO, and nine days after he had sent in the application form, he also placed a telephone call to RECO and spoke to Ms. Paolercio. Her summary of that conversation is found at Tab 2 of Exhibit 3. In effect, the Applicant told her that he could not sleep the night before. He said that he had a criminal record and wanted to talk about it. As to why the Applicant waited nine days after he sent in the Application form before he told RECO about his criminal record was not satisfactorily answered at this Hearing. The Applicant himself gave no explanation. His Counsel suggested, but never provided evidence to support the suggestion, that, when he received the letter of September 20th from RECO, the Applicant was reminded that he should have informed RECO of his Record.

During this telephone conversation, the Applicant identified himself as the person named in the application form. Ms. Paolercio talked to him for ten or fifteen minutes while the Applicant provided some details about his previous convictions.

To this point in time, the Applicant never volunteered any information in the application form itself nor during the telephone conversation with Ms. Paolercio that he had recently

changed his name to the name shown on the form, and that he had previously been known by another name. However, Ms. Paolercio noticed that a name appeared on the call display on her telephone that was different from the name that the Applicant gave on the application form. Also, the telephone number on the call display was different from the number given on the application form.

She asked the caller where he was calling from. He said he was calling from home. Only when confronted with the fact that the name on the call display was different from the name on the application form did the Applicant say that he had changed his name.

Ms. Paolercio asked him for an explanation as to why he used the name that was shown on the application form and wanted to know the details about his convictions.

There then took place the following chronology of events:

1. September 21, 2006: Ms. Paolercio gave instructions to a clerk at RECO to perform a Criminal Record search under the Applicant's previous name.
2. September 27, 2006: RECO received a Criminal Record report from the Ontario Provincial Police ("OPP") in the name that the Applicant used on the application form. No record was revealed.
3. October 6, 2006: RECO received a Criminal Record report from the OPP in the Applicant's previous name. The report gave a list of some fifteen convictions under the *Criminal Code* of Canada during the period 1991 to 2005. This list is found at Tab 7C of Exhibit 3.
4. October 12, 2006: RECO received a letter dated October 10, 2006, from the lawyer for the Applicant providing details of all but two convictions. A copy of that letter is found at Tab 9 of Exhibit 3.

At this point, it would be useful to set out the convictions, the dates of the convictions, the dispositions on each conviction and, where available from the material filed with this Tribunal, the dates on which the offences had been committed. They are as follows:

CHARGE	DATE OF OFFENCE	CONVICTION DATE	DISPOSITION
1.Assault	January 18, 1991	April 5, 1991	30 days; 2 years probation
2.Fail to comply with recognizance		October 24, 1991	30 days; 6 months probation
3. Attempt theft	March 23, 1994	March 24, 1994	\$25.00 fine

4. Obstruct police officer	August 27, 1994	August 31, 1994	15 days (5 days pre-sentence custody)
5. Dangerous operation of motor vehicle	October 20, 1997	January 20, 1998	30 days
6. Obstruct police officer	October 20, 1997	January 20, 1998	60 days consecutive
7. Obstruct police officer		November 24, 1998	3 months
8. Care or control while impaired		November 24, 1998	21 days consecutive 6 months probation 2 years driving prohibition
9. Mischief under \$5,000.00		November 24, 1998	Time served (48 days)
10 Fail to comply with Probation Order	April 7, 1999	April 30, 1999	1 day (2 days pre-Sentence custody)
11. Assault with a weapon	August 24, 2001	October 1, 2001	7 days (14 days pre-sentence custody) 2 years probation 10 years firearms prohibition order
12. Mischief under \$5,000.00	October 4, 2000	October 1, 2001	7 days 2 years probation
13 Assault	June 18, 1994	December 3, 2001	Time served (7 months and 15 days) 12 months probation 10 years firearm prohibition order
14. Failure to provide blood sample	October 10, 2004	October 18, 2005	\$750.00 fine 12 months probation
15. Escape lawful custody	October 10, 2004	October 18, 2005	\$500.00 fine 12 months probation

It is extremely noteworthy to this Tribunal that, even when the Applicant signed his first application form under the Act on September 12, 2006, he was still within the one year period of the one year Probation Order that had been imposed on October 18, 2005. As well, according to the contents of the letter dated October 10, 2006, from his lawyer, and found at Tab 9 of Exhibit 3, the convictions registered on October 18, 2005, were still under appeal at the time he signed the first Application form. Just how the Applicant could forget to refer to two such significant matters that occurred less than one year before he signed the application form was at no time satisfactorily explained before this Tribunal.

This Tribunal also considers it to be significant that the appeal of his October 18, 2005, convictions does not involve a dispute on the facts, but on the law. The Applicant does not seem to deny the facts leading to those charges. Ms. Paolercio confirms in her notes that this is what the Applicant told her at a meeting that took place on November 3, 2006. The particular notation in question is made at page three of the copy of her notes filed as part of Exhibit 4.

After RECO received the Applicant's criminal record and after RECO received the letter of October 10, 2006, from the Applicant's lawyer, Ms. Paolercio sent to the Applicant a letter dated October 17, 2006, found at Tab 10 of Exhibit 3. The letter states that, after discussing this matter with the Deputy Registrar, she was asked to request further information. That information was:

- (i) The judge's reasons for sentencing regarding the conviction on December 3, 2001, for assault
- (ii) Explanation regarding the April 30, 1999 conviction for failing to comply with a Probation Order, since his lawyer had not provided one.
- (iii) Proof of name change from [*the Applicant's previous name*] to the Applicant's current name.
- (iv) A revised Application form

All but one of the above matters seem to have been provided to Ms. Paolercio. There was no evidence presented to this Tribunal to show that the Judge's transcript was ever provided, nor was any explanation given for its absence.

However, RECO received a letter dated October 19, 2006, found at Tab 12 of Exhibit 3, providing details about the conviction in April, 1999. Also, a copy of the Change of Name certificate, albeit a very poor copy, was provided and is found at Tab 11 of Exhibit 3. The change of name occurred on May 25, 2006, less than four months before the date of the Applicant's first application form registration. Finally, at Tab 13 of Exhibit 3 is found a copy of the new application form which is dated October 25, 2006. In it, the Applicant correctly indicated, this time, that he had a criminal record.

From time to time, while a decision was still being considered on the Applicant's application, Ms. Paolercio would receive telephone calls from the Applicant. She

testified that sometimes the Applicant was hostile towards her and belligerent with her. He was excitable most of the time. The Applicant insisted on being registered, but Ms. Paolercio had to discuss the matter with the Deputy Registrar. When the Applicant was rude to her one day, he would call back the next day and apologize.

But, on one occasion, the applicant was so irate with her that, according to her testimony, the Applicant told her that, if he did not get his licence, he would “shove a lawsuit so far up your ass it would make your head spin”. He called the next day to apologize.

At no time during this hearing was there ever a denial on behalf of the Applicant of this statement, or of his rudeness and subsequent apologies or of any of the evidence given by Ms. Paolercio. Consequently, this Tribunal does not have before it any evidence that contradicts the testimony of this witness or, for that matter, of the second witness called by the Registrar.

Counsel for the Applicant did, however, through cross-examination of Ms. Paolercio, suggest that other applicants have threatened lawsuits and may have been rude. However, when this Tribunal considers the above threatening statement and the evidence of his rudeness and subsequent apologies, combined with his lengthy Criminal Record, then this Tribunal considers that these are signs that the Applicant still has some serious problems to deal with.

Ms. Paolercio invited the Applicant to meet with her and with the Deputy Registrar on November 13, 2006, to discuss his application. But, at Tab 14 of Exhibit 3 is found an e-mail from the Applicant to the Deputy Registrar requesting an earlier meeting date. The e-mail is dated October 26, 2006, a mere one day after the Applicant submitted a corrected application form to RECO. The meeting date was changed to November 3, 2006, eight days after the e-mail and ten days in advance of the originally scheduled meeting date. Despite Ms. Paolercio's evidence that the Applicant was upset with the delays in his application process, this Tribunal finds that the Deputy Registrar was quite accommodating of the Applicant's wishes and that any complaints by the Applicant of delay were unreasonable.

Ms. Paolercio made notes of the meeting that took place on November 3, 2006. They were filed as part of Exhibit 4. There were four people at the meeting: the Deputy Registrar, Ms. Paolercio, the Applicant and his lawyer.

The Applicant presented two letters at the meeting. One was a letter dated December 17, 2004, almost two years before the meeting date, from a treatment centre that the Applicant attended from November 16, 2004, to December 17, 2004. The letter is addressed only “To Whom it may concern.” A copy of it is filed at Tab 16 of Exhibit 3.

The Applicant's Probation Officer, confirming that his probation period ran from October 18, 2005, to October 17, 2006, wrote a second, more recent, letter, dated November 2, 2006.

In the end, by letter dated November 7, 2006, filed at Tab 18 of Exhibit 3, Ms. Paolercio informed the Applicant that the Registrar proposed to refuse the Applicant's registration. It is this proposed refusal that the Applicant is appealing at this hearing.

On cross-examination, Counsel for the Applicant emphasized that it was not illegal for a person to change his name. This Tribunal would agree, as long as there is no fraud or attempt to deceive or to escape liability for one's debts or some other similarly deceptive intent on the part of the person applying for the name change.

Counsel also questioned why the Applicant would have to provide his previous name. Without deciding that particular point, this Tribunal finds that counsel is missing the point. It is the criminal record of the person applying that is the significant issue in the application form. The criminal record attaches to the person. It would be a fiction and pure folly to say that the person no longer has a criminal record just because he changes his name. If the Applicant were to commit another criminal offence now, it is doubtful that the Criminal Courts would ignore the criminal record amassed while he was known by another name simply because the Applicant had been known by a different name at the time of those convictions. Likewise, this Tribunal, without ignoring the fact that the Applicant did not voluntarily provide his previous name, is concerned with the fact that the Applicant did not provide the correct details of his criminal record. Both the criminal record itself and the Applicant's failure to reveal it initially are evidence of his "past conduct", to use the wording in the Act.

On the evidence before this Tribunal, it appears that even the Applicant himself was aware that his criminal record would follow him. After all, even though he applied in his new name, he still told RECO, during his telephone conversation on September 21, 2006, that *he* had a criminal record, even though the convictions were registered in his previous name. To argue that, in the circumstances of this case, the person of the Applicant, under his new name, had no criminal record that he had to reveal, on the ground that the convictions were recorded under a different name, would stretch logic beyond its reasonable limits.

Counsel for the Applicant also attempted to have Ms. Paolercio testify that, in the case of a name change, any criminal record search would necessarily involve a cross-reference to the name by which the person was previously known. She did not know if this were the case. This Tribunal asked Counsel to provide it with some authority for that proposition. None was provided. In fact, the documentation before this Tribunal clearly indicated otherwise. If one looks at the OPP report at Tab 7B of Exhibit 3, it will be seen that the criminal record search that was requested in the new name of the Applicant did not at all include any cross-reference to his previous name. Only when a search was specifically requested in the Applicant's previous name did the convictions appear.

Counsel also tried to establish that the Applicant would expect that all applicants under the Act would undergo a criminal record search in order to be registered as a real estate

agent. Therefore, it would not matter that his criminal record was not revealed in the application form, for it would be discovered, anyway. In saying this, Counsel referred to a particular paragraph in Section E of the application form, found and circled on page 2 of Tab 3 of Exhibit 3. That paragraph refers to searches of police databases, a record of offences, or record of judgments or other consumer reports. However, that paragraph simply states that such searches “may” be made, not that they “will” be made. The wording does not obviate the need for any applicant to be truthful in revealing that he or she has a criminal record. This is consistent with the testimony of Ms. Paolercio, referred to earlier, that criminal record searches are not done on every applicant.

Evidence of Brian Schlotzhauer

Mr. Schlotzhauer has been with RECO since November, 1999. He has been the Deputy Registrar under the Act since April, 2006. As such, he assists the Registrar in the administration of the Act.

He confirmed that with approximately 52,000 registrants, RECO does not perform a background check on everyone. Because of that, the Registrar requires Applicants to be honest in completing their Application forms.

If an applicant gives wrong or false information on the form, the Registrar would also be concerned with how such applicants would deal with the public and with the Registrar’s office itself.

Mr. Schlotzhauer confirmed much of the uncontradicted evidence of the Registrar’s first witness. In view of that, and considering that the facts in this appeal are not really in dispute, this Tribunal sees no need to set out his evidence in detail.

However, Mr. Schlotzhauer did provide further insight into the reaction of the Registrar to the convictions of the Applicant and to the failure of the Applicant to reveal them in the application form. The convictions represent offences against the administration of justice. The criminal activity had gone on for a significant period of time starting in 1991. The most recent conviction was on October 18, 2005, less than one year before the Applicant filed his first application. This raised concerns for the Registrar as to how the Applicant would treat consumers. The false information on the application form raised issues as to whether he would treat consumers and the Registrar’s office in an honest and forthright manner.

Mr. Schlotzhauer testified that, at the meeting on November 3, 2006, the Applicant admitted he had a problem with alcohol but was trying to overcome the problem.

On cross-examination, Counsel for the Applicant first questioned Mr. Schlotzhauer on the Applicant’s conviction for assault with a weapon on October 1, 2001. Counsel

pointed out that the information itself, found at page two in Exhibit 4, refers to the assault being carried out with a knife. But, the letter from the Applicant's counsel found at Tab 9 of Exhibit 3 reveals that the assault was carried out with a baseball bat. Nevertheless, in the mind of this Tribunal, the conviction remains the same and the offence was still carried out with an object that could do injury to another person. In the circumstances of this case, this Tribunal sees no lessening of the seriousness of a conviction for assault with a weapon just because it was committed through the use of a baseball bat and not a knife. That may or may not be of significance if this matter were before a Criminal Court, but, here, in a civil proceeding, where past conduct is in issue, one is as bad as the other.

Counsel also brought out that none of the offences involved breach of trust. However, Mr. Schlotzhauer referred to the notes made by Ms. Paolercio at the meeting of November 3, 2006, filed as part of Exhibit 4. More specifically, he referred to page five of those notes, where it is recorded that the Applicant falsely gave to the police his brother's name when they spoke to him about a mischief charge. Mr. Schlotzhauer further stated that he considered such an action to be a form of breach of trust. Without deciding that matter, this Tribunal would also consider such action to be a sign of dishonesty on the part of the Applicant. Nevertheless, the Tribunal acknowledges the point made by Counsel that the Applicant's record does not include a conviction for breach of trust in handling other people's money. That may be, but the basis of the Registrar's refusal of the Applicant's application for registration was based on "past conduct" of the Applicant, and nowhere does it say that that is limited to just breach of trust matters.

Mr. Schlotzhauer also stated that the conviction in 1991 for failing to comply with a Recognizance and the conviction in 1999 for failing to comply with a Probation Order gave rise to fears as to whether the Applicant can operate within a specified set of rules, as he would be required to do under the Act.

Counsel for the Applicant also suggested to Mr. Schlotzhauer that significant weight be placed on the letter from the Applicant's Probation Officer found at Tab 17 of Exhibit 3. Counsel suggested that the Applicant's Probation Officer would know the Applicant better than Mr. Schlotzhauer would. The author of that letter states that the Applicant was taking steps "to acquire assistance for his alcohol use" but no details are given. Further, the letter states that the Applicant "maintained his sobriety throughout the term of his Probation." However, this Tribunal would question how the Probation Officer could be certain of this when she also states, "my intervention with [*the Applicant*] was minimal."

Counsel also attempted to paint the Applicant as a recovering alcoholic who was rehabilitating himself. Counsel referred Mr. Schlotzhauer to the letter dated December 17, 2004, from a treatment centre that the Applicant attended. The letter is found at Tab 16 of Exhibit 3. The letter states that the Applicant completed a residential program for the treatment of alcoholism and substance abuse that ran from November 16, 2004 to December 17, 2004. The letter states,

[...] “if [*the Applicant*] uses the tools he was introduced to and applies the knowledge he has learned at [*the treatment centre*] [*the Applicant*] can expect the quality of life he so much deserves.”

But, there is no recent follow-up done on the Applicant by the writer of that letter. In addition, this Tribunal notes that the letter sounds a positive note only “if” the Applicant uses such tools and knowledge. There is no confidence expressed by the writer that the Applicant “will” use them or “will” succeed. The word “if” does not exude a great deal of confidence in the context of that letter. This Tribunal considers the contents of that letter to be too equivocal and too out of date to be of much probative value.

Other Evidence

With the consent of the Registrar’s Counsel, but without adducing any further explanatory evidence, and without presenting any oral testimony to explain the significance of such matters, Counsel for the Applicant filed additional Exhibits.

Exhibit 6 was the Applicant’s course history and transcripts provided by the OREA Real Estate College. The document shows that the Applicant completed three phases of the course that he had to take as an aspiring real estate agent. His Phase 1 exam mark was 78%. Having failed the first exam in Phase 2 of the course, he subsequently passed Phase 2 on a subsequent exam with a mark of 81%. His Phase 3 Residential Classroom mark was 79%.

Exhibit 7 was a credit report on the Applicant prepared by Equifax. However, the report is done on the Applicant’s previous name, the one he was known by before his Change of Name Certificate was granted. No evidence was led before this Tribunal as to what portions of the report it should focus on, save that the rating “R1” is highlighted on page two of the report.

Presumably, this report confirms that the Applicant is in sound financial shape or that he can use his money responsibly. However, it is not his finances that are in issue in this case; it is his past conduct that is in issue, and whether such conduct provides reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and with honesty. Although, in the Act, there is a ground for denying first-time Applications under the Act on the ground that the applicant cannot be reasonably expected to be financially responsible in the conduct of business, that is not an issue before this Tribunal at this hearing.

Exhibit 8 is an undated Certificate confirming that, on November 15, 2004, the Applicant completed a 28-day Drug and Alcohol Treatment Program offered by the Salvation Army in Toronto, Ontario. There is no assessment before this Tribunal of the Applicant’s progress in that course. The Certificate is over two years old. The Certificate goes on to say that the Applicant will be transferred to the Treatment program at another Salvation Army facility in Toronto. But, did the Applicant attend? What was the purpose of the further program? Why was the Applicant referred to it? Did he complete it? When? How well did he do in it? There is no evidence before this Tribunal that answers those

questions. Further, there is no further report from that other Salvation Army treatment facility. There is too much left unsaid if the Applicant intended to use this Certificate as evidence that he has rehabilitated himself.

Furthermore, the Salvation Army program is said to have ended November 15, 2004. Tab 16 of Exhibit 3 indicates that the Applicant started a program on November 16, 2004, at a facility in Sundridge, Ontario. There is no evidence that this facility is the facility referred to in Exhibit 8. In addition, both programs referred to in Exhibit 8 and at Tab 16 ended in 2004. There is no more recent evidence of the Applicant's progress.

If the Applicant intended to submit Exhibit 8 as evidence of his rehabilitation, it is too dated to allow this Tribunal to come to any significant conclusion as to the state of this rehabilitation.

Finally, Exhibit 9, a medallion from AA dated in 2004 was also admitted without objection from Counsel for the Registrar. But, there was no evidence to identify it or to explain its significance. This Tribunal cannot make presumptions or speculate on the long-term significance of this Exhibit.

There is no evidence before this Tribunal to explain its significance. The representations of the Applicant's Counsel alone, not under oath and not tested by cross-examination, cannot replace such evidence. Once again, if this Exhibit was intended to confirm the Applicant's rehabilitation from alcoholism, it is too dated and ambiguous to be of much probative value.

THE LAW

The Act allows the Registrar to refuse an Application for Registration under the Act on the grounds of past conduct of the Applicant. Section 10(1)(a)(ii) of the Act provides as follows:

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,

.

(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,

If an applicant under the Act is refused registration on the above ground, the Registrar is to give to the applicant a notice of proposal to refuse the application. Then, the Applicant can appeal to this Tribunal within the prescribed time period and request a hearing of an appeal of that refusal. That is what the Applicant did in this case. The powers of this Tribunal at such a hearing are contained in section 14(5) of the Act which provides as follows:

(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.

The proper question to be considered at such a hearing in front of this Tribunal was set out in *Brenner v. Registrar of Motor Vehicle Dealers and Salesmen* [1983] O.J. No. 1017. That was a decision of the Divisional Court of the then Ontario Supreme Court. The case was heard by Reid J., Southey J., and Krever J.

That case involved the refusal to register an applicant under the *Motor Vehicle Dealers Act* of Ontario, R.S.O. 1980, chapter 299.

The Applicant in that case was a person who had a lengthy criminal record with the result that the Registrar refused the application on the ground 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. Southey J. summarizes the facts in paragraph 2 of the decision:

The matter came before the Tribunal because the Registrar had proposed to refuse to grant registration as a motor vehicle salesman to Brenner because the Registrar was of the opinion that the past conduct of Brenner afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Registrar, in the notice of his proposal, went on to state that this opinion was based on the fact that Brenner had an extensive criminal record involving, as it was then believed, fourteen convictions over the twenty year period ending January 25, 1979. It now turns out that there were three other convictions which had not been disclosed by Brenner in his application for a licence, although the Registrar did not attach importance to those additional convictions which were for relatively minor offences.

The Court in *Brenner* had to consider the provisions of section 5(1)(b) of the *Motor Vehicle Dealers Act*, which Southey J. read at paragraph 7 of the Decision. That section dealt with the power of the Registrar to refuse an application for registration:

The Registrar proposed to refuse registration because of the existence of the specific circumstances set out in s. 5(1)(b) of the *Motor Vehicle Dealers Act*. I quote that section:

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.

(emphasis is added)

Note that the following underlined portion of the wording of section 10(1)(a)(ii) of the *Real Estate and Business Brokers Act 2002* in the instant case is almost identical to the underlined portion of the wording of section 5(1)(b) that the Court in *Brenner* had to consider:

10(1)(a)(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.

(emphasis is added)

The powers of this Tribunal, in Section 14(5) of the *Real Estate and Business Brokers Act 2002*, outlined above, are similar to the powers of the Tribunal that the Court in *Brenner* had to consider. At paragraph 8 of the decision, Southey J. states:

The powers of the Tribunal on the application are set out as follows in s. 7(4):

direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The Court in *Brenner* set out the proper test that the Tribunal in that case had to consider in that matter. That test is set out in paragraph 12 of the decision where Southey J. 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.

Therefore, the same question must be considered in this appeal, since the grounds for refusal in both this case and in *Brenner* and the powers of this Tribunal in both cases are basically the same.

APPLICATION OF LAW TO THE FACTS

The facts reveal that the Applicant has a lengthy criminal record. His convictions run from April, 1991, to October, 2005. The conduct that led to the convictions in October, 2005, occurred on October 10, 2004, less than two years before he first applied for registration under the Act. Therefore, Applicant's Counsel submitted that, since the Applicant had not re-offended for a period of almost two years before his application was sent in on September 12, 2006, that factor should be interpreted in a positive light for the Applicant.

But, this Tribunal does not consider that the phrase, "past conduct" in Section 10(1)(a)(ii) of the Act is restricted to only the time that has elapsed since the Applicant committed an offence chargeable under the Criminal Code. Surely the phrase can also refer to such recent conduct as his failure to reveal his criminal record in the application form, the failure to voluntarily reveal his change of name, his rude and belligerent conduct towards Ms. Paolercio and his obscene threat of a lawsuit if his application were not granted, as well as the Applicant's lengthy criminal record.

As well, the fact that less than two years had gone by at the time the Applicant sent in his Application form is not reassuring. Looking at his criminal record, this Tribunal notes

that, on two occasions, there has been a hiatus of even more than three years between offences, yet the Applicant still re-offended. The first such period was from August 27, 1994, to October 20, 1997. The second such period ran from August 24, 2001, to October 10, 2004.

This Tribunal also considers to be serious the fact that, on two occasions, the Applicant had been convicted of failing to obey Court-imposed conditions. The first was his conviction on October 24, 1991, for failing to comply with a recognizance. The second was his conviction on April 30, 1999, for failing to comply with a Probation Order. This is not a favourable sign for the Applicant who wishes to be registered in what is a regulated industry. This Tribunal would, therefore, agree with Counsel for the Registrar that, if the Applicant disobeyed Court-imposed Orders, there is grounds for belief that the Applicant will not carry on his business in accordance with law.

Furthermore, as summarized in the evidence given by Mr. Schlotzhauer, the Applicant gave a false identity to police by identifying himself as his brother during the events that led to his conviction for mischief under \$5,000.00. If he gave false information at that time, the Tribunal has no assurance that he will conduct his business with integrity and honesty?

The same concerns arise from his failure to reveal his criminal record in the original application form on September 12, 2006. As stated, at the time he completed that Form, he was still under probation. As well, he was still involved in an appeal of his two convictions in October of 2005. In the absence of any evidence to the contrary, and in the absence of any cogent explanation, this Tribunal does not accept that the Applicant, in filling out his application form, would simply forget about the existing Probation Order and his current appeals, not to mention his fourteen-year criminal record itself. From the evidence before it, examining it from a common sense point of view, and considering that the Applicant did not reveal his record until he himself had first been contacted by the letter of September 20, 2006, from RECO, this Tribunal would conclude that the failure to reveal his criminal record on the application form was intentional, thereby giving rise to further grounds for belief that the Applicant will not carry on business with integrity and honesty.

Counsel for the Applicant argued that the Applicant had never been convicted of breach of trust. That may be, but the absence of such a conviction is much overshadowed by the Applicant's numerous other convictions, his failure to reveal them in his application form and his conduct towards RECO during his telephone discussions with Ms. Paolercio.

Counsel for the Applicant also placed much reliance on the Decision of this Tribunal in the *McCarthy* case, decided on January 4, 2007, and released January 12, 2007. That case also involved an appeal by an applicant from a notice of proposal refusing to grant to the applicant a licence under the provisions of the *Real Estate and Business Brokers Act, 2002*. Counsel submitted that the reasoning in that case should permit this Tribunal to give some weight to the Applicant's rehabilitation efforts. Counsel specifically referred

this Tribunal to the words of the learned Vice-Chair in paragraph 42 of the Decision, where he stated:

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."

But, in *McCarthy*, the learned Vice-Chair still upheld the Registrar's proposal to refuse the Applicant's registration under the *Real Estate and Business Brokers Act, 2002*, despite the fact that the Vice-Chair heard testimony from the Applicant himself and supporting testimony from three character witnesses who provided current, up-to-date information about the Applicant. In contrast, in the instant case, this Tribunal has no such evidence from the Applicant or from any witness on his behalf. Such Exhibits as Counsel for the Applicant tendered were, as this Tribunal already stated, out of date and equivocal or ambiguous. There was no current compelling evidence as to this Applicant's rehabilitation efforts and results beyond the year 2004. It does not help that, in the following year, 2005, this Applicant was again convicted, this time of two offences under the Criminal Code.

On the other hand, Counsel for the Registrar referred this Tribunal to the Decision of this Tribunal in *Boboros*, released June 16, 2000. That case also involved an appeal from a notice of proposal to refuse registration of that applicant under the *Real Estate and Business Brokers Act*, the predecessor of the current Act. Counsel relied on that case to emphasize why it is so important for an Applicant under the Act to give complete and truthful information in the application form. Counsel referred specifically to that part of the Decision on page 9, where it is stated:

Non disclosure of pending charges as well as previous convictions is a serious matter. The Registrar cannot be expected to check the veracity of answers in each and every completed application form and is entitled to rely upon the truth and correctness of answers given by Applicants. The information given by an Applicant in the application forms the foundation upon which the Registrar is entitled to rely in the assessment of the worthiness or otherwise of an Applicant to be admitted to the ranks of salespersons under the Act. The Registrar is entitled in the discharge of his duties and his obligations to consumers to receive full and true disclosure by all Applicants. The Registrar did not receive such disclosure from the Applicant.

As a result, the Tribunal in *Boboros* directed the Registrar to carry out its proposal to refuse registration of the applicant under the Act.

This Tribunal would accept that reasoning as applicable to the case now before it and would come to the same conclusion; that is, that the Registrar in the instant case did not receive full and truthful disclosure from the Applicant in his application form.

CONCLUSION

Considering all the matters already referred to, including, but not restricted to, the Applicant's lengthy criminal record and his failure to reveal that record in his original application form, this Tribunal concludes that the past conduct of the Applicant gives reasonable grounds to believe that the Applicant will not act with honesty and integrity and in accordance with the law.

Accordingly, pursuant to the authority vested in it by section 14(5) of the *Real Estate and Business Brokers Act 2002*, the Tribunal directs the Registrar to carry out its proposal to refuse registration.

LICENCE APPEAL TRIBUNAL

Ken Koprowski, Vice-Chair

Released: July 30, 2007

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

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: July 12, 2007

Toronto

ORDER

WHEREAS the hearing in the above matter has been concluded insofar as the Parties having presented their evidence and closed their cases;

AND WHEREAS the Parties have not made final submissions to the Tribunal;

AND WHEREAS the Tribunal is of the opinion that final submissions shall be in writing;

NOW THEREFORE, the Tribunal makes the following Order:

1. By no later than Friday, July 27, 2007, the Registrar's Counsel shall submit his final submissions, in writing, to the Applicant, Rahaman Subadar, with a copy thereof filed with the Tribunal.
2. Service of the written submissions by Counsel for the Registrar shall be deemed to be duly served upon and delivered to the Applicant if delivered to or left at the address supplied by the Applicant during the proceeding.

3. By no later than Friday, August 31, 2007, the Applicant shall submit his final submissions, in writing, to the Registrar's Counsel at the offices of the Real Estate Council of Ontario, 3250 Bloor Street West, East Tower, Suite 600, Toronto, Ontario, M8X 2X9, with a copy thereof filed with the Tribunal.
4. By no later than Monday, September 10, 2007, the Registrar's Counsel may serve and file the Registrar's reply upon the Applicant at his aforestated address with a copy thereof filed with the Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: July 25, 2007

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



PRE-HEARING

JANET BENNETT-COX – PRE-HEARING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*,
2002 S.O 2002, C.30 SCHEDULE C AND REGULATIONS
THERETO, AS AMENDED (THE “ACT”).

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, presiding

APPEARANCES: DONALD MCLEOD, Counsel, appearing on behalf of the
Applicant, attended by telephone

ROBERT MAXWELL and RON FORSTER, Counsel, appearing
on behalf of the Registrar, *Real Estate and Business Brokers
Act, 2002*

DATE OF
PRE-HEARING: June 6, 2007 Toronto

ORDER

A pre-hearing was held in this matter on June 6, 2007, in Toronto before this Tribunal in the presence of Robert Maxwell and Ron Forster, Counsel, on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* who attended in person and in the presence of Donald McLeod, counsel on behalf of the Applicant, who attended by telephone.

The Tribunal makes the following order with respect to the hearing of this matter:

1. The hearing of the Applicant's appeal is adjourned until 9:30 a.m. on October 24, 2007 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto and to continue, if necessary, on October 25 and 26 and November 28, 2007.
2. None of the issues raised in the Notice of Proposal have been settled, admitted or withdrawn.

3. On or before September 7, 2007, the Applicant shall provide particulars with respect to the grounds of appeal. She shall respond to each paragraph of the particulars set out in the Notice of Proposal stating whether the paragraph is admitted, denied or if she has no knowledge thereof. Where she denies any particular paragraph she shall provide a brief factual statement of the basis of her denial.
4. The parties shall comply with Rule 6 of the Rules of Practice of the Tribunal with respect to the disclosure of documents. Further, the Applicant shall, not later than ten days before the hearing, provide counsel for the Registrar with a list of the names and addresses of the witnesses she intends to call at the hearing together with a brief outline of the evidence each witness is expected to give at the hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: July 5, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

MICHAEL N. ELMENHOFF – PRE-HEARING

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT, 2002* S.O. 2002, C.30 SCHEDULE C AND
REGULATIONS THERETO, AS AMENDED (THE “ACT”).

TO REVOKE REGISTRATION

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

PARTIES: JAMES MCGRATH, Counsel for the Applicant

GEORGE DRAMETU, Counsel for the *Registrar, Real Estate and
Business Brokers Act, 2002*

DATE OF
PRE-HEARING: June 19, 2007

Toronto

ORDER

A pre-hearing was held in this matter on June 19, 2007 in Toronto before this Tribunal in the presence of Counsel for the Applicant and Counsel for the Respondent.

The Applicant had requested an adjournment of the hearing of this matter and the Respondent had not consented to this request.

The hearing for this matter has been scheduled for July 5 and 6, 2007, by Notice of Hearing dated April 2, 2007.

Therefore the Tribunal orders as follows:

1. The hearing of this matter is adjourned to September 20 and 21, 2007 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor;
2. The parties have verbally exchanged their lists of witnesses and have agreed to exchange "will say" statements by August 23, 2007;
3. The parties shall file an Agreed Statement of Facts and Issues by August 30, 2007;
4. The Registrar's Book of Disclosure consists of the document disclosure on behalf of the Registrar. The Applicant shall disclose and provide a copy of his documents by August 31, 2007; and
5. The Applicant advises that he may retain an expert to prepare a financial report. Any report to be relied upon by the Applicant shall be filed with the Tribunal and a copy provided to the other party not later than August 31, 2007. If the Respondent produces a report in reply to the Applicant's, then that report shall be filed by September 10, 2007.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

Released: July 4, 2007

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



PRE-HEARING

SEPIDEH MOAZZANI – PRE-HEARING

IN THE APPLICATION FOR REGISTRATION OF SEPIDEH
MOAZZANI AS A SALESPERSON UNDER THE *REAL ESTATE
AND BUSINESS BROKERS ACT*, R.S.O.1990, CHAPTER R. 4.

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SYMON ZUCKER, Counsel, representing the Applicant

ROBERT FOERSTER, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF
PRE-HEARING: July 9, 2007 Toronto

ORDER

A pre-hearing was held in this matter on July 9, 2007, before this Tribunal in the presence of Symon Zucker, Counsel for Sepideh Moazzani (the "Applicant") and Robert Foerster, Counsel for the Registrar, *Real Estate and Business Brokers Act*, (the "Respondent" and the "Act" respectively);

WHEREAS the Respondent issued a Notice of Supplementary Proposal to Refuse to Renew the Applicant's registration as a salesperson under the Act;

AND WHEREAS the Respondent sought by Notice of Motion an order that the additional allegations referred to in the supplemental proposal be added to the Applicant's appeal presently in the course of being heard before the Tribunal;

AND WHEREAS after hearing submissions of Counsel for the Applicant and the Respondent, the Tribunal ordered that the proper disposition of the matters raised in the supplementary proposal was to add the matters raised to the existing appeal being heard before the Tribunal;

AND WHEREAS the Tribunal further ordered in regard to the issues raised by the Respondent in the Supplementary Notice of Proposal that a pre-hearing be held and which pre-hearing was held on July 9, 2007;

NOW THEREFORE the Tribunal makes the following Order pursuant to the pre-hearing.

1. Insofar as the allegations made by the Respondent in the Supplemental Notice of Proposal are concerned, the Respondent shall make full disclosure of documents in terms of Rule 6 of the Tribunal's Rules of Practice by July 23, 2007 and the Applicant shall make full disclosure of documents in terms of the same Rule by September 30, 2007.
2. The issues that are to be addressed at the hearing scheduled to take place on the dates hereunder stated shall be the remaining issues referred to in the Notice of Proposal and not yet addressed, as well as the eight issues raised by the Respondent in the Supplementary Notice of Proposal.
3. The resumed hearing in this matter is hereby scheduled for November 15, 16, 19 and 20, 2007 at 9:30 a.m. at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 12, 2007

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



PRE-HEARING

DUGAL-DAN MCDONALD – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: DUGAL-DAN McDONALD, Applicant

RON FOERSTER, Counsel, representing the Registrar, *Real Estate
and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: June 26, 2007

Toronto

ORDER

A pre-hearing was held in this matter on June 26, 2007, in the presence of the Applicant, Dugal-Dan McDonald (the "Applicant") and Ron Foerster, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar").

The Applicant provided a letter from his counsel in which counsel advised that he could no longer represent the Applicant due to potential conflict of interest. Counsel for the Registrar advised he had just been assigned to the matter and was unavailable on the scheduled hearing dates.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The Applicant is retaining new counsel and will provide the name and contact information to Counsel for the Registrar and the Tribunal no later than July 6, 2007.

3. A further pre-hearing in this matter is scheduled to take place on July 19, 2007, commencing at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
4. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6.3 of the Rules of Practice of the Tribunal and the disclosure requirements relating to expert witnesses set out in Rule 6.4.
5. The hearing originally scheduled to begin on August 20, 2007, is adjourned to October 11, 2007, commencing at 9:30 a.m. at the Tribunal's hearing rooms, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue on October 12, 15 and 16, 2007, if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: June 28, 2007

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



MOTION

A. AMEER BAKSH

A MOTION FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, 2002,
R.S.O. 1990, CHAPTER R.4 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: LYNDA TANAKA, Acting Chair

APPEARANCES: ANTHONY POWELL, Counsel, representing the Applicant

TIM SNELL, Counsel, representing the Registrar under the *Real
Estate and Business Brokers Act, 2002*

DATE OF
MOTION: June 26, 2007

Toronto

REASONS FOR DECISION AND ORDER

Alexander Ameer Baksh (the “Applicant”) has brought a motion for an order to stay the Decision and Order of the Tribunal issued January 10, 2007 (the “Decision”), pending the decision of the Divisional Court. The motion is brought pursuant to Section 14. (9) of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30 (the “Act”) which provides that an appeal of a decision of the Tribunal does not operate as a stay unless the Tribunal orders otherwise. The Applicant has appealed the Decision and the Registrar has cross-appealed.

The Decision directed the Registrar to carry out the proposal to revoke Mr. Baksh’s licence as a real estate salesperson, effective July 2, 2007. This order therefore delayed or stayed the implementation of the revocation for a period of approximately six months. The Decision specifically permitted Mr. Baksh to continue acting as a licensed real estate salesperson until a day after a period that is traditionally busy for real estate closings. His licence is, during this period, however, subject to a specific condition that he 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 the Decision, January 10, until the effective date of revocation.

The grounds of the application for a stay are as follows:

1. The hearing of the appeal is unlikely to be held prior to July 2, 2007.
2. The sole source of income of the Applicant is from his work as a real estate salesperson.
3. Time is not of the essence with respect to the revocation, given the lapse of time between the regulator discovering the impugned conduct in 2003 and the issuance of the Notice of Proposal to Revoke in July 2006.
4. The stay provided in the Tribunal's Decision is insufficient to permit the appeal to be heard.
5. The Applicant is severely prejudiced because the effect of the Decision is to take away his means of earning a livelihood prior to his appeal being heard.
6. The Applicant's conduct since the actions complained of has been without incident and faultless and his appeal is not frivolous and has merit.
7. The Applicant has instructed his solicitor to move expeditiously to perfect the appeal and have it heard on the merits within the time prescribed by the Rules.
8. There is a serious issue to be tried, compliance with the Order would cause irreparable harm and the balance of convenience favours maintaining the status quo.

Ground 8 pleads the three elements to be satisfied on a stay application. Counsel for the Registrar stipulated that he agreed that the Applicant was able to satisfy the first test for the granting of a stay as enunciated in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, ("*RJR-MacDonald*") that is, that there is a serious issue to be tried.

Counsel for the Applicant stipulated that there was no dispute that the Applicant had breached Section 32 of the Act, but the appeal was based on the determination of the outcome from that conduct.

Grounds 1, 4 and 7 listed above relate to the processing of the appeal. The following facts are relevant in dealing with these grounds. The Decision of the Tribunal was issued January 10, 2007, and the Applicant had thirty days to appeal. The Notice of Appeal was filed on the 29th day after the Decision was released. The transcripts were ordered after the thirty-day period to order transcripts had expired. The transcripts have

been received, and on June 12, 2007, the Divisional Court issued a notice that it would dismiss the appeal for failure to perfect the appeal within the sixty day time period provided after the transcripts were available (Exhibit 2, Tab 5). On May 8, 2007, counsel for the Applicant advised counsel for the Registrar that he would be bringing a stay application. The first Notice of Motion in this matter is dated June 12, 2007, over a month later. A further Notice of Motion was served June 18, 2007, with a supporting affidavit of the Applicant. The appeal is not perfected, but counsel for the Applicant acknowledges that he must do that by the end of this week and that his office must bear some responsibility for the delays. The affidavit of the Applicant filed on the motion (Exhibit 1, Tab 2) contains a sworn statement that the Applicant has instructed his counsel to move expeditiously to perfect the appeal and have it heard on the merits within the time prescribed by the Rules (paragraph 13 of the Affidavit). There is no evidence of a request to the court that the appeal be expedited, nor an estimate of when the matter might be reached at the Hamilton sittings of the Divisional Court.

The Affidavit of the Applicant, on which there was no cross-examination, provides the following additional assertions:

1. He is the sole support for his family, being his wife and three teenage children.
2. He will suffer irreparable harm “as my sole source of livelihood is and has been for the past fourteen years, from my earning as a salesperson...”
3. There was no evidence of any true or lasting harm to anyone involved in the transactions.
4. On virtually all the purchase transactions, the vendor was represented by a listing broker and agent fully independent of the Applicant, and where the broker was the listing broker the vendor was represented by an agent at full arms length from the Applicant, and therefore no advantage to him resulted.
5. There was no evidence that the purchase transactions were at anything other than fair market value.
6. Most, if not all, of the properties were either held and rented or renovated before being sold and there was no evidence that they were sold at anything other than fair market value.
7. He has carried out his duties as a registered salesperson since the most recent incident four years ago in strict accordance with the Act and in full compliance with the Tribunal’s Decision, and he intends to continue to so act.
8. He has incurred substantial expense in paying for the transcripts and counsel for his appeal and, as noted above, he has instructed his counsel to move expeditiously to perfect the appeal and have it heard within the time set out in the Rules.

9. He does not seek to justify his errors in understanding and judgement, and the affidavit is not intended to take away from the seriousness of his errors, but rather to show relevant mitigating circumstances.

Irreparable Harm

Grounds 2 and 5 of the Motion, listed above, set out the allegations under this heading. The Applicant argues that he will suffer irreparable harm. The harm is the loss of his licence as a registered salesman, and the loss of what he says is his sole source of income.

The Registrar argues that such a bald statement is not sufficient to satisfy the test set out in *RJR-MacDonald*. The Supreme Court in that case held that the test is whether or not a refusal to grant the stay could so adversely affect the Applicant's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the Decision of the Tribunal. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, such as a party being put out of business, permanent market loss, permanent loss of natural resources, irrevocable damage to business reputation. In *Li v. College of Physicians and Surgeons of Ontario* [2004] O.J. No. 1828, Justice MacFarlane held that in a case where the allegation is that the irreparable harm is financial, the burden is on the Applicant to satisfy, on the balance of probabilities, that such harm will occur. In that case, the solicitor for Dr. Li had sworn an Affidavit with little more particularity than the Tribunal has here. Justice MacFarlane held that more than a simple, statement of financial harm is required to meet the test.

The Tribunal has dealt with a similar situation where a registered real estate salesperson applied for a stay of an order revoking his registration. In that case, there was evidence that the Applicant had no other skills than as a real estate salesperson, that he had assets of no significant value, that he and his wife lived in rental accommodation, and that he intended to work as a consultant. The Tribunal noted that there was no evidence as to his income or his current financial obligations, and held that the Applicant had not satisfied the test of showing irreparable harm (*Loneragan v. Registrar, Real Estate and Business Brokers Act*, LAT, September 18, 2006).

In the present case, we have no evidence other than the bald assertion of irreparable harm. The Applicant's licence is as a salesperson and he therefore does not have the infrastructure that a broker would have. There is no evidence of staff who would be let go or ongoing expenses related to his business, should the revocation become effective prior to the Divisional Court proceedings coming to an end. The Applicant's statement that his licence as a salesperson has been his sole source of income is not correct, if we accept that he was in fact an investor in real estate, which he sold in at least some of the transactions that have come under the scrutiny of the Registrar and the Tribunal in this case. There is no corroboration as to his financial situation by an Affidavit of any other party and no documents were provided to establish his current financial situation.

The loss of income that flows from loss of a licence must be considered as a likely outcome within the contemplation of the Legislature when it enacted Section 14. (9) of the Act. This specific section provides that even if the Tribunal's decision is appealed, the revocation order takes effect, unless the Tribunal orders otherwise. Section 25 of the *Statutory Powers Procedures Act, RSO 1990 c. S 22* as amended, provides that an appeal from a decision of a tribunal does act as a stay unless the statute specifically provides otherwise. Therefore, I accept that the Legislature has intended that the loss of income that flows from loss of a licence was an acceptable outcome subject to the discretion of the Tribunal (See *Foster v. Registrar, Motor Vehicle Dealers and Salesmen Act*, CRAT 23 April 1993). I therefore find that the Applicant has failed to show irreparable harm in the evidence provided.

Balance of Convenience

The test as enunciated in *RJR-MacDonald* is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending the decision on the merits. The Registrar cites cases where the public interest is a special factor in determining where the balance lies, such as in constitutional cases and, as previously held by panels of this Tribunal, where the legislation is consumer protection legislation: (*Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993) 106 D.L./R. (4th) 507 at 530, affd 121 D.L.R. (4th) 79; *Lonergan v. Registrar, Real Estate and Business Brokers Act*, op. cit.; *Thakur v. Registrar, Real Estate and Business Brokers Act*, July 26, 2005).

The Applicant says that the balance of convenience favours him. Grounds 3 and 6 of the Motion listed above have relevance to this issue. The Applicant relies heavily on the following statement from page 7 of the Decision appealed from:

“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.”

The Applicant argues that despite the findings in the Decision that he challenges by way of appeal, the Tribunal did not see him as a risk to the public. The Applicant further asserts that there was no evidence that the transactions in question occurred at anything other than fair market value, that his conduct since the transactions in question has been faultless, and there is a significant lapse of time since the events in question.

The Registrar argues that the statute and the licensing system that it establishes are consumer protection legislation. The need for protection of the public from unscrupulous real estate salespersons was identified and responded to by the Legislature in the enactment of the statute and the regulations. As noted by former Vice-Chair Sherman in *Lonergan v. Registrar, Real Estate and Business Brokers Act*:

“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 Registrar further argues that the Tribunal is entitled to look at all of the conduct of the Applicant in making the assessment as to whether or not the stay should be granted, including his conduct during the hearing, as described by the Tribunal in its Decision, since the Decision was issued and in this motion. In terms of the Affidavit, in items 4, 5 and 6 listed above, in which the Applicant describes the circumstances of the transactions, he appears to be taking the position of “no harm, no foul”, while acknowledging that he was in breach of the statutory provisions. In the Decision, the Tribunal deals with the Applicant’s conduct since the transactions in question, a period of some three years, as follows:

“As troubling as this unrestricted delay is, it did offer Mr. Baksh an opportunity to demonstrate that his conduct has 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 Decision makes specific reference to evidence as to the Applicant’s conduct that could have been brought at the hearing and was not. No evidence from his current broker or clients or other registrants was brought in support of this motion. The Applicant has omitted, in the materials filed in this application, corroborative evidence that he has indeed been educated about his obligations, that his work as observed by others shows that his conduct has changed, and that there is no risk to consumers.

This Tribunal holds that the balance of convenience lies with the Registrar who is charged with the responsibility for protecting consumers from real estate salespersons who may not comply with the statute and regulations as to conduct. The Affidavit of the Applicant is unsupported by documents and uncorroborated in any regard. His heavy reliance in his Affidavit on the transactions occurring at fair market value is troubling. The Act does not include a qualifier that permits an exception to the obligation to comply with its terms in all aspects, “except where the transaction is at fair market value.”

Finally, the history of this appeal does not indicate that it is being pressed as diligently as it can be and, as noted above, there is no evidence as to when this appeal might be heard. To grant a stay to an indeterminate time, thereby allowing the Applicant to continue as a real estate salesperson, would not be consistent with the statutory scheme. No evidence has been lead as to what an appropriate time frame might be for a further stay or what conditions might be imposed that would protect the public interest. Therefore the Applicant has not satisfied the third test of the three.

The application for a stay requires that the Applicant bear the onus of establishing that the Tribunal should exercise its discretion in his favour. For the reasons set out above, the Applicant has failed to satisfy that onus for two of the three elements of the test. The Tribunal therefore dismisses the application for a stay.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Acting Chair

Released: June 27, 2007

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

MOTION

SEPIDEH MOAZZANI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT*, S.O. 2002, CHAP C. 30, SCHEDULE "C"

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES: SYMON ZUCKER, Counsel for the Applicant

ROBERT MAXWELL, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING: June 12, 2007 Toronto

ORDER

BACKGROUND

The Registrar issued a Notice of Proposal to the Applicant under the *Real Estate and Business Brokers Act* R.S.O. c R 4 ("the Act") dated July 27, 2005 and duly served it upon the Applicant. The Notice of Proposal advised the Applicant that her application for licence renewal under the Act was being denied. The Applicant responded by way of Notice of Appeal and the matter proceeded to the Tribunal for a hearing commencing March 14, 2006. The Applicant under the Act remains a registrant until such time as the appeal is finalized.

The Registrar issued a Supplementary Notice of Proposal and served it upon the Applicant June 1, 2007. By way of the present Motion the Registrar seeks to have the particulars set forth in the Supplementary Notice heard as part of the original Notice.

Counsel for the Registrar submitted that the additional factual situations, eight in all, outlined in the Supplemental Notice all went to the same violations of the

governing statute already in the original Notice and should be added as a matter of efficiency. They should not be the subjects of a separate proceeding.

Counsel for the Applicant submitted that the additional asserted facts in the Supplementary Notice are of a qualitatively different character from the original and should therefore not be added to the original and form part of the present proceedings.

ISSUES

The position of the Registrar centers on the avoidance of duplicating proceedings and the public interest in the efficient administration of the Act. The hearing on the matter of the renewal of the Applicant's licence should take place in front of the same adjudicator and on all the facts. These factors should take precedent over an inconvenience or prejudice to the Applicant, which, in any event, can be accommodated through costs and terms including preparation time. Proper disposition of the matter of the renewal of the Applicant's licence under the Act requires the avoidance of inconsistent results resulting from separate hearings.

The Applicant introduced the fact that four of the eight new factual allegations were known to the regulator at the time of the original Notice but were not pursued. In fact, the documentary evidence in support was included in the hearing materials. Counsel argued that the conduct of the case would have been different, notably the cross-examination of now dismissed witnesses. On these grounds, the Applicant argues that a new and separate Notice of Proposal be ordered and the new allegations be heard on a separate appeal.

In reply, counsel for the Registrar rejected the notion that the Supplementary Notice introduced allegations qualitatively different from the original Notice such as to require a separate hearing. The allegations in both the original Notice and the Supplemental go to the issue of the "honesty and integrity" required of a registrant under the Act. The Registrar added that any arguments as to prejudice are premature and can only be properly assessed at the time when evidence on the issue is led.

DECISION

The Tribunal after hearing the submissions of both Counsel is of the opinion that the proper disposition of the matter of the Supplementary Notice is to add it to the existing appeal. The Registrar's submissions with regard to timeliness and consistency are more in accord with the purpose of the Act as public interest legislation than those of the Applicant. The new allegations do not raise issues of sufficient variance from those already before the Tribunal such as to warrant an entirely new proceeding. The gravamen of the matter remains the Registrar's

contention that the Applicant should be denied registration on the basis of Section 8 of the Act and the hearing to determine whether that case has been made out to the required standard should encompass all of the evidence in one hearing.

ORDER

It is ordered that the Supplementary Notice of Proposal form part of the present appeal with the rights accorded to the Applicant under the Act intact. A pre-hearing on the issues raised in the Supplementary Notice of Proposal is ordered to commence at 1:30 p.m., on Monday, July 9, 2007, at the offices of the Tribunal.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: June 22, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

MICHAEL N. ELMENHOFF

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT, 2002* S.O 2002, C.30 SCHEDULE C AND
REGULATIONS THERETO, AS AMENDED (*THE "ACT"*).

TO REVOKE REGISTRATION

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member
SHU-TAI CHENG, Vice-Chair

PARTIES: MICHAEL N. ELMENHOFF, Applicant

IAN DALEY, Counsel for the *Registrar, Real Estate and Business
Brokers Act, 2002*

DATE OF
PRE-HEARING: May 16, 2007

TORONTO

ORDER

A pre-hearing was held in this matter on May 16, 2007 in Toronto before this Tribunal in the presence of the Applicant, Michael N. Elmenhoff, and Counsel for the Respondent.

The Applicant had requested an adjournment of this pre-hearing in order to retain counsel to represent him at the pre-hearing and hearing of this matter, and the Respondent had not consented to this request.

The hearing for this matter has been scheduled for July 5 and 6, 2007, by Notice of Hearing dated April 2, 2007.

Therefore the Tribunal orders as follows:

1. This pre-hearing is adjourned to June 19, 2007 at 1:30 p.m. peremptory on both parties;
2. The parties shall agree to two consecutive days for the hearing of this matter, as soon as possible after July 6, 2007, as the parties and their counsel are available, and shall advise the Tribunal in writing of these dates prior to May 31, 2007;
3. If the Tribunal does not receive communication from the parties, as described in paragraph 2, above, then the hearing of this matter will proceed on July 5 and 6, 2007, peremptory on both parties.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

Released: May 31, 2007

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



PRE-HEARING

STEPHEN STODAJINOVICH

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002 S.O*
2002, C.30 SCHEDULE C AND REGULATIONS THERETO, AS
AMENDED (THE "ACT").

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, presiding

APPEARANCES: STEPHEN STODAJINOVICH, Applicant, in person

ROBERT MAXWELL, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: March 21, 2007

Toronto

ORDER

A pre-hearing was held in this matter on March 21, 2007, in Toronto before this Tribunal in the presence of Stephen Stodajinovich, Applicant, and Robert Maxwell, Counsel, on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002*.

The Tribunal makes the following order with respect to the hearing of this matter:

1. The hearing of the Applicant's appeal is adjourned until 9:30 a.m. on July 23, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto and to continue, if necessary, on July 24 through 27, 2007.
2. The Applicant makes the following admissions with respect to the allegations set out in the Notice of Proposal:
 - a. The allegations in paragraphs 1, 3, 6, 11, 12, 24, 28, 32, 34, 35 and 38 are true;

- b. The allegations in paragraph 5 and 7 are true with the exception that the funds in question were paid to Ryan Dewulf;
 - c. The allegations in paragraph 10 are true, except for the middle sentence; and
 - d. The allegations in paragraph 25 are true except for the allegation that the complainants were left without a home.
3. The parties shall comply with the Rule 6 of Rules of Practice of the Tribunal with respect to the disclosure of documents. Further, the Applicant shall, not later than ten days before the hearing, provide counsel for the Registrar with a list of the names and addresses of the witnesses he intends to call at the hearing together with a brief outline of the evidence each witness is expected to give at the hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: May 18, 2007

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



RAHAMAN SUBADAR-ADJ.-Adjournment

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R.4

IN THE MATTER OF
RAHAMAN SUBADAR

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Real Estate and Business Brokers Act*
TO REVOKE REGISTRATION
- Proposal dated: August 15, 2005

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

RAHAMAN SUBADAR

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 to continue on May 14 and 15, 2007;

AND WHEREAS, the hearing proceeded on May 14, 2007, but did not proceed on May 15, 2007, as the Applicant had called to say he was unwell, and could not attend;

TAKE NOTICE that the Tribunal adjourns the hearing, *peremptory against the Applicant*, to commence at 9:30 a.m., on Thursday, July 12, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue, if necessary, on Friday, July 13, 2007.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

RELEASED: May 17, 2007

PRE-HEARING

VINCE CARERE AND HOMELIFE PINE-WEST REALTY INC.

*AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE REAL ESTATE AND BUSINESS BROKERS ACT, 2002 S.O
2002, C.30 SCHEDULE C AND REGULATIONS THERETO, AS
AMENDED (THE "ACT").*

TO REVOKE REGISTRATION

TRIBUNAL: PHILOMEN WRIGHT, PRESIDING Member

APPEARANCES: RICHARD HAMMOND, Counsel, representing the Applicants

GEORGE DRAMETU, Counsel, representing the Registrar under
the Real Estate and Business Brokers Act, 2002

DATE OF

PRE-HEARING: May 2, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on May 2, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, in the presence of the following Parties: Vince Carere, the Applicant, Richard Hammond, Counsel for the Applicants, and George Drametu, Counsel for the Registrar under the Act.

Both Counsel agree that the Applicant has cooperated and has been exemplary in his dealings with the Registrar.

Both Counsel agree to continue communication, with a view to settlement of the issues prior to the scheduled hearing.

Should settlement be reached, both Counsel shall communicate with the Tribunal in a timely manner, such outcome that may affect the proceedings as scheduled.

Should there be no effect, all disclosure between the Parties shall be completed in a timely manner, in order to effect timely disclosure, as previously described, by the Parties to the Tribunal, pursuant to the Tribunal's Rules of Disclosure.

The Tribunal therefore orders:

- 1) Parties to the hearing are Vince Carere and Homelife Pine-West Realty Inc. and the Registrar, *Real Estate and Business Brokers Act, 2002*

- 2) On consent of the parties, respecting the revocation of the registration of the Applicant as a Broker, it is agreed that the Issues of Appeal to be heard at the hearing have been narrowed as follows:

(a) The status of the Corporate Broker of Record, Homelife Pine-West Realty Inc.

(b) The personal status of Vince Carere as a Broker as well as his relationship to the aforementioned Corporation.

- 3) Disclosure:

The Applicant shall make full, complete and timely disclosure, at least ten days prior to the hearing, as required by Rule 6 of the Rules of Practice of this Tribunal.

Full disclosure has already been effected by the Registrar and no further disclosure is anticipated by the Registrar. Should further disclosure be required, the Registrar shall make same at least ten days prior to the hearing, as required by Rule 6 of the Rules of Practice of this Tribunal.

- 4) Witnesses:

(a) For the Applicant: Vince Carere, the Applicant.

(b) For the Respondent: Linda Kim, Inspector, Jo-Ann Swain, Investigator, and Brian Schlotzhauer, Deputy Registrar, or his designate.

- 5) This Tribunal orders that, in accordance with the Issues stated herein, the hearing previously scheduled in this matter for Monday, Tuesday, Wednesday and Thursday, the 28th, 29th, 30th and 31st days of May 2007, shall commence at 9:30 a.m., on Monday September 24, 2007 and continue on Tuesday and Wednesday the 25th and 26th days of September 2007, if required, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Philomen Wright
Presiding Member

RELEASED: May 15, 2007

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



PRE-HEARING

MARCUS BREKKER

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE REGISTRATION

TRIBUNAL: PHILOMEN WRIGHT, Presiding Member

APPEARANCES: PETER LEVINE, Counsel, representing the Applicant

GEORGE DRAMETU, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: April 13, 2007

Toronto

ORDER

A pre-hearing conference was held in this matter on April 13, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, with the Parties' representatives.

Following submissions on behalf of the parties made at the pre-hearing, the Tribunal makes the following Order:

- 1) The Parties to the hearing are:
 - (a) The Applicant, Marcus David Brekker;
 - (b) The Respondent, the Registrar, the *Real Estate and Business Brokers Act, 2002*.
- 2) It is agreed by the parties that the issue in this appeal to be determined at the hearing has been narrowed as follows:

Do the Applicant's record of convictions, the nature of those convictions and the Applicant's method of completion of the application itself for registration, all demonstrate past conduct which constitutes reasonable grounds for believing that the Applicant will not conduct himself with integrity and according to law, should he be granted a licence by the Real Estate Council of Ontario?

3) The Parties shall make full, complete and timely disclosure at least ten days prior to the hearing, as required by Rule 6 of the Rules of Practice of this Tribunal.

4) The following witnesses shall be called:

For the Applicants:

Marcus Brekker and two other unnamed witnesses.

For the Respondent:

Maria Paolercio, Registration Officer and

Brian Schlotzhauer, Deputy Registrar.

5) The Tribunal Orders that the appeal of the Applicant is to be heard, commencing at 9:30 a.m. on Thursday, June 28, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue, if necessary, on Friday June 29, 2007, commencing at 9:30 a.m. at the Tribunal's aforesaid Chambers. The hearing previously scheduled to be heard in Toronto on June 6, 2007 and June 7, 2007, is hereby cancelled.

LICENCE APPEAL TRIBUNAL

Philomen Wright
Presiding Member

RELEASED: April 24, 2007

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

GEORGE CHRISTOPHER SZANTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002,
CHAP C. 30, SCHEDULE "C"

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: GEORGE CHRISTOPHER SZANTO, Applicant

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: April 3, 2007

Toronto

ORDER

Following attendances on April 3, 2007 at a hearing before this Tribunal of George Christopher Szanto, appearing on his own behalf (the "Applicant") and George P. Drametu, Counsel, appearing on behalf of the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Registrar");

The Tribunal makes the following Order:

1. The hearing of this matter scheduled for April 3, 2007 and April 4, 2007, is hereby adjourned on the terms and conditions that appear hereunder.
2. The Applicant shall by no later than 12 o'clock noon on April 4, 2007, deliver to Counsel George P. Drametu at the offices of RECO, 3250 Bloor Street West, East Tower, Suite 600, Toronto, Ontario a bank certified cheque dated no later than April 4, 2007 for the sum of \$1600.00 representing the costs awarded by this Tribunal to RECO in respect of the adjournment of the hearing of the Applicant's appeal set

down for April 3, 2007 and April 4, 2007.

3. In the event of the above cheque not being received by RECO according to the terms and conditions as stated in the previous paragraph, the hearing of the Applicant's appeal shall commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto at 2:00 p.m. on April 4, 2007, and to continue, if necessary, at 9:30 a.m. on July 30, 2007 and July 31, 2007 at the Tribunal's aforesaid Chambers.
4. In the event of the Applicant complying with the terms and conditions set forth in paragraph 1 above, the hearing shall be adjourned, on a peremptory basis against the Applicant, to 9:30 a.m. on July 30, 2007 and to continue, if necessary, on July 31, 2007 at the Tribunal's aforesaid Chambers.
5. The Applicant was further ordered not to retain the services of counsel to represent him unless he has counsel's prior assurance that such counsel will be available to appear on the dates to which this matter has been adjourned, namely July 30, 2007 and July 31, 2007.
6. This Order shall be handed by the Applicant to the counsel he retains and such counsel shall forthwith advise the Tribunal, in writing, of his having been retained by the Applicant for the hearing on July 30, 2007 and July 31, 2007.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 3, 2007

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



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- » [FTT TRAVEL INTERNATIONAL INC. o/a FTT TRAVEL INTERNATIONAL INC.](#) 
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PRE-HEARING

JERRY CAPLAN TRAVEL SERVICES INC. O/A JERRY CAPLAN TRAVEL SERVICES,
SOARING TRAVEL – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002.

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ARDAVAN KHAVARI, agent representing the Applicant

SOUSSANNA S. KARAS, counsel, representing the
Travel Industry of Ontario

DATE OF
PRE-HEARING: March 17, 2008

Toronto

ORDER

Following attendances on March 17, 2008 at a pre-hearing before this Tribunal of Ardavan Khavari, appearing as agent on behalf of Jerry Caplan Travel Resources Inc. (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 April 25, 2008 at the Tribunal's Chambers, 1 St. Clair Avenue West, Suite 1200, Toronto;

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no resolution of any of the issues in this matter.
3. The Applicant shall, by no later than March 31, 2008 produce to the Registrar proof, satisfactory to the latter, that the TD Bank, Willowdale Branch, 312 Sheppard Avenue West, North York has issued an irrevocable letter of credit in favour of TICO for the sum of \$10,000.00 for the account of the Applicant.

4. The Applicant and the Registrar shall continue their negotiations to resolve this matter. In particular, the Applicant shall deliver to the Registrar, by no later than April 14, 2008 the Trust Account Reconciliation for the year ending December 31, 2007 as well as the Trust Account Reconciliation for the three-month period ending March 31, 2008.
5. Both Parties, irrespective of the continuing negotiations being conducted by them, shall fully comply with the Disclosure requirements under section 6.3 of the Tribunal's Rules of Practice, effective January 1, 2008.
6. The Parties acknowledge that the date of hearing of this matter, namely April 25, 2008, is peremptory against both parties.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
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PRE-HEARING

11323733 ONTARIO LTD o/a THE TRAVEL HUT – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, R.S.O. 2002, CHAPTER
T.30 SCHED. D AS AMENDED TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: RALPH CINTI, Agent, appearing on behalf of 1132733 Ontario
Ltd. (the Applicant)

SOUSANNA KARAS, counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
HEARING: March 12, 2008 Toronto

ORDER

A pre-hearing was held on March 12, 2008, before the Licence Appeal Tribunal in the attendance of Ralph Cinti as agent for the Applicant and Sousanna Karas, counsel for 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. The parties shall comply with the provisions of Rule 6 of the Tribunal's Rules of Practice with respect to documentary disclosure.

3. The hearing shall commence at 9:30 a.m. on April 21, 2008 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: March 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

FERN'S TRAVEL AGENCY & CUSTOM TOURS INC. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002, S.O. 2002, C. 30, SCHEDULE D
AND ONTARIO REGULATION 26/05

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: MAURICE GATIEN, Counsel, appearing on behalf of the Applicant,
Fern's Travel Agency & Custom Tours Inc.

MARY-ANN HARRISON, Agent, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF

PRE-HEARING: March 4, 2008

by teleconference

ORDER

A teleconference pre-hearing was held on March 4, 2008, before the Licence Appeal Tribunal (the "Tribunal"), in the presence of Maurice Gaten, Counsel, who appeared for Fern's Travel Agency & Custom Tours Inc. (the "Applicant"), and Mary-Ann Harrison, Agent, who appeared for the Registrar, *Travel Industry Act, 2002* (the "Registrar").

The Parties agreed that the required financial statements had been filed and that the outstanding issues were the working capital deficiency and the trust account reconciliation reports.

Mr. Gaten advised that the Applicant would be able to: (1) fax a copy of the deposit slip to confirm that the working capital deficiency was resolved; and (2) submit trust account reconciliations for March 31, April 30 and May 31, 2008, by the second working day of the month following each of the noted months.

Ms. Harrison noted that upon receipt, by March 31, 2008, of the confirmation that the working capital deficiency had been resolved and that the trust account reconciliations were received on the dates already noted, and subject to the Registrar's review of all the submitted documents, the Registrar may consent to the withdrawal of the Proposal dated December 5, 2007, and the matter will then not proceed to the hearing.

The Parties requested that the previously scheduled hearing date of April 10, 2008, be adjourned to allow for additional time for the matter to be resolved. The Parties agreed on April 21, 2008, as the new hearing date.

The Tribunal makes the following Order respecting the hearing now scheduled to commence at 9:30 a.m. on Monday, April 21, 2008, 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. The Parties were reminded that in the event of a settlement or withdrawal by either Party, the Tribunal must be advised in writing. Absent a settlement or withdrawal, the hearing will proceed on April 21, 2008, 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

Simon Dann, Presiding Member

RELEASED: March 27, 2008

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



PRE-HEARING

MILESTONE TRAVEL LTD.- PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT* 2002, R.S.O. 2002, C. T.30
SCHED. D AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: SOUSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act*

LINDA RUMBERG, Agent, appearing on behalf of Milestone
Travel Ltd. (the "Applicant")

DATE OF
HEARING: March 12, 2008 Toronto

ORDER

Linda Rumberg as Agent for the Applicant and Sousanna Karas, Counsel for the Registrar under the *Travel Industry Act, 2002* attended at a pre-hearing of this matter on March 12, 2008.

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

1. The parties to the hearing are the Applicant and the Registrar.
2. The matter shall proceed under the Rules of Practice in force prior to January 1, 2008, (the "Old Rules").
3. The parties shall comply with the provisions of Rule 6 of the Old Rules with respect to documentary disclosure.

4. The hearing shall commence at 9:30 a.m. on April 14, 2008, at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: March 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CITYSTAR TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR, *TRAVEL
INDUSTRY ACT, 2002* S.O. 2002 c.30, Sched. D

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: KAIFEZAHID SYED HUSSAIN, Agent, appeared on behalf of the
Applicant, Citystar Travel Inc.

SOUSSANNA KARAS, Counsel, appeared on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
HEARING: February 25, 2008 Toronto

DECISION AND ORDER

This is an appeal by Citystar Travel Inc. ("Citystar") to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Registrar, *Travel Industry Act, 2002* (the "Registrar") dated November 6, 2007, to revoke the registration of Citystar.

As a preliminary matter, Ms. Karas, counsel for the Registrar, noted that Mr. Hussain, agent for Citystar, is not approved by the Travel Industry Council of Ontario ("TICO"), the organization that administers the *Travel Industry Act, 2002* (the "Act"), as a general manager nor is TICO aware that Mr. Hussain has any authority to represent Citystar. Mr. Hussain agreed to supply, by March 7, 2008, written confirmation by Ms. Samina Perwaiz, the owner of Citystar, of Mr. Hussain's authority to act as agent for Citystar in this matter.

FACTS

Ms. Samina Perwaiz purchased Citystar, a travel agency, in September, 2006. She is the owner of Citystar and she and her husband are the sole officers and directors. Ms.

Perwaiz duly notified TICO of the change in ownership, the new officers and directors and the fact that she was changing banks.

Ms. Perwaiz spends about nine months of the year in Pakistan. She visits Canada approximately every second month for periods of approximately five days at a time, attending to her business. When Ms. Perwaiz is out of the country, she communicates with the business by e-mail and telephone. She receives monthly reports about the business from Mr. Hussain. There is no officer or director of Citystar who is in regular residence in Canada. Mr. Hussain is the senior employee of the company regularly resident in Canada. He was hired in June, 2007 as the general manager of the business on the recommendation of a friend of his, the previous general manager. He did not meet his employer prior to being hired nor was he informed of his duties and responsibilities. Mr. Hussain is, at the date of this hearing, not yet approved by TICO as a general manager of Citystar. At issue is the fact that he has no experience with the travel business in Ontario; his previous travel experience was in Pakistan. Mr. Hussain is working with TICO to meet their concerns about his experience but he concedes he is not as knowledgeable about the Act and doing business in accordance with it as he needs to be. It became clear during the course of the hearing that Mr. Hussain does not understand the requirements of the Act sufficiently to ensure that Citystar is in compliance. The Tribunal was unable to assess the understanding of Ms. Perwaiz as she was not present at the hearing.

For the past several years, Citystar has filed its annual financial statements late. In 2006, the annual financial statements were again late and, when they were filed, the required Trust Account Reconciliation was not provided. In the past, this tardiness has been acquiesced in by TICO and TICO apparently did not insist that the 2006 Trust Account Reconciliation be provided. The 2007 annual financial statements have not yet been filed, despite the fact that they were due in November, 2007 and despite demands for the financial statements from TICO in December, 2007 and January, 2008. Ms. Perwaiz was out of the country during this time and Mr. Hussain had to return to Pakistan for 20 days in December and again for 20 days in January, so there was no one in Canada who could respond to TICO's demand. There have been persistent shortfalls in the working capital, but these have always been remedied by infusions of capital from Ms. Perwaiz when requested by TICO.

TICO received a customer complaint in 2007 and in October of that year, an inspector visited the Citystar premises. The inspector was unable to complete his review of the business because the source books were not available. Source books are the day-to-day accounts that form the basis of the financial reports. The source books for the business had been sent to immigration officials to deal with an immigration matter involving Ms. Perwaiz. They have not yet been produced for TICO's review despite a demand for them. TICO has been unable to speak to Ms. Perwaiz about its concerns because they have been unable to contact her since the fall of 2007. Mr. Hussain testified that he could provide the source documents and the 2007 financial statements within a month. However, Mr. Hussain also testified that he could not say with certainty when Ms. Perwaiz would be returning to Canada, so the Tribunal considers his

testimony about the timing of a possible filing to reflect his hopes rather than a realistic assessment of probability.

The TICO inspector found two instances of overdrafts in the trust account but without the source documents, he was unable to determine what caused them. The concern is that trust money is being improperly withdrawn. Mr. Hussain testified that these two overdraft situations in the trust account were not the result of improper withdrawals but rather stemmed from two cases where cheques written by customers were not honoured and that in each case the shortfall had been made up by Citystar.

Citystar's problems are not only with TICO. Corporate taxes have not been paid by Citystar for two years and the relevant corporate tax authorities are demanding tax returns be filed. Mr. Hussain is attempting to deal with this issue as well.

The Registrar is proposing to revoke Citystar's registration on several grounds. These grounds included an assertion that TICO had not been informed of a change in ownership of Citystar or in a change in Citystar's banker. TICO concedes that it did receive that notification. Other grounds for revocation are that:

- the new general manager is not approved by TICO;
- source documents of the financial records of the company have not been produced, four months after the inspection;
- financial statements are persistently and increasingly late, and starting in 2006, are incomplete;
- Citystar has not yet submitted documentation concerning the 2007 customer complaint;
- the renewal application for Citystar is still not complete and is improperly signed by Mr. Hussain rather than by an officer or director of Citystar;
- there have been persistent shortfalls in the working capital and TICO is concerned about how much longer Ms. Perwaiz intends to fund the business;
- In the absence of the source documents, TICO cannot determine that the trust accounts are being properly kept,
- there were two instances of trust account overdrafts, raising concerns about the proper use of the trust account.

LAW

Section 8 of the Act provides that an applicant who otherwise meets the requirements for registration as a travel agent is entitled to be registered unless, in the case of a corporation:

8 (1)(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,

(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, ...

Section 22 of Ontario Regulation 26/05 made under the Act, specifies that financial statements are to be filed by registrants every year and spells out the specific requirements.

If the Registrar proposes to revoke a corporation's registration, then the corporation may apply to the Tribunal for a hearing and subsection 11(5) of the Act provides:

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.

The standard of proof required in a hearing before the Tribunal that involves the possible revocation of a registration under the Act is as stated in the case of *Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* (1988), 65 O.R. (2d) 526 (Div. Ct.) in which Mr. Justice Reid wrote:

This message is clear and has been consistently adopted by this Court. Nothing short of clear and convincing proof based on cogent evidence will justify an administrative tribunal in revoking a licence to practise medicine or to gain a livelihood in business.

This case has been cited by the Court of Appeal in *Stetler et. al. v. The Ontario Flue-Cured Tobacco Growers' Marketing Board* (2005), 76 O.R. (3d) 321 (C.A.).

On the related matter of what deference is owed to the decision of the Registrar, the law is clear that a hearing before the Tribunal is a fresh consideration of the facts and law, with no deference owed to the decision of the Registrar. There is a line of Divisional Court decisions which make this point. The earliest of these decisions is *Brenner v. Ontario (Registrar of Motor Vehicles Dealers & Salesman)*, [1983] O.J. No. 1017 (Ont. Div. Ct.). The Court in the *Brenner* case made two apparently contradictory statements about the degree of deference owed to the Registrar's decision by the Tribunal. First, on page 3 of the decision, the Court said:

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.

If the Court had stopped there, the effect of the decision would have been to sharply curtail the scope of hearings before this Tribunal under Section 7(4) of the Act. However, the Court continued on page 4,

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.

The second of these cases is *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales* (2003), 169 O.A.C. 77 (Ont. Div. Ct.). In the *Shine* case the Court considers the two passages of the *Brenner* decision which are quoted above and concludes that the *Brenner* decision must be read carefully, as follows:

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

The third and most recent of these decisions is that of *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers Act)* (2005), 205 O.A.C. 110 (Ont. Div. Ct.). This case is of particular interest because the central issue before the Court was whether the Tribunal had applied the right interpretation of *Brenner* in reaching its decision. The Court concluded that the Tribunal was applying the passage on page 3 of the *Brenner* decision, quoted above, rather than the passage on page 4, which is also noted above. The Court continued:

The distinction between the two passages is significant. The question 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 licence have been proven, showing no deference to the initial decision of the Registrar. . .

The Vice-Chair [of the Tribunal] . . . clearly based his decision on a conclusion that the Registrar was not in error. In doing so, he asked himself a question that this court in *Shine* had expressly stated was improper. This is, in our view, an error of law.

TICO is also relying on the case of *London South Transportation Centre Inc. (c.o.b. Diamond Tours Canada) (Re)* [1999] O.C.R.A.T.D. No. 24 in which the predecessor of this Tribunal reviewed the case law and concluded that the requirements under the Act to submit annual financial statements, including Trust Account Reconciliations, are absolute and do not confer any discretion on the Tribunal. Given the decision discussed below, it is not necessary to consider whether this line of cases ought to be followed in all circumstances.

DECISION

The Registrar has been moved to propose that Citystar's registration be revoked because TICO is aware of several violations of the Act but has been unable to

determine whether these are the only violations or whether the traveling public is at risk. Known violations of the Act include the fact that Citystar's general manager has not been approved by TICO and that Citystar has failed to file 2007 financial statements and has failed to provide source financial documents for TICO's inspection. It is significant that TICO offered to attend at a pre-hearing before the Tribunal to attempt to settle these issues, but no one was present in Canada to represent Citystar at such a pre-hearing.

TICO has acquiesced in filing delays in the past, but this fact does not relieve Citystar from its obligation to file promptly. Nor is Citystar entitled to rely on the previous indulgences to continue late filing of financial statements. The unavailability of the source documents is a legitimate source of concern, as is the fact that the general manager of the business is not yet approved by TICO, more than six months after he began the job. The position of general manager is a particularly important one in this case, given the absentee status of the owner.

The financial filing requirements in the regulations to the Act are there to protect the public by permitting TICO to satisfy itself that the business is solvent and operating with sound accounting methods. A registrant cannot evade its responsibilities by failing to provide the documents that TICO needs to review in order to ensure compliance.

TICO made several efforts to contact the owner of Citystar to discuss the delinquencies. What neither the Registrar nor TICO knew until the hearing is that Ms. Perwaiz is an absentee owner. While she has plans to become a resident of Canada at some point in the future, at present she is rarely here. Mr. Hussain is running the business. He appears to be a dedicated and sincere employee and, with the right training and supervision, he could become an adept general manager. However, he is not receiving that training or supervision. Instead, he has been left on his own without the knowledge or experience to operate Citystar in accordance with the complex accounting requirements of the Act.

There is no requirement that Ms. Perwaiz notify TICO that she does not intend to be regularly resident in Ontario, but it is customary for absentee owners to inform TICO. In those cases, TICO requires one officer or director to be resident in the province. TICO may also require some greater financial surety to protect the public.

There is no suggestion that Ms. Perwaiz lacks the ability to conduct the business with honesty and integrity. There is no evidence that she is anything but a person of honesty and integrity. The issue that arose during the hearing is whether, in her present circumstances, she is capable of operating Citystar in accordance with the law, including compliance with the requirements of the Act. It is clear that at present she is not meeting the requirements of the Act and it is safe to assume that, so long as she is an absentee owner, she will continue to be unable to meet the accounting and reporting requirements of the Act. If Ms. Perwaiz' circumstances change, she may re-apply for registration. At present, it is in the best interests of the public that Citystar have its registration revoked.

ORDER

The Tribunal orders as follows:

1. Mr. Hussain shall forthwith provide to TICO and to the Tribunal a written authorization by Citystar to act on its behalf in these proceedings.
2. After considering the evidence, and acting pursuant to subsection 11(5) of the Act, the Tribunal directs the Registrar to carry out his Proposal of November 6, 2007 to revoke the registration of Citystar Travel Inc. as a travel agent.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: March 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

THE CRUISE PEOPLE – PRE-HEARING

APPEAL FROM A DECISION OF THE REGISTRAR, *TRAVEL
INDUSTRY ACT, 2002*

TO REVOKE A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice Chair

APPEARANCES: JOHN LANG, Agent, representing the Applicant, The Cruise People

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: March 3, 2008 Toronto

ORDER

During the pre-hearing, the parties agreed that if certain conditions were met by the Applicant, then the matter could be settled, but that in the absence of a settlement, the hearing should proceed on the date currently scheduled.

Accordingly, the Licence Appeal Tribunal orders that:

1. The Applicant, The Cruise People, shall have until April 1, 2008 to provide the Travel Industry Council of Ontario ("TICO"), the body which administers the *Travel Industry Act, 2002* (the "Act"), with the following:
 - a. The financial statements required under the Act for the Applicant's fiscal year ending June 30, 2007, and

- b. A statement clarifying who made the capital infusion for the fiscal year ending June 30, 2006 and from what type of account.
2. If the Applicant meets the requirements in paragraph 1, then on or before April 4, 2008, TICO will advise the Applicant if a further capital infusion is required for the fiscal year ending June 30, 2007 to maintain the working capital required under the Act.
3. If a further capital infusion is required, then the Applicant will have until April 9, 2008 to provide it in a form satisfactory to TICO.
4. If the Applicant meets the requirements under paragraphs 1 and 3, above, then TICO will notify the Applicant and the Licence Appeal Tribunal that the matter has been settled and the hearing will not proceed.
5. If the matter is not settled, then the parties will have until April 10, 2008 to disclose to each other any documents or things on which they intend to rely at the hearing. Other than these disclosure requirements, the Licence Appeal Tribunal Rules, effective January 1, 2008 will apply to the hearing.
6. If necessary, the hearing of this matter will proceed on **April 17, 2008** at the offices of the Licence Appeal Tribunal, commencing at 9:30 AM.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: March 10, 2008

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

PRE-HEARING

IZABELA BORYS o/a HUMBERVIEW TRAVEL – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: MAYA SABHARWAL, Counsel, representing the Registrar,
Travel Industry Act, 2002

*NO AUTHORIZED REPRESENTATIVE APPEARED FOR
THE APPLICANT*

DATE OF
PRE-HEARING: January 9, 2008 by teleconference

ORDER

The pre-hearing did not proceed because the Applicant, Izabela Borys, did not attend and the representative attending on her behalf had no written authorization to represent her. The representative advised that the Applicant was out of the country and he was present at the request of the Applicant's husband. Staff of the Tribunal confirmed that no verbal authorization had been provided for the representative, to act on the Applicant's behalf.

The Tribunal makes the following Order:

1. The pre-hearing in this matter is adjourned to February 6, 2008 commencing at 1:30 p.m., the date already scheduled for the hearing. The pre-hearing will take place at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th floor, Toronto.
2. The Applicant shall provide written authorization for any representative who attends the pre-hearing on her behalf.

3. The hearing date will be rescheduled at the pre-hearing. If neither the Applicant nor a representative authorized to represent her attend the pre-hearing, the date will be scheduled by the Tribunal with the input of the Registrar alone.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Panel Member

RELEASED: February 4, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

2041061 ONTARIO LIMITED
O/A PLANET EARTH TRAVEL – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002, S.O. 2002, CHAPTER 30,
SCHEDULE D AND ONTARIO REGULATION 26/05

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: JAMES E. ROGERS, Agent, appearing on behalf of the Applicant,
2041061 Ontario Limited o/a Planet Earth Travel

MAYA SABHARWAL, Counsel, appearing on behalf of the Registrar,
Travel Industry Act, 2002

DATE OF
PRE-HEARING: January 11, 2008 Toronto

ORDER

A pre-hearing was held before the Tribunal on January 11, 2008, in the presence of James E. Rogers, Agent, who appeared for 2041061 Ontario Limited o/a Planet Earth Travel (the "Applicant") and Maya Sabharwal, Counsel, who appeared for the Registrar, *Travel Industry Act, 2002* (the "Registrar").

The issue was stated by Ms. Sabharwal as being the timely submission of financial statements and possible capital deficiency.

Mr. Rogers advised that he had brought completed financial statements in the requested form and had provided Ms. Sabharwal with a copy prior to the commencement of the pre-hearing.

Additionally, Mr. Rogers confirmed that, subject to the Registrar's review of the financial statements and in the event the Registrar determined that a capital shortfall did exist, the Applicant was fully prepared to remedy such shortfall.

Ms. Sabharwal noted that subject to the Registrar's review of the submitted financial statements, the Registrar may consent to the withdrawal of the Proposal dated August 17, 2007 and the matter will then not proceed to the hearing on February 11, 2008.

Therefore, the Tribunal makes the following Order respecting the hearing scheduled to commence at 1:30 p.m. on Monday, February 11, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Parties were reminded that in the event of a settlement or withdrawal by either Party, the Tribunal must be advised in writing. Absent a settlement or withdrawal, the hearing will proceed on February 11, 2008, 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

Simon Dann, Presiding Member

RELEASED: February 5, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

DAHABSHILL TRAVEL & TOURISM INC. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002, S.O. 2002, CHAPTER 30,
SCHEDULE D AND ONTARIO REGULATION 26/05

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: MUSTAFA YUSUF, appearing for the Applicant, Dahabshill
Travel & Tourism Inc.

MAYA SABHARWAL, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002* (the “Respondent” or the
“Registrar”)

DATE OF
PRE-HEARING: January 11, 2008 Toronto

ORDER

A pre-hearing was held on January 11, 2008, before the Tribunal, in the presence of Mustafa Yusuf, who appeared for Dahabshill Travel & Tourism Inc. (the “Applicant”) and Maya Sabharwal, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the “Registrar”);

The issues reviewed by Ms. Sabharwal were stated as being: (i) the timely submission of financial statements, (ii) the required management of trust accounts and records, and (iii) that a qualified manager must always be on-site.

Mr. Yusuf noted the third issue and undertook to provide to the Registrar, through Ms. Sabharwal, the company’s financial statements for the calendar year 2007 and trust account records for the period August through December 2007, inclusive on or before January 25, 2008.

Ms. Sabharwal noted that following receipt of the specific financial statements and trust account records, and subject to the Registrar's final review, the Registrar may consent to the withdrawal of the Proposal dated November 5, 2007, and then the matter may not proceed to the hearing on February 6, 2008.

Therefore, the Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, **February 6**, 2008, at the Tribunal's chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Parties 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 November 5, 2007. In the event the Proposal is not withdrawn, the hearing will proceed on February 6, 2008, 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

Simon Dann, Presiding Member

Released: January 17, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

CITYSTAR TRAVEL INC. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, R.S.O. 2002, CHAPTER
T.30 SCHED. D AS AMENDED TO REVOKE REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: MAYA SABHARWAL, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

NO ONE appearing on behalf of the Applicant

DATE OF
HEARING: January 2, 2008 Toronto

ORDER

A pre-hearing was held in this matter on January 2, 2008, in Toronto before this Tribunal in the presence of Maya Sabharwal, counsel for the Respondent. No-one appearing for the Applicant, although properly served with the Appointment for and Notice of Pre-hearing as evidenced by a facsimile confirmation report dated November 23, 2007.

The Tribunal makes the following Order:

1. Subject to paragraph 2 below, the Applicant shall comply with rule 6.3 of the Licence Appeal Tribunal's Rules of Practice (effective January 1, 2008). A copy of Rule 6.3 is attached to this Order.
2. The Applicant shall, on or before January 23, 2008, disclose and deliver to the Respondent every document and thing that the Applicant will refer to or tender as evidence at the hearing;

3. The hearing of this matter is scheduled for February 21, 2008, at 10:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

RELEASED: January 10, 2008

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



PRE-HEARING

FAIROUZ TRAVEL LTD. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: MOHAMMED ALI ZREK, representing the Applicant

MAYA SABHARWAL, Counsel, representing the Registrar,
Travel Industry Act, 2002.

DATE OF
PRE-HEARING: January 9, 2008

Toronto

ORDER

A pre-hearing was held in this matter, by teleconference, on January 9, 2008, in the presence of Mohammed Ali Zrek, Agent representing Fairouz Travel Ltd. (the “Applicant”) and Maya Sabharwal, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the “Registrar”).

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The issues to be addressed at the hearing are set out in the Registrar’s Notice of Proposal to Revoke Registration dated October 31, 2007 and relate primarily to the regulatory requirements to provide information relating to the persons supervising or managing an office.
3. By no later than January 16, 2008, the Applicant’s Agent will complete and submit to the Registrar, a letter confirming that the Applicant’s primary manager is Nizar Nezameddin.

4. By no later than January 16, 2008, the Applicant's Agent will complete and submit to the Registrar, a Schedule "A" form, providing detailed information on the individual who will act as assistant manager for the Applicant. The Registrar will fax the required form to the Applicant's Agent no later than January 10, 2008.
5. Subject to the Registrar's review of the documentation provided by the Applicant, the Registrar will notify the Tribunal in writing if the matter is settled and the Proposal dated October 31, 2007, is withdrawn. Should the Proposal be withdrawn, the hearing scheduled to take place on February 5, 2008, will then be cancelled.
6. The hearing will proceed in accordance with the Tribunal's Rules of Practice dated November 3, 2003.
7. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the above-noted Rules of Practice.
8. The hearing is scheduled to commence at 9:30 a.m. on February 5, 2008 at Gillespie Reporting Services, 130 Slater St., Suite 200, Ottawa, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Presiding Member

RELEASED: January 9, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



CAVLOVIC, MARISSA o/a MARISSA TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, R.S.O. 2002, CHAPTER
T.30 SCHED. D AS AMENDED TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MARY-ANN HARRISON, Agent, appearing on behalf of the
Registrar, *Travel Industry Act*

MARISSA CAVLOVIC, Applicant, in person

DATE OF
HEARING: December 17, 2007 Toronto

CONSENT ORDER

Marissa Cavlovic o/a Marissa Travel, the Applicant, and the Registrar under the *Travel Industry Act, 2002* have applied to the Licence Appeal Tribunal for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written Minutes of Settlement signed by the Applicant and the Registrar under the *Travel Industry Act, 2002* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A" and upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing in accordance with the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: December 27, 2007

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

SCHEDULE "A"

MINUTES OF SETTLEMENT
TRAVEL INDUSTRY ACT, 2002

IN THE MATTER OF THE REGISTRATION OF CAVLOVIC, MARISSA, o/a MARISSA TRAVEL

1. The Registrar, *Travel Industry Act, 2002* agrees to withdraw his proposal dated August 27, 2007 as Cavlovic, Marissa o/a Marissa Travel will voluntarily terminate reg. # 2525797 effective December 17, 2007.
2. The Registrar agrees that Cavlovic, Marissa o/a Marissa Travel can reactivate her registration if she files the appropriate financial statement for the year ended December 31, 2006 prior to March 31, 2008. The applicable fee will be the renewal fee. The applicant must demonstrate that she maintains the minimum working capital.
3. If Cavlovic, Marissa o/a Marissa Travel does not submit the appropriate financial statement for the year ended December 31, 2006, or demonstrate that she maintains the minimum working capital, prior to March 31, 2008, a new application fee of \$2,750 will apply.
4. Cavlovic, Marissa o/a Marissa Travel will file the appropriate financial statement for the year ended December 31, 2007 no later than March 31, 2008.

Dated Dec 17, 2007

Signed

Marissa Cavlovic

Michael Pepper
Registrar, *TIA 2002*



PRE-HEARING

665666 ONTARIO LTD. O/A DRUM TRAVEL SERVICE (BRIMLEY) – PRE-HEARING

APPEAL FROM A DECISION OF THE REGISTRAR, *TRAVEL
INDUSTRY ACT, 2002*

TO REVOKE A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: VIJAY KISHUN, Agent, representing the Applicant, 665666 Ontario
Ltd. o/a Drum Travel Service Brimley

MAYA SABHARWAL, Counsel, representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: November 21, 2007 Toronto

ORDER

During the pre-hearing of this matter the parties settled all outstanding issues and signed Minutes of Settlement which were reviewed by the Tribunal.

The parties wish to keep the Minutes of Settlement confidential.

Accordingly, this Tribunal orders that:

- (1) The issues in this matter are settled in accordance with the Minutes of Settlement, which have been filed with the Tribunal; and
- (2) This matter is concluded.

LICENCE APPEAL TRIBUNAL

Laurie Sanford
Vice-Chair

RELEASED: November 29, 2007

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

PRE-HEARING

MARISSA CAVLOVIC o/a MARISSA TRAVEL – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: MARISSA CAVLOVIC, the Applicant

MAYA SABHARWAL, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: November 7, 2007

Toronto

ORDER

A pre-hearing was held in this matter on November 7, 2007, in the presence of the Marissa Cavlovic, the Applicant, and Maya Sabharwal, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the “Registrar”).

The issue to be addressed at the hearing was discussed in detail.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The issue to be addressed at the hearing is set out in the Registrar’s Notice of Proposal to Revoke Registration dated August 27, 2007, and relates to the regulatory requirements for the Applicant to provide financial statements for the fiscal year ended December 31, 2006.
3. The Applicant will provide the required financial information to the Registrar no later than November 30, 2007.

4. Subject to the Registrar's review of the documentation provided by the Applicant, the Registrar will notify the Tribunal, in writing, if the matter is settled and the Proposal dated August 27, 2007, is withdrawn. Should the Proposal be withdrawn, the hearing scheduled to take place on December 17, 2007, will then be cancelled.
5. The Parties to the hearing shall provide disclosure of documents to be relied upon at the hearing by no later than December 7, 2007.
6. The Registrar will call two witnesses at the hearing. The Applicant will call one witness.
7. The hearing is scheduled to commence at 9:30 a.m. on December 17, 2007, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: November 9, 2007

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



PRE-HEARING

DEMFER TRAVELS INC. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-chair

APPEARANCES: REMEGIUS ANTHONY PEREIRA, Agent, representing the
Applicant, Demfer Travels Inc.

MAYA SABHARWAL, Counsel, representing the Registrar,
Travel Industry Act, 2002.

DATE OF
PRE-HEARING: October 29, 2007

Toronto

ORDER

A pre-hearing was conducted on October 29, 2007, in the presence of Remy Pereira, representing the Applicant, and Maya Sabharwal, representing the Registrar;

The Parties confirmed that the two major concerns of the Registrar identified in the Proposal to Revoke have been addressed. There are some minor matters to be addressed, as set out below, and provided they are addressed to the satisfaction of the Registrar the Proposal will be withdrawn. An undertaking was given by Counsel, on behalf of the Registrar, to notify the Tribunal as soon as possible of the intention to withdraw the Proposal so that the one day hearing scheduled to commence at 9:30 a.m. on December 12, 2007, at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, may be cancelled.

The Tribunal makes the following stipulations and Order:

1. The Parties to this matter are Demfer Travels Inc, Applicant, and the Registrar, *Travel Industry Act, 2002*.

2. The Applicant shall provide to the Registrar with a letter confirming the contact information for the Applicant's accountant and confirmation of his authority to act on behalf of the Applicant in matters involving the Registrar.
3. The Applicant undertakes to maintain all business records at the business premises in accordance with the *Travel Industry Act, 2002*.
4. The Applicant shall submit to an inspection on a mutually convenient date to be arranged between the Registrar and the Applicant, sometime between the date of this Order and the scheduled hearing date,

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: November 5, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

MARIE A. SORIANO AND MANUEL M. MANIQUIS O/A ROYAL VACATIONS
TRAVEL AND TOURS – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-chair

APPEARANCES: MARIE A. SORIANO AND MANUEL M. MANIQUIS,
o/a Royal Vacations Travel and Tours, Applicants, representing
themselves

MAYA SABHARWAL, Counsel, representing the Registrar,
TRAVEL INDUSTRY ACT, 2002

DATE OF
PRE-HEARING: October 25, 2007 Toronto

ORDER

A pre-hearing was conducted on October 25th, 2007, in the presence of Marie Soriano and Manuel Maniquis, Applicants and Maya Sabharwal, representing the Registrar;

The Tribunal makes the following stipulations and Order regarding the one day hearing scheduled to commence at 9:30 a.m. on December 12th, 2007, at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th floor, Toronto:

1. The Parties to this matter are Marie A. Soriano and Manuel M. Maniquis, Applicants, and the Registrar, *Travel Industry Act, 2002*.

2. The Applicants shall provide to the Registrar with the following documentation by the indicated dates:
 - i) Financial statements together with a review engagement report by a public accountant for the fiscal year ending December 31, 2006, on or before November 30th, 2007.
 - ii) A letter from the Applicants' financial institution confirming their trust account has been designated as 'Travel Industry Act' trust account on or before November 4th, 2007.
 - iii) Trust reconciliations for the months of August and September, 2007, on or before November 1st, 2007.
 - iv) Trust reconciliations for the month of October, 2007, on or before November 8th, 2007.
 - v) Trust reconciliations for the month of November, 2007, on or before December 5th, 2007.
3. The Parties shall provide copies of all other documentation to be relied upon to the other party at least 10 days before the hearing.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: November 2, 2007

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



PRE-HEARING

ATTACHE CONCIERGE SERVICES INCORPORATED – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: WILLIAM KERBY, Agent, representing the Applicant, Attache
Concierge Services Incorporated

MAYA SABHARWAL, Counsel, representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: October 15, 2007 *by teleconference*

ORDER

A pre-hearing was conducted by telephone conference on October 15, 2007, in the presence of William Kerby, Agent representing the Applicant and Maya Sabharwal, representing the Registrar;

The Tribunal makes the following stipulations and Order regarding the one-day hearing scheduled to commence at 9:30 a.m. on December 5, 2007, at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th floor, Toronto;

- 1) The Parties to this matter are Attache Concierge Services Incorporated, Applicant, and the Registrar, *Travel Industry Act, 2002*.
- 2) The Applicant shall provide to the Registrar the following documentation on or before November 9, 2007:
 - a) completed Form 1, for the income period ending February 28, 2007,
 - b) letter from Applicant's financial institution confirming trust account designation as *Travel Industry Act, 2002* trust account,

- c) Schedule A Form, setting out personal information of Applicant's new General Manager,
 - d) Schedule A Form – "Notice of Business Change" setting out details of new business location.
- 3) The Parties shall comply with the disclosure requirements set out in Rule 6 in all other regards.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: October 22, 2007

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

PRE-HEARING

GILLIGAN'S ISLE TRAVEL LTD. – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: CAROLINE GILLIGAN, Agent for the Applicant

MAYA SABARWAL, Counsel representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: September 26, 2007

Toronto

ORDER

A pre-hearing was held in this matter on September 26, 2007, in the presence of the Caroline Gilligan, Agent for the Applicant, and Maya Sabarwal, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar").

The issues to be addressed at the hearing were discussed in detail. Contact information for the Applicant was also discussed and the Applicant's Agent confirmed that information should be sent by courier and regular mail to the business address on file with the Tribunal.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The issues to be addressed at the hearing are set out in the Registrar's Notice of Proposal to Revoke Registration dated July 12, 2007, and relate to the regulatory requirements to:

- (a) provide information relating to the persons supervising or managing an office in accordance with section 14 of O.Reg 26/05, and
 - (b) maintain a trust account or provide security as required by sections 27 and 28 respectively of O.Reg. 26/05.
- 3. The Applicant's Agent will complete and submit a Change of Business form to the Registrar, providing the required details for herself as manager and for the agency's assistant manager by no later than October 1, 2007.
 - 4. The Applicant's Agent will establish a trust account and or line of credit as security and provide the required information to the Registrar by no later than October 12, 2007.
 - 5. Subject to the Registrar's review of the documentation provided by the Applicant, the Registrar will notify the Tribunal in writing if the matter is settled and the Proposal dated July 12, 2007, is withdrawn. Should the Proposal be withdrawn, the hearing scheduled to take place on November 1, 2007, will then be cancelled.
 - 6. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6.3 of the Rules of Practice of the Tribunal.
 - 7. The Registrar will call two witnesses at the hearing. The Applicant will call no witnesses.
 - 8. The hearing is scheduled to commence at 9:30 a.m. on November 1, 2007 at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: September 28, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

AGASZY TRAVEL LTD. o/a AIRWAVE TRAVEL – PRE-HEARING

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, R.S.O. 2002, CHAPTER T.19 AS
AMENDED TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MAYA SABHARWAL, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

SAFIYA YUMNU, Agent, appearing on behalf of the Applicant

DATE OF
HEARING: September 7, 2007 Toronto

ORDER

The Applicant and the Registrar, *Travel Industry Act, 2002* (hereinafter the "Registrar"),
attended a pre-hearing before this Tribunal on September 7, 2007.

The Tribunal makes the following Order for the hearing:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The hearing is adjourned on the terms set out below. It will commence at 9:30 a.m.
on January 14, 2008, at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th
Floor, Toronto, such adjournment to be preemptory on both Parties.

3. On or before January 7, 2008, the Applicant shall provide to the Registrar, financial statements, satisfactory to the Registrar, for the fiscal year 2006, prepared in accordance with Applicant's obligations pursuant to the *Travel Industry Act, 2002* and regulations.
4. Commencing on September 30, 2007, with respect to the trust account reconciliation for the month of August, 2007 and continuing until the date of the hearing, the Applicant shall, within thirty days of the end of each month, provide monthly trust account reconciliations to the Registrar with respect to activity in the Applicant's *Travel Industry Act, 2002* Trust Account for the month.
5. On or before December 31, 2007, the Registrar shall disclose to the Applicant, with copies to the Tribunal, any and all documents upon which it intends to rely at the hearing.
6. On or before January 4, 2008, the Applicant shall disclose to the Registrar, any documents it intends to rely upon at the hearing, in accordance with the provisions of Rule 6 of the Tribunal's *Rules of Practice* regarding disclosure of documents.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: September 18, 2007

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



COVENANT TOURS INC. O/A COVENANT TOURS & TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, 2002, R.S.O. 1990, CHAPTER
T.19 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: JANE WEARY, Chair

APPEARANCES: NIGEL GILBY, Counsel for the Applicant, Covenant Tours Inc. o/a
Covenant Tours & Travel

MAYA SABHARWAL, Counsel for the Registrar, *Travel
Industry Act*, 2002

DATE OF
PRE-HEARING: August 13, 2007

Toronto

ORDER

A teleconference was held at the Tribunal's Chambers in which both M. Sabarwal, Counsel for the Registrar under the *Travel Industry Act*, 2002 (the "Act") and N. Gilby, Counsel for Convent Tours Inc. o/a/ Convent Travel & Tours (the "Applicant"). The parties discussed the Applicant's appeal dated June 12th, 2007 of the Registrar's Proposal to Revoke its Registration. The Tribunal orders as follows:

1. The Parties to the Hearing are the Applicant and the Registrar.
2. The Parties intend to resolve the matter by August 31, 2007 and will, in the event such settlement occurs, notify the Tribunal in writing prior to the end of the day of September 3rd, 2007 that the matter is concluded and no further proceedings before this Tribunal are required.
3. Should the settlement not transpire, the Parties have been reminded of their obligations concerning disclosure of evidence contained in the Tribunal Rules of

Practice – being twenty (20) days prior to the Hearing – such that all disclosure shall be provided by August 31, 2007.

4. In the event that the Hearing is required, the Parties agree to the historical facts as alleged in the Proposal of the Registrar. The issue for the Hearing will be whether or not the Applicant's explanation of this history and position provides the Tribunal sufficient grounds to amend or modify the Proposal in accordance with its authority under subsection 11(5) of the Act.
5. In the event the Hearing is required, the matter will proceed as scheduled on September 19, 2007 at 9:30 a.m. at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, unless a change of venue request is received and approved by the Tribunal Registrar in advance.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: August 27, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

SUNNY SHORES TRAVEL INC. – PRE-HEARING

APPEAL FROM A PROPOSAL BY THE REGISTRAR, TRAVEL
INDUSTRY ACT, 2002

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: VERA SILAJEVA, Agent, appeared on behalf of the Applicant,
Sunny Shores Travel Inc.

MAYA SABHARWAL, Counsel, appeared on behalf of The
Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: August 24, 2007

Toronto

ORDER

This pre-hearing arises out of an appeal by the Applicant to the Licence Appeal Tribunal (the “Tribunal”) from a proposal by the Registrar, *Travel Industry Act, 2002* (the “Act”) to revoke the Applicant’s registration.

All issues have been resolved between the parties and the Registrar has agreed to withdraw the proposal. The Applicant was encouraged to schedule a meeting with a qualified representative of the Travel Industry Council of Ontario to review the working capital requirements under the Act and how they may be met in the Applicant’s case.

Accordingly, the Tribunal stipulates:

1. The Registrar has withdrawn his Notice of Proposal to Revoke Registration of the Applicant, dated June 4, 2007.
2. This matter is concluded.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: August 27, 2007

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



PRE-HEARING

CONQUEST VACATIONS COMPANY – PRE-HEARING

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY
COUNCIL OF ONTARIO UNDER THE *TRAVEL INDUSTRY
ACT, 2002*, RSO, 1990 T.19, AS AMENDED

TO PARTIALLY DISALLOW A CLAIM AGAINST THE TRAVEL
INDUSTRY COMPENSATION FUND

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: SIMON SHIVA BALA, Agent, appeared on behalf of Conquest
Vacations Company

FRANK WILLIAMS, Counsel,
MAYA SABHARWAL, Counsel,
appeared on behalf of The Travel Industry Council of Ontario

DATE OF
PRE-HEARING: July 12, 2007

Toronto

ORDER

This pre-hearing arises out of a claim made by Conquest Vacations Company (“Conquest”) against the Travel Industry Compensation Fund established under the *Travel Industry Act*, RSO 1990, T.19, as amended, and associated regulations.

Following an earlier pre-hearing in this matter on May 25, 2007, the parties exchanged further documentation and met to discuss the disputed claims.

The parties were not able to agree on all matters. However Conquest has withdrawn its claims for compensation due to losses incurred in the “non-risk programs” that it had with the bankrupt carrier. Conquest has also abandoned the claims for compensation arising from the “risk programs” that it had with the bankrupt carrier and for which claims

were detailed in Exhibits 3(A), 3(B), 3(C) and 3(H) of its claim. Conquest will be pursuing all other claims against the Travel Industry Compensation Fund.

The parties were reminded of their disclosure requirements under Rule 6 of the Tribunal's Rules of Practice.

Accordingly, the Tribunal orders that the hearing into this matter shall commence at 9:30 a.m. on September 26, 2007 at the Tribunal's Chambers and shall continue, if necessary, on September 27 and 28, 2007.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: July 18, 2007

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

FTT TRAVEL INTERNATIONAL INC.
o/a FTT TRAVEL INTERNATIONAL INC.

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: VALERIE MOKRY, Agent, representing FTT Travel International
Inc.

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act*, 2002 (the "Respondent" or the
"Registrar")

DATE OF
PRE-HEARING: April 23, 2007

Toronto

ORDER

A pre-hearing was held in this matter on April 23, 2007, in Toronto before this Tribunal in the presence of Valarie Mokry, who appeared on behalf of her company, FTT Travel International Inc., (the "Applicant" and "FTT") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act*, 2002 (the "Respondent" or the "Registrar");

The Applicant confirmed that the financials were not available and that she was in the process of selling the business or merging it with another established travel agency. She added that with the completion of the sale or merger, she would voluntarily terminate her registration. She also said she expected to know the outcome within the week.

Ms. Karas requested that the Applicant provide a response on whether her plan to sell

or merge the business had been completed and whether there would be voluntary termination of the Applicant's registration by or before 12:00 p.m. noon, Monday, April 30, 2007. The Applicant agreed to do so.

Ms. Karas noted that if the Applicant wished to continue the existing business, she also had the option of providing the required financials in that time and subject to the Registrar's final review, the Registrar may consent to the withdrawal of the Proposal dated December 13, 2006 and the matter will then not proceed to the hearing on May 9, 2007.

Therefore the Tribunal orders as follows:

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 13, 2006. In the event the Proposal is not withdrawn, the hearing will proceed on May 9, 2007.
3. The Parties were reminded of the applicable requirements of disclosure as set out in rule 6 of the Tribunal's Rules of Practice and as they did not wish to change the scheduled hearing date of May 9, 2007, the Parties agreed to a reduced disclosure period and that all documents and or materials to be relied upon shall be submitted by or before May 4, 2007.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: April 30, 2007

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
G.V. TRAVEL LTD.
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 21, 2006

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

G.V. TRAVEL LTD.

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 April 20, 2007;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Thursday, the 10th day of May, 2007.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Acting Chair

RELEASED: April 18, 2007

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

PAN EXPRESS TRAVELS & TOURS (CANADA) LTD.
o/a PAN EXPRESS TRAVELS & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*, R.S.O. 1990,
CHAPTER T.19 AS AMENDED

TO REVOKE REGISTRATION

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: SUE KALIA, Agent, representing Pan Express Travels & Tours

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 Sue Kalia, who appeared on behalf of her company, Pan Express Travels & Tours (the "Applicant") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar");

Ms. Karas stated the issues contained in the Notice of Proposal To Revoke Registration, dated December 22, 2006, had to do with non-compliance with trust accounting procedures as outlined in Section 27 of the Regulation and, (2) compliance with invoicing requirements as stated in Section 38(1) of the Regulation.

Ms. Karas confirmed that compliance with invoicing procedures had been resolved prior to the pre-hearing and this was no longer an issue. She stated that if the Applicant could provide confirmation that credit card payments received from consumers were going directly into the Applicant's trust account then, this remaining issue may also be resolved.

Ms. Kalia advised that credit card payments have been going directly into the trust account and she has requested transaction confirmation from the Bank of Montreal.

Ms. Kalia explained the delay in providing written confirmation by noting she had only just realized written confirmation was required and it could take up to 7 working days to receive written confirmation from the Bank of Montreal.

While Ms. Kalia expected to be able to submit the confirmation within the next week she confirmed, as agreed with Ms. Karas, that it would be submitted to the Registrar by or before April 10, 2007.

Ms. Karas noted that upon receipt of the requested confirmation and subject to the Registrar's final review, the Registrar may consent to the withdrawal of the Proposal dated December 22, 2006, and the matter will then not proceed to the hearing on April 27, 2007.

Ms. Karas also requested Ms. Kalia submit a completed Schedule "A", Requirements for Manager/Supervisor. Ms. Kalia agreed.

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 December 22, 2006.

The Tribunal Orders that:

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

2. In the event the Proposal is not withdrawn, the hearing will proceed on April 27, 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

Simon Dann, Presiding Member

RELEASED: April 5, 2007

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



PRE-HEARING

GV TRAVEL LTD. o/a GV TRAVEL 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: GYOUGYI VITEZ, Agent, representing GV TRAVEL LTD.

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act*, 2002 (the "Respondent" or the
"Registrar")

DATE OF
PRE-HEARING: March 22, 2007

Toronto

ORDER

A pre-hearing conference was held on March 22, 2007, before the Licence Appeal Tribunal (the "Tribunal") of Gyougyi Vitez, who appeared on behalf of her company, GV Travel Ltd., (the "Applicant" and "GV Travel") and Soussanna Karas, Counsel, on behalf of the Registrar, *Travel Industry Act*, 2002 (the "Respondent" or the "Registrar");

Ms. Karas stated the issue contained in the Notice of Proposal to Revoke Registration, dated December 21, 2006, had to do with the timely submission of financial statements as stated in Section 22(6) of the Regulation.

Ms. Karas noted that statements had recently been received but were not acceptable as they had not been prepared by a public accountant licensed under the *Public Accountancy Act*.

Ms. Vitez noted that she would contact the person who prepared her statements and correct this issue or find an alternate service provider with the required designation. She advised that she would be able to meet the requirement by or before April 5, 2007, failing which, the matter would proceed to the hearing scheduled for April 20, 2007.

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 21, 2006. In the event the Proposal is not withdrawn, the hearing will proceed on April 20, 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

Simon Dann
Presiding Member

RELEASED: April 2, 2007

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