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Fiscal Year 2008 - 2009

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JOSEPH DELBERT ADAMS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, c. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JOSEPH DELBERT ADAMS, Applicant, unrepresented (on November 28, 2008), and represented by Richard I. Kesten, Paralegal (on February 21, 2008) and by Ralph Swaine, Counsel (on December 11-13, 2007)

REBECCA ROSENBERG, Counsel, representing the Registrar, under the *Bailiffs Act* (on November 28, 2008), and by ALVIN TORBIN, Counsel (on January 18, February 21, 2008; December 11-13, 2007)

DATES OF HEARING: December 11, 12, 13, 2007
January 18, February 21, 2008
November 28, 2008

Toronto

DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) by the Applicant, Mr. Adams, from a proposal by the Registrar under the *Bailiffs Act* (the “Registrar”), revoking his appointment.

DECISION

On April 25, 2008, the Tribunal released an Interim Decision and Order in this matter. In that Order, the Tribunal, after reviewing the facts, concluded that Mr. Adams was an assistant bailiff under the *Bailiffs Act*, R.S.O. 1990, c. B.2, and that he was not operating in compliance with the 2004 Amendment because he was not employed by a bailiff, but instead was holding himself out as a bailiff. Under the *Bailiffs Act*, assistant bailiffs are required to be employed by a duly appointed bailiff. In the Interim Decision and Order, the Tribunal ordered that the hearing resume in November, 2008 for the purpose of determining whether Mr. Adams had brought himself into compliance with the *Bailiffs Act*.

At the resumption of the hearing, Mr. Pitkin, the Registrar, gave evidence that Mr. Adams had not given notice that he was employed by a bailiff nor had he applied to become a bailiff. Mr. Adams did not give evidence but confirmed that he had taken no action to bring himself into compliance with the *Bailiffs Act*. Mr. Adams advised that he intended to pursue this matter in another forum.

Accordingly, by the authority of subsection 10(4) of the *Bailiffs Act*, R.S.O. 1990, c. B.2, the Tribunal directs the Registrar to carry out his proposal dated April 23, 2007, to revoke the appointment of Mr. Adams as an assistant bailiff.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: December 16, 2008

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

BAILIFFS ACT
R.S.O. 1990, c. B.2

NEIL EMERSON

IN THE MATTER OF
NEIL EMERSON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Bailiffs Act*
TO REVOKE AN APPOINTMENT
- Proposal dated: February 6, 2008

AND IN THE MATTER of a hearing of a Motion to consider an application for an Order
staying the Decision and Order of the Tribunal respecting the said Proposal

NEIL EMERSON

Applicant

- and -

REGISTRAR, *BAILIFFS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Neil Emerson, Applicant, and the Counsel
for the Registrar under the *Bailiffs 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, c. S.22; and

Having reviewed the written agreement signed by the Applicant and the Counsel for
the Registrar under the *Bailiffs 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 stays the
execution of the Tribunal's Order dated October 20, 2008, pending the disposition of the
Applicant's appeal to the Ontario Superior Court (Divisional Court), subject to the terms
agreed to, which are hereto attached as the aforementioned Schedule "A".

LICENCE APPEAL TRIBUNAL

Lynda Tanaka, Chair

RELEASED: November 7, 2008

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

SCHEDULE 'A'

LICENCE APPEAL TRIBUNAL
(at Toronto)

BETWEEN:

NEIL EMERSON

Applicant

- and -

REGISTRAR, BAILIFF'S ACT

Respondent

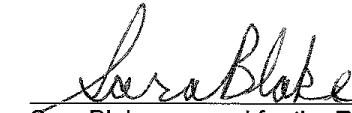
CONSENT

The parties consent to an order in the following terms:

1. Paragraph 2 of the order made by the Tribunal on October 20, 2008, is amended to read: This order is stayed pending the outcome of the Applicant's appeal.
2. If the Applicant fails to perfect the appeal within the time limits prescribed by rule 61.09 of the *Rules of Civil Procedure*, this order is set aside.

DATED:

October 6, 2008


Sara Blake, counsel for the Respondent

DATED:

October 6, 2008


Neil Emerson, Applicant



NEIL EMERSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, c. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: DOUGLAS WALLACE, Vice-Chair
GENEVIÈVE BLAIS, Member

APPEARANCES: No one appeared on the Applicant's behalf

REBECCA ROSENBERG, Counsel, appeared on behalf of the
Registrar, *Bailiffs Act*

DATE OF
HEARING: October 9, 2008

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal heard all evidence relating to the facts of this case on July 2, 3 and 4, 2008, and issued its Interim Decision on August 22, 2008.

In its Interim Decision the Tribunal found that the Applicant had made, or assisted in the making of, an entry which was unlawful by reason of the use of force, and that this entry occurred subsequent to the receipt of a letter from the Registrar cautioning against the use of force on a prior occasion. The Tribunal found that the use of force to effect an entry in the circumstances, constituted a failure by the Applicant to act responsibly within the meaning of this term in section 9(b) of the *Bailiffs Act*, R.S.O.1990, c. B.2.

At the conclusion of the hearing on July 4, 2008, the Tribunal adjourned the matter for a hearing of a constitutional question raised by the Applicant. The constitutional question alleged that the word "responsibly" in section 9 violated section 7 of the *Constitution Act, 1982* by reason of vagueness and overbreadth. A hearing of submissions on this question was subsequently scheduled for September 17, 2008.

The Applicant appeared in person on September 17, 2008, and requested an adjournment for 60 days to allow him to prepare his submissions on this question and to add a second question challenging the Tribunal's jurisdiction to decide questions of criminal law.

For written reasons given, the Tribunal agreed to adjourn the hearing on the Applicant's submissions until October 9, 2008.

The Applicant also indicated on September 17, 2008 that he believed the Tribunal panel should recuse itself on the basis of a bias against him, which in his opinion, was revealed in the Interim Decision. The Tribunal rejected this submission on the grounds that an adverse finding of facts does not indicate in the mind of a reasonable person that a court or tribunal has prejudged the outcome of a submission on a point of law in the same case.

On October 8, 2008, the Applicant served and filed with the Tribunal a letter advising that he would not be attending the resumed hearing the next day and that he was withdrawing his amended Notice of Constitutional Questions. The letter and Notice of Amended Constitutional Questions are filed as exhibits.

Counsel for the Registrar appeared before the Tribunal on October 9, 2008 and requested that a formal decision be issued directing the Registrar to carry out his Proposal. Counsel also requested that costs be awarded against the Applicant as a result of the short notice that he would not be attending the hearing.

The Tribunal agrees that a formal order should be issued, as requested, based on the findings of fact set out in the Interim Decision. It does not find, however, that this is an appropriate case for the exercise of its discretion to award costs.

A final issue was raised by the Applicant in a letter to the Tribunal, which was served on the Registrar on October 4, 2008. In this letter the Applicant asks that the Tribunal's final decision not take effect for 10 days after its release, to allow him time to make an application to the Divisional Court on short notice for a stay pending the disposition of an appeal to that court. Section 11 of the *Bailiffs Act* allows this Tribunal to grant a stay of its order until the disposition of an appeal. The Applicant did not appear at the hearing or make submissions in support of his motion nor did he comply with the requirements of Rule 11 of the Tribunal's Rules of Practice, concerning the filing of supporting documentation. The Commercial Registration Appeal Tribunal dealt with a request for a stay of an order under this section of the *Bailiffs Act* in *Ewart (Re)* [1995] O.C.R.A.T.D. No. 136. Following a review of the authorities Vice-Chair G.R. Dryden set out the factors to be considered on such an application. These factors include a consideration of the *bona fides* of the appeal, the substance of the grounds for appeal and the hardship to the respective parties if a stay were to be granted or refused.

This Tribunal does not have the necessary facts before it to enable it to make a decision based on a consideration of all three factors and finds that it is therefore not in a position to be able to grant a stay for the full period which may elapse before the disposition of an appeal.

It is satisfied, however, that the public interest will not be unduly harmed if the order herein were to be stayed for the period of 10 days, as requested, to allow the Applicant to make a motion on proper material either to this Tribunal or the Court for a stay for the full period allowed by the statute.

ORDER

Having considered the submissions of the Parties and based on the facts found by the Tribunal as set out above, the Tribunal orders as follows:

1. The Registrar is directed to carry out his Proposal dated February 6, 2008.
2. This order will not take effect until 10 days following the date of its release to the Parties.

LICENCE APPEAL TRIBUNAL

Douglas Wallace, Vice-Chair

Geneviève Blais, Member

RELEASED: October 20, 2008

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

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MOTION

NEIL EMERSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, c. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: DOUGLAS WALLACE, Vice-Chair
GENEVIÈVE BLAIS, Member

APPEARANCES: NEIL EMERSON, Applicant, appearing on his own behalf

No one appearing for the Registrar, *Bailiffs Act*

RICHARD OGDEN, Student-at-law, appearing on behalf of the
Attorney General of Ontario, Intervener (the "Attorney General")

DATE OF
HEARING: September 17, 2008

Toronto

ORDER

This hearing arises out of a Notice of Proposal issued by the Registrar, *Bailiffs Act* to revoke the licence of the Applicant.

Following three days of hearing on July 2, 3 and 4, 2008, the Tribunal issued an Interim Decision on the factual situation presented at the hearing, adjourning on the consent of all Parties the hearing of the submissions on the constitutional question raised by the Applicant until a later date.

The Tribunal subsequently set September 17, 2008, in consultation with all Parties, as the date for the continuation of the hearing.

The Applicant attended at this time in person and requested an adjournment to allow for further time to consult legal representation, and to amend his factum so as to add a second constitutional question.

The Student-at-law for the Attorney General consented to the request for adjournment, and indicated that Counsel for the Registrar, *Bailiffs Act*, although not present, had advised him that she also consented. The response to the submissions on the constitutional question(s), submitted by the Applicant, will be made by the Attorney General alone.

The Tribunal does not consider the fact that the Applicant has taken steps to appeal the Tribunal's Interim Decision, or that he may move for an order requiring the panel to recuse itself from the hearing of the constitutional question(s), to be relevant to the question of whether or not an adjournment should be granted.

The Tribunal finds the following facts established and relevant to the Applicant's request for an adjournment:

- (a) The request was made only a day or two prior to the date set for the continuation of the hearing.
- (b) No reason was advanced for either the late notice or the Applicant's failure to obtain legal advice before the hearing on the facts or in the approximate one-month interval between the release of the Interim Decision and the date of the motion for an adjournment.

The Tribunal also considers the following facts relevant under Rule 12 of its Rules:

- (a) All Parties consent to the adjournment;
- (b) This is the first adjournment requested by the Applicant;
- (c) No witnesses are inconvenienced, nor additional expense incurred;
- (d) A new date can be found for the continuation of this matter in the near future;
- (e) The Applicant is self-represented and wishes to obtain legal advice prior to making submissions as to the validity of the legislation in question. A failure to allow him to do so may prejudice his ability to fully and properly present his case; and,
- (f) The Registrar, *Bailiffs Act* made no submission relating to any possible danger to the public interest which might result from the granting of an adjournment.

Having given consideration to the submissions of the Parties and based on the facts found by the Tribunal as set out above, the Tribunal orders that the matter is adjourned, peremptorily against the Applicant, to re-convene at 9:30 a.m., on Thursday, October 9, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Douglas Wallace, Vice-Chair

Geneviève Blais, Member

RELEASED: October 1, 2008

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



NEIL EMERSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, c. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: DOUGLAS WALLACE, Vice-Chair
GENEVIÈVE BLAIS, Member

APPEARANCES: NEIL RICHARD EMERSON, Applicant, appeared on his own behalf

REBECCA ROSENBERG, Counsel, appeared on behalf of the
Registrar, *Bailiffs Act*

DATES
OF HEARING: July 2, 3 and 4, 2008 Toronto

INTERIM DECISION

The Applicant appeals a proposal by the Registrar to revoke his licence as a bailiff under the *Bailiffs Act*, R.S.O.1990, c. B.2 (the “Registrar” and the “Act”, respectively).

He appeals the Registrar’s decision on the facts and also challenges the constitutional validity of the section of the Act, which gives the Registrar the right to revoke a bailiff’s licence. His challenge is based on the grounds that the section contravenes the *Canadian Charter of Rights and Freedoms*, by reason of vagueness. On the consent of both Parties, as well as Counsel for the Attorney General of Ontario, Deborah Baumgarten, who was present at the opening of the hearing, it was agreed that submissions on the constitutional question would only be made if there was a finding against the Applicant on the facts.

BACKGROUND

The Applicant worked as a Sheriff’s Officer in the Ministry of the Attorney General for approximately 16 years, and as a licensed Private Investigator for another six years prior to applying to the Ministry of Consumer and Commercial Relations for appointment as a bailiff.

Following completion of a written examination, he received his appointment effective April 30, 1999. His appointment was by the Lieutenant Governor on the recommendation of the Minister in accordance with the Act, as it existed at the time.

In proposing to revoke Mr. Emerson's appointment, the Registrar states that he is of the opinion that the Applicant has, in the wording of the statute, "not acted, or is without capacity to act, responsibly". His opinion is based on the circumstances surrounding two incidents: the first, a 2003 complaint, hereinafter referred to as the JW complaint, and the second, a 2006 complaint, which shall be referred to as the VM complaint. A summary of the two complaints is set out in the Registrar's Notice of Proposal (the "Proposal") as follows:

1. In January of 2003 a complaint was received from one JW respecting EMERSON having broken a lock in order to gain access to a fenced property and having used force to gain entrance to a trailer located on the property for the purpose of seizing a number of vehicles subject to a security agreement. The investigation of the complaint concluded that EMERSON had identified himself as a peace officer and used force in the exercise of a self-help remedy contrary to law. EMERSON was cautioned respecting the use of force in the exercise of a self-help remedy and warned that a further occurrence of the same, or similar conduct would result in a Proposal to Revoke his appointment.
2. In November 2006 a complaint was received from one VM in which she alleged that EMERSON used force to enter her commercial premises for the purposes of seizing certain items belonging to a former employee, JF. The investigation of the complaint showed that EMERSON caused or permitted the use of force to be used to gain entry to VM's commercial premises when to do so was unlawful.

Particulars of the two complaints are set out in the Proposal as follows:

JW Complaint

1. In or about December 2002, EMERSON was retained by Automotive Finance Corporation to seize a number of vehicles from JW carrying on business as WMS.
2. The vehicles were purportedly secured by a general security agreement registered pursuant to the *Personal Property Security Act*, RSO 1990, chap. P10.
3. On December 10, 2002 EMERSON attended at (an identified address in Hamilton) where JW carries on business.
4. JW was not present at the time of EMERSON's attendance.
5. JW's identified address in Hamilton is fenced and has a gate for access to a vehicle compound.
6. At the time EMERSON attended a padlock secured the gate.
7. EMERSON cut the lock and gained access to the compound.
8. Once inside the compound EMERSON directed a locksmith to open a lock securing a trailer that served as an office.

9. JW returned to the compound while EMERSON was still present. A physical confrontation ensued in which EMERSON identified himself as a peace officer and purported to arrest JW.
10. At the time EMERSON was wearing uniform like clothing including a jacket with the word "bailiff" on it and a badge.
11. EMERSON was cautioned respecting the use of force in the exercise of a self-help remedy and warned that a further occurrence of the same, or similar, conduct would result in a Proposal to Revoke his appointment.

VM Complaint

1. VM operates a cosmetic and laser centre in Milton (VM's place of business).
2. VM and JF entered into a verbal arrangement whereby equipment owned by JF, at the time the arrangement was made, would be used in VM's business and JF would be an employee of VM.
3. On or about October 1, 2006 JF resigned her employment with VM.
4. Shortly thereafter JF and VM became involved in a dispute concerning the return of the equipment to JF.
5. JF retained the services of EMERSON and, on October 16, 2006 EMERSON attended at VM's place of business and demanded the release of the equipment in question. VM refused the request and EMERSON left the premise.
6. On November 12, 2006 GS, a locksmith, attended at VM's place of business and was instructed by EMERSON to "pick" the lock. Unable to open the lock, EMERSON then instructed GS to drill the lock, which he did.
7. On November 12, 2006 EMERSON contact (*sic*) the Halton Regional Police Service and advised that VM's place of business would be entered.
8. On November 12, 2006 at approximately 9:12 AM Constable Dillon (8346) attended at VM's place of business in response to an alarm.
9. Constable Dillon observed EMERSON outside the premise dressed in a jacket bearing the word "Bailiff" on the back.
10. EMERSON advised Constable Dillon that he was present to observe JF remove equipment belonging to her and would contact VM to advise her of the "attendance".
11. EMERSON subsequently attended at Halton Regional Police 12 Division to provide further information.

THE LAW

The authority for the Registrar's revocation of a bailiff's appointment is set out in section 9 of the *Bailiffs Act* as follows:

9. Subject to section 10, the Registrar may revoke an appointment of a bailiff if, in the opinion of the Registrar, the bailiff,
- (a) has not complied with this Act or the regulations or the *Costs of Distress Act*;
 - (b) has not acted, or is without capacity to act, responsibly as a bailiff;
 - (c) has breached a term or condition of the appointment; or
 - (d) (d) in the case where the bailiff is a corporation, has no director who is appointed as a bailiff and is actively involved in the day-to-day operations of the corporation as a bailiff.

The Proposal relies on the authority contained in subsection 9 (b).

The Registrar's authority to revoke an appointment under subsection 9 (b) is limited to cases where the bailiff "has not acted, or is without capacity to act, responsibly as a bailiff". The wording of this test differs substantially from the wording commonly found in licensing statutes in this province and used elsewhere in this Act in connection with assistant bailiffs, where the test is whether "the past conduct of the person affords reasonable grounds for the belief that the person will not act in accordance with the law and with integrity and honesty".

Although the test to be applied by the Tribunal is worded differently from the test used in other licensing statutes, the role of the Tribunal remains the same. It owes no deference to the Registrar's decision but must exercise its own judgement, basing its decision solely on the evidence adduced before it at the hearing. As stated by Laurie Sanford, Vice-Chair, in a recently released decision of this Tribunal on an appeal by Joseph Adams, the role of the Tribunal in hearing appeals under the *Bailiffs Act* is no different than its role in hearing appeals under the *Motor Vehicle Dealers Act*. This role was described by the Divisional Court in *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers)*, as:

The question that the Tribunal must ask itself is not whether the Registrar was wrong. Instead, the Tribunal is required to make an independent decision as to whether the criteria for depriving the Applicant of his license have been proven, showing no deference to the initial decision of the Registrar.

Where as here the bailiff's professional standing or livelihood is at risk, the onus resting on the Registrar must be met with "clear, cogent and convincing evidence". (*Coates v. Registrar of Motor Vehicles and Salesmen* [1988] 65 O.R. (2d) 526).

The powers of the Tribunal with respect to a Notice of Proposal issued by the Registrar are set out in subsection 10 (4) of the Act as follows:

- (4) If a hearing by the Tribunal is required in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may 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.

The Act contains a clear division of powers between the Minister and the Registrar. The Minister appoints bailiffs and may, with the consent of an applicant, attach conditions. The Registrar, although having the power to revoke a bailiff's appointment for various enumerated reasons including a failure to comply with a condition imposed by the Minister, is not given the authority either at the time of a bailiff's appointment, or at the time of revoking his appointment, to attach conditions. The Registrar accordingly did not impose conditions in this case and did not request the Tribunal to direct him to do so.

A right to recapture personal property from land or premises owned by another exists in common law and by statute. This case raises the interesting issue of its limits. The Registrar says that force may never be used to gain entry to the land or premises where the personal property is located. The Applicant, a licensed bailiff, says that the cutting of a padlock to gain entry to land and the changing of a lock to gain entry to business premises was justified in the circumstances.

EVIDENCE

At the opening of the hearing, the Applicant admitted the facts set out in paragraphs 1 through 7 of the JW complaint, and paragraphs 4, 5, 7, 8, 10 and 11 of the VM complaint. The occurrences, dates and the names of the parties involved having thus been admitted, the hearing focused on the role played by the Applicant in these two occurrences. Two very different views of the role became apparent as the Parties gave their evidence. A total of 11 witnesses were called including the Registrar and the Applicant. Twelve exhibits were also filed on consent, many containing a number of supporting documents.

The Applicant objected in his Notice of Appeal, to the Registrar raising the facts surrounding the JW complaint on the grounds that this matter took place some six years ago and was finally disposed of three years ago. He did not renew his objection, at the opening of the hearing, and the Tribunal proceeded to hear evidence in full on both complaints. In the Tribunal's opinion, the fact that the Applicant received a Letter of Caution following a forceful entry several years prior to the present complaint is relevant and speaks to the question of the seriousness of the most recent complaint.

The Registrar opened his case by calling eight witnesses involved in the two complaints giving rise to his Proposal. Before the Registrar had given evidence himself and closed his case, the Applicant noted that his first witness was from out-of-town and was self-employed with a busy schedule. He requested permission to call her prior to the close of the Registrar's case. This request was granted and the Tribunal heard from the Applicant's first witness, JF, prior to the close of the Registrar's case. At the conclusion of JF's testimony, the Registrar gave evidence and closed his case. Mr. Emerson then moved for a non-suit. The Tribunal heard submissions on the motion and after a brief recess, denied the motion on the grounds that Mr. Emerson had already opened his case.

JW Complaint

The Registrar's evidence concerning this complaint consisted of his own oral testimony supported by a considerable number of documents, and the oral testimony of three witnesses: JW, the complainant; JP, a finance company representative; and, Vaughan F. O'Toole, a Ministry investigator.

Evidence of the complainant, JW

The complainant stated that a finance company representative, one JP, attended his sales lot on the morning of December 10, 2002. He apparently had had previous contact with JP as he recognized him as he was getting out of his car. JP was looking for immediate payment of money owing to the finance company and threatened to call in the bailiff if payment was not made immediately. Arrangements for at least a partial payment that day were made which appeared to satisfy JP, and the complainant went off to lunch. When he returned to his lot after lunch, he found that the padlock on the gate had been cut, a lock on his sales trailer had been picked, and two people were in his trailer. He told everyone to get off his lot in no uncertain terms. A "little fight" took place when the Applicant attempted to take a bag of keys out of the complainant's hand. During the confrontation, Mr. Emerson got the witness down on the floor in the trailer and punched him a number of times. When the witness got up, he grabbed a hammer and made his way to his car and drove off. He had no recollection of Mr. Emerson telling him that he was being held for assault pending the arrival of the police or that he was under arrest. Returning some twenty minutes later, he found Mr. Emerson waiting for him with a police constable who promptly arrested him and charged him with assaulting Mr. Emerson. The complainant subsequently pled guilty or had the charge withdrawn (it's not clear which) on signing a peace bond. He indicated that he did not want to contest the charge as he was "getting married and didn't want anything further to do with it". He produced seven pictures taken on his release from jail showing bleeding from his nose, right ear and cheek, and a discoloured area under his right eye. He had no recollection of hitting Mr. Emerson or of being told that he was under arrest.

Evidence of the finance company representative, JP

The evidence of the finance company representative, JP, was significant in several respects. First, he confirmed that the company held the ownership of many of the vehicles on the complainant's lot and that ownership was not to be transferred to new owners without the company's consent. He further confirmed that a spot check by a company sub-contractor revealed that vehicles had been removed from the lot contrary to the terms of the security agreement with his company. He was not able to shed much light on the nature of the physical altercation between Mr. Emerson and the complainant, as he had left the trailer before the fight began but it appeared to him that the complainant was "flailing around", and that Mr. Emerson was trying to push him away. He was also able to confirm the evidence that Mr. Emerson was to give later with respect to the following:

- The complainant did not tell everyone to get off the lot, but rather told him to get out of the trailer;
- He, JP, directed the locksmith to pick the lock on the trailer but not until he talked to a lawyer in his company's head office;
- He saw lacerations on Emerson's face when he exited the trailer;
- He heard Emerson tell the complainant that he was being held for the police and that he was a peace officer; and,
- JW continued to struggle after he was told that he was being arrested.

JP also contradicted the complainant's testimony with respect to one substantial piece of evidence by the complainant. He testified that he only attended at the complainant's lot once on December 10. There had been a visit earlier in the day by an employee of a company retained by his company, to do spot checks to see that vehicles covered by their financing agreements had not been sold or removed from lots without their knowledge or consent, and their findings were reported back to him, but he himself did not attend.

Evidence of Vaughan F. O'Toole

Vaughan F. O'Toole gave evidence that he investigated this complaint in 2003 and, following consultations with the Registrar, sent Mr. Emerson a letter on February 23, 2005, setting out his findings. His conclusions were as follows:

Upon review I have considered all the circumstances, in particular the description of JW with respect to the events as they transpired on December 10, 2002. As well I have reviewed the statements of JP and WN that were made to the Hamilton Police Service, as well as the statement of Police Constable T.

In addition to the aforementioned, your admittance to me that you in fact had attended (JW's place of business) Hamilton, Ontario, on December 10, 2002 and cut the padlock off the security gate to gain access to the car lot of <name deleted> for the purpose of repossessing motor vehicles on behalf of Automotive Finance Corporation.

I find the descriptions of JW, JP, WN, and Police Constable T. compelling as they pertain to the forcible entry to the compound and the eventual entry to the sales office to gain access to keys for the motor vehicles secured within the compound.

As the common law presently stands, repossessions are to be carried out by 'peaceful means' and 'without force'. Pertaining to this, I refer you to: Regina v. Wallace (Canadian Criminal Cases, Volume 125, at page 72); and, Regina v. Ducette (Ontario Reports, 1960 at page 407).

In my opinion by your actions you have contravened common law. As an appointed bailiff you are required to know the law. The acts committed constitute Break and Enter and Theft and could be dealt with criminally.

Accordingly, accept this correspondence as a "**Letter of Caution**" as your actions were not acceptable and could be cause for the revocation of your appointment.

No explanation was offered for the two-year delay between the time of the complaint and the “Letter of Caution”, nor for his apparent failure to interview Mr. Emerson before coming to his conclusions.

Evidence of the Registrar

Brian Pitkin was appointed Registrar of Bailiffs in 2001, following a career as a bailiff, Sheriff for the Judicial District of York, Senior Regional Investigator with the Police Complaints Commission, and as Manager of Investigations and Claims Processing at the Criminal Injuries Compensation Board. He advised that Mr. O’Toole handled the investigation but asked for his opinion prior to sending the caution letter noted above. He testified that it was his opinion then and still is, that bailiffs appointed under the Act are not peace officers and are not authorized to use force in carrying out repossessions. He also introduced two documents demonstrating that Mr. Emerson was aware of the Registrar’s position with respect to these two matters. The first was the written test applicants were required to write as a condition of their appointment, and the second was a letter dated June 21, 1999, advising that he had been appointed a bailiff in and for the Regional Municipality of Halton, effective April 30, 1999. Although the test did not directly raise the issue of whether or not bailiffs were peace officers or contain any questions dealing with the use of force while carrying out a seizure under the *Personal Property Security Act*, the application process stressed the requirement for all applicants to make themselves familiar with the law relating to the conduct of their duties. The second document informing Mr. Emerson of his appointment did deal directly with both these matters. Paragraph seven reads: “In your capacity as an appointed bailiff I would confirm that you are not a peace officer or a court official and your authority is limited to effecting peaceful seizure or eviction”.

The Registrar’s position with respect to these issues was forcefully brought to Mr. Emerson’s attention in two further documents between the time of the JW complaint and the time of the VM complaint. On February 23, 2005 or shortly thereafter, Mr. Emerson received the Letter of Caution from Mr. O’Toole referred to above. In this letter Mr. O’Toole writes, in part:

As the common law presently stands, repossessions are to be carried out by ‘peaceful means’ and ‘without force’. [referring to R. v. Ducette and R. v. Wallace].

In my opinion by your actions you have contravened common law. As an appointed bailiff you are required to know the law. The acts committed constitute Break and Enter and Theft and could be dealt with criminally.

This communication does not appear to have had the desired effect on Mr. Emerson. His reply on February 28 was as follows:

Mr. Vaughan F. O’Toole
Investigator
Ministry of Consumer and Business Services

WITHOUT PREJUDICE

Dear Mr. O'Toole:

I read with interest your letter dated February 23, 2005. I can only reach the conclusion that you do not know what your [sic] are talking about. It appears that you, based on your background as a police officer, and without any knowledge of Civil Process investigate your assignment with the objective of making findings based on Criminal Law. I had written Brian Pitkin previously after your visit with me a year or so ago. I again will state as follows...

After reviewing the cases cited by Mr. O'Toole, and giving his interpretation of them, Mr. Emerson concluded as follows:

In conclusion, I request you to withdraw your letter immediately. I am not going to stand around and have you have make specific allegations of criminal conduct against me without taking action against you personally. If I find out that your letter has gone to any person outside your Ministry, such as Mr. W., you will be served with a Statement Of Claim forthwith. It may seem easy for you to sit on your pious perch and make serious unfounded allegations of Criminal Conduct, but there will be a price to pay.

The Registrar responded on April 28, 2005, indicating in no uncertain terms that he did not accept Mr. Emerson's interpretation of the law with respect to forceful entry and the status of bailiffs as peace officers. In this letter Mr. Pitkin states as follows:

1. By your own admission you committed mischief by breaking the lock on the gate to the property and trespass by then entering onto the property. As a bailiff appointed pursuant to the *Bailiffs Act* you have no authority beyond that which the party instructing you has. In this case you used force without the authority to do so.
2. Bailiffs are not peace officers. This matter is well settled. As you mention that you were wearing a "uniform style" jacket, I will draw your attention to section 130 of the *Criminal Code* dealing with the use of badges and uniforms by persons who are not peace officers.

Mr. Pitkin then goes on to confirm the conclusion set out in the Letter of Caution that a further similar complaint may result in the revocation of Mr. Emerson's appointment.

In cross-examination, the Registrar admitted that he knew bailiffs carried badges and wore jackets such as the Applicant's jacket. The Ministry has not provided them with any approved form of identification and has no guidelines or regulations governing apparel.

Evidence of the Applicant (re: JW Complaint)

Mr. Emerson's evidence regarding both the JW complaint and the VM complaint differed substantially from the complainants. With regard to the JW complaint, Mr. Emerson stated that when he was first contacted by the finance company, he was advised that the complainant was absconding with vehicles covered by a revolving inventor lien on all stock, and that the complainant had threatened to break the legs of any bailiff who attempted to repossess them.

He arrived at the car lot before the finance company representative, JP, to find the lot enclosed with a wire fence and the gate secured with a padlock. When JP arrived, Mr. Emerson asked him if the security agreement allowed the cutting of the lock to gain entry. He asked JP to seek instructions from a company lawyer at the head office in Montreal, before proceeding to cut the lock with bolt cutters. When the complainant arrived at the lot, he went directly to the trailer and told JP to get out. Mr. Emerson then went to the trailer, and was “sucker punched” by the complainant as he went in. He then told the complainant that he was under arrest for assault and was being held for the police. His actions in the struggle were in self-defence.

He produced the jacket that he was wearing at the time. It had been purchased from the Bailiffs Association and had been at least tacitly approved by the Ministry. It has the word “Bailiff” embroidered in gold on the right breast, his name embroidered in the same fashion on the left breast and a crest with the words “Ontario and Bailiff” on each shoulder. There were no words on the back. He believed at the time that bailiffs were peace officers, and admitted in cross-examination to sending the then Registrar of Bailiffs a letter sharply criticizing his contrary opinion. He stated, however, that he never identified himself as either a peace or police officer and now agrees that they are classified as such. The JW incident was the first physical altercation he was involved in, while a bailiff or in his work in the Sheriff’s office for 16 years. Mr. Emerson readily admitted that he cut the padlock to gain entry to the car lot, but expressly denied the Registrar’s statement in his letter of April 28, 2005, that he committed mischief by breaking the lock or trespass by entering onto the property.

VM Complaint

The Registrar’s evidence concerning this complaint consisted of the oral testimony of the complainant, VM, her daughter NVM, two locksmiths and a police constable. The Ministry employee, who carried out the investigation although present throughout the hearing, was not called to testify.

Evidence of the complainant, VM

The complainant testified that she entered into a business relationship with her friend, JF, in November, 2004. The business looked like a good fit as JF was in financial difficulty and going through a difficult time, and VM had recently retired after a very successful career as head of a trucking company, and was looking for a business to set up for her daughter. The relationship was not evidenced by any written agreement but the principle terms included the following:

- VM entering a new lease of the premises at an identified place of business, formerly in JF’s name, and carrying on a business at this location with JF under the name that incorporated references to both parties;
- The new business would use much of the equipment owned by or leased to JF in her former business at this location;

- VM would make monthly payments to JF, based in part on her expenses and in part on the revenue generated by JF's services. Although the expenses portion of the monthly payments included amounts JF still owed on the equipment the business was to use, VM made no payments directly to the equipment manufacturer or financial institution financing the purchase. All payments were made directly to JF or JF's company;
- The arrangement could be terminated at any time on reasonable notice.

VM entered into the new lease, spent some \$70,000 on renovations and new furniture for the reception area, and made monthly payments to JF until sometime in September 2006, when difficulties between the parties began to surface. The cause of the difficulties may be attributed in whole or in part to a business opportunity, which arose relating to a program to be offered by a community college. VM's evidence was that it was she who initiated negotiations with the college with JF's full involvement. Negotiations had not been finalized when VM went on a week's holidays to California. While VM was out of the country, JF, without any prior notice or consultation, used her key to the premises at night and removed a considerable amount of furniture and personal belongings from the premises. VM's daughter who was managing the business in her mother's absence was worried JF would return to take out all the equipment necessary to run the business, and therefore had the locks changed.

On October 1, 2006, VM received an email message from JF in Texas, indicating that she was resigning to take up a teaching position at the college. The email also informed her that JF had moved out some of her furniture as she was short of cash and had an opportunity to sell some tables, chairs and a blackboard. There was no intent, JF said, to remove equipment at that time, but, as she was taking up a teaching position with the college, she would like to have her equipment back "as soon as you are able to make do without it. Hopefully by the end of the month". JF advised that she would be in to talk to VM on October 10. VM went straight to her lawyer and shortly thereafter JF received a letter claiming, amongst other things, a proprietary interest in the equipment JF had left behind.

On October 10, 2006, JF's husband attended at the premises and demanded the return of the equipment. VM refused and JF's husband returned that evening with the police but left again when the police informed all parties that this was a civil matter, in which they could not intervene. On October 14, 2006, she returned one piece of rented equipment to JF.

On October 16, 2006, Mr. Emerson made his first appearance at VM's identified place of business. He was in full uniform, wearing a black jacket with the word "Bailiff" printed across the back and a badge on the sleeve, and a stripe down the pants like a police officer. He presented her with a business card indicating he was appointed by the Lieutenant Governor and indicated that if she didn't turn over the equipment to him, he would go immediately to JF's home and they would return and break in, as they had the right to. He indicated that he knew who owned the equipment, as between JF and VM, and didn't want to see any papers VM might have.

VM called her lawyer and was assured that nobody could break into her business. Notwithstanding this assurance, VM and her daughter took their equipment home with them every night for a week or so and reinstalled it again each morning so that JF would not be able to get it if she should break in.

VM further testified that on Sunday, November 12, 2006, the identified business premises were broken into and the equipment in question removed. Also missing was a personal briefcase containing correspondence with JF, handwritten notes, and financial records including invoices paid to support her claim to ownership of the equipment. A new lock was on the door and there was a telephone message from JF telling her the keys were in her mailbox. VM then made a number of telephone calls: the first was to B. at the locksmiths where she had a three-way telephone conversation with B., an employee, G., who had changed the lock, and herself. G. advised her he hadn't seen an order authorizing the entry, but that "when Neil tells you to open a lock you do it". She also telephoned Emerson who advised her that JF was acting on the advice of her lawyer, and that he was just there to see that she got what was hers. The third telephone call was to the Lieutenant Governor. She did not reach her but left a message. When VM attempted to report the incident to the police, she was told that Emerson had been in the night before to advise that he would be entering the premises. The officer would not reveal any documents but advised her that "when Neil breaks in, it's usually in accordance with the law". She concluded her examination in chief by noting several subsequent attendances at her business by Mr. Emerson, which she considered unnecessary and a form of harassment.

In cross-examination, VM was asked about inconsistencies in her description of her relationship with JF. It was pointed out that although she was adamant in denying that JF was a partner, or an affiliate as JF alleged in her affidavit, and in saying that she was not an employee, she had described her as an employee or affiliate in evidence given under oath before a Justice of the Peace and in several documents. One of these documents was a letter of November 16, 2006, written after the incident of November 12, 2006, which gave rise to her complaint. This letter was written on the letterhead of <name deleted>. The company name included reference to the corporate entity solely owned by JF. VM had no credible explanation for the discrepancy.

VM was also asked in cross-examination if there was a corporate entity by the name of <name deleted>, the named plaintiff in court proceedings initiated by the complainant. When she said that there was, Mr. Emerson directed her attention to a Statement of No Record, indicating that the Ministry of Consumer and Business Services could not find a record for this corporation.

Further questions in cross-examination revealed that VM took the following actions as a result of the November 12th incident:

- Complained to the Halton Regional Police Services regarding their alleged improper response to her calls;

- Made a formal complaint to the Halton Regional Police Services concerning Constable Dillon;
- Swore out a private information alleging theft on the part of JF, JF's husband and Mr. Emerson, which charges were subsequently withdrawn by the Crown Attorney;
- Made a complaint to the Crown Attorney's office concerning the withdrawal of charges which did not result in the laying of any new charges;
- Issued a Statement of Claim which was not proceeded with;
- Filed a complaint with the LSUC concerning the conduct of JF's lawyer;
- Contacted the community college concerning JF's continuing involvement with it;
- Made a complaint to the Ministry regarding JF's use of her business name; and,
- Complained to the Lieutenant Governor regarding Mr. Emerson's use of a business card indicating he was appointed by the Lieutenant Governor.

VM indicated that she was "proud of these actions" as they show "I've kept it up", and that she had the right to hold onto JF's equipment "until legal process".

Evidence of NVM

NVM is VM's daughter. She testified that she was the office manager and "jack-of-all trades" at her mother's business, and in charge while her mother was on vacation in September. One day she came in and noticed everything in one treatment room had been cleared out, including JF's diploma off the wall, her plants and personal belongings. She asked JF the next day what was going on and JF replied that she had had an opportunity to sell some stuff and did so. NVM had the locks changed that night. Two days later NVM talked to JF and when asked why she had changed the locks, informed her that she couldn't leave with the equipment when her mother was away. On October 14, JF returned and got one piece of equipment. She wanted to take more but when prevented by NVM, said "Fine. I'll get the bailiff". She confirmed VM's evidence regarding the October 16th visit by Mr. Emerson, including the fact that Mr. Emerson was "in full uniform, like a police uniform", and stated that she felt very intimidated by him and gave him all sorts of information she wouldn't otherwise have told him.

NVM's evidence relating to the November 12th break-in was also much the same as her mother's, other than for minor discrepancies concerning the telephone call with the locksmith. It was NVM's evidence that the locksmith, B., refused to attend on the night of the break-in because "there was a court order". She also said that they located the keys for the new lock, not through JF's telephone message but through the locksmith talking to Mr. Emerson. When Constable Dillon of the Halton Regional Police Services came to the scene of the break-in, he advised that Mr. Emerson was a "civil law enforcer".

In cross-examination, NVM could give no examples of information she gave Mr. Emerson that she wouldn't have if she had not thought he had the status of a police officer, other than for verbal statements she gave him regarding the equipment.

Nor could she produce any evidence supporting her and her mother's claim to ownership of the equipment other than repeating that they had been paying monthly invoices to JF. She did not know what part, if any, of those payments related to equipment but concluded that the payments must have given them some ownership rights.

Evidence of Locksmith B.

Locksmith B. gave evidence that he received a call from JF on November 12th, asking him to send someone to change the lock at VM's identified place of business. He was told that JF did not own the premises but he sent locksmith G. anyway, as Mr. Emerson was there. In cross-examination, he advised that he did not normally require proof of ownership except when entering motor vehicles or residential buildings.

Evidence of Locksmith G.

Locksmith G. advised the Tribunal that he attended the premises in question on November 12, 2006, as requested by Locksmith B. On arrival he attempted to pick the lock as directed by Mr. Emerson. When this was unsuccessful, he drilled the lock on Mr. Emerson's instructions. Had Emerson not been there, he would have asked the person requesting the entry to produce some proof that he had a right to enter. A business card would have been sufficient if it showed the holder had a business at the location in question. Mr. Emerson was wearing his black jacket with a crest on it and talked to the police on their arrival. JF was billed for the service. He did not recall any conversation in which Mr. Emerson indicated that he was not attending as a bailiff but only as a witness.

Evidence of Constable Dillon

Constable Dillon has been a member of the Halton Regional Police Services since April 2003. On November 12, 2006, he received a call from dispatch to attend at VM's identified place of business in response to an alarm that had been activated at the premises. The call indicated that Mr. Emerson would be on the site. He attended to find JF, a locksmith (G.), and Mr. Emerson in attendance. He spoke to Mr. Emerson who indicated that JF was picking up her property. JF indicated that she was in a dispute with VM over the property and showed him some paperwork relating to equipment. In light of this information and as Mr. Emerson was present, wearing a jacket which read "Bailiff" on the back, and said that he would be contacting VM, Constable Dillon concluded this was a civil dispute not requiring a police presence. He admitted that he would not have acted the same way if Mr. Emerson had not been present. Although he was aware that a complaint had been filed concerning his conduct on this occasion, he received no form of disciplinary action.

The Applicant's evidence regarding the VM Complaint consisted of his testimony and that of JF.

Evidence of JF

JF produced an affidavit setting out her version of the events relating to this complaint. The affidavit, which was filed as an exhibit on the consent of the Parties, sets out the facts in considerable detail. The facts most relevant to the issues before the Tribunal are as follows:

- She graduated from <name deleted> in 1984 and has carried on a private practice since that time, first in other premises, and then in premises located at an identified place of business, which she first leased in 2002;
- In 1994, she wrote the curriculum for a professional certification program, and has delivered part of this program under various business names, more or less continually since this time;
- In 2004 a former client, VM, suggested they “partner up” to keep the business going while she was recovering from a family loss. It was agreed that the lease would be in VM’s name and that they would operate under the name VM “in affiliation with <name deleted>”. She was never an employee of VM, but a partner or affiliate in a joint business venture. The agreement envisioned the continued use of the equipment JF had been using at that location while carrying on her business, the continuation of JF’s services to established clientele, and a sharing of profits and expenses in one manner or another. Both parties to the agreement had keys to the premises and it was certainly her opinion that each had an equal right to occupy the premises;
- Although the amount that VM paid JF monthly varied during the currency of the agreement and was based at one time in part at least on the expenses JF incurred in the purchase of her equipment, no monies were paid directly to the companies financing the purchase of this equipment. JF made these payments herself;
- When she was unable to obtain what she considered a proper accounting for the monies received by the business in 2004, and being short of funds at that time, she removed some desks, chairs and a blackboard from the premises without prior notice to VM;
- VM or her daughter, NVM, changed the locks the next day and refused to hand over any further equipment;
- JF wrote VM on October 1, 2006, advising that she had accepted a teaching position with a college and proposing to pick up her equipment “as soon as you are able to do without it. Hopefully by the end of the month”. She also proposed to meet with VM to discuss the termination of the arrangement but upon arrival was told that the matter was being handled by VM’s lawyers;
- She rented alternative premises and was under considerable pressure to install her equipment in these premises quickly in order to meet her financial obligations and satisfy her obligations to the college;
- When legal representatives of both parties were unable to reach agreement on a date for the transfer of the equipment in question, and after being assured by her lawyer that she had a right to take possession of her equipment by means of self-help, she contacted the Applicant.

The Applicant advised her to obtain a second legal opinion. When that opinion confirmed her right to self-help, she requested the Applicant's assistance;

- The Applicant agreed to attend as a witness to photograph her entry and removal of equipment, and conduct an inventory of the equipment once it was secured in her new premises, but advised that he would not take part in the entry to the premises or the removal of her property;
- She retained the locksmith and heard the Applicant tell him that he was there only as a "witness" and not as a bailiff;
- The Applicant did not have a jacket that said "Bailiff" on the back;
- She provided VM with a key to the new lock the same night as it was changed;
- She was not interviewed by the Registrar's office at any time prior to the Registrar's Notice of Proposal.

Finally, it is JF's opinion, based on the complaints made by VM as outlined above, that VM has been and will continue to wage a vendetta against herself and the Applicant.

Evidence of the Applicant (re: VM Complaint)

The Applicant confirmed that he knew JF but advised that she was not a friend and he had no reason to give her preferential treatment. He became involved in the VM complaint when JF's lawyer called him in. He saw that the lawyer had asked VM's lawyer for any documentation VM might have indicating ownership or a proprietary right to the equipment, which JF was seeking to recover and had received none. Before agreeing to help JF exercise her right to recover her property, he went to talk to VM and asked to see any bills of sale or liens, which might confirm her ownership of the property. VM offered to show him receipts for amounts paid to JF but he advised her that he didn't want to see them. He also advised VM that JF could come to the premises at any time and retrieve her equipment. When he reported back to JF, she asked about self-help and he advised her to seek a second opinion. When that second opinion confirmed her right to pick the lock if necessary and regain possession of her goods, he agreed to go with her but not to enter or take part in the removal of her property. His sole role was to record her activities, take photographs and compile an inventory of the property removed. He also agreed to talk to the locksmith and police but she would have to talk to them first. Before going to the premises, he telephoned the police to make sure they knew what was going on and advised them that he wasn't attending as a bailiff. He carefully observed what was removed from the premises and testified that no briefcase came out of the premises. One chair was removed that JF said was not hers and he directed it to be put back.

Following the removal of all equipment identified as JF's and the re-keying of the lock, he went with JF to observe her putting a key in VM's mailbox. When the police arrived at the premises, he went with JF and the police back to the station to show them documents supporting JF's claim to ownership of the equipment. He was not interviewed with respect to this complaint prior to receiving the Registrar's Proposal.

DECISION

The Registrar's position is that he is not required to interview a licensee prior to making a Proposal to revoke a licence and is not required to give any reason why he considers the conduct of a bailiff irresponsible. In his opinion, the facts set out in his Proposal "speak for themselves". They show the Applicant made an entry by force, was cautioned, and then was involved in a second, similar incident. A licensed bailiff's conduct falls under his scrutiny whether that bailiff is actually making a seizure himself or in assisting another person in any capacity. In his submission, no force is ever justified in making an entry onto real property, and the act of picking or changing a lock constitutes the use of force. Further, any unlawful entry is an irresponsible act within the meaning of subsection 9 (b) of the Act.

Before dealing with the issue of forceful entry, the Tribunal must dispose of two minor matters raised in the Proposal. First, paragraph 9 of the Particulars, relating to the JW Complaint, states that the Applicant identified himself as a peace officer. This allegation was supported by the written notes of the finance company's representative, which indicated that he heard the Applicant identify himself as a peace officer. The Applicant flatly denied that he had ever done so, however, and the finance company representative admitted on cross-examination that he could well have been mistaken. In the result, the Tribunal does not find that this allegation has been proven to its satisfaction.

With respect to the second allegation regarding the wearing of a uniform, the Tribunal is somewhat surprised by the consistency of evidence indicating that the Applicant was wearing a jacket with the word "Bailiff" on the back. The wording of the testimony of each witness in this regard was remarkably similar. To refute this evidence the Applicant showed the Tribunal the jacket he swore was the only jacket he ever had with the word "bailiff" on it, and the Tribunal noted that the word "bailiff" was not printed on the back but rather on the front pockets and shoulder crests. In any event, the Tribunal does not attach any importance to the location of the word, as the uncontradicted evidence of the Applicant was that both the jacket and the badge had the tacit approval of the Registrar's office.

In summary, neither of these two allegations supports in any way a finding of irresponsibility on the part of the Applicant.

Now the Tribunal will address the real issue in this matter. Do the facts surrounding these two incidents support the Registrar's allegation that the Applicant made an unlawful entry in each of these incidents and that this conduct was irresponsible?

The Tribunal's Findings with respect to the JW Complaint

The complainant's failure to contradict the evidence of the finance company representative leads credence to that witness' evidence that JW had sold and removed a number of vehicles from his lot, contrary to the terms of his security agreement with the finance company, and was in the process of removing more. Immediate action was required to prevent the continuation of this illegal practice. The evidence of the Applicant, corroborated by the finance company representative JP, also confirms that the Applicant received some assurance from a legal representative that the company had the legal right to cut the lock allowing them access to the property to put a stop to this practice.

The Tribunal agrees that this advice may, depending on the terms of the security agreement, have been correct if there had been no prior threat of violence by the complainant and no confrontation with him after the entry. Unfortunately, there was a threat in this case and physical violence did occur resulting in personal injuries to both parties.

Authority for the proposition that force may be used to effect an entry to land in certain cases where no breach of the peace occurs, can be found in a useful Study Paper on Wrongful Interference with Goods prepared for the *Ontario Law Reform Commission* in 1989. In a chapter entitled "Recaption - The Extrajudicial Remedy", the authors, Ralph L. Simmonds and George R. Stewart, state the following at page 78 under the heading "Trespass to Land Causing Damage to the Realty":

Present law grants, in most cases, a right to a recaptor to do reasonable and necessary damage to effect recaption. The privilege has extended to the forceful breaking open of a recaptee's doors and the breaking of some boards off the recaptee's barn with an axe.

(emphasis added)

As the authors make clear on the following page, however, is the right to use force to "break open the recaptee's doors" is lost where it becomes clear that force will be necessary to effectively recapture the goods in question. Once this occurs "the recaptor who persists in attempting to retake goods...becomes a trespasser to land *ab initio*".

Chief Justice Richard, in *Rayson v. Graham*, [1864] O.J. No. 229 (contained in the Registrar's Book of Authorities) cites with approval Blackstone's Commentaries, which describes the limitation on the right to entry in slightly different words. The Chief Justice says at paragraph 9 of his judgment:

The passage from Blackstone, on the recaption of personal property, after stating the impolicy of allowing the right, upon the ground that the public peace is a superior consideration to any one man's private property, and if any man was allowed to use force for the remedy of private injuries, social law must cease, the strong give law to the weak, &c., concludes: "For these reasons it is provided that this natural right of recaption shall never be exerted when such execution must occasion strife and bodily contention, or endanger the peace of society..."

Chancellor Boyd quoted the same passage from Blackstone in the case of *Traders Bank of Canada v. G. & J. Brown Manufacturing Co.* [1889] O.J. No. 121, some 35 years later when he held that:

It is the common law right of a person whose chattels are on the land of another under some arrangement which has ended, to enter upon the land to resume possession of his goods, without thereby committing a trespass...But as said by Blackstone, in the passage cited in the argument of that case, "this right of recapture shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society". The defendants had the legal right to enter upon the mill premises in order to resume actual possession of the machinery (giving notice and using all care in so doing), but it would be illegal for them to take possession by force.

Finally, a more recent reminder to bailiffs of the danger they run of converting a legal entry into an illegal one should a breach of the peace occur, can be found in the words of Schroeder, J.J.A. in the case of *Regina v. Doucette*, 129 C.C.C. 102.

In this case the County Court Judge, accepting their plea of self-defence, found three bailiffs not guilty of assaulting a homeowner when a fight broke out in the course of their repossession of a television set. In reversing the County Court Judge's decision Schroeder, J.J.A. notes that "there appears to be a popular misconception in the minds of many people, particularly in the minds of persons engaged in the business or calling of licensed bailiffs as to the extent of their rights and privileges...". After pointing out that such people do not have the protection granted by the *Criminal Code* to court appointed bailiffs, and quoting with approval the excerpt from Blackstone's Commentaries noted above, as well as the more modern authorities of *Devoe v. Long* [1951] 1 D.L.R. 203, *Nilan v. McAndless* (1912), 8 D.L.R. 169 and *R. v. Shand* [1904] O.J. No.124, the learned Judge concludes with these words:

It follows logically that if a person enters premises lawfully in the first instance for the purpose of resuming possession of his movable property and subsequently abuses his authority, he becomes in law a trespasser. It is rather singular that three bailiffs had to descend upon the complainant to repossess a chattel which could be borne by one man, unless it was their purpose to make a display of might, against which the complainant's lone opposition, whether right or wrong, could scarcely be expected to prevail... Once it was made clear to them, as indeed it was, that they would not be suffered to remove the television set without resistance, they grossly exceeded and abused their rights when they persisted in carrying out their project of abducting the television receiver, using force for the purpose if necessary. They thus became trespassers even if their original entry was lawful, a point which, on the evidence, is itself not free from doubt.

In the Tribunal's opinion, the entry by the bailiff in the instant case became unlawful, if not at the moment he cut the padlock to gain entry, at the very latest at the moment a breach of the peace occurred. This may have been as early as when he decided to proceed with the recapture knowing of a threat of violence by JW but, in any event, occurred no later than when punches were thrown. The Tribunal finds that proceeding with a recapture when there is a threat of violence is an irresponsible act.

The Tribunal's Findings with respect to the VM Complaint

The Tribunal accepts JF's evidence relating to the nature of her relationship with VM in preference to the evidence of VM, which contained serious unexplained contradictions noted above. In the Tribunal's view, there is no doubt that the equipment in question in this complaint belonged to JF at the time VM joined her as a partner or affiliate in business. Further, VM led no convincing evidence that she somehow acquired ownership of the equipment as a result of her monthly payments to JF. The Tribunal thus finds that, as in the JW Complaint, the Applicant's client, JF, had a sufficient proprietary right in the personal property in question to justify the exercise of a right to recapture the goods at common law. The only question is whether that right was exercised legally or whether the changing of the lock on the complainant's business premises involved more force than allowed by the common law.

A review of the cases cited by the Registrar and the comments in the Study Paper by Ralph L. Simmonds and George R. Stewart noted above, reveals that the limitation on the common law right of recapture has sometimes been expressed as prohibiting the use of force and sometimes as prohibiting a real or threatened breach of the peace. The Tribunal is not confident that the two concepts are necessarily synonymous. In the JW complaint, for example, it was, in the Tribunal's view, almost inevitable that there would be a breach of the peace when the Applicant entered JW's premises and the entry clearly became unlawful whichever test is used, whereas in the VM incident, minimal force was used to effect an entry, and the Applicant took reasonable steps to ensure that there would be no breach of the peace.

Notwithstanding the steps taken to avoid a breach of the peace, some force was of course necessary to drill the lock and replace the cylinder, and the question is whether this use of force was sufficient to make the entry unlawful notwithstanding the absence of violence or forceful taking?

In *Devoe v. Long & Long* [1951] 1 D.L.R. 203, the New Brunswick Court of Appeal held that breaking a door endangered the peace.

In *Southam v. Smout* [1964] 1 Q.B. 308, Lord Denning M.R. reviewed at considerable length the boundaries placed on the force that a bailiff might use to enter premises in order to recapture goods. His conclusions on this point are set out at 329:

The other question raised is as to the mode by which entry was effected, which must have involved on a reasonable view of the evidence turning the knob or lifting the latch or opening the door by some other ordinary means.

Now "ordinary means" for this purpose would include such methods as that, or perhaps pushing a door that is merely standing ajar, or a fortiori walking through the entrance to a door that was open in the ordinary sense, but it would not include going through a window, and would not include using physical force to break open the door and, if the door was locked, it would not include using a key if there was no authority from the householder to make use of the key.

Lord Denning's words were quoted with approval by the British Columbia Supreme Court in *Millar v. Sumo Engine Co. (Canada) (1989) Ltd.* [1993] B.C.J. No. 1881.

And finally, Mossop, D.C.J. dealing directly with a case of lock replacement, held in *Spencer v. Pollard (Dist. Ct.)* [1989] O.J. No. 776 that if the bailiffs in that case had a common law right to distrain "they far exceeded their powers under the law in effectively removing the lock and installing their own".

In light of these authorities, the Tribunal finds that the entry of the VM business premises to recapture the goods of JF was unlawful, and constituted an unjustifiable use of force as alleged by the Registrar.

The Applicant contends that he was not acting as bailiff while JF made this entry and so falls outside the authority of the Registrar to discipline him. In support, he cites JF's evidence in which he made it clear to her from the outset that he would not act as bailiff but would only remain on the outside during her entry to record the goods taken, take photographs, and talk to the police if necessary. It was JF who called the locksmith and paid for his services.

The Tribunal does not accept the Applicant's submissions in this regard. Whether or not the Applicant fell within the definition of a bailiff in the Act at the time of the entry, he certainly was known to all the parties involved as a bailiff. His first appearance at the complainant's place of business on October 16, 2006, was clearly in his role as a bailiff, complete with the jacket. Further, according to the evidence of locksmiths B. and G. and Constable Dillon (which the Tribunal accepts as having been given by non-interested parties), all parties attending the scene knew the Applicant as a bailiff, and relied on his presumed authority as a bailiff in governing their conduct at the scene. The Applicant could hardly have been unaware that his presence in his normal bailiff jacket would give JF's act of entry an air of authority it would not otherwise have had, and facilitate an entry that would not otherwise have taken place. The Tribunal finds, based on the evidence of locksmith G., that the Applicant actually directed the drilling of the lock. But at the very least, the Applicant used his position as a bailiff to assist JF in what the Tribunal has found to be an unlawful entry. In the Tribunal's opinion, the Applicant's participation in JF's entry makes him a joint tortfeasor in this unlawful act and brings him squarely within the Registrar's purview.

The Applicant also submitted that he took all reasonable steps prior to the entry to ensure that he would be on safe legal grounds in assisting JF with her entry. These steps included obtaining legal advice from two lawyers. He also pointed out that no guidelines or Code of Conduct exists to give bailiffs guidance, and that the Registrar did not expect bailiffs to request an opinion from him on the legality of any entry prior to making it.

The Tribunal cannot accept the Applicant's lack of knowledge of the illegality of his actions as a valid excuse in the circumstances of this case.

He was specifically advised, as early as the letter notifying him of his appointment, that bailiffs must use peaceful means in carrying out their duties. This advice was again brought to his attention in the most unambiguous manner in the letter of caution he received following the first incident. The Tribunal finds that it was irresponsible to ignore this advice.

Finally, the Applicant points to the urgency of the situation and pleads that recourse to the courts to determine the rights of the parties would involve an intolerable delay causing hardship on his client, JF. The Tribunal is not convinced that this apprehended injustice could not have been avoided by bringing a motion before the courts for the interim recovery of chattels but, be that as it may, urgency does not excuse recourse to an unlawful remedy.

In summary, the Tribunal concludes that the Applicant made or assisted in an unlawful entry of VM's business premises, and that this entry occurred after a previous unlawful entry and a written warning from the Registrar's office concerning the use of force.

Neither the Act nor any Regulation promulgated thereunder expressly defines how a bailiff is expected to act or what acts could be considered as not acting "responsibly". Nor has the Tribunal been directed to any generally accepted standard of conduct. In the absence of any specific description of what it is meant for a bailiff to act or not to act responsibly, the term is to be given its ordinary meaning or "the meaning that would be understood by a competent language user upon reading the word in its immediate context" (Sullivan, R. *Statutory Interpretation*, 2nd ed.). In this case, the Tribunal finds that to act responsibly is to act in a way that will increase public confidence and respect for the profession of bailiffs. Conversely, a bailiff may be considered as not acting responsibly if he acts in a manner that brings disrepute, contempt or scorn on his profession.

Although it is, of course, impossible to enumerate all acts which would be considered irresponsible, the Tribunal finds that at the very minimum, the public has a right to expect that those entrusted with a role in the administration of the law will not break the law in carrying out their duties or assist others who might rely on their expertise, to carry out an unlawful act. The Tribunal finds that the Applicant failed to meet this standard and that the Registrar has satisfied the onus resting on him of proving on the balance of probabilities and with clear, convincing and cogent evidence that the Applicant failed to act responsibly while participating in JF's unlawful entry.

In light of this finding, the Parties will contact the Tribunal to arrange a date for the hearing of the Applicant's motion questioning the constitutional validity of section 9 (b) of the Act.

LICENCE APPEAL TRIBUNAL

Douglas Wallace, Vice-Chair

Geneviève Blais, Member

RELEASED: August 22, 2008

FILE NAME: 4720.ba.Emerson.interim decision.doc

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

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



PRE-HEARING

NEIL EMERSON

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, c. B.2

TO REVOKE AN APPOINTMENT

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair
DAVID CARYLL, Member

APPEARANCES: NEIL EMERSON, Applicant, appearing on his own behalf

REBECCA ROSENBERG, Counsel, appearing on behalf of the
Registrar, *Bailiffs Act*

DATE OF
PRE-HEARING: May 14, 2008

Toronto

ORDER

A pre-hearing was held in this matter on May 14, 2008, before the Licence Appeal Tribunal (the "Tribunal"), in the presence of Neil Emerson (the "Applicant") and Rebecca Rosenberg, Counsel for the Registrar, *Bailiffs Act* (the "Registrar").

The Tribunal makes the following order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, July 2, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue if necessary on July 3 and 4, 2008:

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

2. The Registrar and the Applicant acknowledge that each has had documentary disclosure from the other. In the event that further documentary disclosure is necessary, the Applicant and the Registrar shall fully comply with Rule 6 of the Rules of Practice of this Tribunal, and in regard to Rule 6.3 of such Rules, disclosure shall be made at least 30 days before the hearing.
3. With respect to the Notice of Constitutional Question filed by the Applicant, the Applicant shall comply with the provisions of Rule 4 of the Tribunal's Rules of Practice regarding service of the Notice of Constitutional Question on the Attorney General of Ontario and on the Attorney General of Canada, as required by Rule 8, and file proof of service with the Tribunal at least fourteen days before the date set for the hearing.
4. The Applicant admits the following allegations in the Notice of Proposal:
 - a. In the W. allegations, the Applicant admits paragraphs 1 through 7; and,
 - b. In the M. allegations, the Applicant admits paragraphs 4, 5, 7, 8, 10 and 11.
5. In the event the Parties resolve this matter prior to the hearing, the Registrar shall advise the Tribunal forthwith that he is withdrawing the Notice of Proposal.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: June 20, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



JOSEPH DELBERT ADAMS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *BAILIFFS ACT*, R.S.O. 1990, C. B.2, AS AMENDED

TO REVOKE AN APPOINTMENT

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: RICHARD I. KESTEN, Agent, 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
January 18, February 21, 2008

Toronto

INTERIM DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) by the Applicant, Mr. Adams, from a proposal by the Registrar under the *Bailiffs Act* (the “Registrar”), revoking his appointment.

FACTS

The Registrar is proposing to revoke Mr. Adams’ appointment on the grounds that Mr. Adams is an assistant bailiff who is holding himself out as a bailiff. The Registrar’s position is that assistant bailiffs are required to be employed by a bailiff and that Mr. Adams is currently employed by a company he owns and is presenting himself as a bailiff. Mr. Adams argues that he is a bailiff. There were other grounds for revocation cited in the Notice of Proposal to Revoke Appointment, but these were not pursued during the hearing.

It is fortunate that the issues in this case are narrow in scope and technical in nature as determining the facts has been challenging, for three reasons. First, Mr. Adams’ testimony was unreliable. Mr. Adams suffers from short-term memory loss. For example, after a break in the hearing of slightly more than a month, Mr. Adams could not recall that the Registrar had given evidence in this matter and had been cross-examined.

His long-term memory appears to be better but it is very selective. He remembers vividly those facts which support his argument that he is a bailiff but, during cross-examination, his memory became spotty. Throughout, Mr. Adams insisted on arguing his case rather than responding to questions. His testimony is best viewed as a statement of his position rather than a statement of fact. Therefore, the Tribunal is unable to rely on his testimony except to the extent that it is corroborated by the testimony of the only other witness called, Mr. Brian Pitkin, the Registrar, or by documentary evidence. The second challenge stems from the fact that Mr. Pitkin has only been the Registrar since April 2, 2001. Most of the events in issue occurred before his appointment and he is not in a position to shed light upon them. The third challenge is that, by apparent agreement between the Parties, the documentary evidence before the Tribunal is incomplete. Counsel for the Registrar made frequent allusions to other documents and evidence not before the Tribunal; the Tribunal cannot rely on these assertions by Counsel. Despite these challenges, the following can be found as facts.

Mr. Adams applied for an appointment as a bailiff under the then current *Bailiffs Act*, R.S.O. 1990, c. B.2 (the "1990 Consolidation") in April of 1994.¹ No appointment was made. There was some hearsay evidence as to why this application was not dealt with, but no direct evidence. What is clear is that in August, 1994, Mr. Adams re-applied. There was some dispute between the Parties as to whether Mr. Adams' second application was for appointment as a bailiff or as an assistant bailiff. An examination of the second application² reveals that, however reluctantly he may have acted, Mr. Adams did apply for an appointment as assistant bailiff. The Minister of Consumer and Commercial Relations recommended to the Lieutenant Governor of Ontario as follows: "pursuant to Section 3 of the *Bailiffs Act*, R.S.O. 1990, Chapter B.2, that Joseph Delbert Adams be appointed assistant bailiff, in and for the Municipality of Metropolitan Toronto, effective January 4, 1995."³ The Municipality of Metropolitan Toronto was one of the predecessor municipalities to the City of Toronto. There is a second signature on this recommendation which Mr. Torbin advised was the signature of the then Lieutenant Governor, Colonel The Honourable Henry N.R. Jackman, CM. This recommendation constitutes Mr. Adam's appointment; there is no Order in Council. Appointments under the 1990 Consolidation were at the pleasure of the Lieutenant Governor.

Mr. Pitkin testified that, despite the fact that the 1990 Consolidation makes no mention of the position of assistant bailiff, the Ministry had been in the practice of recommending people for appointment as assistant bailiffs since the 1960s. The position was seen as an apprenticeship. The duration of the apprenticeship increased over time from one year to two, but it appears to have been for a period of one year at the time of Mr. Adams' appointment. After the apprenticeship was complete, assistants re-applied for appointment, this time as bailiffs. Sometime in the late 1990s, a further requirement that assistant bailiffs pass a test before becoming bailiffs was added, but this test was not in place when Mr. Adams was appointed. An assistant bailiff had to be employed by a bailiff; apart from that, an assistant bailiff had all the powers of a bailiff.

1 Exhibit 4

2 Exhibit 5

3 Exhibit 3

In an undated letter,⁴ receipt stamped January 19, 1995, Mr. Adams wrote to the Registrar, *Collection Agencies Act*, who at that time was administering the 1990 Consolidation. Mr. Adams refers to a telephone conversation he had with her on January 9, 1995, less than a week after his appointment. In the letter, Mr. Adams complains of his appointment as assistant bailiff, both in form and in substance. He takes the position that he is prepared to work for a bailiff for a period of one year, despite his assertion that there is nothing in the 1990 Consolidation that would prevent him from acting as a bailiff. On May 14, 1995, less than five months after his appointment, Mr. Adams applied to the Ontario Court (General Division) for, among other things, a mandatory order directing the issue of a bailiff's licence to him.⁵ For reasons not made clear, this application was abandoned.

By letter dated January 30, 1996,⁶ the then Registrar acknowledges receipt of a letter from Mr. Adams informing the Registrar that he has changed employers. It can be concluded from this letter that as of January, 1996, Mr. Adams was employed by a bailiff, in this case a corporation. By letter dated January 6, 1997,⁷ his employer of record advises the Ministry then administering the 1990 Consolidation that Mr. Adams was no longer in its employ. There were a variety of Ministries charged with the administration of the 1990 Consolidation. For simplicity, they will each be referred to simply as the "Ministry". The Ministry took no action on this letter and it appears that, from this date, Mr. Adams was no longer employed by a bailiff but rather held himself out as a bailiff.

There is evidence that Mr. Adams commenced several other legal actions in the latter half of the 1990s to either have himself declared a bailiff or to seek damages for not having that status. On July 30, 1997, on an *ex parte* application to the Ontario Court (General Division), Mr. Justice Day appointed Mr. Adams a bailiff in the Regional Municipalities of Peel, York, Durham, Halton, Hamilton-Wentworth and the County of Simcoe.⁸

On August 6, 1998,⁹ the then Minister of Consumer and Commercial Relations wrote to Mr. Adams as follows:

I am pleased to inform you that The Honourable Hilary M. Weston, Lieutenant Governor of Ontario, has asked me to acknowledge your appointment pursuant to Section 3 of the Bailiffs Act, R.S.O. 1990, Chapter B.2.

Your appointment became effective January 4, 1995, in and for the Municipality of Metropolitan Toronto.

I understand, The Honourable Mr. Justice Day on the 30th day of July 1997, signed an Order for consent to act as appointed bailiff in and for the Regional Municipality of Peel, the Regional Municipality of York, the Regional Municipality of Durham, the Regional Municipality of Halton, the Regional Municipality of Hamilton-Wentworth and the County of Simcoe, in addition to your appointment in and for the Municipality of Metropolitan Toronto.

4 Exhibit 14

5 Exhibit 8

6 Exhibit 6

7 Exhibit 7

8 Exhibit 10

9 Exhibit 11

I hope that I have been able to clarify matters for you, and I thank you for bringing your concerns to my attention.

Mr. Pitkin testified that after this letter, the Registrar made occasional inquiries of Mr. Adams as to his status and in 2000 the Ministry wrote asking him to confirm his status. Mr. Adams' lawyer wrote that Mr. Adams took the position that he is a bailiff. The Registrar took no action on this 2000 letter and reply.

Effective in 2004, the *Bailiffs Act* was substantially amended (the "2004 Amendment"). The 2004 Amendment expressly includes the category of assistant bailiff and provides for the registration of assistant bailiffs, specifies the activities in which they can engage and provides for their regulation.

By letter dated January 10, 2005,¹⁰ Mr. Pitkin wrote to Mr. Adams advising him that the 2004 Amendment expressly requires an assistant bailiff to be employed by a bailiff and giving Mr. Adams 60 days to find a bailiff employer. By Notice of Proposal dated April 23, 2007,¹¹ the Registrar proposes to revoke Mr. Adams appointment because he is an assistant bailiff who is not employed by a bailiff. Mr. Pitkin explained the ten year delay between learning that Mr. Adams was not employed by a bailiff and taking action against him by referring to the numerous legal actions begun by Mr. Adams. The various Ministries which administered the 1990 Consolidation and the 2004 Amendment during these ten years were waiting for these actions to conclude before acting, according to Mr. Pitkin.

LAW

Section 1 of the 1990 Consolidation defines a bailiff as:

a person who acts, assists any person to act or holds himself or herself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction.

Subsection 3(1) of the 1990 Consolidation provides:

No person, other than a person authorized to act as a bailiff under court process, shall act as a bailiff unless appointed by the Lieutenant Governor on recommendation of the Minister.

Section 4 of the 1990 Consolidation states:

A bailiff may act as a bailiff in a county other than the county for which he or she is appointed if the consent of a judge of the Ontario Court (General Division) is first obtained.

There is no mention of the term "assistant bailiff" in the 1990 Consolidation. Not until the 2004 Amendment is the category of assistant bailiff expressly created. In the 2004 Amendment, the process for creating and regulating assistant bailiffs is established.

¹⁰ Exhibit 12

¹¹ Exhibit 1

The process whereby bailiffs are created is also changed from appointment by the Lieutenant Governor to appointment by the Minister of Consumer and Business Services. Assistant bailiffs are appointed by the Registrar for a fixed term. Fees are different for a bailiff and assistant bailiff and it is expressly provided that an assistant bailiff must work in the employ and under the supervision of a bailiff.

There is no transitional legislation requiring people who have been appointed under the 1990 Consolidation to re-apply under the 2004 Amendment. Rather, existing Vice-Regal appointments appear to survive the 2004 Amendment. Subsection 2(12) of the *Ministry of Consumer and Business Services Statute Law Amendment Act, 2004* is the enacting legislation for the 2004 Amendment.

The 2004 Amendment contains the following definitions, in Section 1:

“assistant bailiff” means a person who acts, under the supervision of a bailiff, in the repossession or seizure of chattels or in an eviction;

“bailiff” means a person who acts, assists any person to act or holds himself or herself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in an eviction, but does not include an assistant bailiff;

Section 3 and Subsection 3.1 of the 2004 Amendment read:

3. No person, other than a person authorized to act as a bailiff under court process, shall act as a bailiff unless the person is appointed under this Act and is not a person described in clause 3.1(b) or (c)

3.1 No person shall act as an assistant bailiff unless,

- (a) the person is registered under this Act;
- (b) the person has been appointed under this Act since before the day subsection 2(12) of the *Ministry of Consumer and Business Services Statute Law Amendment Act, 2004* came into force, and the person’s appointment contemplates the person acting as assistant bailiff; or
- (c) the person is otherwise identified by the Lieutenant Governor or the Minister as a person authorized to act as an assistant bailiff since before the day subsection 2(12) of the *Ministry of Consumer and Business Services Statute Law Amendment Act, 2004* came into force.

Subsection 9.5 of the 2004 Amendment provides that the Registrar may revoke an appointment described in clause 3.1(b) or an authorization described in clause 3.1(c) if the assistant bailiff has ceased to be employed by a duly appointed bailiff.

Subsection 10(4) sets out the powers of the Tribunal where an assistant bailiff requests a hearing before the Tribunal:

If a hearing by the Tribunal is required in accordance with subsection (2), the Tribunal shall appoint a time for and hold a hearing and, on application of the Registrar at the hearing, 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.

One question which was not raised in argument before the Tribunal but which is nevertheless relevant is the question of how much deference, if any, the Tribunal owes to the decision of the Registrar. There is a line of cases under the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42, as amended, that consider the question in relation to Section 7 (4) of that Act, which 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.

In *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers Act)* (2005), 205 O.A.C. 110 (Ont. Div. Ct.), the Divisional Court, after reviewing earlier case law on this point, continues:

The question that the Tribunal must ask itself is not whether the Registrar was wrong. Instead, the Tribunal is required to make an independent decision as to whether the criteria for depriving the Applicant of his license have been proven, showing no deference to the initial decision of the Registrar.

The difference in wording between the hearing provisions of the two statutes does not change the application of the principle that in this hearing, the Tribunal must make an independent determination of whether or not Mr. Adams should have his appointment revoked and, in making this determination, the Tribunal owes no deference to the decision of the Registrar.

DECISION

The questions in this case are threefold. First, is Mr. Adams a bailiff or an assistant bailiff? Second, if Mr. Adams is an assistant bailiff, is he employed by, and acting under the supervision of, a duly appointed bailiff? Finally, if Mr. Adams is an assistant bailiff acting outside the scope of his authority, what sanction should flow from his conduct?

The first question is deceptively simple. To determine whether Mr. Adams is a bailiff or assistant bailiff, it is necessary to consider several subsidiary questions, as follows:

- what was the nature of Mr. Adams' 1995 appointment under the 1990 Consolidation;
- what was the effect of Mr. Justice Day's Order of 1997;
- what was the effect of the Minister's 1998 letter to Mr. Adams; and,
- what is the effect of the 2004 Amendment on the status of Mr. Adams?

As noted above, the Tribunal finds as a matter of fact that Mr. Adams did apply under the 1990 Consolidation for appointment as an assistant bailiff and that he received a form of appointment as an assistant bailiff. The question remains, what was the effect of his appointment at law?

According to Mr. Pitkin, the Ministry was attempting to create an apprenticeship program by appointing people as assistant bailiffs. However, the 1990 Consolidation did not include an express provision for the position of assistant bailiff.

The definition of bailiff under the 1990 Consolidation is an inclusive one. Bailiffs are not only those who act as bailiffs but also those who assist another in acting as a bailiff. However, it cannot be said that the definition sets up separate classes of bailiffs; the different activities are internal to the definition. There is nothing in the 1990 Consolidation to suggest that some bailiffs may only assist other bailiffs to act, while others may only hold themselves out as available to act. Once a person is appointed as a bailiff, that person may act, assist, or be available to act in the capacity of a bailiff. Further, under Section 3 of the 1990 Consolidation, the only position that the Minister is authorized to recommend for appointment is that of a bailiff. A plain reading of the 1990 Consolidation leads to the conclusion that the Ministry was acting without authority in creating any position other than that of bailiff.

Mr. Torbin argues that the Tribunal has only two choices in interpreting the 1990 Consolidation. Either the appointment was effective in creating Mr. Adams an assistant bailiff, or the appointment was entirely ineffective, rendering Mr. Adams' appointment void from the beginning.

Either interpretation is problematic. The Ministry was acting outside its legislative authority in creating a class or category of assistant bailiff when the 1990 Consolidation did not provide for it. However, to render the appointment null and void would affect not only Mr. Adams but everyone who was appointed assistant bailiff prior to the 2004 Amendment, when the category of assistant bailiff was expressly established. If the legislature had intended to render prior appointments as assistant bailiff void, it could easily have done so in the 2004 Amendment. It did not. On the contrary, clauses 3.1(b) and (c) of the 2004 Amendment not only give effect to the prior appointments as assistant bailiff but also regularize certain forms of appointments and authorizations made under the 1990 Consolidation.

This Tribunal is bound to discern the intent of the legislature and to give effect to it. The 2004 Amendment provides that a person whose appointment pre-dates the 2004 Amendment and whose appointment "contemplates the person acting as an assistant bailiff" or who is "otherwise identified by the Lieutenant Governor or the Minister as a person authorized to act as assistant bailiff" is entitled to act as an assistant bailiff under the provisions of the 2004 Amendment.

Sullivan and Driedger on the Construction of Statutes,¹² sets out an analytical framework for legislation that operates to change the effect of past actions. Such legislation may be referred to as "retroactive" if it changes the past legal effect of a past situation; "retrospective" where it changes the future legal effect of a past situation, or "immediate" to the extent that it changes the future legal effect of an on-going situation.

12 Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th Edition (Toronto and Vancouver: Butterworths Canada Ltd. 2002), p. 546

Sullivan and Driedger¹³ goes on to say that in the absence of an express provision, there is a presumption that legislatures do not intend new legislation to be given a retroactive application. If the legislature had intended Section 3 of the 2004 Amendment to have retroactive effect, it could have expressly stated its wishes. What is being changed by Section 3 of the 2004 Amendment is the future effect of past appointments. Hence the legislation is retrospective in its application. Had Mr. Adams done nothing, had he been content to operate as an assistant bailiff, then his appointment would have been expressly recognized and given effect to by the 2004 Amendment.

However, Mr. Adams was not content with his appointment and from the outset he challenged the authority of the Ministry to create the position of assistant bailiff and took a variety of actions to assert his position that he was appointed a bailiff or, as he put it in his testimony, “a bailiff assisting a bailiff”. So, at the time of his appointment and prior to the enactment of the 2004 Amendment, what was his status?

If the Tribunal is bound to give effect to the intention of the legislature, it owes no such deference to the intention of the Ministry. The Ministry may have intended to set up a separate class of bailiffs by creating a category of assistant bailiffs but it did not have the authority to do that. Its attempts to create a new class of bailiff were ineffective until the 2004 Amendment gave effect to them. If the intent of the Ministry could not be achieved, what was the effect of the appointment at the time it was made? It can be said that the effect of Mr. Adams’ appointment was to create him a bailiff, subject to certain restrictions which were established outside the bounds of the appointment itself. The Ministry informed Mr. Adams of the initial restriction it sought to impose on his appointment, specifically that he be sponsored by and employed by a bailiff for a period of one year. Subsequently, the restrictions increased.

Following this logic to its natural conclusion, the choice before this Tribunal is whether Mr. Adams’ appointment, at the time it was made, was without effect or whether the restriction that the Ministry sought to impose on it was without effect. As stated above, to declare Mr. Adams’ appointment to be without effect would be to thwart the intended effect of the 2004 Amendment. The way to interpret Mr. Adams’ appointment is to regard the restrictions that were imposed on it as ineffective until the 2004 Amendment gave effect to them. In other words, Mr. Adams was appointed as an assistant bailiff but he was entitled to act as a bailiff until the class of assistant bailiff was expressly provided for and until his appointment as assistant bailiff was expressly recognized by the 2004 Amendment. The fact that Mr. Adams, reluctantly, submitted to the restriction that he be employed by another bailiff until January, 1997, does not change the legal effect of his appointment.

Mr. Torbin cited two cases in support of his position that either the appointment of Mr. Adams as assistant bailiff was effective from the outset or his appointment is wholly without effect. Both cases are before the Toronto Small Claims Court and both involve Mr. Adams, or a company owned by Mr. Adams, as Plaintiff. There were no submissions made to this Tribunal as to whether the Tribunal is bound by the decisions of the Small Claims Court, but in any event, the cases are of limited utility.

13 Ibid

In the earlier of the cases, *Ontario Sheriff Association Inc. and Used Car Dealers Association of Ontario*, Court File No.: TO-84400/03, decided on January 14, 2004, the Defendant brought a motion to dismiss the action both on its merits and as a matter of *res judicata*. Judge Pamela A. Thomson concluded that she had evidence before her that neither the corporate Plaintiff nor Mr. Adams were bailiffs and apparently, she did not feel it necessary to consider the question of whether the Ministry had the jurisdiction to make an appointment as assistant bailiff.

In the second case, *Joseph Delbert Adams and Toronto Police Services Board*, TO - 73060/03, decided after the 2004 Amendment in July 2004, Mr. Adams brought an action for the tort of slander. The question was whether Mr. Adams was acting within his authority in seizing a car in the City of Toronto while not employed by a bailiff. Deputy Judge Michael O'Dea Mungovan did not address the question of the nature of Mr. Adams' appointment directly. Rather, he concluded that Mr. Adams was not acting within his authority either because his appointment was *void ab initio* or, in the alternative, if the appointment as assistant bailiff was effective, then Mr. Adams was acting outside the scope of that authority.

Mr. Torbin also cited the *Legislation Act, 2006*, S.O. 2006, Chapter 21, Schedule F and in particular Subsection 56(2) of this Act which reads, "The amendment of an Act or regulation does not imply that the previous state of the law was different." Mr. Torbin submitted that because, on his reading of this Subsection, amendments do not operate to change the underlying law, therefore the 2004 Amendment did not operate to change the 1990 Consolidation; it merely elucidated a troublesome point. The better way to interpret Subsection 56(2) is that the act of amending an Act or regulation is neutral. However, if the amendment is substantive, then that substance must be interpreted and applied. To adopt Mr. Torbin's interpretation would be to make every amendment retroactive, which surely was not the intended effect of the *Legislation Act, 2006*.

If the effect of Mr. Adams' appointment was to permit him to act as a bailiff until the 2004 Amendment regularized his status as assistant bailiff, then what was the effect of Mr. Justice Day's Order appointing Mr. Adams a bailiff for the Municipalities and counties surrounding the City of Toronto? Mr. Torbin argues either that the appointment was without effect because, under Section 4 of the 1990 Consolidation, only bailiffs could apply for such an appointment or, if the judgment has effect, it is not relevant to the matter before this Tribunal because it does not affect Mr. Adams' appointment within the City. It is not necessary to consider the first of Mr. Torbin's arguments because his second argument is correct; Mr. Justice Day's Order has no effect on the nature of Mr. Adams' appointment within the City of Toronto.

Next in chronology is the letter of the Minister of Consumer and Commercial Relations of August 6, 1998. Deputy Judge Michael O'Dea Mungovan in the *Joseph Delbert Adams and Toronto Police Services Board* case considered this letter and concluded that it did not affect the nature of Mr. Adams' appointment and Mr. Adams should not have been confused into thinking that it did. However, the Deputy Judge refers in his reasons to a letter that Mr. Adams wrote to the Minister that triggered the August 6, 1998 response.

That letter was not in evidence before this Tribunal and this Tribunal therefore is reading the August 6, 1998 letter without that context.

A reasonable person reading the Ministerial letter of August 6, 1998 would conclude that the Minister was confirming that Mr. Adams had been appointed as a bailiff under Section 3 of the 1990 Consolidation. If this was not the intention of the Minister, why would he refer to the Lieutenant Governor asking him to inform Mr. Adams of his appointment? If he intended merely to affirm that Mr. Adams was appointed an assistant bailiff, he would not have needed a Vice-Regal acknowledgement. Further, the Minister apparently acknowledges that he is bound by Mr. Justice Day's Order and adds that it is "in addition to your appointment in and for the Municipality of Metropolitan Toronto." Nowhere in the letter is there any reference to the term "assistant bailiff". Instead, there is a specific reference to Section 3 of the 1990 Consolidation, which speaks only of an appointment as bailiff. A reasonable person reading this letter would be left with the impression that the Minister is acknowledging and acquiescing in Mr. Adams' appointment as a bailiff. The reference to the appointment becoming effective January 4, 1995, would be seen as correcting the situation retroactive to the date of appointment.

Did the letter go further? Did it have the effect at law of changing Mr. Adams' appointment from that of assistant bailiff to that of bailiff? One way to interpret this letter is that it acknowledges that the restrictions the Ministry attempted to impose on Mr. Adams' appointment were without effect. However, as discussed above, these restrictions were given effect by the 2004 Amendment. Therefore, unless it can be said that the Minister's letter constituted an appointment of Mr. Adams as bailiff, it did not change Mr. Adams' status at law and it does not change the effect of the 2004 Amendment on Mr. Adams' position today. Under Section 3 of the 1990 Consolidation, the only form of appointment as bailiff is by recommendation of the Minister and appointment by the Lieutenant Governor. This letter does not meet those requirements of form and therefore cannot be considered to be either a new appointment or a retroactive re-appointment.

The last point to be considered in determining Mr. Adams' status is the effect of the 2004 Amendment. As noted above, the 2004 Amendment gives effect to Mr. Adams' appointment as an assistant bailiff and that is what he is today.

The second question to be considered is whether Mr. Adams is employed by, and under the supervision of, a bailiff as required by the 2004 Amendment. The unchallenged evidence is that Mr. Adams has not been employed by a bailiff since January 1997. Therefore, he is acting outside his scope of authority and in violation of the 2004 Amendment.

What consequences should Mr. Adams face as a result of his violation of the 2004 Amendment? In determining those consequences, three considerations are noteworthy. First, the Ministry delayed for ten years after becoming aware of Mr. Adams' violation of the 1990 Consolidation before taking action. Even after receiving a reply to their 2000 letter in which Mr. Adams, through his lawyer, makes clear his position that he was a bailiff, the Registrar does not act.

Mr. Pitkin's explanation that the Ministry was waiting for Mr. Adams' various legal actions to end is not persuasive. The Ministry cannot abdicate its responsibility to regulate a bailiff just because he is of a litigious nature. Either the Ministry did not regard this as a matter of urgency or it did not feel it had strong grounds to proceed prior to the 2004 Amendment. Second, Mr. Adams' appointment was effectively that of bailiff prior to the 2004 Amendment and therefore, prior to the 2004 Amendment, he cannot be said to have been in violation of the terms of his appointment. Thirdly, Mr. Adams was justified in reading the Minister's 1998 letter as authorizing him to act as a bailiff. Taking all of these circumstances into account, it is appropriate to give Mr. Adams some reasonable period of time to bring himself into compliance with the 2004 Amendment, either by finding a bailiff who will employ and supervise him or by becoming a bailiff. It would be unreasonable to impose the sanction of immediate revocation in a situation where the various Ministries responsible for administering the Act, by their actions and inactions, have allowed Mr. Adams to believe that he was in compliance with the law.

The question of costs was also raised during the hearing. The facts surrounding Mr. Torbin's motion for costs in the amount of \$350 for attending on January 18, 2008, when Mr. Adams elected not to attend the hearing, despite having been warned of the consequences by his lawyer, are detailed in the Interim Order of this panel, released January 21, 2008. Briefly, Mr. Adams left the hearing while he was being cross-examined on December 12, 2007 and did not re-appear on December 13, 2007, a scheduled hearing date. His lawyer advised that Mr. Adams was unwell and the Tribunal ordered a very specific form of medical certificate, stating that Mr. Adams was too unwell to attend the hearing and to give evidence. This certificate has still not been received by the Tribunal. Mr. Adams has produced a certificate saying he is too unwell to work, but given that Mr. Adams has stated frequently that he is at present working, this certificate does not assist him. The hearing was adjourned until January 18, 2008 and again, Mr. Adams did not appear. Under the Tribunal's Rules of Practice, 2003, which were in effect when the hearing began, the Tribunal may order costs of up to \$800 a day where it finds that one party has behaved unreasonably, frivolously, vexatiously, or in bad faith. Examples of this type of behaviour include failing to attend on a hearing day without notifying the parties. In this case, Mr. Adams faxed a letter announcing his intention to absent himself but he did so on the morning of January 18, 2008, too late to spare the Registrar and his lawyer from travelling to the hearing and attending at it. Another example of vexatious behaviour is failing to comply with procedural orders of the Tribunal. By failing to produce the required medical certificate or to otherwise explain his absence, Mr. Adams has behaved unreasonably and vexatiously. Mr. Kesten noted that Mr. Adams did not have notice that costs were to be sought on January 18th. It would be unreasonable to expect the Registrar to notify Mr. Adams that he would be seeking costs if Mr. Adams failed to attend when the expectation was that Mr. Adams would be present. In any event, Mr. Adams was put on notice that costs would be sought in the Interim Order of this Tribunal. Costs are therefore awarded against Mr. Adams in the amount of \$350, payable immediately.

ORDER

Accordingly, the Tribunal orders that:

1. This hearing shall resume on a date to be set in November 2008, for the purpose of determining whether Mr. Adams has brought himself into compliance with the *Bailiffs Act*. The Tribunal will consider any evidence the Parties wish to bring forward to determine this issue, provided the Parties have disclosed any documentary evidence on which they wish to rely at least 10 days before the hearing resumes.
2. Mr. Adams shall forthwith pay to the Registrar the amount of \$350 as costs in this matter.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: April 25, 2008

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



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4406 – CFSA – Registration

IN THE MATTER OF an Appeal by the Applicant of a Notice of Intention,
To Refuse To Renew Licences for the operation of children's Residences
issued by the Director, under *Child and Family Services Act*.

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: KATHERINE RENNISON, Counsel for the Director, under
the Child and Family Services Act

ANDREW ROMAN AND CATHERINE O'DONAHUE,
Counsel for the Applicant

DATES OF HEARING: November 13, 14, 15, 16, 20 and December 10, 13, 14 and
21, 2007.

REASONS FOR DECISION AND ORDER

BACKGROUND

On January 18, 2008, the Tribunal issued its order in this matter with reasons to follow. These are the reasons of the Tribunal.

For over twenty years the Applicant has operated as "a privately owned and operated residential treatment programme for developmentally delayed and dually diagnosed" youth (Exhibit 21, Tab 3). Its residences house youth ranging in age from 12 to 18, although there is provision for persons over 18 to remain in the program where suitable adult housing is temporarily unavailable. As with similar operators, referrals for placement of youth in its facilities typically originate with provincial Children's Aid Societies ("CAS").

The Applicant's four youth residences have been continuously licensed since 1986 under provincial licences issued by the Ministry of Community, Family and Social Services (the "Ministry") pursuant to *the Child and Family Services Act* R.S.O. 1990 c. C.11 (the "Act"). The relevant residences are: (a) M. Residence, for a maximum of eight children; (b) Mo. Residence, for a maximum of eight children; (c) DG Residence, for a maximum of eight children; and, (d) P. Residence, for a maximum of nine children. Licences for the first three of these Residences expired on August 20, 2007; the licence issued to the P. Residence expired in May 2007. The Applicant applied for renewal of all four licences. The Director issued a Notice of Intention (the "Notice") to refuse to

renew all four licences on September 4, 2007. The Applicant filed a Notice of Appeal to this Tribunal on September 14, 2007. At the time of the commencement of this hearing, the P. Residence had been closed for some time. By the second day of evidence, the Applicant advised that it was withdrawing its appeal of the Director's Notice as it concerns the P. Residence. Consequently, the validity of its ongoing licence status is no longer in issue.

Licences issued by the Ministry are generally valid for one year, although provisional licences, often granted on original set-up to assist in a licensee coming into compliance with all regulatory requirements, can be issued for a shorter period. In the case of the Applicant, provisional licenses were issued continuously from 1999 – 2003, due to on-going compliance requirements. Since 2003, all licenses issued to the Applicant have been regular, with the caveat that Mo. Residence had a term and condition that it adhere closely to regulatory notice requirements on admission, and M. Residence had a requirement that staff review regulatory requirements on the filing of Serious Occurrence notices.

In May 2006, a youth residing in one of the residences died while off the premises. As it had a number of other children placed with the Applicant, CAS Toronto ("CAST") undertook to complete a thorough review of the facility, but delayed the process for nine months in order to allow the Applicant, its staff and children, time to come to terms with the disruption and confusion that the tragic death wrought on all concerned. Thus, it was not until February 2007, that the CAST Quality Assurance Review ("QAR") officially commenced with a standard survey questionnaire sent to all workers with children placed at the Applicant's residences. Sometime that month, two separate CAST workers responsible for children placed at the Applicant raised concerns about their care. In the first week of March, the Ministry received a written complaint about the Applicant from a former Residential Co-Ordinator of one of the residences. As a result, both the Ministry and CAST commenced separate formal reviews of the program and facility.

Over the next few months numerous inspections, reports, meetings and discussions took place between senior management of the Applicant, the Ministry and CAST. Eventually, in a meeting on July 11, 2007, CAST decided to remove all CAST children placed at the Applicant's residences. The actual date of removal was not until August 16, as finding alternative accommodation for the children required some time.

In late July, the Applicant requested renewal of its annual licenses from the Ministry. In August, the Director made her decision not to renew, as set out in the Notice.

PRELIMINARY MOTION

On October 24, 2007, Counsel for the Ministry brought a Motion before this Tribunal for production of relevant materials held by the CAS. The Motion was opposed by the Applicant. After hearing Counsel's submissions, Vice-Chair Sanford allowed the Motion

ordering the production of such material subject to considerations of privacy and protection in the interests of the children in issue. The Order further scheduled a pre-hearing, held on October 26, which resulted in no resolution of any of the outstanding issues. Over 70 volumes of evidentiary material, and a potential witness list of 17 individuals were filed by the Director as part of its disclosure. The Applicant, in response, advised that it would be relying on 234 documents, an expert witness and four others.

MOTIONS DURING THE HEARING

A. Decision Date

The Tribunal asked Counsel at the outset of the hearing whether their consent could be obtained to waive the requirement contained in subsection 201 (8) of the Act which requires a decision within 90 days from the date the Notice of Appeal is filed with the Tribunal, in this case September 14, 2007. It was apparent that compliance with the Act absent such consent would require that a final decision disposing of the Appeal would be required on the last day scheduled for hearing evidence. Applicant's Counsel refused to provide such consent noting that he intended to present a number of motions which he hoped would make such consent unnecessary.

Hearing of the evidence extended through to December 14, and was scheduled to continue, if need be, to December 21, 2007. In fact, resumption of the hearing on this last day did not include evidence, but was limited to hearing final submissions and argument of Counsel. At this time, Ms. Renison provided the Tribunal with the Divisional Court decision of 1994, *Jo Marshall v. Guy Laine Noel Wade, Robert Seim and Jeanne Seguin, Members of the Child and Family Services Review Board* [1994] O.J.No. 2363, 31 Admin. L.R.(2d) 52. Sutherland J., in an extensive review of subsection 201(8) of the Act, determined that the 90-day provision was directory and not mandatory on the Board, a predecessor of this Tribunal. In doing so, he reviewed Canadian legal precedent and legislation, to conclude at page 27:

In summary, I arrive at that conclusion by considering the over-all purpose of the Act and the nature of the proceeding thereunder to which ss. 8 applies. I confirm my view that the words "Despite section 21 of the *Statutory Powers Procedure Act*" do not determine the question of whether ss. 8 is mandatory but leave the matter to be determined by the more general rules developed by the courts. I respectfully adopt the above-mentioned decisions to the effect that the provision of the *Interpretation Act*, R.S.O. 1990 c. I-11 stating that "shall" shall be interpreted as imperative provide only a *prima facie* test and do not oust the criteria developed in the case law...In the case of ss.8, it is provided that the Board must deliver its decision, after a hearing, within 90 days of a triggering event. As was shown by the evidence before the Board involving these parties, the hearings can involve "boxes and boxes of documents"; and clearly the Board or a court can require that other matters be dealt with at the same hearing, as in fact was ordered here. The record of this very matter reflects the difficulty in finding hearing dates that meet the schedules of counsel and the Board itself. The more parties there are the more difficult such scheduling becomes. It is also quite apparent that the hearings can involve difficult factual questions in that non-compliances, and possible means of rectification of

difficulties, have to be weighed with the positive qualities and achievements of the particular licensees. A mandatory interpretation could lead the Board to scant its task.

Moreover, the duty in question is clearly a public one, where the Legislature and the public look to the Board to protect children assigned to the premises of the licensees. No relevant penalty is set forth in the Act, and, in my opinion, there could readily be prejudice, not only to the children and to the licensee but also to the Board itself and to the broader public interest, if the provision were interpreted as mandatory, where one result could be loss of jurisdiction

Nor do I believe that the Legislature intended an interpretation that would encourage the desperate and undignified practice of having the Director withdraw a Notice of Intention and quickly substitute a new one to start a new ninety-day period. A mandatory provision that is subject to such evasion is actually less rigorous than an openly directory provision. Little prejudice could flow from interpreting the subsection as directory. Delays could be considered on appeal as there is an appeal to the Divisional Court. Persistent delays can be dealt with by way of the process of appointments and re-appointments to the Board.

For all these reasons a declaration will issue to the effect that the provision is directory.

This Tribunal, like the Board in *Jo's Place*, is sitting on an appeal from a proposed Intention of the Director to refuse the license renewal. In both cases, the licensee continues to hold its licence which remains in force until this Tribunal has issued a decision, and thus there is no direct prejudice to be suffered whilst the Tribunal considers the matter and prepares its decision. Nonetheless, in recognition of the Applicant's expressed desire for a prompt decision in this matter, on January 18, 2008, the Tribunal released its decision advising written reasons would follow. These are the written reasons.

B. Reduction of Evidence

Counsel for the Applicant made a motion before the Tribunal seeking an Order that the Respondent reduce her evidence to two bankers boxes of documents and no more than five witnesses with any further submissions of exhibits or witnesses to be determined admissible on a case-by-case basis by the Tribunal, and only after compelling arguments as to their relevance and necessity are found persuasive.

Counsel for the Applicant argued that the material upon which the Respondent intended to rely was oppressive. The material was, further, questionably relevant as it appeared to be predicated on the expectation of absolute compliance by the Applicant with the requirements of numerous bureaucratic manuals, and not therefore limited to the health, safety and welfare of the children in care when it was these latter concerns over which the Ministry has jurisdiction. As a consequence, the process involved in hearing such evidence would counteract the legislature's intention in providing a Tribunal hearing, which is to be more efficient and affordable than would be a court of law. In submissions, Counsel stressed that by providing particulars of incidents going back in history and overlapping witnesses, the Respondent was defeating this very legislative purpose.

Counsel further submitted that the chronology of the Applicant's licence issues with the Ministry led to the Applicant's position that the Ministry was motivated to refuse its registration renewal for political, as opposed to operational, concerns arising out of a child's tragic death. He submitted that it was not in the interests of natural justice that the hearing should bankrupt his client due to time and cost of the proceeding only to conclude the Ministry's actions were unjustified.

In the alternative, Counsel sought an Order requiring the Ministry to pay for the legal costs of the proceeding, regardless of outcome, on a substantial indemnity basis.

Counsel for the Ministry opposed the Applicant's Motion. She argued that the numerous acts of non-compliance by the Applicant over time were germane and relevant to demonstrate contraventions of a nature that negatively impact on the children's health, safety and welfare.

Counsel agreed that the death of a child-in-care in 2006 caused the Ministry to look more carefully into the management of the Applicant's Residences. However, earlier evidence was necessary and relevant to demonstrate the existence of the Ministry's concerns with the Applicant's ability to comply with legislative requirements prior to 2006. Licencing inspections in the latter half of 2006 and 2007 would show that a vast number of contraventions, some of which may appear alone to be "petty", were in fact consistently apparent and repeated. Further evidence consists of complaints received from previous employees as well as various investigations into the homes by the Children's Aid Societies whose children were placed with the Applicant. All this requires witness and documentary evidence and is relevant and necessary to establish the correctness of the Director's issuance of the Notice of Intention. Ms. Renison advised that she would do her utmost to reduce the possibility of any repetitive or extraneous evidence as the matter proceeded.

The Tribunal rejected the Applicant's Motion. It noted that it was almost impossible to make any determination as to relevancy or necessity of material and/or witness testimony in advance of such being brought forward. It did, however, take note of the vast amount of material filed and the burden this caused the Applicant in its attempt to adequately mount an Appeal. Counsel was cautioned that the Tribunal's mandate, as was the Director's, is only in part predicated on the Applicant's ability to ensure the children's health, safety and welfare. Section 196 of the Act, concerning the renewal of a licence, also directs the regulator to review the operator's past compliance with the legislation. In this regard, repeated evidence provided by ex-employees that the Ministry intended to call may not be required; nor might questionable evidence as to finances be necessary. In sum, the Tribunal advised that it was primarily interested in hearing evidence which impacted on the management and supervision of the residences, and the programming activities and resources which the Applicant provided to the children.

The Tribunal noted that the volume of evidence had been previously put in issue by Counsel for the Applicant in the Motion earlier heard by Vice-Chair Sanford, who noted:

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.

This Tribunal adopts such reasoning. It is unfortunate that the Parties were not able to agree to follow this direction at the pre-hearing. The Tribunal notes that, despite a direction in the Order for the Applicant to provide a statement of admitted facts in advance of this hearing, no such document has been filed.

The Tribunal is “master of its own house”, and may act to exclude any evidence it finds unreasonable, repetitive or unnecessary as the matter proceeds. Further, Counsel were invited to speak to the issue of costs again at the conclusion of the hearing.

C. Jurisdiction

After the Ministry's first witness had completed her testimony involving her observations of the Applicant's residences as a Ministry Inspector over a period of some months leading up to the Director's issuance of the Notice of Intention, Mr. Roman brought a Motion to dismiss the hearing. He did so without prior notice to either Counsel for the Respondent or the Tribunal.

The basis for the Motion was his submission that the Director's decision to issue the Notice was based on improper grounds beyond the scope of her authority. Mr. Roman's contention was premised on a letter sent from the Office of the Coroner to the Ministry's Assistant Deputy Minister in early May 2007 (Exhibit 5, Volume 2, Tab 18). In that letter, the Coroner disclosed that he was considering holding an Inquest into the recent death of the child referred to above. However, the letter continued:

Before such time an inquest decision is made (sic), the Ministry is asked to provide assurances based on the results of an investigation, that the quality of care at [name of the Applicant deleted] meets the licensing requirements and is adequate to meet the needs of children with autism.

The letter went on to reference findings of the Paediatric Death Review Committee (PDRC) of April 2007, which included:

The office of the Chief Coroner to consider the ... request for an inquest if the Ministry cannot ensure the quality of care at this facility meets licensing requirements

Mr. Roman submitted that it was these communications which led six days later on May 16, 2007 to a letter from the Director to the Applicant which noted that the “Toronto Region is considering revoking the licenses”.

Mr. Roman also referred the Tribunal to an email sent by Ministry's Counsel to the Director in September 2007, included in Volume 18 of the Ministry disclosure material. Ms. Renison's objection, based on solicitor-client privilege, was denied by the Tribunal. In the email, Ms. Renison refers to an issue of time constraints required of a Ministry witness vis-à-vis her preparation for this hearing and includes the following:

The Ministry has responded to the enquiries of the Coroner by making the decision to refuse to renew the licenses. I think we are all in agreement that closure of [name of Applicant deleted] is the only method by which the Ministry could "ensure" the safety of the children at [name of Applicant deleted]

(Exhibit 5, Volume 18A, p 10)

Applicant's Counsel concluded that, if not the reason, then the Coroner's threat of an inquest was clearly a reason behind the Ministry's issue of the Notice revoking the Applicant's licence. By being motivated in part by considerations which included satisfying the Coroner, the Director's decision became tainted and cannot stand.

For authority, Counsel relied on *Roncarelli v. Duplessis*, [1959] SCR 121 (SCC). In that case, a politician was found to have given instructions to a regulator of liquor licences to refuse a license renewal based on the applicant's religiously motivated activities. The Supreme Court of Canada allowed the applicant his damages holding that, firstly, the cancellation of the licence was the result of instructions given by an individual not exercising any power which he possessed and, secondly, that the cancellation of the licence by the correct regulatory authority was not a proper exercise of his powers contained in the statute.

Counsel for the Respondent contested the Motion. She stated that numerous inquiries had been commenced with regard to the Applicant long before the Coroner advised that he was considering an inquest into the unforeseen death of the child in question. Affected Children's Aid Societies, as well as the Ministry, had already commenced investigations into the Applicant's ability to provide the regulated services contemplated in its licence. She also noted the effect upon the Ministry of the March 2007 complaint from a previous employee of the Applicant which triggered the Director's review of the facilities operated by the Applicant (Exhibit 5, Volume 2, Tab 6). She submitted that the investigation was well under way before the Ministry even received the Coroner's letter on May 10, 2007.

The Tribunal denied Mr. Roman's Motion. The evidence was not persuasive that the Ministry had acted outside of its jurisdiction in issuing the Notice of Intention. While only a small part of the evidence had been heard, it was clear that prior to the issuance of the Coroner's letter to the Assistant Deputy Minister, all was not well with the Applicant's registration status.

Further, the inference that the Ministry chose to act in order to avoid an inquest was not supported by the evidence. The Coroner's letter does not suggest that an inquest will or will not be held depending on the actions of the Ministry, but rather seeks for the

Ministry to conduct its own investigation to determine that the licence requirements are being met before it even makes its decision. This is no more and no less than what the Director is properly required to do and very much within her authority.

Further, the reference to the solicitor's letter was not in itself evidence of any nefarious collusion between the Director and the Coroner to protect the Ministry from some scandal. This is at best speculation. As I read the notation contained in the email, it is equally consistent with the view that the decision to issue the Notice simply *meets* the Coroner's concerns, as opposed to Mr. Roman's suspicion that it is instead the *result* of the Coroner's concerns.

I also note that the May 16 letter to the Applicant from the Director, wherein licence revocation is contemplated, follows from a letter directed to the same individual dated March 13, 2007, in which the concluding paragraph advises that enforcement proceedings could be instituted without further notice based on the Applicant's failure to address outstanding deficiencies (Exhibit 5, Volume 2, Tab 10). Moreover, a careful reading of the Director's May 16 letter reveals that the Director was referring to an earlier meeting with the Applicant on May 10 where she had advised the Applicant that "the Toronto Region is considering revoking the licenses". This was four days before the Coroner's letter to the Ministry was even drafted.

Even if Mr. Roman's interpretation were accepted, the Coroner's input is only one factor at best in the Director's decision to revoke the licences. Unlike *Roncarelli*, it is obvious that the Director has amassed a significant amount of presumably proper and relevant evidence to support her decision, and it is this evidence which the Tribunal is to consider in determining the suitability of the Applicant to continue to be registered under the legislation. Evidence already placed before the Tribunal includes concerns for the children's health, safety and welfare by administrative officials with authority to inspect the Applicant's premises, observed insufficiencies in the Applicant's programming provided to these children, staffing and management failures and inadequate or improper Plans of Care. While, at the end of the day, this evidence may not be convincing, the Tribunal concluded that, at this early date in the proceedings at any rate, there appear to be proper and valid grounds for consideration of the Applicant's licence under the Act.

Most important, however, is the fact that the Motion appears to look to the Tribunal as a Court of equitable jurisdiction with overriding responsibility to ensure that equitable principles predominate. Rather, this Tribunal is a statutory body, the jurisdiction of which is limited to that provided in various statutes under which it is mandated to operate. Under the Act, section 196 is clearly predicated on the notion that there is no final decision made concerning an applicant's licence status until the Tribunal's process has been completed. Thus, the Director's decision remains only an intention unless and until either the appeal period has passed without an appeal or the Tribunal has held a hearing into the merits of the Director's position and made a decision. Thus, even if the Director's Notice was based on improper considerations, this does not stop the Tribunal from holding the hearing, which it must do under the legislation once an appeal is filed.

Thus, if *Roncarrelli* can be said to apply to this matter, it is to apply to the Tribunal's decision making process, as it is at this level that the administrative decision is actually determined. For a more detailed discussion of the Tribunal's authority, Counsel are directed to the Divisional Court cases dealing with the *Motor Vehicle Dealers Act*, which provide the Tribunal with authority in language almost identical to that contained in s. 196, commencing with *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)*, [1983] O.J. No. 1017, and continuing with *Ontario (Registrar, Motor Vehicle Dealers Act) v. Shine Car Sales*, 2003 CanLII 11437 (ON. S.C.D.C.), and *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda*, [1994] O.J. No. 954. In particular, the holding of the Court of Appeal in *Amereto (Re)* 2005 CanLII 31577 (2005) 77 O.R. (3d) 241 (ON.C.A) at para 31, p. 6 of 8, states:

It is the Tribunal's obligation to consider the evidence and make factual determinations; the Registrar is an investigator, not a trier of fact, and the Tribunal owes the Registrar's opinions no deference.

ISSUES

The Notice of Intention issued by the Director alleges that:

- (a) The Applicant's licenced activity has been carried out in a manner that is detrimental to the children's health, safety or welfare, contrary to section 196 (c) of the Act – as set out in Part A of the Notice;
- (b) The licensee has contravened the Act and/or Regulations contrary to section 196 (a) (i) – as set out in Parts B and C of the notice; and
- (c) The licensee has breached terms and conditions of its licence by failing to comply with the Ministry's Criminal Reference Check Policy contrary to section 196(a) (iii) – as set out in Part D of the notice.

Other allegations originally contained in the Notice of Intention have been withdrawn by the Director and form no part of this appeal.

While over 40 specified particulars were provided in the Director's Notice of Intention, the Tribunal advised Counsel on the first day of evidence that it was primarily interested and concerned with evidence of the allegations as to the following concerns:

- 1. The Programming description contained in the Applicant's material upon which the Ministry relied in providing the licences and upon which the placing agencies relied in determining appropriate and suitable Residence for the children in care was false and/or misleading – see Allegation A2;
- 2. The Applicant failed to provide appropriate, nutritious and well balanced food and nutrition to the children in its care – see Allegation A5;

3. The Applicant failed to provide competent management, direction and supervision necessary for the effective functioning of the residences – see Allegations B3, B28 and B30; and
4. The Applicant failed to comply with communication requirements for documentation, including Plans of Care and Serious Occurrence Reports, prepared by the licensee on children placed in its residences – see Allegations B7 and B26.

EVIDENCE

The testimony of Ms. Teri Campbell

Ms. Campbell has been a licencing specialist with the Ministry since 2005. She inspects residences for compliance with licensing requirements. Her resume (Exhibit 3) discloses that she earned a sociology degree from York University in 1996. Prior to joining the Ministry in 2005, she spent eight years as a Youth Worker in three different residential facilities serving youth in Ontario. Her last placement was at Kennedy House (2000-2004) where she supervised a group of nine Youth Workers in the Group Home and went on to become the Program/Project Manager, supervising and training staff, providing clinical case management to the youth and, coordinating activities for the children in care with outside agencies. She is the lead on her team of licencing specialists for issues concerning restraint policies used in licensee facilities, and co-lead for issues pertaining to children's Residences.

Ms. Campbell first performed a licence inspection of the Applicant in 2006. Her consequent reports for each of the residences operated by the Applicant, and the Applicant's responses, were put into evidence (Exhibit 5, Volume 1B, Tabs 18 et seq.). They establish a number of infractions of the legislated requirements which include: Serious Occurrence Reports ("SORs") were not filed within the legislated time periods; staff annual review in one case was not on file within the five days required; an intake medical on a child was not filed within 72 hours as mandated; as well as apparent improprieties including juices served to children with high sugar content and garbage strewn in the children's play area of the backyard. As is her usual practice, Ms. Campbell reviewed all her findings with the Applicant prior to writing her report. The Applicant did not deny the findings, and agreed to remedy all areas of non-compliance immediately. Regular licences were then issued, though two were subject to Terms and Conditions arising from the Inspector's Report.

In February 2007, a telephone complaint about the Applicant was received by the Ministry from an ex-employee, who shall be referred to as "Complainant # 1" for the purposes of this decision. Followed up in writing on March 1 (Exhibit 5, Volume 4, Tab 5), the complaint contained numerous allegations of operational legal infractions and administrative improprieties by the Applicant, and included photocopied excerpts from

the residence logbook. These referenced an abuse allegation made by a child which had not been reported to the Ministry or the CAS by way of a SOR within 24 hours as is required, despite staff initials next to the log entry verifying all staff in the Residence knew of the allegation. Furthermore, the child in question had attended a Plan of Care¹ meeting since the abuse allegation, but subsequent documentation revealed no reference to the allegation nor to any subsequent investigation or follow-up by the Applicant. Staff from the Ministry immediately advised CAST as the agency responsible for the child in question. CAST undertook an investigation.

Ms. Campbell arranged for an inspection of the Applicant's residences on March 12, 2007. Her inspection of M. Residence (Exhibit 5, Volume 2, Tab 40) revealed numerous apparent regulatory violations, all of which were discussed with the Applicant's Executive Director ("AED"). Ms. Campbell returned four days later to find contractors on site correcting the physical repairs required. On March 14, the license inspector was provided with an Action Plan by AED with reference to all issues noted on March 12 (Exhibit 5, Volume 4, Tab 10). The Action Plan included:

- Minimum weekly surprise visits to inspect cleanliness/maintenance/interactions of each Residence by the Program Manager;
- Monthly mini-audits of each Residence to review physical plant/ paperwork by the Program Manager;
- Mini-license reviews every three months by the Program Manager;
- Program Manager to review daily/weekly checklists completed by each Residence supervisor; and
- Program Manager to attend team meetings bi-weekly to ensure that all communication is effective and timely.

So as not to interfere with the inspection undertaken by CAST, Ms. Campbell elected to return for follow-up on April 20, and again on June 5 and 6. Her reports as filed with the Tribunal include her findings, and the Applicant's responses, from all three visits.

At the DG Residence (Exhibit 5, Volume 7B, Tab 32), Ms. Campbell noted numerous deficiencies at her initial visit of March 12 including: an insufficient variety of foods; a grocery list evidencing numerous processed meats and sugared drinks; and milk past its due date. In cross-examination, the Inspector agreed that neither processed meat nor frozen milk was evidence of health risk. The interviews she conducted on April 20 with staff at the DG Residence revealed that there had been no recent review by management of physical restraint policies, and that one student worker had no knowledge of SOR requirements, necessary after any restraint is employed. Staff

¹ Regulated documents prepared with contributions of all individuals associated with a child's care including CAS, Residence staff, caregiver/parent and child

training and supervision had been concerns requiring the granting of provisional licenses to the Applicant in previous licence periods in 1999 (Exhibit 5, Volume 3A, Tab 1.6; Exhibit 5, Volume 7A, Tab 1.11) and 2000 (Exhibit 5, Volume 1A, Tab 1.12, and Exhibit 5, Volume 3A, Tab 1.8, Exhibit 5, Volume 7A, Tab 1.12). In more recent years, a lack of evidence of required training reviews had been noted by Ministry inspectors, although such had not led to provisional licenses - see 2002 DG Residence (Exhibit 5, Volume 7A, Tab 1-66); 2004 M. Residence (Exhibit 5, Volume 1A, Tab 1.100) and 2006 Mo. Residence (Exhibit 5, Volume 3A, Tab 1.97).

Ms. Campbell further determined that no staff meetings had been held on January 31, February 14 and 28 and March 17 and 22. This was of particular concern given AED's Action Plan submitted to the Ministry in March.

One of the allegations contained in Complainant # 1's written complaint to the Ministry cited as evidence of inadequate programming was the fact that there was no Snoezelen Room available, despite the residence housing autistic children. In her April site visit, Ms. Campbell found that there was such a room in the residence. It was her observation that the sensory objects available were insufficient and half the allocated space was actually inappropriate for the children's use, as it included electrical panels and other safety risks. It appeared no longer in use by the June 5 inspection.

At Mo. Residence (Exhibit 5, Volume 4, Tab 43), Ms. Campbell noted among other concerns the following: food requiring refrigeration was left on the counter; no one with appropriate medical competence was on site as relief staff from the relief agency were not authorized to administer medication; one child, J, was administered a regular dose of over-the-counter pain medication with no record of such disclosed to her CAST worker; no written record of regular fire drills (although staff recollected such had taken place); evidence of emergency funding borrowed on a number of occasions from staff/children as insufficient monies were available on site; and incidents where the staff had used "touch control" to redirect a child's behaviour and had so documented the incident when the actual touch used had been a "physical restraint" requiring the creation and filing of a SOR and debriefing with the child in question – neither of which were found to have taken place. In cross-examination, Ms. Campbell clarified her finding that the staff were not correctly informed as to the distinction between the two concepts. Her discussion with the Mo. Residence Coordinator, Employee # 1, a long-time employee of the Applicant, revealed that Employee # 1 believed "touch control" was the correct term, despite her acknowledging the child's freedom of movement was restricted.

Employee # 1 also verified that no record was kept of foods purchased to provide the menu items recorded as served; that there is no formal shopping list; and that receipts are not checked against any such list. On the April inspection, Ms. Campbell had observed children eating substituted foods without any change in the posted menu, and was advised by staff that fresh salad would be served at the next meal when it was not. Wilted lettuce in the fridge was observed. No staff on site could confirm amounts spent for food shopping and all staff required prompting to confirm fruits and vegetables were

served with each meal. One child was seen eating cereal for lunch and a pizza pocket later, with no fresh fruit or vegetables offered, even though the Applicant offered assurances in response to food issues raised by the Ministry in March.

Plans of Care for the resident Je in some cases revealed the child had signed as being in attendance when that child had not been assessed as being capable of doing so. In other cases, there was no reference to Je being present at the Plan of Care meeting and no notation provided as to why she was absent. In cross-examination, Ms. Campbell conceded that a child can choose not to attend a Plan of Care meeting, but if so, she testified a notation of the reason is required.

Ms. Campbell raised concerns regarding the children's activities. Exhibit 7 is a series of photographs she took of the residences at her attendance in June. Pictures 20, 23, 24 and 25 show the outside of the Mo. Residence. There is no evidence of any play area or equipment and she noted that in all three of her visits, each lasting approximately a half-day, she never observed any of the children engaged in outdoor play or activity. She stated that she never witnessed any interaction with staff and children involving creative or play materials. She asked for a children's program outline from the Supervisor as part of her review, and received a schedule outlining no activities on the weekend and standard group outings for various days of the week (i.e. swimming/library). However, often children did not attend the group outing, for staffing reasons, or if a child's behaviour was unpredictable, or as a consequence for behaviour when "off-program" was frequently the penalty. In such cases, there was no evidence of any alternative programming in place, and certainly nothing which appeared designed to develop interests and/or skills of these special needs children – save for the Snoezelen Room above referenced.

Ms. Campbell submitted into evidence material she obtained from the Ministry of Education's website, which material is available to assist those responsible for autistic children, a number of which were in the Applicant's care. Ms. Campbell never witnessed any such specialized equipment or therapeutic/communication tools utilized by the staff in their interactions with the children or made available to the children in the home to assist in communication or interaction while she was at the residences, although some picture cards were taped to one wall in the Mo. Residence (Exhibit 7). In light of this, she suggested to AED during her March inspection that an electronic imaging device be made available for the children.

In contrast to the Applicant's Mission Statement filed with the Ministry (Exhibit 5, Volume 56, page 215), Ms. Campbell never saw physical evidence of therapeutic or treatment programming of the children in care. Based on the concerns raised during her inspection, Ms. Campbell reviewed the residential communication logs and could find no reference to any therapy or counselling to children despite numerous references to severe behavioural issues involving aggression, sexual touch, frustration, anger and physical boundary concerns. The only notation of psychiatric or psychological consultation was in reference to medication reviews or assessments and/or CAST arrangements.

The logs also revealed a number of instances where the children's supervision appeared inadequate. Exhibit 5, Volume 24, page 75 is a record from the Mo. Residence log of November 12, 2006, which notes that one child was smoking in the washroom; there is a notation of four lighters found in another child's room, and, on page 99, a child with 1:1 staffing had been able to steal lighters and matches from a store. In Exhibit 5, Volume 12 page 21, there is a notation of the same child setting a fire on the roof in August of 2006, and later, having scissors, pliers and a metal bar in his room.

The Testimony of Heather Clarke

Ms. Clarke has been employed with the CAST for fifteen years, commencing as a child and youth worker. She currently supervises a team of seven social workers.

Ms. Clarke was the social worker for A, in care in the DG Residence in 2003, but moved to Mo. Residence in 2004. Ms. Clarke described A as a child with many special needs. She has language delays, gross motor problems, a cleft palate and speech impediment, and a history of sexual and safety issues. A also exhibited aggressive behaviours and was often unpredictable and explosive. Because of her mouth problems, A has difficulty in swallowing and needs assistance in cutting, chewing and swallowing her food.

In cross-examination, Ms. Clarke readily agreed that children like A were often very hard to place and advised that, at the time A was looking for accommodation, the Applicant was the only facility available for her high needs.

Because of her gross motor impairments, A also requires assistance in tooth brushing and general hygiene. Oral hygiene in particular was an on-going issue frequently brought up at Plan of Care meetings held with the CAST and Applicant's staff. Ms. Clarke noted that frequent cancellation by the Applicant of dental appointments became increasing concerns. Exhibit 10, Volume 33, page 12 is the dentist office's report noting the following with reference to 2006/7 dental appointments for A: March 6 – appointment cancelled; May 3 – one hour late; June 6 – severe gingivitis; August/06 – missed due to staffing problems; September/06 – missed due to staffing problems; December/06 – cancelled due to staffing; February/07 – lesions detected.

One of Ms. Clarke's first concerns on A's move to the Mo. Residence was that the backyard had no gate, resulting in easy access by the children from the play area to the street. This concern was corrected. Ms. Clarke testified that the home was often in physical disrepair, though she believed that the Applicant made efforts to make it "homey", and correct physical damage which often occurred due to children's high risk behaviours.

Ms. Clarke was also well aware of high staff turnover at Mo. Residence, and the common use of temporary relief staff. She was concerned as A's complex needs

required continuity, and some expertise of care giving. While the Applicant initially assigned a Primary Worker/Case Manager to take overall responsibility for each child, Ms. Clarke found that such workers would change frequently, and eventually appeared to disappear altogether, commencing around the spring of 2005. It was in the fall of 2006 that the Applicant first requested that CAST fund a 1:1 worker for A. The request was initially for a limited time period to help A settle back into the home after a hospitalization, but was thereafter extended to 12 hours per day. Nonetheless, insufficient staffing often appeared to be the rationale for inadequate activity. The missed dental appointments were followed with a missed deadline to have A enrolled in a cooking program she had requested and swimming activities were noted as missed for two weeks running – all recorded as due to insufficient staffing availability.

On April 10, 2007, Ms. Clarke called for a Plan Placement Conference Meeting. Typically requested when there is a concern with a child's placement, this form of meeting can be initiated by either the CAS worker or the group home. Present at the meeting besides Ms. Clarke was Employee # 1, then Coordinator of the Mo. Residence. The CAST worker identified a number of issues including staffing turnover and inconsistency, lack of community involvement for the child and programming. Ms. Clarke recollected that she had specifically expressed growing concern with the supervision of the children – she noted that Employee # 1 was supervising all three of the residences at one point – as well as what both she and her supervisor at CAS felt was inappropriate use of 1:1 staff time. Ms. Clarke noted a number of occasions when the 1:1 worker for A was being used to take the child to medical appointments. This was contrary to the CAS expectation which was that the 1:1 would engage with the child on a direct level and leave the licensee to meet the child's daily needs through its own staff resources. Despite her concerns, Ms. Clarke continued to fund A's 1:1 staff at the Applicant's request until A's eventual removal in the summer. This funding was, in part, due to the fact that the 1:1 worker had once been A's case manager and was, consequently, familiar with her and her specific needs, and provided some consistency in her world at the residence. At the conclusion of the meeting, Ms. Clarke elected to hold off on seeking alternate placement for A in the hope that the Applicant could improve its programming offered to the child.

On April 26, CAST received a letter of complaint from A's mother, who was actively involved in A's life at the residence. In her letter, the mother also raised her serious misgivings regarding instability resulting from changing staff which had, on more than one occasion, led to risks to A's health, when relief staff did not appear to be updated as to A's medical needs. The mother noted that this disruption in A's life and care, plus the lack of stimulation and activity were resulting in increased attempts by A to run away. These attempts, in turn, raised safety risks to the child. A's mother requested the CAST seek an alternate placement for A (Exhibit 10, Volume 37B, Tab 72).

On May 10, 2007 Ms. Clarke attended at A's school to meet with her teacher who had called CAST with concerns. The teacher advised that A frequently came to school with inadequate food for lunch. She made specific reference to a soggy sandwich, a black banana another day, and, most recently, on May 4, to inedible foods. The teacher also

expressed concerns with A's activities and noted significant concerns as to her hygiene and personal care. A was frequently dirty, messy and had told the teacher this was because only one shower was working at her home. She also was exhibiting a serious inadequacy of oral hygiene (Exhibit 10, Volume 33, p. 466 et seq.).

Ms. Clarke also testified to problems she had with the Applicant concerning its appropriate filing of reports concerning children in care. On May 1, she received a phone call from Employee # 2, the Applicant's Program Manager, advising that A had been involved in an incident on April 30, with a relief staff member who had pulled the child's hair and dragged her across a room. A report was, however, not delivered until May 2, and was in the form of an Incident Report, as opposed to SOR, which would have been required within 24 hours of the event. This was the second time in two weeks that the wrong report was filed by the Applicant. The earlier occasion concerned a knee injury requiring the child's hospitalization. The report was faxed to Ms. Clarke, late, as an Incident Report rather than an SOR. These reports both followed on the earlier abuse allegation investigation concerning A which had also not been correctly reported. A had made the allegation of abuse in October 2006 to a nurse in the hospital. The allegation was never reported to the CAS and Ministry as required. It was apparently A's mother who advised the Applicant's staff who had recorded it in the log book where it was noted by Complainant # 1. The CAST investigation commenced on March 13, 2007, concluded that the abuse was not verifiable and unlikely. Ms. Clarke was concerned that the Applicant's handling of the matter demonstrated a basic ignorance of reporting requirements. She found this ignorance disturbing for an operator of over 20 years experience that should know the requirement to report such allegations, regardless of its own conclusions as to validity.

Ms. Clarke also noted that A's Plans of Care, while including goals for the child, failed to show any evidence of her progressing towards these goals (Plan of Care July, 2007, Exhibit 10, Volume 33, page 61). She therefore queried whether the goals as stated were realistic and/or achievable. She further noted that there was no mention of any counselling being made available for the child to provide her with some outlet for obviously increasing and escalating behaviours.

In cross-examination, Ms. Clarke agreed that a child with as high needs as A would require significant staff resources to access community programming off site. However, she noted that an activity such as swimming was one that A had used earlier in her placement. Ms. Clarke stated that it was not her responsibility to determine how a resource managed its resources effectively, but it was her responsibility to ensure her child placed at the resource receive adequate programming and activity. Even with the added 1:1 staffing funded by CAST, the Applicant was failing in its obligation to provide A with the basic required resources on a daily or regular basis.

The Testimony of Mr. Terry Standish

Mr. Standish is an intake supervisor with CAST, and also responsible for the Serious Investigation Unit. He has worked with CAST for over twenty years and is responsible for overseeing every Investigation Report performed by CAST.

Mr. Standish advised the Tribunal of the event, incorrectly filed as an Incident Report by the Applicant, concerning A on April 30, 2007, and not received by Ms. Clarke until May 2. It involved a staff member at the Mo. Residence holding the child inappropriately, throwing water in her face and pulling her hair. After attending at the residence and interviewing both the child in question plus the staff member, the incident was verified.

Although the staff member involved, a relief worker "G", was let go from the Applicant's services, Mr. Standish, who himself has worked as a child worker in a home where children have significant mental challenges, believed the incident could and should have been prevented. He noted that the CAST investigation disclosed that G had completed two back-to-back shifts that morning (Exhibit 10, Volume 38, Tab 3, p.3v). There were indications that A was escalating earlier in the morning (throwing chairs), and a notation by staff that G was acting inappropriately (shouting). This conduct by G should have raised a flag to those on duty witnessing the event. Instead, G was allowed to lead A downstairs. Again, there was further opportunity to call for management or staff back-up. Experienced or trained staff know that escalation tends to feed on itself requiring clear procedures to be in place, understood by all staff on site, and followed where warning signs, such as these, are apparent. In cross-examination, he advised that other facilities might use a panic button, or will have supervisors/management readily available to respond. Here, the Applicant is an experienced operator of many years, and the child was well known having resided in the residence for a number of years. Therefore triggering behaviours and volatility should have been recognized and accounted for by staff.

A separate occurrence of staff abuse was alleged against child SPEel in late July 2007. It was subject to an investigation by CAST in August 2007. Mr. Standish was not the investigator; however, the files are under his direct supervision and authority. It concerned Applicant's Employee # 3, who had completed her training in April 2007, and recently been hired by the Applicant as a residence worker. The investigation notes include an interview with Employee # 3 who advised that she had received no supervision at the residence, did not participate in staff meetings and, although provided with youth files, was not provided with an opportunity to discuss the youth's needs prior to working with them. Employee # 3 also advised that other staff were in the home while she interacted with SPEel, and did not provide any feedback to her as to the appropriateness of her interaction.

AED declined recommendations by CAST following the investigation, for further staff training, mandatory file review and staff supervision. She felt that these were already in place and the problem lay with Employee # 3's lack of judgement and ability.

The Testimony of Employee # 4

This witness worked for the Applicant for 14 years before taking disability leave in October 2006. She holds a Masters degree in parapsychology. Prior to working for the Applicant, she had worked with severely disabled and cognitively impaired adults at a facility in Toronto. Her position during her last eighteen months with the Applicant was at Mo. Residence where she worked night shifts. Her duties included cleaning, laundry and making breakfast.

She recollected that a number of the Applicant's staff were good and experienced, but a number of others were unprofessional and would yell at the children. Employee # 4 advised that these latter staff members were not fulltime employees of the Applicant, but rather relief staff, of which the Applicant made increasing use. She advised that it was not uncommon for none of the Applicant's staff to be on duty over the weekend, when only one such staff member was scheduled and might call in sick.

Employee # 4 stated that, although weekly menus were posted, there was seldom sufficient food available to make the meals that were posted.

In reviewing the Mo. Residence logs for December 2, 2005 (Volume 8), Employee # 4 advised that she had written to the attention of AED, who was checking on the house from time to time, since the house Supervisor was on an extended sick leave for over a month. She stated that she could no longer rely on the assistance of her co-worker Employee # 5 as, having worked too many shifts (on December 2 he had worked three back-to-back shifts), Employee # 5 was simply sleeping on duty. She was not comfortable being alone on shift with eight high needs children where vigilance was a requirement for their safety. Nonetheless, three days later on December 5, the situation had not been rectified. The Supervisor returned to work that day only to resign, leaving the residence without a supervisor. Employee # 1, who was Supervisor of DG Residence, would rotate and take responsibility for Mo. Residence from time-to-time.

Employee # 4 testified that she was often reprimanded for leaving "rude" comments in the communication book. She was told by management to make her comments more positive when she underlined reminders for shifts to complete their logs or for the house supervisor to ensure cleaning supplies were adequate for her to complete her night duties. Over the 2005 Christmas period, she left notations for three consecutive days that there was no toilet paper in the home.

The Testimony of Stephanie Leung

Ms. Leung has a Bachelors degree in Social Work from the University of Hong Kong. She has worked with CAST since 1999 as a Children's Worker. In this capacity, she is responsible for the child, Je, who was already a resident with the Applicant when Ms. Leung first became her worker in February 2007. Je was 12 years old, when her family found that they were no longer able to cope with her autism and high needs. The child's psychological assessment prior to being placed in care, recommended a residence

specializing in management of her behavioural needs. The Applicant's facility was selected.

Ms. Leung determined almost immediately after first attending the Applicant's premises at the end of February 2007 that Je should be removed. Prior to her visit, the residence Coordinator, Complainant # 1, reported to her that Je's school advised that the child had such severe gas problems that the school had placed her near the classroom door and had a fan installed in the classroom. Complainant # 1 stated that the residence staff had been treating Je with over-the-counter pain medication. Ms. Leung visited Je's school on February 19, 2007. Je's teacher repeated her concerns, adding that the Applicant had failed to respond to communications from her regarding Je's on-going and severe gas issues. As a consequence, the teacher had initiated a logbook to document her concerns, which included Je bringing lunch foods she did not like and would not eat.

Ms. Leung also spoke with the school principal who expressed frustration in her attempts to communicate with the Applicant's staff. The principal advised that two consent forms had been sent home with Je prior to Christmas which required signatures. One was for the school to have direct contact with the child's physician and the other concerned a referral form for an autism specialist at the school. Neither had been acknowledged or returned. Phone calls made by the principal to follow-up had not been returned.

Ms. Leung first visited Je in Mo. Residence on February 21, 2007. No staff she spoke with, including the Residence Coordinator, Je's 1:1 and Employee # 2, the Program Manager, professed to any knowledge of the above school consent forms.

As regards the stomach problems, Je's medical records provided to Ms. Leung by the Applicant demonstrated that the child, seen by a CAST doctor in late November for the problem, made no reference of the fact that the staff at Mo. Residence had been treating Je with over-the-counter pain medication for over two months (September through November). The worker also found disturbing medical records which revealed that Je had not been seen consistently by any one physician, despite the problem having been an issue for almost four months, and further that the only symptom noted by staff to doctors was the vague reference to "stomach pain".

Ms. Leung found discrepancies in staff information provided to her during her initial visit. The Coordinator had told her of concerns with Je's gas problems during phone conversations on February 14, 16 and 19, and the school teacher had verified such concerns on February 19, but the residence staff, on February 21, stated that there were no longer any such concerns. Further, on this date staff explained to Ms. Leung that Je had been kept home from school that day by morning staff who had determined that the child was sick; yet neither Je's 1:1 worker, nor her Primary Worker could advise Ms. Leung on what basis this decision had been made. The child was present at the residence and appeared healthy to Ms. Leung. Finally, while one staff member told Ms. Leung that Je took three hours each night to fall asleep, sleeping issues had long been identified and were one of the primary reasons the Applicant considered 1:1 additional

staffing necessary. Je's 1:1 informed Ms. Leung that Je would usually fall asleep within three-quarters of an hour after going to bed.

Ms. Leung was disturbed by other staff information at her initial visit. Despite the high-needs, hyperactivity and inappropriate behaviour described of Je by the Applicant in its repeated requests for additional funds from CAST for 1:1 staffing, the 1:1 staff hired informed Ms. Leung that she had taken Je across town by public transport, requiring an hour and a half commute each way, for a routine medical appointment. It was the CAST worker's experience with other licensed facilities that such visits were performed by regular staff and were an inappropriate use of the 1:1 resource who is to provide therapeutic and special needs. In cross-examination, Ms. Leung agreed that bus transport can be a good lesson in socialization for life skills, but questioned the lesson in such a long commute with a 1:1 who was hired because of the child's allegedly unpredictable and destructive behaviour.

She testified that a CAST student attending Je's Plan of Care meeting at the Applicant's residence in January 2007, was of the opinion that the Applicant's use of the 1:1 was not appropriate and, as a result, CAST had arranged for a behavioural team from a resource known as Sherry Place to assess Je at the residence and recommend better use of the 1:1. Employee # 2 signed this Plan of Care document as Program Manager.

On March 1, Ms. Leung wrote to her superior at CAST to inquire about what form of review was available to determine whether a 1:1 request should continue to be approved. She had noted that the Applicant's continued monthly 1:1 written requests for Je reflected no change in substance or any proper updates of meaningful information. Requests continuously relied on the same negative descriptions of the child's behaviour with no attempt to provide step by step strategies as to how such behaviour might best be modified or targeted. Nor was there any review as to how the use of a 1:1 had benefited, controlled or improved Je's daily living to date.

As had been observed by Ms. Clarke with A, Ms. Leung was also concerned that Je's Plans of Care for February 1 and March 1 demonstrated no progression or alteration of the goals listed for Je.

More importantly, Ms. Leung was concerned that Je's Primary Worker at Mo. Residence asked that she speak to the child in Mandarin language to determine her favourite toys, likes and dislikes. Since Je had been a resident at the home for over seven months by this date, Ms. Leung testified that she would expect a "specialized treatment" home such as that of the Applicant, with other autistic and non-verbal children in residence, to know how to discern this basic information through tools other than language skills. "It appeared", she stated in evidence, "as though the child had only just arrived." To this effect, Ms. Leung never saw staff using picture cards (PECS) or other communication tools specifically fashioned to enhance autistic/ language communication. When she specifically asked staff whether such tools existed in the home, she was shown pictures on the dining room wall which appeared to be publicly posted for all children in the residence, as well as generic store-bought cards. These tools are not consistent with

specified representations demonstrating the Residence's ability to provide structured individual routines for Je specifically in the residence, and with Residence staff and peers, as would be expected with therapeutic communication strategies.

Physically, Ms. Leung found Mo. Residence to be sufficient, except that she did note that there was no meaningful security system which other group homes housing autistic children have installed. There appeared to be no recreational facilities, save for a basketball in the backyard. She stated that staff advised her there were arts and crafts and board games kept for the children, but she never observed any of these materials either on location, or in use with children and staff.

Quite by happenstance, Ms. Leung attended at a local recreational centre one Tuesday evening for a class. She saw Je pacing by a table overlooking the swimming area. At an adjacent table were staff from the Applicant, including Je's 1:1 who was the only female staff member on site, despite four other female residents being in the pool. There were no staff actually in the pool with the six Applicant's residents who were swimming. Ms. Leung asked the staff why they were there given that Mo. Residence posted swimming as an activity for Monday evenings. She was told that it was raining and therefore swimming appeared to be a suitable activity. Ms. Leung questioned why Je would be allowed to swim unattended. Her 1:1 advised that she had forgotten her swimsuit, but Je had spent some 15 minutes in the water. The staff informed Ms. Leung that they had advised the lifeguard on duty of the attendance of their children in the pool.

The Testimony of Judy MacLeod

Ms. MacLeod is the Director who signed the Notice of Intention to revoke the licence of the Applicant. She has extensive experience in child welfare. While she completed her Bachelors degree in Social Work from York University in 1993, she was professionally involved as a childcare worker in a therapeutic care residential setting as far back as 1977. She is currently the Ministry's Manager of Compliance Review of Childcare Programs, Homes for Children and Homes for Adults with developmental delays. As such, she is responsible for a total of 1060 licences in the Toronto Region, of which 106 are Group Homes such as the Applicant's. In the last five years, she has issued 17 provisional licences, suspended one license and issued eight Refusals to Renew, four of which are for the Applicant's Residences. She testified that it is very unusual for her to take this step and she only does so after serious and lengthy reflection of the licensee's ability to meet the Act's main purpose being the health, safety and welfare of the children in care.

The Act provides her various enforcement powers ranging from a simple reminder of compliance requirements through to an immediate suspension of licence. On receipt of a first licence from the Ministry, each operator receives the Ministry Licence Manual (Exhibit 4, Volume 54, Tab 4) which sets out all legislative requirements and relevant compliance indicators included in the Ministry's licence checklist used by Ms. Campbell in her inspections of the Applicant in March, April and June of 2007. These legislated

requirements are specified as minimum and mandatory in the Ministry's Licencing Protocols. The Manual used by the Ministry was updated in March 2007 when all licencees, including the Applicant, were provided with all requisite information on CD's. The update included indicators of non-compliance, examples of best practices and a copy of the Ministry's inspection checklists.

Ms. MacLeod concluded from the repeated non-compliance indicators exhibited by the Applicant in the inspections, and further reflected in CAST findings, that the children's best interests, health, safety and welfare were indeed compromised. In reaching this conclusion, she had considered both the cumulative nature of the findings as well as their substance. She concluded that a refusal to renew the Applicant's renewal applications was the only reasonable administrative action available to her based on the Applicant's past licence history, which included numerous prior provisional licences predicated on findings of non-compliance not posing an immediate threat to the children in care. Over half the Applicant's prior licences had been provisional in nature, which, she stated, was very unusual. Even though a number of these were due to issues concerning the Applicant's attempts to comply with fire regulation requirements, Ms. MacLeod concluded that it denoted inconsistency in the Applicant's ability to meet legislative minimum standards for operation. In 2002, CAS had arranged for a Program Consultant to work closely with the Applicant in order that it might better achieve compliance. Again, in 2003 there had been a plan between the Applicant, CAS and the Ministry to meet on a monthly basis in order to address on-going operational issues. These were in the Director's words "extraordinary" measures undertaken by the Ministry to assist the Applicant to meet compliance requirements. Despite the fact that the Applicant had a recent history of clear licences, Ms. MacLeod recognised that normally scheduled licence visits gave an operator a forewarning of an inspection visit to its facility. The unscheduled visits to the Applicant's residences arising from the ex-employee letter of complaint in March, revealed a clear picture of significant staffing, management and program problems.

The Director's concerns included inadequate or compromised training and management of staff. This was indicated in the failure of the Applicant to report the alleged abuse of child A, despite the clear indication in the residence logs that all staff had signed the entry indicating the allegation. Nor was there any mention of the incident or follow up in the child's next Plan of Care, which is intended to record all incidents of concern involving the child for review and discussion by the staff, CAST and/or parents involved in that child's welfare.

Evidence from the logs and documentation demonstrated that 1:1 staff were not always providing the duties for which they were hired. For example, Peel CAS found that the 1:1 funded by that Agency for their child APeel. was not in evidence when they attended P. Residence in the winter of 2006. Also, on a May 20, 2007, there was a notation in the Mo. Residence log that the child SPeel was described as having escalated "because her 1:1 was not available to take her for a walk".

There was also an issue concerning what the Ministry concluded was inadequate supervision by staff. Staff turnover had been very high in recent months and there was insufficient staff available such that the relief staff had increased substantially over recent months (Affidavit of Dr. Hadi, Exhibit 16). Further, a number of notes in the Applicant's records reveal that there were repeated occasions where no permanent staff were on shift at the Mo. Residence in June of 2007. Reliance on relief staff is not adequate, as such staff are not authorized to provide medication to the children or able to drive should an emergency arise.

Ms. MacLeod also expressed concern in light of the numerous occasions where children under the supposed care of 1:1 staffing were able to be in possession of dangerous objects as revealed in M. Residence log for November and December 2006 and January 2007 (Exhibit 5, Volume 24, pages 99, 106, 108, 116, 176, 180 and 208) and Mo. Residence log for February 2007 (Exhibit 5, Volume 55, pages 40-47) and July 2007 (Exhibit 5, Volume 55, page 36).

The Director also expressed grave concern with evidence provided in the Applicant's records and staff interviews as to the Applicant's application of intervention behaviour management strategies as reflected in its reliance on an improper and inconsistent "touch control" description. In particular, there was a restraint used by staff on May 8, 2007, on the child SPeel which was not reported as required. Employee # 1, the Supervisor of Mo. Residence, advised Ms. Campbell in June 2007, that she had used "touch control" to restrict a child's behaviour when she had in fact held the child's arms and legs in a manner to restrict her movement altogether. Although this was acknowledged by her to have been a restraint, and thus requiring the filing of an SOR, on August 19, 2007, a second restraint used on SPeel was not reported as a Serious Occurrence as required. Nor were requirements to file SORs followed on June 4, 5 and 7 for restraints required for A despite the Applicant being reminded of the particulars of the requirement by CAST in an email dated May 14, 2007

Ms. MacLeod determined that the level of child specific daily programming provided to the children by the Applicant, as exposed in CAST staff reports and Ministry observations of the residences, demonstrated further evidence the Applicant failed to meet the level of care demanded of it under the legislation. She noted that the Applicant's own public material describes it as a "treatment program", and this description is what the Ministry and CAS, as well as families, rely upon in utilizing its resources. As a consequence, various children had been placed with the Applicant when it quickly became apparent, either to the Applicant itself in some cases, or to the placement agency in others, that such a placement was not conducive to the child's needs. That the material was not correct was apparent to Ministry staff attending the Residences and reviewing the log where they witnessed no on-going or consistent programming. Neither was any such effort reflected in Plans of Care and recreation opportunities provided to the children.

Exhibit 5, Volume 56, Tab 8, is the Applicant's filed Policies and Procedure Manual. Pages 232 and 233 reference implementing and designing a behaviour management

program for each child, and, under the Coordinator's direction, developing and implementing day programming for each child. It is this level of programming which the Director testified she would expect. Instead, logs reveal the Applicant's own position that appropriate use of 1:1 staffing consisted of shopping trips and attending other children's medical appointments. Assisting in meal preparation was the third activity referenced by the Applicant as "programming" life skills.

Ms. MacLeod also noted the inadequacy of the Applicant to provide appropriate autistic programming, given its emphasis on its ability to provide a "therapeutic milieu". As observed by Ms. Leung, her Ministry staff had also concluded that there were no particular tools or programming modified for these children in care. Nor was there evidence of an attempt by management at the Applicant to ensure individual children's assessment needs were provided to realistically give structured programs necessary for their security and wellbeing. In this respect, Ms. MacLeod testified that the Snoezelen Room which did exist at Mo. Residence was alleged to have been created by Employee # 1, in response to concerns earlier expressed by Complainant # 1. The Applicant's Program Manager advised that she was unable to find any research on the use of imaging tablets, recognized as a valid tool for such developmental needs, despite this being suggested to her specifically by the Ministry Inspector in her March inspection.

The original complaint by Complainant # 1 included alleged inadequate children activities. Ms. MacLeod concluded from Ms. Campbell's observations, residence logs and CAST workers reviews, that this allegation was verified. She testified that logs and Plans of Care demonstrate that various efforts made by CAST or teachers or individual staff to have a specific child enrolled in an individual activity regularly were not followed. In Je's very first Plan of Care, there is a notation of Je's desire to swim and yet there is no mention of her attending any regular swim program in any further Plan of Care document. While observations in Je's Psychiatric Report prior to admission at the Applicant, as well as the Surrey Place Assessment, filed towards the end of her placement there, referenced her enjoyment of sensory tactile stimulus and love of water, only sporadic references can be found to her swimming in the daily logs maintained by the Applicant.

Resident A missed being enrolled by staff in a Chef's Program, which she had expressed interest in joining. Despite her Plans of Care references to being disengaged from various community activities due to increasing behavioural concerns, there is no mention of any in-house activities being provided to her as an alternative. There is a record of an attempt to enrol her in horseback riding just prior to her removal in the summer of 2007 (she had been a resident at Mo. Residence since spring the year prior), but no record of efforts to engage her musically either off-site or in-house, despite specific recommendations that such an outlet be provided to her from teachers in logs dated as far back as fall of 2006.

CAST worker (Exhibit 10 Volume 5A, Tab 5 p 47) CC noted on her report in March 2007 for CAST that her child, Dh, had requested enrolment in art classes seven months

earlier, in September 2006, but the Applicant's staff had not yet had the time to enrol him in any such activity, and did not purchase any suitable supplies for him to engage in art.

Ms. MacLeod observed that children must be provided with adequate programs and recreation appropriate to their functioning and/or special needs; otherwise the children will exhibit escalation in behaviours demanding attention due to frustration, and act out to the detriment of their own potential and greater environment. In her experience, the Director noted that, generally, residential programs such as those purported to be offered by the Applicant, do routinely access professional resources in the community, if not their own employed staff, to ensure that particular programs are created for children in their care. Such consultation is necessary on an on-going basis in order that the day-to-day staff responsible for the children can understand each child's requirements, respond effectively to their needs and behaviours and meaningfully contribute to their potential and progress at Plans of Care meetings. None of this was in evidence with the Applicant.

Ms. MacLeod concluded that her apprehensions regarding the Applicant's resources were not dispelled by attempts made by the Applicant's senior management to respond to various letters from the Ministry noting numerous violations and expressing concerns in March, April and May of 2007. Instead it was the Director's opinion that each of these responses was reactive in nature and failed to reassure the regulator that the administration of the homes was subject to a methodical and structured review which would result in the improvements needed. By May 10 she met with the President of the Applicant, and AED to review the Ministry's on-going issues. It was at this meeting that the Ministry raised the possibility licence renewals may not be issued. On May 25, Ms. MacLeod was advised by CAST an allegation of abuse by a worker in Mo. Residence had been verified. On June 4, both Ms. Campbell and her Supervisor reported to her their concerns of insufficient training of staff, including the fact that the Applicant was increasingly reliant on relief staff, who did not receive training prior to working with the Applicant, on reporting requirements or the Applicant's own Policy and Procedures. By June 14, a teleconference was arranged with AED where the reactive responses were noted as being insufficient and the creation of a proactive Plan of Action was urged. The Applicant responded that an outside licensing specialist had been engaged to advise as to improved operations, and that a report would be submitted to the Ministry by July 11, detailing a proposed proactive plan. On June 28, the Ministry sent a letter to the Applicant specifically noting its concerns for the health, safety and welfare of the children and identifying on-going problems with children's programming and staffing, and staff training/supervision. Nonetheless, AED's letter of July 11 was again reactive to various particular infractions, failed to present any proactive plan of action, made no reference to a licensing specialist, and was silent on staff supervision/training and programming concerns, save for a first time reference to weekly "kids meetings" where any activities they suggested would be implemented.

In cross-examination, Ms. McLeod agreed that instances of technical non-compliance in themselves may be tolerated where an operator has a precise system in place to catch

such problems and correct them within a reasonable time frame. This would be the case where physical repairs were consistently required due to hard wear caused by disruptive behaviour by the residents and required time to correct due to the repair people's schedules. Here, however, even after having been alerted by the Ministry staff that physical restraints were not being properly recorded, there appeared to be further incidents of such occurring. At the same time, there appeared no evidence of management training sessions for all staff to ensure that the correct expectations for touch restraints were clearly understood and comprehensively practiced by all staff in all Residences. So too, after being advised that children had told Ministry inspectors that they were "bored" or had little "activity", the Applicant provided no evidence of specific programming in place for the children so identified.

The Director denied that the Coroner's letter impacted on her decision to refuse the licence renewals.

The Testimony of Complainant #2

Complainant # 2 worked as Supervisor of the P. Residence from February 2005, through to October 2006, when P. Residence closed, and she was let go. She has a Special Counselling Diploma from a province of Quebec CEGEP, where she worked in group homes with dually diagnosed and autistic children. She also completed two years working as a front line worker in a high support unit in Ireland with low functioning adults. She returned to Canada to work with Catholic Children's Aid receiving and assessment home in the Toronto area before commencing employment with the Applicant in 2005.

Complainant # 2 stated that she was asked to sign off on previous log entries, including fire drills, from before she started at the residence, and did so to keep her job, although she recognised that doing so was improper.

She noted that food was often insufficient as the budget provided was not adequate and she often subsidized the children's food budget from her own pocket.

In cross-examination, she was shown documentation demonstrating that the budget for food purchase was higher than what she had earlier testified to, and agreed that she would not have made these assertions had she been made aware of these figures.

In response to questions from the Tribunal, Complainant # 2 stated that there was never sufficient healthy food such as fresh fruit, vegetables, and milk, resulting in the children eating these products quickly as they feared there would be none left. She acknowledged, however, that it was her responsibility to provide groceries and recreation activities from the budget provided for the Residence.

Complainant # 2 stated there were no sports facilities available to the children at the residence. There were some balls available, but no hoops or organized play. While some residences did have board games on site, these were either missing pieces or

were too technically advanced for the children to play. There was no computer available. There was some paid recreation for those children able to benefit. Bowling occurred once a week and sometimes swimming or a trip to the local library.

She spoke of one child who was reaching the age where he would be leaving the residence to enter adult housing and demonstrated significant interest and affinity for electronic and mechanical repairs. He would take items from neighbours' garbage, and was given a space to work on them, but no apprenticeship or outside program apart from school was ever suggested or made available to him, despite senior staff, including the Program Manager, being made aware of his hobby.

In cross-examination, Complainant # 2 stated that, even if the Applicant had a general membership to the YMCA, she knew that it was never used by children at P. Residence while she was the Supervisor/Coordinator.

With reference to Plans of Care and activities noted, Complainant # 2 stated that any activity in which a child was placed occurred only as a consequence of initiatives by individual staff, including herself on occasion, but did not arise from administrative direction or process.

While the Applicant offered her information sessions on Foetal Alcohol Syndrome from a local resource, there was no staff training on programming for children's recreation or therapy needs, or for insight into anger management issues or behaviour triggers that she could recall being made available. Complainant # 2 testified that she received no training prior to commencing her employment, although she was provided with the Applicant's Manual on its Policies and Procedure. Her first shift was a staff meeting, and after that she was left to run the P. Residence.

The Testimony of Catherine Tedder-Masterson

Ms. Tedder-Masterson is one of two placement supervisors with CAST and is also responsible for program reviews. She has worked in, and supervised, group homes, and was responsible for initiating the CAST review of the Applicant's residence commencing in February 2007. The CAST review consists of worker feedback from questionnaire; interviews with staff and children at the Residence; site visits and reviews of SORs filed by the operator. Ms. Tedder-Masterson was not privy to Ministry inspection reports, and had not viewed any of these documents until shown them by AED in late June 2007.

Exhibit 10, Volume 37 contains the responses to the CAST questionnaires provided to workers with children in the care of the Applicant. These were all completed in the late winter/early spring of last year. They consist of the following:

- Child C's worker would **not** recommend further placements at the Applicant – C had been at the Residence for eight months, and the worker was concerned with the high staff turnover. She noted that, although the child had expressed an

interest in art, no effort had been made to provide him with this activity because staff were too busy. She found communication with the staff to be poor.

- Child A's worker would **not** recommend further placements at the Applicant – A had been with the Applicant for over two years and, although she appeared to attend swimming a couple of times each week, the recreational programming failed to meet her expressed desires and needs and was inconsistent generally due to insufficient staffing. Further, the worker had concerns with numerous missed dental appointments and poor communication. The child's mother had written to CAST complaining about the Residence and expressing the view that A's behaviours were escalating due to the high staff turnover and consequent uncertainty of caregiver.
- Child L's worker **would** recommend the Applicant though expressed concerns with high staff turnover and consequent disruptions to the child's adjustment, having been a resident for over three years. The worker noted that communication was dependent on the staff member in question.
- Child Ja had been placed in M. Residence for over three years and the worker **was satisfied** with his care and very appreciative of that residence's Supervisor.
- Child J had been with the program for seven months. Her worker did **not** recommend the Applicant, citing inadequate medical follow-up, lack of program resources, poor communication with school, and conflicting staff information.
- Child SPEel worker would **not** recommend the Applicant. She noted her child had been in Residence for over a year and complained about the food, and that there were no sports or games provided. The worker had concerns with the effects of staff turnover on children with anxiety disorders, and the additional need for structure and stability in such a program. There was inadequate programming on weekends due to staff shortages and poor communication in general. The worker was not able to determine the Applicant's management style or philosophy.
- Child Dh had been residing in a residence for eight months. His worker did **not** recommend the Applicant for future CAST placements. She noted that the child was a good artist and the purchase of artist supplies has been an identified goal agreed to in a number of Plans of Care but not followed up as his worker had no time due to staffing issues. Such staffing concerns were identified as the primary reason that Dh's older brother had escalations in behaviour resulting in CAST being required to fund 1:1 staffing to manage him. The worker concluded that there was no staff consistency in the home, and the Applicant relied on relief staff over weekends.
- Child Je's worker noted Je had been with the Applicant for over five years. She noted that, while the basic physical needs of her child were met by the Applicant, his emotional and recreational needs were **not** so met, leading to increased

aggression displayed by her child in care. The worker also noted that the large staff turnover further exacerbated her child's condition as temporary staff cannot properly assess his behavioural clues. She believed that staff needed training in behaviour management and autism, noting that CAST had to get involved before staff recognized the necessity of a gate and lock for the backyard. She noted that there had been no swing provided in the back yard for her child, despite this having been recommended months earlier and would not recommend the Applicant for future placements.

- Child D's worker noted that D was almost 20 and had been in residence for six years with much family involvement. This worker **recommended** the Applicant.
- Another worker had only been involved with a child's care with the Applicant for six months, and didn't feel able to adequately assess the Applicant, but noted that the 1:1 appeared to manage the child's behaviour.

During the review period Ms. Tedder-Masterson heard that the Ministry had received a written complaint from Complainant # 1 which contained an allegation of an unreported abuse. The written complaint was made available to Ms. Tedder-Masterson, and became part of the focus of the CAST review. The complaint followed on the filing of three different complaints regarding their children's care at the Applicant by two others and A's mother.

CAST concluded from its initial site visit on March 14, 2007, that the Applicant was responsible for the most challenging of all CAST children in care in the region, and that there were clear concerns as to how the children were being cared for, particularly arising from evidence of inadequate hygiene, oral care and medical treatments. The problems were sufficiently serious that Ms. Tedder-Masterson herself attended at the facility a week later. She confirmed the problems identified in the earlier report and raised a number of sufficiently similar concerns as to the physical environment that had been alleged in Complainant # 1's complaint. She arranged to re-attend within the week to conduct staff interviews.

Staff made available for this purpose by AED were the Applicant's employees, over half of whom had a long history of employment with the Applicant. It appeared from their statements that there was no overall philosophy of management or administration and that there had been a breakdown in earlier strategies to provide efficient supervision. Staff advised Ms. Tedder-Masterson that, after their initial hire and orientation, no further training opportunities or continued educational materials had been presented to them by management. There was a lot of turnover, which Ms. Tedder-Masterson agreed was endemic in the industry, leading to those long-term loyal staff feeling overburdened. At the time Employee # 1, was responsible for the supervision of two residences (DG Residence and Mo. Residence). Another staff person advised CAST that she was exhausted by having to be available at all hours of the day, even when not on shift, to deal with basic operational situations as they might arise in the house. She felt a lack of support by management.

The result was an operation relying on ad hoc independent functioning by individual staff.

With the increasing reliance on relief staff, a common characteristic of such residences, it was essential that clear and consistent procedures be in place and documentation of behaviour and interventions be consistent. In fact, staff advised that the supervision was inconsistent and had broken down. Questions posed by Ms. Tedder-Masterson concerning the availability of clinical supervision met with the response that this was only available when staff attended with the child to medical appointments off site. Team meetings were described as ineffective and not conducive to growth or team development, but rather seemed to focus on errors and criticism. Ms. Tedder-Masterson testified that this lack of process was especially disruptive with high needs children such as those being cared for by the Applicant, many of whom were non-verbal.

Observations made by CAST workers at the site included little interaction between staff and children. When asked about a list of programming for the children, the 1:1 staff on shift advised that she was not aware of its location. The children too didn't seem to know where and when such a list might be located. During the meal, the children ate separately from the staff. After the meal, staff sat on couches chatting and the children wandered or watched TV.

Ms. Tedder-Masterson found conflicting staff evidence as to food quality (too much pasta and pizza for both lunch and dinner) and budgeting. She was advised staff were under strict instructions to purchase only \$35.00 worth of food per child per week. She also expressed on-going concern with the physical condition of the facilities. On March 14, the M. Residence inspection revealed the play area grounds were dirty with used condoms, broken glass and garbage littered about. On inspection, Mo. Residence had no towels or paper towels or soap in the washroom which was generally dirty and a cold water tap was not functioning. None of the residences had vacuum cleaners and all children reported in their interviews that their chores included sweeping the Residence.

Interviews with the children included one child at DG Residence, who advised he had done basketball and soccer the summer previous and would like to do something similar again, but, outings consisted of going shopping with staff or attending with other children at appointments. An interview with a child at Mo. Residence revealed there was no homework and staff did not help her with homework. She wanted to take piano or singing lessons but there was insufficient funding for her to do so, but she did sing in her church choir. Outings included accompanying staff to the store and, although uncertain as to how often activities were engaged in with staff, she could recollect once playing a game together. Interviews with a child at M. Residence disclosed that there were no sports available to him, although he used to go swimming at his last placement, and that most of the day he watched TV or video games. Another child at M. Residence also stated TV was the prime activity. Je disclosed that he did go swimming twice

weekly but added that staff did not enter the water with him; they just watched him in the pool.

Ms. Tedder-Masterson testified that her knowledge of the Applicant led her to conclude that it had done some great work with some very challenging children, but that it had relied on crisis management and a few good individuals to do so. She testified that she had first been involved with the Applicant in 2004, when it was facing a possible licence revocation and CAST had agreed to send her in to assist the facility to meet the compliance requirements. She attended monthly meetings with both Ministry representatives as well as the Applicant's management personnel for a period of time until compliance levels appeared to be achieved. She did not say that she ever physically attended the residences during that time period. She also worked closely with AED following the death of the child referred to above and assisted in attempts made by the Applicant to ease the horror of that tragedy on its operations.

Ms. Tedder-Masterson's May Report concluded that the Applicant should be provided with time to prepare an Action Plan to adequately address the concerns raised. Senior management at CAST requested that she re-attend the facility on July 10. At the time, Mr. Standish had just concluded his review of other abuse allegations and verified the occurrence involving A and a relief worker who had pulled the child's hair and thrown water in her face. Ms. Tedder-Masterson's site visit of July 9 was not announced. Her Report on July 10 (Tab 83, Volume 40, Exhibit 10) notes further program concerns: mice in the food storage, open food stuffs in the pantry, and inappropriate staff night wear in residence. There were also indications that undertakings made by AED to meet earlier concerns were not being followed. For example, the program manager was not attending bi-weekly residence meetings. In fact, such meetings were, in many instances, not occurring at all. On July 11, a meeting including all CAST workers involved with the Applicant took place and resulted in the decision to remove all CAST children. In an effort to ensure this removal took place with the least disruption to the children, the move was scheduled for later in August. The Ministry was informed of the CAST decision the day before the children's removal on August 16, 2007.

In cross-examination, Ms. Tedder-Masterson stated that CAST concerns were not the same as those of the Ministry regarding licencing. As such, she pointed to her misgivings with regard to a lack of any program philosophy, which she agreed was not a licencing requirement, but was in every similar residential program accessed by CAST. The program philosophy delineates how the facility treats and evaluates its programming. Despite numerous program concerns raised by many people, this philosophy was never in evidence with the Applicant. Nor were there the standard monthly staff supervision structures such as formal sit-downs with supervisors to discuss supervision and management issues, even though staffing and supervision had been repeated concerns of both CAST and the Ministry for the entire three to four months of the review.

The Testimony of Craig Spencer

Mr. Spencer is a Supervisor with Peel CAS. He testified that this agency had five different children placed with the Applicant between 2003 and 2006, and that their final child there turned eighteen and left the facility in April 2007.

Mr. Spencer's testimony concerned his scheduled routine Plan of Care visit of CAS Peel resident Ax and the Mo. Residence staff on January 31, 2006. Ax, had been with the Applicant since 2004. According to Mr. Spencer, Ax's case was extremely complex with very high needs including Pervasive Development Disorder, aggression and autism. It had taken Peel CAS a long time to find a placement willing to take the child.

On arrival at the Applicant's Mo. Residence, Mr. Spencer described a scene of chaos, disruption, and disorder. He and his staff were appalled. Ax's room was dark and depressing and the smell of urine overwhelming. There were no posters or decorations to individualize the room and the toys and material purchased and supplied by CAS Peel for the child were nowhere to be seen. When questioned, staff advised they were in storage. On arrival, the CAS Peel workers witnessed staff berating Ax in what they found to be demeaning and unprofessional terms in front of seven other staff and four residents. Employee # 1, the then Supervisor, arrived late on the scene and suggested that the Plan of Care meeting be re-scheduled.

The following day, Ax's CAS Peel worker telephoned AED to express her serious misgivings. Notes submitted to the Tribunal taken by the worker of that phone call include her alerting AED to the inadequate organization evidenced by the Applicant's residence the day before, as well as on-going issues with the apparent lack of leadership, direction and programming in the home. Peel CAS arranged for Ax to be moved to a different facility on February 2, 2006 (Exhibit 10, Volume 41, pages 25 and 26).

Mr. Spencer testified that it was not usual for Peel CAS staff to visit the children in their bedroom and prior to this occurrence, the Agency had no real concerns with Ax's care. One other Peel child was in Mo. Residence, but that individual had a mother who was very involved in the child's daily care. One other Peel child resided at M. Residence where the long established supervisor had a close relationship with the CAS worker for that child. M. residents were also higher functioning, unlike Ax who required high need supervision.

The testimony of AED

AED has a background in Social Work from McMaster University and received her diploma as a Child and Youth Worker (CYW) from Mohawk College. She worked for four years as a child and youth worker for an unrelated agency after receiving her diploma, followed by over a year of work with CAS in Waterloo. She has been with the Applicant since 2002 when she was hired as Program Manager, the position now held by Employee # 2. In the spring of 2006, a month before the death of the child referred

to above, she was promoted to the position of Executive Director and Employee # 2 took over as Program Manager. The Executive Director is responsible for all operational, as well as financial matters concerning the operation of the Residences. She works very closely with the Program Manager who is responsible for the direct operation of the four residences. Residence Supervisors are responsible for the house cleanliness, maintenance and staff supervision.

AED described the Applicant's Program materials as containing the referral requirement for its facility of developmentally delayed children with a dual diagnosis. She described the specific residences.

The Applicant's Program references to providing a "therapeutic milieu" were described by AED as recognition of the daily life and social skills (hygiene, cooking, cleaning and shopping), which the Residence staff provided for the children in an effort to prepare them for life after their placement. Resource services such as the Griffen Centre, Surrey Place, the Shoniker Clinic and the Geneva Centre were available and accessed where recommended by medical reviews conducted by outside professional services. In cross-examination, AED explained that the Geneva Centre offered art therapy and staff training, with particular emphasis on autism. Surrey Place provided counselling services and the Shoniker Clinic provided client medication reviews. There were no psychiatrists or psychologists on retainer with the Applicant. Most of the children attended the Applicant's Day Program with the Board of Education, overseen by a Board teacher with a staff member also in attendance.

Activities were scheduled for most days of the week and included swimming, bowling, and the library. These were provided to any child not "off-program" for behavioural punishment or otherwise unable to attend. Provision and monitoring of these activities were the responsibility of the Program Manager, Employee # 2, AED was aware of a number of activities accessed by children, including three at the M. Residence who were involved in a hockey league, another taking art classes and Ja who did attend Variety Village for a while until his behaviour and aggression required that he stop. Ja was provided with an exercise bike for use in the residence. Given the limitations of many of the children, she agreed that organized outside activities were not always appropriate or possible.

Client Ja arrived at the Applicant as a CAST referral in 2002. Recognizing his very high needs, the placement was intended to be for four months while alternate accommodation could be found. Due to Ja's size and aggression, the Applicant frequently requested that CAST find alternate placement over the next year and a half, but Ja remained at the Applicant for five years. His behaviour was unpredictable such that, although he generally responded to staff, he could lash out at random, resulting in the Applicant determining that he was an increasing risk to have in the community so that outside programs originally made available to him, such as swimming and the YMCA, were withdrawn. AED denied the observation that Ja "never" went out, as she stated he attended school daily.

AED described N as also extremely difficult to manage. He had been placed with the Applicant with little background information. When it did come from the last placement facility, it included the recommendation that he be placed in a "secure facility" which was not offered by the Applicant. However, he was not removed by CAST for another eight months, and in that time, proved very challenging. He even set fire to one of the residences at one point.

Client Ax was autistic, non-verbal and a constant bed wetter, such that he changed his sheets each morning and wiped down his plastic covered mattress with disinfectant. AED noted that all mattresses at the Mo. Residence are plastic covered with the result that they could not be "urine soaked" as was alleged by Mr. Spencer. AED also stated that the month following Ax's removal, Peel CAS requested a new placement. She also noted that all CAS Peel Applicant evaluations from 2003 to 2006 were positive (Exhibit 20, Volume III, Tab 84).

In describing staff training, AED referenced the Applicant's Manual (Exhibit 21, Volume I, Tabs 1-15). She noted that staff are generally required to have a CYW Diploma or equivalent, which would cover basic legal requirements such as abuse reporting requirements. New staff must complete training in CPR, CPI (Physical Intervention i.e. restraints), Fire Safety and First Aid. Her Program Update of April 2006, advises that staff are "encouraged" to attend safeguard training and are provided with regular refresher courses in fire extinguisher safety, CPI, CPR and First Aid.

AED advised that staff information as to Ministry requirements concerning SORs is contained in the Applicant's Manual on which staff are to have update training form placed in their file annually.

AED testified that training on the Applicant's restraint policies occurred with orientation of new staff. For relief staff, it was assumed such knowledge existed, and the Applicant's Policy and Procedures Manual would be referenced. The same assumption was relied upon by management concerning the duty to report requirements of the workers.

As concerns the Applicant's use of "touch control", AED testified that the Applicant had always used this terminology for any redirecting skin-skin contact which fell short of a physical restraint. For some reason, this appeared to no longer be acceptable with the arrival of Ms. Campbell as licence inspector in 2007. CPI restraint requires two staff to administer, whereas touch control can be utilized by a single staff. In either case, the occurrence is documented and hence open to review, although the latter does not require the issuance of a SOR.

Staffing is a chronic concern in this field of work. Since the Applicant specializes in providing residential accommodation to very high needs children, staff turn-over is even higher. Pay is low, and stress and demands of the job are high. Experienced, well-qualified staff often leave for better paying positions with publicly paid local Boards of Education or Child Welfare Agencies. AED stated that the Applicant paid \$15.00 hourly

for fulltime qualified staff. Pay for relief staff was \$12.70 per hour. In contrast, workers for the CAS generally receive \$18 to \$19.00 per hour. Nonetheless, the Applicant has retained a number of reliable, experienced and loyal staff including Employee # 1.

After the death of the child in 2006, the residence experienced a number of staff changes. The Coordinator of the house had left just prior to the incident, and was replaced by Employee # 1 for a few months until a replacement was hired. The replacement stayed one year only. Employee # 1 was again assigned the position for a few weeks until Complainant # 1 was employed. Complainant # 1 was dismissed within three months, whereupon Employee # 1 again took over in March of 2007. In July, another employee was promoted to the coordinator position.

1:1 staffing is often necessary, given the demands of the children in the Applicant's care. While the preference was to utilize permanent staff, given their knowledge of the children and the residence, often there were none available, and relief staff were therefore used.

AED denied ever directing one employee to sign another employee's name to any record. She did concede, however, that a great deal of paperwork is required in maintaining the residences, and that there would be times when these would need going over to ensure proper completion had occurred. This was a normal practice.

Prior to the complaint of the dismissed residence Coordinator, Complainant # 1, it was AED's understanding that the Applicant had enjoyed a good working relationship with the Ministry's licensing department. Subsequent Ministry inspections, in her opinion, cited contraventions which were simply petty and/or technical in nature. Nonetheless, AED complied with all requests to change/clean/repair. Despite this cooperation, more visits took place and the list of non-compliances mushroomed. When CAST came on board, the situation seemed to become one where the Applicant could do nothing right. Unscheduled visits started to take place, unsettling staff and children who found the process of investigators searching through the residences disturbing. AED stated that it negatively affected the children's programming as the Ministry would want to meet with the children for interviewing purposes, and thus the children could not attend their scheduled activities. Staff morale also was negatively affected. Gossip and collusion began to occur, as questions were raised and fears fanned. No longer did the residences have strong staff teams.

When the May 16 letter arrived from Ms. MacLeod warning that the licences may not be renewed, management was shocked. It was requested that Ms. Tedder-Masterson's QAR Report be shared to provide the Applicant an opportunity to respond. CAST responded that this was not their policy. AED testified that she found Ms. Tedder-Masterson's attitude changed. Whereas previously she had been supportive and helpful, she now appeared to question efforts being made by AED to implement greater operational controls. For example, residence budgets were clearly sufficient to provide adequate nutritious foods. Further, AED herself reviewed the houses' storage amounts, and concluded that there were enough items to provide meals for two weeks. Yet Ms.

Tedder-Masterson appeared to imply that visual inspections by the Ministry revealed that this was not the case. It was as though the CAST as relying on Ministry findings, despite newly developed tracking systems initiated by AED.

With regard to maintenance and cleaning, AED stated that each house had clearly delegated schedules and checklists for cleaning and that maintenance issues were addressed as soon as identified by staff. The Applicant had pest control visits on a monthly basis, and phone numbers were available to each residence supervisor if interim immediate assistance was required. AED had no knowledge of there being no toilet paper in one Residence for a number of days, and speculated that references in house logs to non-performance of cleaning duties were more a reminder by supervisors of staff expectations than indicative of on-going failures. Employee # 2, responsible for overseeing the day-to-day operation of staff, residences and programs, was to attend each residence weekly and read the logs, ensuring that all staff responsibilities were met. She also held regular house meetings to discuss both operational issues as well as detailed information on each child and his/her routines. Part of AED's response to the Ministry concerns of staff supervision included the requirement that Employee # 2 attend such meetings more frequently. Even so, both the Ministry and CAST appeared to find fault with the Applicant's process for supervision.

The Testimony of Employee # 2

Employee # 2 is the Applicant's Program Manager. She has a Bachelors of Arts degree in Psychology/Sociology from York University where her focus was on autism. She received her CSY diploma from Centennial College in 1998. While a student, she had a placement at the Applicant, and on graduation was hired there fulltime as a case manager responsible for two to three clients in a residence. In 2000, she became the residential Coordinator for the Mo. Residence, which was at the time an all male residence, housing two or three autistic children. In 2002, she became Community Liaison and Training Coordinator. As such, her role expanded to overseeing all residences in terms of staff training and social worker issues, including referrals. In June of 2006, she was promoted to Program Manager with a reporting relationship to AED. In this capacity, she stated that her responsibilities include supervising all residences, editing and reviewing all Plans of Care (written up by the Residence supervisor), and, consulting at house meetings. She is not necessarily aware of each residence or child's day-to-day programming. Rather, she would determine which house meetings her timetable would allow her to attend and provide staff with ideas or resources (i.e. how to use PECs, implement autism tools) where required.

In response to a question concerning a log entry from the M. Residence where a staff member recorded a child wanting a membership to an outside activity, Employee # 2 revealed that such a request from a child would go from the house Supervisor directly to AED for approval. It would not be directed to her as Program Manager.

Employee # 2 clarified that only one child at the Mo. Residence had been enrolled at Geneva Centre, an agency specifically set up for, amongst other things, education on

autistic behaviour management. She stated that the waiting list to access this resource is long, and other children (i.e. Je) remained on it up to the time of CAST removal. In cross-examination, Employee # 2 conceded that she only was aware of the one child who had accessed the Centre a number of years earlier. A membership at the Centre was in her name, and she had attended some caregiver courses there. She thought perhaps one other staff member had gone for an introductory course on autism some years back, but was not sure.

Variety Village is another outside resource, both Employee # 2 and AED testified, that was used by the Applicant in its programming. It provides recreation for developmentally disabled clients. Over the years, a number of children at the Applicant have attended this resource, although when asked, Employee # 2 was only able to name Ja, who had not attended the resource for a long time due to his aggressive and unpredictable behaviour. Employee # 2 noted that in the case of this resource, the CAS would be asked to supply the necessary funds if it was deemed appropriate for any given resident.

As concerns in-house programs, Employee # 2 advised that PECs were indeed used by staff with the residents. In examination-in-chief, she stated that such pictures were on the walls in the bathroom at the Mo. Residence. In cross-examination, she identified those photographs taken by Ms. Campbell of pictures posted on the residence's dining room wall (Exhibit 7) as being the PECs to which she had referred. She wasn't entirely certain where she had seen them over the last two years, but knew they had been on walls of both the Mo. Residence bathrooms in the past. Employee # 2 also stated that the Applicant had purchased programming PECs which were kept in a plastic sleeve and were to be displayed to the children on a daily basis to assist in communication. She could not recollect if she had ever seen these in use and agreed that she might have forgotten to remind staff of their existence. When questioned as to other tools specifically available (i.e. electronic imaging tablets) for developmentally delayed children, Employee # 2 advised that she had been unable to find any information on such resources when they were recommended to her by the Ministry.

Employee # 2 advised that the emphasis was to have children involved in the community as often as possible. To this end, staff would take the children to the malls, shopping, library and swimming to teach safety skills and socialization. There were summer excursions to Wonderland and the Science Centre, and able children were enrolled with City Parks and Recreational summer camp activity. She agreed that for a youth like N who clearly had a predisposition to shoplift, going to the mall might not be an appropriate activity, but advised that she was never made aware of this concern. When queried, she stated that she would "glance" at the house logs, but the children's daily program was really the responsibility of the house Supervisor, in this case Employee # 1. She stated that she was not ever aware that Employee # 1 needed to remind staff on repeated occasions that N should not be going to the mall. Employee # 2 was of the opinion that Employee # 1 was generally able to handle her staff effectively.

Employee # 2 could not recollect whether she was aware that Ms. Clarke was concerned with A's lack of programming and activity as early as February 2007. She testified that, again, this was the responsibility of the house Supervisor, Employee # 1. She denied there was "no program in place" for Ja, but did not provide any information as to what activities the child did have. Despite concerns with Je, Employee # 2 testified that the child was involved with lots of life skills activity, including making her bed and brushing her teeth. As well, she had attended hip-hop classes, swimming, and was accepted to Surrey Place about the time of the CAST removal. In response to a question by the Tribunal as to what interventions Employee # 2 had discussed with staff vis-à-vis Je's ongoing sleep problems, Employee # 2 advised that her response was to go to a doctor for medical intervention, and then ensure a 1:1 worker was funded.

A review of child SPEel's Plans of Care illustrate that staff were to find some community activity for SPEel as she has a recognized need for such an outlet (July, 2006). In September, she is reported to have enjoyed summer camp and staff are looking into fall activities. In October, there is again a reference to a need to find a program for her. In January, the Plan of Care notes that the school has suggested she take piano lessons as she demonstrates a "natural aptitude for music", and recommends that the residence install a swing for the child and this is to be provided in the spring. In April, there is no reference to music or the swing. Employee # 2 is listed as in attendance and there is a notation that SPEel prefers solitary activity to group outings with the recommendation that she be enrolled in a program. Horseback riding and piano are both mentioned as possibilities. In July, again attended by Employee # 2, the Plan of Care notes SPEel is putting on weight and the suggestion is made that CAST fund her a membership at the YMCA and the staff will apply for a 1:1 to attend such a program with her. There is a notation that staff have found a horseback riding school and will enrol SPEel. A few weeks later, however, the discharge report notes that staff had only made an application for her attendance at the horseback riding activity. It suggests that should she receive some art therapy for self-expression. When asked, Employee # 2 testified that SPEel never attended the horseback-riding centre because she refused, but in re-examination, she clarified that she never actually asked why the child never attended the activity.

Employee # 2 testified that the P. Residence children, who were higher functioning, received assistance from the Applicant in finding part-time jobs and volunteer experience in the community. When pressed as to specifics, she recalled one child getting a part-time job at a furniture store through a staff connection. Other staff assisted with resume writing and applications and a third child's interest in electronics had led staff to inquire at the local high school as to possible work opportunities albeit without success.

With regard to staff supervision, Employee # 2 explained why she had missed numerous house weekly meetings in the spring, and early summer of 2007 despite AED's undertaking to the Ministry that she would attend. These ranged from being off sick to conflicts with other responsibilities.

In cross-examination, she also advised that she was responsible for ensuring up-to-date documentation was contained in the files. To this end, she would follow up with the house coordinator if something appeared to be incomplete or missing. Where an issue might arise with regard to, for example, the use of “touch control” as more likely a restraint, Employee # 2 testified that the coordinator would take up the misnomer or discrepancy with staff responsible, as it was the coordinator’s responsibility to sign off on such reporting prior to Employee # 2 becoming involved.

Although Employee # 2 has gone in to a residence when a crisis on the floor has arisen due to short staffing, this has rarely occurred. Generally, when staff call in sick, the shift leader will arrange for relief staff support.

Her testimony on staff training was that staff had received the bulk of this during their education prior to joining the Applicant’s facility, although this was enhanced by on-going staff meetings where coping strategies for dealing with the children in care were often discussed. For example, AED’s reference to holding off on Je’s medication prescribed at a recent medical consult due to “staffing issues”. She explained as simply her decision to wait for a staff meeting to discuss the efficacy of the medication prior to implementing it and to ensure the requisite approval from the house coordinator was recorded.

The Testimony of the President of the Applicant

The President of the Applicant has owned and operated it since 1996. Currently he also is active in the Ontario Association of Residences Treating Youth (OARTY).

He described the hierarchy of the organization as himself, as head, followed by AED (Executive Director), Employee # 2 (Program Manager), Employee # 1 (the current Community Liaison and Training Coordinator), the secretary, two House Supervisors, frontline staff and, finally, relief staff.

In 2003, the Ministry approved a substantial rate increase in the per diems receivable for each child in care, from \$186.00 to \$233.00, resulting in an additional \$50,000 monthly in revenue, based on the then occupancy. Much of this money was spent in upgrading fire protection systems in the residences, a long standing concern and one of the main reasons the residences had been subjected to provisional licenses for a number of years, as well as paying off debt for amounts incurred over the previous lean years of operation. Also, a condition attached to the rate increase was the requirement for two night staff to be on duty, which resulted in a 100% increase in the night shift cost to the Applicant.

Since 2005, however, the operation has not been profitable. In more recent years, the Applicant’s occupancy rate has decreased significantly. This was in part due to the 2005 management decision to alter the DG Residence focus to an older age group with an emphasis on preparation for moving into community living accommodation. This decision was based on consultation with placing agencies as to what type of service

was most needed. As well, needed renovations to a number of the residences had caused disruption, the most recent being the closure of the P. Residence. The Applicant's occupancy rate figures for the year up to June 2007 were 45% of capacity.

The President of the Applicant noted the discrepancy caused by funding in that temporary agencies such as the CAS itself receive per diem funding based on capacity, whereas per diem operators such as the Applicant are limited to payments based on actual occupancy. The result is the situation where, when occupancy substantially drops as has been the case with the Applicant, the revenue becomes inadequate to sustain the facility appropriately.

The Testimony of Clarence Wheaton

Mr. Wheaton was accepted by the Tribunal as a Licencing Specialist expert put forward by the Applicant. Mr. Wheaton's resume, filed with the Tribunal as Exhibit 19, establishes a long list of credentials and a professional history of over 25 years in the public service of group home licencing and operational concerns. While he officially retired over eleven years ago, Mr. Wheaton currently continues in the business, acting as a consultant.

In October 2007, Mr. Wheaton was hired by the Applicant to inspect the residences with a view to the Applicant mounting a successful appeal from the Director's Notice. He visited both the M. and the DG Residence on October 29 and returned to inspect the Mo. Residence in mid-November. He interviewed two staff member, AED and the long-time employee Coordinator of the M. Residence. He also reviewed various documents held by the Applicant, including the Ministry licence inspection findings, AED's responses, some of the CAST reports and some of the children's Plans of Care. His observations are contained in his Report (Exhibit 19) which concludes that he found nothing to cause concern for the health, safety and well being of the children who had been residing on the premises.

From his review, Mr. Wheaton concluded that there was nothing about the physical premises of the Applicant, which appeared to him to show substandard maintenance. Photographs taken by him during his inspections of both the M. and the DG Residence revealed certain wear patterns and small damage certainly not inconsistent in any home housing high needs children. What he viewed in these residences, as well as at the Mo. Residence a few weeks later, fell well within normal and acceptable conditions.

In cross-examination, he acknowledged that his inspection occurred some months after the children's removal, but noted that, had the houses been in the state of disrepair allegedly to have been the case the preceding June, elements of such would no doubt continue to exist, particularly given the Applicant's financial situation and the high cost of repair.

Documentation reviewed by the specialist also demonstrated what he felt were common industry practices. Often signatures are missing or dates incompletely noted. He stated

that 100% compliance with the Ministry Licensing Manual is neither realistic nor expected. Instead, it purports to set out a systemic guide to correct administration and operation of such Residences, and where concerns are raised, experts should be consulted to determine if such operation and procedures are inadequate. For example, where the children's nutritional needs are questioned, a nutritionist should be contacted to determine how the operation might better achieve the intended result. There was no evidence in any of the Ministry's findings that this had occurred. While Bill C210, setting out additional requirements to Plans of Care, was to have been implemented by January 2007, and a review of the Applicant's materials revealed this had not occurred, it was Mr. Wheaton's opinion that generally the Plans of Care amounted to little more than a "paper chase". Especially with autistic children where the reality is that goals change little over time, such documents become an exercise in creative writing providing little real assistance to aid in the child's development, often unintelligible and thus of little purpose.

The staff interviewed by Mr. Wheaton appeared knowledgeable, competent and very experienced. It was his opinion that they were mystified as to Ministry expectations, given what they believed were immediate and adequate responses to all concerns which Ms. Campbell's on-going inspections continued to allege existed. Mr. Wheaton queried why there appeared no effort from the Ministry to assist the licensee in meeting the demands of the legislation in the event it was determined it had failed to do so consistently. In this respect, he noted that the CAST's May Review recommended working together with the Applicant to assist it to achieve the necessary compliance standard. Given the fact that the Applicant had received clean licences over the most recent licence periods, and that it was apparent there were no concerns as to any immediate risk to the children, it would be more reasonable for the Ministry to move in a helpful manner as opposed to a reactive one.

Mr. Wheaton's findings concerning the programming in place for the children was that it was "adequate to meet their recreational, social and community needs" as is required under the Ministry's own Manual. While a residence housing similarly adapted children may well be able to offer homogenous activities to all, a facility such as the Applicant's, with children displaying any number of varied and distinctively assorted behaviours and abilities can not reasonably be expected to provide what the Ministry appeared to demand. It was his conclusion that the Applicant's staff were extremely creative in finding resources and activities, especially considering that the operator was operating at 50% capacity. In cross-examination, he conceded that he had never verified with staff whether activities referenced in the Plans of Care which he reviewed had in fact been accessed by the child in question. He further noted, however, that there is no requirement in any legislation that an operator should provide a Snoezelen Room or any other specific resource. Many of these are expensive and only assist special children. It was his conclusion that the Applicant had done a lot to attempt to accommodate what were often unreasonable demands from the Ministry.

When asked as to the appropriate use of 1:1 staffing, Mr. Wheaton agreed that this is not a solution to care issues and should only be utilized for specified time periods and specific purposes.

In conclusion, Mr. Wheaton characterised the Ministry's licence revocation as a "knee jerk" reaction, and opined that, if other licenced operators were subjected to the type of investigation that the Applicant experienced, not one would still be operating in the province.

SUBMISSIONS

Counsel for the Applicant argued that the evidence disclosed a pettiness and arbitrariness in the regulator's conclusions as to non-compliance, which scrutiny demonstrated were not supported by the fact that the Applicant had operated under clear licences for a number of years. This was further evidenced in the Ministry's acknowledgement that there was no immediate risk to the children's health, safety or welfare which would have triggered an immediate suspension of its licence. Rather, he submitted that the Ministry was motivated by public relations issues arising out of a child's death in 2006, which, being outside the contemplation of the Act, was extraneous to the legislation and therefore an unlawful purpose.

In the alternative, Counsel submitted that the Ministry had relied on subjective conclusions made by Ms. Campbell based on a "reading into" the Regulations requirements which were not specified, such as crafts scissors being "sharps" and therefore requiring heightened control, or a necessity for a certain stock of food supplies, or a nutritionally mandated percentage of sugar in juice served. More importantly, allegations as to the Applicant not utilizing specialized programs such as PEC were based on a limited number of days the inspector had observed the home, rather than on discussions with children and employees, and therefore more an effort to support findings of non-compliance than ever an effort to truly determine the reality of the Applicant's program in the residences. Given that Ms. MacLeod had relied on the conclusions of Ms. Campbell, the Director's fact findings are equally suspect.

In dealing with the evidence of Ms. MacLeod, Counsel argued that she relied on a number of "concerns" based on "indicators" which were not facts of specific violations of the Act. Counsel for the Applicant relied on the 2003 Divisional Court decision of *Byl (Litigation Guardian of) v. Ontario*, 175 O.A.C. 171, for the proposition that such emotive responses to apparent conditions carry no legal weight. The *Byl* case contained a number of similarities to the decision before this Tribunal. It concerned the same Ministry taking administrative action against a centre operated in the province for mentally challenged patients by removing funding from the centre thereby effectively causing it to shut down. The Ministry's actions arose after a number of patients suffered unfortunate accidents, and one died by drowning. In concluding that the Ministry had acted outside its authority, Meehan J reviewed the law on administrative discretionary decision making to conclude that the standard of reviewing the decision maker is one of

“patent unreasonableness”. The Court found as facts that the Ministry had no evidence before it of the Centre’s inability to protect its clients, that the Centre had not received fair warning of the Ministry’s intention to remove funding, or been given a reasonable opportunity to make representations to avoid its demise. Consequently, in removing funding, the Ministry had been patently unreasonable by having acted outside any reasonable exercise of discretion.

Counsel for the Applicant also drew the Tribunal’s decision to the Divisional Court decision of *Robinson v. Kingston (City) Commissioners of Police* (1980), 13. M.P.L.R. 129, where a taxicab driver’s license was revoked by the municipality determining that advertising by the cab driver on his vehicle was “unseemly”. Although the statute conferred such power to the City, the Divisional Court found this prohibition extraneous to the business of running a taxi, and therefore ultra vires. Reid J. reviewed the section of the *Municipal Act* which provided the City with authority to make bylaws such as the one relied upon by it in revoking the license. The Court found that this provision limited authority of licencing to what can be justified as a clear relation to the taxicab business. Consequently, a taxi’s licence could not be invalidated based on an arbitrary concept of “seemliness” of the advertising a cab might display. The Court held that regulatory authority can only properly be exercised in relation to its purpose, here being the realities or exigencies of the taxicab business. Counsel submitted before this Tribunal that concerns regarding chipped counters and/or sugar content in food are but the regulator’s vague idea of “seemliness”, and thus not valid grounds for the exercise of her discretion.

Counsel for the Applicant also directed the Tribunal to the evidence of Ms. Tedder-Masterson, a credible witness with significant experience both in the industry and with the Applicant itself. Her May review concluded that the Applicant should be given more time and some assistance to correct its apparent problems. Yet, the Applicant was never given a copy of this Report despite its requests, which would have provided it a chance to respond.

Counsel submitted that CAST social workers who testified were primarily motivated as child advocates, and did not act from any knowledge of operational and financial realities for operators such as the Applicant in making their determinations as to what was reasonable in care providers. He argued that most CAST workers were satisfied with the services provided by the Applicant such that it was not reasonable for the Ministry to rely on the evidence of those selected by it to testify.

Employee # 2’s testimony made it clear the situation that the Applicant is not a treatment centre, but rather a group home operator. As such, it provides children with local programming where appropriate, but does not aim to, nor can it, based on its funding, duplicate treatment facilities already funded by taxpayers of the province. There was no evidence established by the Ministry that such programming was a standard for other homes operating as per diems such as the Applicant.

Based on these considerations Counsel for the Applicant requested costs be awarded to his client.

Counsel for the Respondent noted that the legislature has provided the Director with a very broad discretion in section 196 of the Act, which sets out that it is her “opinion” upon which the granting of a licence is issued. Counsel argued that, unless the Tribunal could find the Director had acted maliciously or recklessly, it should give deference to her opinion. Moreover, given the authority granted to this Tribunal under section 197, which allows for this body to “substitute” its decision for that of Ms. MacLeod, it was incumbent on the Ministry to make available the witnesses and the bulky evidence which it did. Not only does this provide the Tribunal with the grounds for the administrator’s decision, and thereby establish it was neither reckless or malicious, it also ensures that the Tribunal has more detailed information by including subpoenaed CAS files which were not available to Ms. MacLeod in August 2007, but were ordered by the Vice-Chair in the Pre-Hearing into this matter.

Counsel for the Respondent argued that, simply because numerous items of non-compliance were not verified, or, in many cases, adequately corrected by AED, they nonetheless establish patterns based on the thorough review of documents, and site inspections which led to legitimate and concrete factual conclusions that insufficient training or programming was taking place within the operation of the Applicant. Such patterns, with evidence adduced as to their repeated frequency over time, further led to the administrator’s reasonable opinion that similar non-compliances will re-occur in the future.

Counsel for the Respondent noted that credibility was an issue as three of the witnesses for the Applicant were directly responsible for the operations, and financially dependent on the outcome of this hearing. Mr. Wheaton admitted only a cursory examination of documents and records with no effort to interview staff other than those presented by the President of the Applicant, who employed him to prepare his report

CAST witnesses were all subpoenaed by the Ministry. Ms. Tedder-Masterson was indeed credible, and testified to her disillusionment at her last investigation in July 2007, when recurrent issues were apparent despite undertakings by AED that these had been rectified. It was clear from her evidence that, although there was communication between CAST and the Ministry, each took their own steps in independent decision-making.

Counsel for the Respondent argued that Employee # 2 and AED indicated through their evidence a culture of blame avoidance. While there is no doubt that AED responded to the numerous Ministry concerns raised, it was Ms. Tedder-Masterson’s testimony that these reactive improvements were not evidenced by her observations in mid-July and it was this finding, and not the Coroner’s communications, which led CAST to determine that their children were no longer sufficiently protected in the Residences run by the Applicant. The Ministry was certainly in communication with CAST. However, the Ministry’s decision not to renew the licences was made later that summer, and was

based on a different consideration, that being whether Ms. MacLeod believed that the Applicant could be relied upon to provide the children in its residences with the adequate supervision and care to meet the Act's mandate. She determined, from a review of all the evidence of repeated and numerous violations including its past licence history, that it did not.

Counsel for the Respondent submitted that costs against it were not reasonable. The Ministry had significantly reduced the number of witnesses it had originally scheduled in an effort to save the Applicant costs in its appeal, including police to support its allegations. Moreover, she submitted that the licence remained intact such that operation of the residences was continuing, and would do so until the Tribunal's decision. Counsel for the Respondent also noted that the vast disclosure was necessary to ensure that the Applicant fairly knew of the evidence against it, and could therefore properly prepare its appeal.

THE LAW

The *Child and Family Services Act* states:

1(1) The paramount purpose of this Act is to promote the best interests, protection and well-being of children.

1(2) 3. To recognize that children's services should be provided in a manner that:

- i. respects children's needs for continuity of care and for stable family relationships
- ii. takes into account physical and mental developmental differences among children.

105.(1) A child in care has a right to a plan of care designed to meet the child's particular needs, which shall be prepared within thirty days of the child's admission to the residential placement.

(2) A child in care has a right,

- (a) to participate in the development of the child's individual plan of care and in any changes made to it;
- (b) to receive meals that are well-balanced, of good quality and appropriate for the child;
- (c) to be provided with clothing that is of good quality and appropriate for the child, given the child's size and activities and prevailing weather conditions;
- (d) to receive medical and dental care, subject to section 106, at regular intervals and whenever required, in a community setting whenever possible;

- (e) to receive an education that corresponds to the child's aptitudes and abilities, in a community setting whenever possible; and
- (f) to participate in recreational and athletic activities that are appropriate for the child's aptitudes and interests, in a community setting whenever possible.

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

- (a) the licensee or an employee of the licensee, or where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene,
 - (i) this Act or the regulations,
- (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;
- (d) a person has made a false statement in the application for the licence or for its renewal, or in a report or document required to be furnished by this Act or the regulations, or by another Act or the regulations made under another Act that applies to the activity for which the licence is required;

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

(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 he, she or it mails or delivers to the Director and to the Tribunal, within ten days after the notice under subsection (1) is served, a written request for a hearing

(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.

Regulation 70 of the Act states:

72. (1) Every licensee who provides residential care is responsible for the operation and management of the residences operated by the licensee, including the program, financial and personnel administration of the residences.

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

88. Every licensee shall ensure that with respect to each residence operated by the licensee,

- (a) the residents receive well balanced meals that are nutritionally adequate for their physical growth and development; and
- (b) where special foods are recommended by a resident's physician or registered nurse in the extended class, they are provided to the resident.

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

- (a) a written proposal that outlines the program goals of the residence, the types of residents to be served in the residence and the services to be provided in the residence;

DECISION AND ORDER

The Tribunal finds, on the evidence in this hearing, that the Director should carry out the Proposal, and so orders pursuant to s.197 (4)(a) of the Act.

As concerns the Applicant's submissions that Ms. MacLeod's action is ultra vires based on the *Bly* decision, the Tribunal does not agree. Basic to the Divisional Court's decision was the finding of fact that there were no grounds on which to reasonably conclude that the centre in question was not adequately protecting its clients. For the reasons which follow, the Tribunal has come to an entirely different conclusion as to the evidence in this case. Further, the *Bly* decision was also based on the Court's finding that the centre was not advised of the Ministry's intention to effectively close it down and, consequently, not provided with an opportunity to redress the Ministry's concerns, and thereby avoid such closure. In this case, the facts demonstrate that both notice of impending licence revocation and numerous opportunities to avoid such action were made available to the Applicant. It was by finding these elements missing that the Court, in *Bly*, concluded that the administrator's decision in that case was "patently unreasonable", and therefore could not be supported. As noted by Meehan, J., quoting Mme Justice L'Heureux-Dube of the Supreme Court:

discretionary decisions, like all other administrative decisions, must be made within the bounds of jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion...[I]t is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which such discretion was exercised.

Under section 196 of the Act, the legislature of Ontario had provided the Director with broad discretion in determining the fitness of an operator for licence as a group home operator. That it is discretionary is clear from the use of the word “may” in the opening sentence. It is broad in that it is dependent only on the Director’s opinion that the operator has *either* (a) contravened the law or term and condition of licence, or (b) the activity which is licensed is carried on in a prejudicial manner to the children’s health, safety or welfare.

Clearly, to avoid being “patently unreasonable” the opinion of the Director that either of these triggers exist must be founded on clear and cogent evidence. It should be noted that a finding that the children’s health, safety and welfare is somehow compromised is not necessary.

The Tribunal agrees that, in exercising her discretion to revoke an operator’s licence, the Director would be wrong to rely exclusively on a finding that the licensee’s actions outside of its licenced activity was “unseemly” as was the situation in the *Commissioners* decision also relied upon by Counsel for the Applicant. However, where the evidence establishes that the very activity for which the home is licenced is carried on in a manner which, in her opinion, seems prejudicial to the children’s health, safety or welfare, the Tribunal finds that this Divisional Court decision does not apply. The distinction being that the former scenario pertains to the decision-maker’s **values** extrinsic to the activities for which a licence is necessary, while the latter concerns the decision maker’s **conclusions** concerning those very activities.

In reviewing the extensive evidence presented in this case, the four major issues originally specified to be of particular concern to this Tribunal will provide structure.

1. Allegation of false or misleading material (section 196 (d)):

The Tribunal finds that the evidence supports the Ministry’s allegation that misleading information was provided by the Applicant in a number of its published materials upon which placing agencies relied. Its Residential Program Description, required prior to licensing and subject to regular review by the regulatory authority (Exhibit 21, Volume I, Tab 3), refers to its treatment of children in three places, and concludes that its “treatment objective is for all residents to attain the highest level of self-sufficiency and integration possible”. The group home is further referenced as a “residential treatment service for dual diagnosed youth” (emphasis added) in its Mission Statement, which describes its facility as a “therapeutic milieu”. The Concise Oxford Dictionary, New Edition defines “therapeutic” as: *curative; of the healing art; Branch of medicine concerned with treatment of disease and action of remedial agents in disease or health*. The use of this terminology would then reasonably support expectations by parents/placement agencies and the regulator that, given its referral requirements of children with dual diagnosis issues, the Applicant would have some form of core treatment or remedial interventions on site.

The Tribunal agrees with Mr. Wheaton that treatment which simply duplicates other resources already available in the community might well be unrealistic. However, to give meaning to the descriptive language used by the Applicant, some form of therapy must be provided, even if simply through regular access to local community facilities as part of an individualized structured program.

Evidence of such an attempt by the Applicant would, in theory, be the Snoezlen Room made available in the Mo. Residence for some four months, commencing last February. However, the Tribunal accepts the conclusions of Ms. Campbell, that the room was inadequate to truly provide therapy given its location and furnishings. In this regard, the testimony from staff witnesses established that staff were not trained to properly utilize whatever therapeutic aid such a room might theoretically provide. Not one of the Applicant's witnesses testified differently.

The Tribunal further finds that the evidence concerning the use of PECs, also a possible therapeutic device, established that these were not used consistently by staff as a therapeutic aid to improve communication ability of, often non-verbal, children in the home. There was no suggestion that staff had ever been provided or even offered specialized training or education in their use. Witness testimony established that, where used with children, the pictures posted in Exhibit 7 simply provided a practical visual clue to elicit an expected physical response when needed ie. getting an apple, washing hands, rather than a tool for therapeutic efforts. The testimony of Employee # 2, in charge of programming for the Applicant, that she may have "forgotten" to advise staff of the existence of specialized cards which may have more truly represented PECs was most telling. Her response to Ms. Campbell's suggestion that the Applicant provide therapeutic assistance to some of the autistic children through the purchase of an electronic imaging device further indicated the Applicant's complete lack of initiative in making contemporary autism tools available to the children.

Ms. Leung's testimony as to her being shocked to find that staff caring for her child for over eight months didn't appear to know her most simple likes and dislikes to the extent that it appeared as if the child had "just arrived" is relevant here, as is the evidence provided by Ms. Clarke of her mounting concern that the staff had no therapy available to respond to A when her behaviour escalated.

Given some of the findings of the assessments seen in some of the children's psychological reports (Je in particular), swimming may be thought of as a therapeutic activity. While some references did exist in logs and Plans of Care to establish that the Applicant provided some of the children with swimming opportunities some of the time, there was no evidence that this was provided consistently or in an effort to assist the children with their motor or mental needs. What swimming was provided was simply regular swims provided by community recreation centres under the supervision of the local lifeguard where the Applicant staff were not necessarily even in the water with the child participating in the activity.

So too with references to basketball, horseback riding, hip hop classes, Variety Village, YMCA: all were consistent with CAST staff interviewees reporting that what activities were available were instigated on an ad hoc basis by individual staff employees with a particular interest in a child. Complainant # 2 corroborated this when she testified that, if not for the frontline staff, the children would have had no activities. She added that this was unlike other facilities where she had worked where there were clear programming guidelines, and a framework for implementation which could be modified depending on an individual child's need or ability. This was not the case with the Applicant. In its case, where such activities occurred there was no evidence to support a finding that they were consistent and/or overseen by any member of the Applicant's team as part of an attempt to provide the child with some form of treatment or therapy for his/her condition.

The Applicant's Mission Statement also declares: *through dedication and integrity our qualified teams will surpass both professional and community standards*. Here too, it would be reasonable to conclude that the Applicant's staff would have some qualifications which provide it with particular expertise beyond that found in the general professional population and community supporting children in care. Other than CYW diplomas typically required of persons in this service industry, there was no indication of any specialized training or education provided to the Applicant's staff, whether full-time, relief or in a supervisory position, save for Employee # 2. However, her evidence was that each child's activities were dependent on the house coordinator, who, again, was responsible for such programming. Employee # 2's function was simply that of a consultant on potential resources available should a staff have questions. In fact, Employee # 2 said that AED had responsibility for funding such staff requests and staff would generally approach her with suggestions rather than Employee # 2, the Program Manager. The logical result was that no one took responsibility for providing individualized treatment program for each child's care.

AED testified that the Applicant had not changed its program over the years, and that it had never relied on its own internal staff to provide specialized counselling or psychiatric assistance to the children in its care. As it had never been raised as an issue by the Ministry in previous licence inspections, she questioned why it now was an issue.

What happened in the spring of 2007 was that the Applicant was no longer simply subjected to a normal licencing inspection; rather a complaint had been received alleging numerous detailed concerns which the regulator felt obliged to investigate. Simultaneously, the Applicant's main source of placements, CAST, was in receipt of a number of its own complaints concerning the Applicant, and both CAST and the Ministry were in communication on the issues raised. With each successive site visit, the Ministry became more concerned not only with physical observations, but equally importantly, with the perceived insufficiency of the response. More will be said of this later. For now it suffices to acknowledge that the regulator began to recognize that, while the licensee may not have professionals on staff to monitor and treat its specialized children's growth and well-being, it did not even have a structure of

programming whereby the facility itself could provide a structured environment aimed at meeting these needs.

Further, rather than the Applicant's purported "collaboration" with named professional agencies, as was stated in its Program Description, the evidence demonstrated that consultations with these agencies only occurred on referrals from CAS or from medical professionals when the latter were sought clinically by frontline staff in response to specific acute behaviour or physical problems a given child might exhibit from time to time; in other words, as a crisis management referral. While AED testified that Geneva Place was used by the Applicant as a facility specializing in art therapy and staff training for autism, Employee # 2 clarified that this access had only been provided to her, as she was the only staff member who had received specialized education in autism from Geneva Place and she knew of only one child who had benefited from its resources.

Such a crisis response model of operation was not what the Ministry understood the Applicant to provide, in part given its stated Mission and Program Description. Such materials were thus very misleading. Tellingly, both CAST workers who testified very quickly ascertained that, contrary to initial expectations, the Applicant was not the right placement for their child. It did not take long to discover the Applicant's lack of adequate resources necessary for anxiety ridden, high needs children, fundamentally reliant on highly organized routines. As staff turnover increased, especially at the Mo. Residence which experienced seven Residential Supervisors from May 2006 through to July 2007, the only existent routine hitherto provided by consistency of staff was removed. Despite the inference made by the Applicant that only those CAST workers who did not favour the Applicant were called to testify, Ms. Tedder-Masterson's staff interviews establish that out of ten youth workers interviewed, six definitely did not recommend future placements with the Applicant, one was non-committal as new to the system, another stipulated concerns but advised the child in question had a strong bond with his staff support at the Applicant, the ninth noted the child's family was extremely involved in his care and that he had been with the residence for over six years, and the last spoke highly of the residence's Supervisor.

The Tribunal concludes from the testimony it heard over the duration of these proceedings that one of the primary motivations for the extraordinary supports the Ministry and CAST provided the Applicant in 2002 and 2003, was a recognized provincial need for residential treatment facilities specially dedicated to supporting the type of high needs children which the Applicant purported to serve. The reality made apparent by the close scrutiny which occurred last spring revealed that no such specialized structure, training, management or operations actually existed. The result was that extremely challenging and vulnerable children were placed in residences which could not meet their best interests and well-being.

The Tribunal thus concludes that the written materials, required to be furnished to the Ministry under section 105 of the Regulations, as an aspect of the licence procedure, meet the provisions of section 196 (d) as a valid ground for the Director to issue the Intention to Refuse.

The Tribunal is also of the opinion that the Applicant abdicated its role by its failure to provide consistent and individualized activities to engage the children physically, intellectually and emotionally particularly in the case where generic community organizations were inaccessible for a given youth. In doing so, the Applicant violated the children's rights under section 105 (2) (f) of the Act, as well as a contravening its own statement of children's rights contained in Chapter IX of its Manual.

The evidence of this failure to provide activities was overwhelming. It was one of the prevalent reasons for CAST youth workers to not recommend the facility. It was reflected in the Plans of Care. For example, with SPeel and her teacher's recommendation for music activity, there was no follow up of implementation. This was evidenced with Je and the swing, with A and her interest in animals; with Dh and the art supplies, to name a few. When a night worker employed for almost two years, testified that she never saw Ja engaged in any activities, the Applicant countered that, as a night worker, she would not have knowledge of such activities. However, in cross-examination of Employee # 2, it was clear that because Ja had such significant behavioural issues, he had not been taken to community recreational events for a number of years. The alternative in-house activities provided to him were claimed to include a stationary bicycle, blowing bubbles or throwing a ball for his activities. There was no evidence that such activities were structured on a consistent basis or part of any treatment routine developed by the Applicant to provide him with alternative activities for his growth and well being.

The schedule of activities provided to the Ministry by the Applicant denotes community outings, only utilized by certain children who were higher functioning and never those being punished for behaviour and therefore "off-program". There was no record of events and activities planned for weekends at the Mo. Residence when the evidence established at least two children were generally in residence. Although Mr. Wheaton's pictures show some board games were kept at the residence, there was no evidence from any witness, including those of the Applicant, that these were accessed and utilized with any children on any regular basis as a means of engagement. Indeed Complainant # 2 testified that these were generally in such poor condition that they were not useable. There was no computer or computer games provided for the children. The evidence demonstrated that even the higher functioning children were left to their own devices in achieving some form of recreational or active hobby or past-time, as was the case with the youth who was interested in electronic repairs. Despite AED agreeing that his rummaging through garbage to access supplies for this interest was not proper, at no time did management assist the efforts of the staff to provide him with support, with the result that no structured support was in fact made available to him.

The evidence is persuasive that this state of affairs led to frustration and escalation of behavioural problems with the children. This, in turn, increased the risk to their safety and security.

2. Failure to provide appropriate and nutritious food

While much time was taken during the hearing to provide the Tribunal with information on this issue, the evidence was not persuasive that the Applicant failed to provide the children in its care with the quality of food envisioned under section 105(b) of the Act and section 88 of its Regulations.

There was certainly no suggestion that any child was found to be nutritionally deficient at any time; nor was there any persuasive evidence as to any child's health being at risk due to improper or inadequate food supplies.

Observations by both the Ministry and CAST included the former's speculation of insufficient food supplies to provide meals for two weeks worth of meals, but the obligation to do so only arose out of an undertaking by AED, and is not mandated by law.

There was also concern as to sweetened juices and snacks being served to children with aggression and behaviour problems and not much activity. There was however no persuasive evidence that these foods contributed to any associated risk to their health or well-being. Further, the evidence did demonstrate that the Applicant took measures to reduce such foods when requested to do so.

While Complainant # 2 testified that insufficient funding was made available to her as a house supervisor to purchase an adequate supply of foods, she retracted this assertion when the budget amount she received from the administration was clarified (Exhibit 14). In fact, the evidence presented satisfied the Tribunal that the supervisors of each residence were provided with adequate monies from which they were responsible to allocate sufficient funds for food. This they apparently did.

References by teachers to improper foods being sent with the children to school were made on two occasions (A's soggy sandwich and Je's brown banana). In both cases, the Tribunal finds there may well be normal and reasonable explanations, as neither instance is unusual or determinative of any reason to suspect improper food handling or management by the provider.

There is no doubt that improvements could have been made in making better use of leftovers, for healthy soups for example, or ensuring a greater amount of fresh produce was available. Certainly there was no evidence that the Applicant ever held staff training on nutrition or recommended dietary considerations for children with special needs, even after the Ministry and CAST made clear their concerns as to the foods provided. But this failure is more an indication of where the Applicant failed to reassure the regulator of its management ability, than an indicator of unhealthy or inadequate food supplies.

3. Failure to provide competent management /supervision of Residences

The Tribunal is convinced from the evidence that the Applicant failed to provide its staff with the necessary training and supervision to ensure that programming was administered, activities were provided, routines were consistent and staff were sufficiently supported. As a direct consequence, it further concludes that the children's health, safety and welfare were not adequately protected.

When Employee # 2 was promoted to the position of Program Manager, responsible for supervision of all the Residences, she was not provided with any specialized support or training in human resources or other managerial skills. Her resumé does illustrate some specialized knowledge of autism, and she testified that she was the only staff member she was aware of who attended training on this condition, while a member of the Applicant staff. However, there was a glaring absence of any system initiative on her part to improve the autistic children's daily lives, either in the provision of specialized programming for those children, or in the provision of specialized staff training in the use of materials and/or interventions to assist them in supporting the children under their direct care.

Je's on-going gas and stomach ailment persisted long after it should have due, in some significant measure, to the inconsistency of staff response. Given that the child's primary worker advised her CAST worker that Je was non verbal, it would not be unreasonable to conclude that the lack of effective communication played a role in this failure. It was made worse by the staffing issues resulting in a lack of continuity such that treatment efforts were scattered. The presenting problems were allowed to escalate to such an extent the school and CAST worker, neither of who lived with the child, felt required to intervene. Similar evidence is apparent concerning the use of a weighted blanket to assist Je in her disrupted sleeping patterns, a problem which was recognized by a physician when she was first placed at the residence in 2006. The suggestion was not followed up by the Applicant staff. When asked by the Tribunal as to what treatment the Applicant had provided Je for this ongoing concern, Employee # 2 who signed off on Je's Plans of Care, did not mention the intervention of a blanket for Je (eventually provided by CAST) but rather noted the use of prescription medicine and the hiring of a 1:1 staff.

These 1:1 staff were increasingly relied upon by the Applicant to such an extent that there was often only relief staff on site not trained in any of the Applicant's own policies and/or procedures. The Applicant's staff would only be available if requested and taken from their duties in other residences if required to administer medication or drive children. The relief staff were expected to familiarize themselves with the Applicant's operations from materials kept at the relief agency location. This expectation did not alter, despite the abuse incident with A and G, an incident which Mr. Standish testified should have been foreseen and therefore prevented with trained, properly supported and experienced staff.

The evidence also demonstrated that the 1:1 staff was not utilized consistently nor, in many instances, appropriately. Yet there was no oversight by any management or other staff to observe and catch such improprieties and install measures to ensure they were not repeated. Employee # 2 had been aware of the CAST concern on this issue as far back as January 2007, but no indication of any management attempt to review or seek clarification from the Ministry or other operators was ever apparent.

All CAST witnesses noted their discomfort with the use the Applicant made of 1:1s and their increasing reliance on such funding and staffing. Even Mr. Wheaton agreed that the use of a 1:1 is meant to be temporary and to address a specific purpose. Yet, numerous examples were cited in the testimony before the Tribunal of the 1:1 taking other children out as well as their own child, attending routine appointments with the child, not being present when on duty, and log book entries repeating problems with 1:1 expectations and performance. At no time was there an initiative taken by the Applicant to provide some oversight or support or education to either the 1:1s as to expectations or to their Supervisors as to procedures required and available.

Similar conclusions can be applied to the effect of incoherent and inadequate activities made available to the children. As the Applicant's material makes clear, such programs were the responsibility of each residence's coordinator to implement. However, as the evidence demonstrated, the fact is no one supervised the activities for the children to ensure each child was receiving adequate physical, emotional and psychological stimulus and challenge.

Part of the reason why no one staff member took overall responsibility was due to the changing staff components. As noted over six different supervisors were in charge of the Mo. Residence during Je's residence period. While the Mo. Residence was primarily affected by changing management in that it experienced the greatest turnover in supervisors, the other residences were also affected as the Applicant's long-term staff shuffled between residences when and as needed.

The evidence established that high turnover in staffing is not unusual in group homes, given the stresses inherent in this employment and the higher pay scales offered by competing programs. In this case, however, the evidence demonstrated that the managerial response to the growing problem over the fall of 2006 and winter and spring of 2007, was increasing reliance on relief staff from the agency. This was especially concerning, given the nature of the children which the Applicant solicited for its residences. Even reading the Applicant's own material it was clear that these children required structure and continuity of care. Yet increasing reliance was placed on the use of relief staff and 1:1's taken from the relief agency. This reliance doubled in these months from what had been more or less consistent reliance in a number of years prior.

There was no overall accountability for performing the function placed on the coordinator, Employee # 2, who stated that, as Program Manager, she was not responsible for any child's individual schedule. The documents submitted into evidence show she often signed the Plans of Care as Program Manager, yet her testimony made

clear that she simply reviewed these documents for editorial content; she did not necessarily attend the actual discussions or verify the content. Nor did AED take ultimate responsibility. Her role appeared to be that of banker where a coordinator had the initiative and/or motivation to pursue a specific activity for any given child. The unfortunate consequence was that many of these children were simply not engaged.

And, while the function was the coordinator's responsibility, no management programs were offered to assist such staff in performing this function, unlike other residential group homes which do provide employees with a framework for implementing such programming.

Ms. Tedder-Masterson observed that increasing boredom or frustration experienced by the children in the home had a direct influence on the incidents of behavioural escalations they exhibited. It was her conclusion that, in turn, behavioural problems exhibited by the children served to increase the problems for the staff, leading to a higher incidence of employee turn over. Similar observations were made by Ms. MacLeod. Ms. Carter, the CAST worker for Dh., observed that the inconsistency of staff and resulting uncertainty of care provided to the children was highly problematic in the high needs youth the Applicant served, where change is a major anxiety trigger. A similar concern was raised in A's mother's complaint to CAST in March 2007.

Ms. Tedder-Masterson's main reason for finally removing her earlier support of the Applicant in July 2007 was the dawning realization that its lack of overall management vision and/or inadequate supervisory structure was the major cause of the increasing operational problems. Her interviews with Applicant's staff in April 2007 included staff observations of a breakdown in supervision, a lack of any clinical supervision, and inconsistent and ineffective team meetings. The responses by AED and other principals failed to address these concerns in any meaningful manner. It was rather a reactive remedial approach, as opposed to a proactive creative approach.

The Tribunal agrees with Ms. Tedder-Masterson. Evidence concerning the issue of touch control versus restraint is a case in point. Management of the Applicant became aware that its earlier characterization of touch control had been improper based on discussions with Ms. Campbell in March. However, it attempted to resolve the matter by treating all physical interventions as a restraint as opposed to holding an information session for all staff where the issue could be discussed and the matter canvassed. The consequence was continued confusion resulting in further incidents of improper reports filed by the Applicant's staff in May of 2007 and again in August of 2007. AED's testimony before the Tribunal revealed on-going sense of confusion and uncertainty as to what was required.

The evidence as to the implementation of Bill C210 was also indicative. A staff memo was directed by AED to Residence supervisors advising of changes to be implemented on January 26, 2007 (Exhibit 4, Volume IV, Tab 120) and including a copy of the Ministry's mailing as to the changes required. Three days later AED advised the Ministry that all staff had been advised and the changes were developed and

implemented by the Applicant as required (Tab 119). However, there was no follow up or training or team meetings held to ensure this was in fact the case. Documents submitted in evidence demonstrate that Plans of Care drafted after January 2007 by the Applicant did not correctly meet the new requirements and AED, in her evidence, acknowledged that implementation had not been completed.

This lack of overall attempts to train staff on issues inherent in the operation and those made pertinent as a result of Ministry and CAST inspections is important. It demonstrates the lack of proactive management which both Ms. MacLeod and Ms. Tedder-Masterson found extremely concerning, a concern the Tribunal shares.

When AED was asked about staff training initiatives, she responded that staff were trained on hire and expected to annually review training on fire and safety, CPR, and CPI. When the issue arose as to the failure of the staff to report the alleged abuse of A, the Applicant again did not determine that upgraded training on abuse requirements was necessary, and appeared satisfied to rely on the fact that no new staff were hired and all staff had received earlier training on this issue. Mr. Standish testified to a similar response by AED over the CAST verification of the abuse against a child by Employee # 3 when the Executive Director denied there was any need for review or re-training of staff procedures. Her response was to rely entirely on the failure of the individual staff member involved.

And, while she testified that Ministry and CAST investigations in the spring and summer of 2007 caused increasing disruption to staff and children, there was no suggestion of any system response by her or other management to counter these effects by instituting proactive measures.

Then there is also the lack of follow up with what was a clearly overworked front line staff. Both the loyal and effective M. Residence supervisor and Employee # 1, who was continuously brought in to be “acting” supervisor of the Mo. Residence while maintaining her own duties at the DG Residence, complained of being exhausted. The latter specifically requested that she no longer be responsible for both residences (she had taken over responsibility for the Mo. Residence after the removal by management of Complainant # 1 in February) as far back as April 2007. Employee # 2 was not brought in to replace her at the DG Residence, however, until June with a permanent staff replacement finally taking effect in July when another employee was promoted to the position.

Despite ongoing issues raised by both CAST and the Ministry dealing with the management and operation of the residences – food, physical plant, money, and programming, the majority of weekly meetings scheduled for both the DG Residence and the Mo. Residence were simply cancelled during April, May and June. A number of those meetings, which did occur, did not include any representation from management despite the undertaking to the Ministry that such would be implemented to help overcome some of the issues raised by the Ministry. This inconsistency in ensuring

staff meetings occurred was apparent also from CAST interviews with staff in March 2007.

The Tribunal finds there was an absence of effective supervision of these various Residences coupled with an increasing dependence on temporary relief staff and, further, that no staff were trained in the direct issues concerning the specific needs of the children in care sufficient to meet the regulator's requirements.

4. Communication failures

Even a cursory review of the evidence establishes that the Applicant failed to comply with a number of communication requirements stipulated in children's Plans of Care as well as reporting of incidents to CAS and the Ministry.

AED admitted candidly that the Applicant had not implemented Bill C210, despite advising the Ministry such was the case.

Mr. Wheaton's testimony that the information sought to be provided in Plans of Care as more a "paper chase" than of any use is not a justification. The Tribunal has no mandate to determine policy. The fact is that the Applicant failed to ensure that information determined necessary and required by law was adequately communicated to its staff responsible for completing these documents, with the consequence that it was not made available as mandated.

Much of the evidence on the Applicant's failure to properly report SORs, both in terms of time frames as well as substance, has been discussed. The conclusion the Tribunal draws is that these important reporting mechanisms were improperly completed by the Applicant on a number of occasions. Given that the ramification of using the correct reporting format includes further health and/or safety measures in the form of mandatory debriefing, for example, this omission is of some significance. That this evidence exists with an operator with as many years experience as the Applicant is also significant. Not only is it a breach of its responsibilities, it is further indication of insufficiency of oversight by management and training of staff.

The evidence illustrated that these improper recordings continued to occur even after management was alerted to the problem by the Ministry, as made clear in the failure to record the events involving A on June 5, 2007 and SPeel on August 19, 2007 as SORs.

As Plans of Care are the essential communication device outlining a child's life in the facility, this lack of overview could and did lead to misleading assumptions. Hence, while AED testified Je had an active program consisting of bowling, hip-hop and swimming, a review of her Plans of Care, which are required to contain a description of all her activities, discloses that in January 2007, staff at the Applicant had taken Je bowling once and that she had attended with staff grocery shopping. A former employee testified that Je had gone bowling two times. Employee # 2 was evasive, advising Je attended hip-hop classes which was referenced as only occurring on one Plan of Care.

The same document notes that Je's family had advised she likes swimming and the Applicant staff had agreed to look into this activity for Je. This was six months after her placement with the Applicant. The same Plan of Care notes that a Ministry specialist at the meeting suggested that Je have a program put in place for her on consultation with Geneva Place or another such facility. It was only a few weeks later that staff specifically asked Ms. Leung what Je liked and disliked. Mr. Wheaton testified that the children all appeared to have sufficient activities, but later, in cross-examination, conceded that he had not investigated whether those activities referenced on Plans of Care in fact ever occurred.

Although not necessarily mandated by the legislation, this hearing established on going and repeated issues of poor or non-existent communication between the Applicant and others involved in the care of the children with direct impact on the potential health, safety and well-being of those children. As such, this evidence is pertinent to the Tribunal's considerations of whether the Applicant is in fact sufficiently able to meet the standards of care envisioned by the Act and its regulator. The Tribunal notes the evidence that four different CAST workers complained of poor or inadequate communication with Applicant staff in their QAR questionnaires of March/April, 2007. In this respect, the evidence of Ms. Leung, whom the Tribunal found to be principled, detailed, credible and entirely motivated by the best interests of her child, with regard to the school's attempts to communicate about Je and potential autism therapy available to her is highly relevant. So too, is her evidence concerning conflicting information as to the child's sleep problems by staff at the residence and the fact that medications regularly provided to the child by staff were not communicated to physicians or listed as being supplied on her Plans of Care. So too is Ms. Clarke's testimony that she had raised her concerns as to improper use of 1:1 staff with the Mo. Residence Coordinator during her Placement Meeting on April 10 and yet this information does not appear to have been communicated to 1:1 staff nor to management. There was also evidence in a Plan of Care in January 2006 about CAST worker concerns of the Applicant's use of 1:1 staff. At the time Employee # 2 was Program Manager and in this capacity responsible for reviewing this documentation. Yet no indication of any attempt to address this issue with staff and/or management was ever provided by her.

One particular situation is illustrative of the risk to children's welfare caused by such poor communication. In her cross-examination, Employee # 2 acknowledged that she had never been made aware of N's predisposition to shoplift as, had she so known, she would agree that outings to shops may not have been appropriate "programming" for him. This despite residence logs containing numerous notes about N's activity with lighters, matches and fires from November 2006, some four months after Employee # 2's promotion to the position of Program Manager. Ms. Campbell ascertained the child's predisposition from a random review of these logs the following spring. AED, in her evidence, clearly recalled the difficult issues presented by N's behaviour to the extent that 1:1 staffing was necessary. However, if the Tribunal accepts Employee # 2's testimony that she was not aware of N's behaviour, this lack of awareness emphasizes the potential results due to the inadequacy of communication. As Program Manager it would appear reasonable that Employee # 2 should have been made aware of each

child's presenting behaviour so as to properly assess and provide meaningful interventions and activity for that child, as well as to ensure staff knew the modifications required for that individual child so as to not place him, or others, at risk. For that reason, the Program Manager's duty includes signing all Plans of Care – where all such noteworthy behaviour and incidents are required to be recorded. Hence, if shoplifting is a concern, it seems only rational that shopping not be an activity which is encouraged. If fire setting is a concern, then, again, it would only be prudent to reduce the opportunity of the child accessing matches or lighters. A prudent Program Manager would suggest programming which involved organized play or sports or arts and not shopping expeditions. This, however, did not occur with N who eventually set fire to the residence before he was removed.

In conclusion, the Tribunal finds that a number of the Ministry's allegations in its Notice of Intention are made out in the evidence it has heard, seen and reviewed. It further finds that the Applicant was given sufficient notice of the regulator's deep misgivings as early as May 10, when it met with the President of the Applicant and AED. The Applicant was advised of various options available to it including closure. While immediate technical concerns were addressed each time, no overall recognition of the necessity for managerial intervention at a system level occurred other than the increase in reporting and checklists required by frontline staffing. As Ms. Tedder-Masterson suggested in her testimony, more paper work for frontline staff was not an effective response for the deep problems the reviews had uncovered.

If not before, then by June 28, the Ministry's letter to the Applicant was explicitly clear; the concern was one of "overall" functioning of the facility with a particular note of problems with staffing and staff training. While the Applicant seemed to understand the problem and advised that a licencing consultant had been hired to review its procedures and a detailed Action Plan for the future would be made available to the Ministry by July 11, this did not take place. In fact, Mr. Wheaton was not hired to perform a review until months later and then in response to the Director's formal Notice of Intention to refuse to renew the licences.

Despite Ms. Tedder-Masterson's recommendation that the Applicant be afforded an opportunity to improve its operation by providing an Action Plan and the Ministry's direct request in June to AED that such be provided, no Action Plan was ever forthcoming. As well, the evidence demonstrated that the undertakings given to the Ministry in response to Ms. Campbell's first licencing visit in March by AED were not followed through with by the Applicant. In fact, even at the hearing there was no evidence provided by the Applicant of any amendments to its management practices or alterations to its operational process which would meet these serious concerns and provide either the Director or the Tribunal with some assurance that these inadequacies were even recognized by the Applicant, let alone likely to be corrected.

The testimony of AED, Employee # 2, and the President of the Applicant demonstrated to the Tribunal's satisfaction that, even once all the disclosure had been made to the Applicant as to why its purported responses were found inadequate to meaningfully

correct the failures of the facility, management of the Applicant continued to blame frontline staff rather than demonstrate correction, or provided further efforts to meet regulatory standards. Employee # 2 stated that coordinators were responsible for programming, Plans of Care and SOR write-ups; AED stated that staff were responsible for food purchase and cleanliness and the President of the Applicant testified that funding was insufficient.

There was no evidence of any nefarious or malicious action on the part of anyone associated with the Applicant. Rather, the evidence demonstrated insufficiency of adequate controls coupled with decreasing revenues, which led to dropping staff morale and higher than usual turnover. The Applicant's response relied on hiring relief staff and requiring greater frontline vigilance with no corresponding framework or training. The result failed to meet the paramount purpose of the legislation.

The Tribunal does not accept counsel for the Applicant's submission that the extent of the Ministry inspection was such that no licensee experiencing similar review would remain operable. The fact is that other licensees are subject to annual inspections and they must reassure the Ministry that the Act's intention is met by their operation. Here, the Applicant was not just subject to annual inspection, but had also been the subject of a number of client complaints which highlighted various operational deficiencies which may not have been necessarily caught at a simple licence inspection. When these complaints were reviewed, the deficiencies of this operator were brought to light.

Lastly, the evidence of Mr. Wheaton must be canvassed. He questioned why the Ministry, rather than remove the Applicant's licence, would not work with it to improve its facility, especially in light of the conclusions of Ms. Tedder-Masterson in May that this be the recommended approach. It is true that there was no evidence of immediate risk to the children and it is also true that various non-compliances raised by the regulator were responded to appropriately by the Applicant. However, the Tribunal finds that the Ministry had worked for numerous years with the Applicant to assist it meet the compliance concerns raised in previous licence applications. In certain respects this compliance had been achieved. However, the public purse is not intended to fund staff to expend unlimited time, energy and cost on private operators who are expected to meet legislated standards, albeit with cooperation and support by the regulator. Here the evidence demonstrates to this Tribunal, that the Applicant's operational failures were so fundamental to the overall approach of the operation as to be virtually impossible to move forward with any confidence in licencing the Applicant. Employee # 2 herself, although promoted to manager in 2006, never received training or education and skills in dealing with staff or human resources. Indeed, this was mentioned by AED as one of her earlier concerns with Employee # 2. Again, however, no action was embarked upon to correct the apparent failing or even counter its potential implications.

COSTS

The Tribunal does not find any basis for granting the Applicant costs as requested. Although the length and nature of the proceedings clearly required significant monies from the Applicant, there is no basis to conclude that the Ministry actions in presenting the witnesses and material meet any of the grounds enumerated in section 14 of the Tribunal's Rules of Procedure. Given these are the only grounds upon which a cost award is available, there will be no such order.

RESTRICTED ACCESS

By order of the Tribunal released October 25, 2007, the Tribunal restricted access to documents and portions of the hearing, and to information concerning the children. Paragraphs 6 to 10 of that order will continue in effect to protect the privacy as intended in these circumstances. Further, the Order of the Tribunal released on January 18, 2008, which includes information necessary for the parties only, will not be published.

DECISION AND ORDER

The Director's Notice of Intention to refuse the renewal of licences for the Mo. , the M. and the DG Residences of the Applicant is upheld.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

RELEASED: April 4, 2008

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



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

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4463-MED-DOWN-Downgrade

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*,
R.S.O. 1990, C. 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: D. GREGORY FLUDE, Vice-Chair, presiding
KEVIN FLYNN, M.D., Member

APPEARANCES: KEARY F. GRACE, Counsel for the Applicant
JOHN PETROSONIAK, Counsel for the Minister of Transportation

DATE OF
HEARING: March 5, 2008 Toronto

DECISION AND REASONS

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

FACTS

The Applicant was the holder of a Class "B" licence to drive, which allowed him to drive a school bus.

On October 31, 2005, a cardiologist, Dr. S., informed the Ministry of Transportation ("MTO") by copy of a letter to the family physician, that a Holter Monitor performed on the Applicant showed a short run of non-sustained ventricular tachycardia at a rate of 154/minute. He recommended that the Applicant be considered for implantation of an internal defibrillator, and possibly also bi-ventricular pacing.

Arrangements were made for a MUGA Scan and Dr. S. advised the MTO that this finding would preclude the Applicant from commercial driving. He advised the Applicant accordingly.

On November 2, 2005, a letter was sent by the cardiologist to the MTO pursuant to Section 203 of the Act, stating:

This gentleman currently holds a Class B licence. He has a significant cardiac condition which should preclude him from holding a B licence although I believe he does meet the criteria to continue driving privately. The patient has been informed of this and of the fact that we are reporting his condition to the Ministry.

A MUGA Scan was performed at a regional health centre on November 10, 2005. The resulting report stated:

Left ventricular ejection fraction is 24%. Ratio of accepted to rejected beats is 500 to 1.

There is severe hypokinesis of the septum, apex, distal anterior wall and inferior wall.

Lateral wall shows the most normal wall motion.

The MTO downgraded the Applicant's licence to a Class "G" and he was so advised by letter on April 6, 2006.

The Applicant arranged for a 48-hour Holter test to be done on February 14, 2006, and no arrhythmia was found.

The Applicant applied for a waiver of the downgrade, which was denied by the Medical Advisory Committee on June 22, 2006. The reasons given were:

Driver no longer meets the requirements for a commercial licence [O. Reg. 340/94] nor does he meet the waiver criteria – C.C.S. Functional Class 1 Requirements [CCMTA 3.1]...and is being considered for AICD implantation [CCMTA 3.5.9]. In addition, the reporting cardiac specialists are not supportive of driver operating a commercial licence.

The Applicant was advised that his case would be reconsidered upon receipt of a detailed and supportive assessment from his treating physician including up-to-date investigations demonstrating a significant improvement in cardiac status, confirmation that he is no longer a candidate for an ICD, and up-to-date radionuclide angiogram scan showing improvement in left ventricular function with a minimum ejection fraction ("E. F.") of 35% as well as confirmation that the C.C.S. requirements have been met, (CCMTA 3.4.1).

An Echocardiogram performed on July 30, 2007, showed an E. F. of 32% consistent with Grade 3 LV function.

On September 10, 2007, the MTO informed the Applicant that a minimum E. F. of 35% was required for consideration of a Class "B" licence.

He was requested to arrange for his cardiologist to file a letter showing significant improvement in his cardiac status, confirmation that he no longer was a candidate for an implantable defibrillator, and that he meets the C.C.S. Functional Class 1 requirements.

His Cardiologist, Dr. R., filed a Medical Condition Report with the MTO pursuant to Section 203 of the Act on October 4, 2007. The medical condition noted on the report was described as:

Heart disease with Pre-syncope/Syncope/Arrhythmia
Viral Cardiomyopathy

Further elaboration of his clinical condition was noted as:

Viral Cardiomyopathy – stable and not a risk to road safety. No coronary artery disease or significant arrhythmia. No heart failure symptoms since Feb. 2005.

The Report was based on an examination on April 19, 2007, and Dr. R. confirmed that the patient was aware of the Report. The Applicant had been a patient for approximately 18 months.

On November 28, 2007, the MTO informed the Applicant that he did not meet the requirements for a Class “B” licence.

A letter from Dr. R. (Exhibit # 3) on January 22, 2008, stated that the problems began with a viral illness in 2005 when the Applicant was found to have an enlarged heart with an E. F. of 23%. His symptoms improved while on medication and the short run of ventricular tachycardia was found in October 2005 on a Holter Monitor, and did not appear on subsequent Holter testing. Initially the Applicant was being considered for an implantable cardiac defibrillator (ICD) because of the poor left ventricular function. A T-Wave Alternans test suggested that he was at low risk for malignant ventricular arrhythmias and coronary angiography was normal.

Since the improvement of his E. F. to 32%, the Applicant was no longer being considered for an ICD. He was free of symptoms and led a fairly active lifestyle and, in Dr. R.’s opinion, was fit to operate smaller vans or trucks as he met the New York Heart Association Class 1 guidelines, and because his E. F. was close to the CCMTA requirement of 35% for commercial licensing.

Expert evidence was given for the Respondent by Dr. R. Hamilton, who serves on the MTO’s Cardiovascular Medical Advisory Committee and is also a member of the Consensus Panel of the Canadian Cardiovascular Society panel on cardiovascular standards for drivers.

Dr. R. Hamilton stated that the improved E. F. from 23% in 2006 to 32% in July 2007, showed a possibility for further improvement but the more recent figure placed the Applicant at Grade 3 function level, and 35% or over would be required in order to be

considered for a waiver.

Less than 35% significantly increased the risk for sudden cardiac incapacitation or death. The Medical Advisory Committee was firm in its requirement of an E. F. of 35% for commercial drivers. The standard has not been changed in the past decade despite regular review, and it is consistent with the most recent revision of the C.C.S. Guidelines.

ISSUES

Should the decision of the Minister of Transportation 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 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 state:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;

- (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet a 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 Respondent relies on the following:

1. The minimum E. F. for commercial drivers established by the Canadian Medical Association Guide, 13.6, which states:

Patients with cardiomyopathy, with or without a history of heart failure, potentially pose a risk on the roads. Functional status is a major determinant of fitness, as is the left ventricular ejection fraction. Because sudden death is so common in this group, physicians are encouraged to cross-reference this section with section 13.3, Cardiac rhythm, arrhythmia devices and procedures. In the event of a conflict, the more restrictive recommendation applies.

NYHA Class I Private driving: No restriction; Commercial driving: EF $\geq$ 35%
 NYHA Class II Private driving: No restriction; Commercial driving: EF $\geq$ 35%

2. Since damage caused by a commercial driver involved in an accident is so much greater, the interest of public safety is best met by application of the E. F. of 35% set by the C.C.S.
3. The Applicant may apply for a waiver if he reaches the 35% in further tests.

The Applicant relies on the following:

1. The normal T-Wave Alternans test, performed at his own initiative and expense,

which defines the risk of sudden heart event and gives the Applicant a good prognosis.

Also patients with a normal TWA test are likely to benefit little from ICD therapy.

2. Strict application of the guideline has created undue hardship on the Applicant's livelihood and does not take into consideration his own cardiologist's opinion that he is fit to drive small vans or trucks.
3. The Applicant's cardiologist has submitted a supportive letter stating that his viral cardiomyopathy is stable and not a risk to road safety. His stress test results are normal.
4. There has been overall improvement in the Applicant's health since the MTO was first notified of his condition.
5. The decision is in breach of the *Ontario Human Rights Code*.

DISCUSSION

It is not in dispute that the current tests produced by the Applicant do not meet the 35% E. F. standard that defines the lower limit for the grant of a waiver. The evidence of Dr. Hamilton establishes that the standard is not arbitrary but is the result of ongoing consultations among cardiac specialists, incorporated into the Canadian Medical Association guidelines and, ultimately, into provincial standards. According to Dr. Hamilton's evidence, research has shown a 2.3 fold increase in the risk of a sudden debilitating event for every 10% the E. F. falls below the average of 55%. When questioned further, Dr. Hamilton stated that, while the increased risk factor is considered as a linear function, graphs in much of the literature show an exponential curve. In balancing risk to the public against the privilege of holding a commercial driver's licence, the medical community has determined that at 35% E. F., the risk becomes unacceptable. Various provincial regulatory authorities throughout Canada have accepted the medical community's analysis and incorporated the 35% lower limit into their regulations.

While conceding that he does not currently meet the 35% E. F. standard, the Applicant argues that the enforcement of the provision against him is in breach of the provisions of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 ("HRC"). The HRC protects the residents of Ontario from "discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability". By virtue of Section 47 (1) the HRC binds the Crown in right of Ontario. Section 10 defines a "disability" to include any degree of physical disability or infirmity. Based on the definition, it is clear that the Applicant is suffering from a physical disability or infirmity and is therefore disabled for the purposes of the HRC and comes within its ambit.

What is at issue is the question of whether the HRC can be applied in such a manner to

require the Respondent to issue a commercial licence to the Applicant.

The Respondent argues that the HRC does not apply in the current case. Section 47(2) of the HRC states:

Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

It is the position of the Respondent that the applicable regulation specifically provides that the HRC does not apply. Drivers licensing standards are set out in Regulation 340/94. Section 17 sets out the medical qualifications for the issuance of a commercial driver's licence. The Applicant is caught by the provisions of Section 17(1) (d), a provision relating to heart disease. Some relief is provided by the provisions of Section 17(2) which states:

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 demonstrates the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.

It is with respect to Section 17(2) that the Respondent has established the Medical Advisory Committee to sets standards for waivers. Section 19 of the Regulation explicitly provides that the standards in certain sections of the Regulation apply despite the HRC, as follows:

- (1) The examinations and qualifications required of an applicant for or a holder of a driver's licence by section 16, clauses 17 (1) (j) and (k), subsections 17 (4) and 18 (1), clause 18 (2) (a) and sections 21.1 and 21.2 apply despite the *Human Rights Code*. 83/05, s. 11.
- (2) Subsection 17 (2) applies despite the *Human Rights Code*.

The wording of Section 19 as a whole is curious. In Section 19(1) two specific medical conditions are excluded from the ambit of the HRC: 17(1)(j) and (k). These two subsections address visual acuity and peripheral vision and by virtue of Section 19(1) cannot be challenged on the disability grounds set out in the HRC. Section 17(2) does not address any specific medical condition. It addresses waivers of the medical standards. The subsection specifically excludes the visual requirements set out in Section 19(1). It is the Applicant's position that by excluding all of the medical conditions except those relating to vision for Section 19(1), the Regulation specifically includes all other medical conditions within the ambit of review under the HRC. The difficulty with this position is that it would render subsection 17(2) nugatory. It is a principle of statutory interpretation that the entire statutory instrument speaks all the time. Interpretations that render regulatory provisions nugatory should be avoided. The Tribunal is of the view that Section 17(2) removes the standards set by the Medical Advisory Committee from review under the HRC. Section 17(2) places the onus for establishing an ability to drive safely on an applicant with a disability. The HRC standard of reasonable accommodation, as developed by the case law, does not apply. If the Tribunal is incorrect in this interpretation of the statute, it is the

Tribunal's view that the Applicant cannot succeed under the HRC in any event.

In support of his position, the Applicant relies on the 1999 decision of the Supreme Court of Canada in the case of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 better known as the *Grismer* decision. Mr. Grismer made his living as a truck driver in the interior of B.C. At the age of 40, he suffered a stroke which left him with an almost total loss of his left-side peripheral vision in both eyes. The B.C. Motor Vehicles Branch cancelled Mr. Grismer's licence on the ground that he failed to meet the minimum required field of vision of 120 degrees. A normal person has approximately a 210 to 220 degree field of vision. Over a seven-year period, Mr. Grismer passed a standard visual test and was found by a driving examiner to compensate well for his loss of peripheral vision. Notwithstanding these results, Mr. Grismer was routinely turned down for a licence because he did not meet the standard. At paragraph 20 of the decision, the Court sets out a three-part test to establish justification. To paraphrase, the standard must be adopted for a purpose or goal and must be rationally connected to the function being performed; the standard must be adopted in good faith in the belief that it is necessary for the fulfillment of the purpose or goal; and the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the particular characteristics without incurring undue hardship.

It is clear from the evidence of Dr. Hamilton that the first two parts of the test have been satisfied in this case. The Respondent seeks to enhance highway safety in the interests of all road users in Ontario. On the advice of the medical community, the Respondent has set standards. There can be no suggestion that the Respondent is acting other than in good faith. The issue falls to be determined on the last branch of the test. Is it possible to accommodate the Applicant without incurring undue hardship?

The Applicant argues that the result of the T-Wave Alternans test establishes that he is not at risk for a sudden debilitating event. Dr. Hamilton addressed this test in his evidence. He stated that there are a number of studies that confirm that it appears to be a good way of establishing which patients should undertake the risk of an operation to insert an ICD, and which patients should not. He also stated that some studies are not so positive in their findings of the effectiveness of the test. The Applicant reasons that, since ICDs are for the purpose of preventing a sudden debilitating event, the fact that he is not a candidate for an ICD indicates that he is not at risk of a sudden debilitating event and should be licenced. It is the position of the Applicant that the T-Wave Alternans test provides a result that is specific to him that the Respondent can rely on in granting him his licence. The Tribunal is of the view that the Applicant's position involves a leap of logic that the medical community in Canada has not yet made. If accepted, the result will be that the current standards will become outdated and the only meaningful test will be the T-Wave Alternans test. Indeed, the Applicant's own cardiologist does not go so far. It is her recommendation that the Applicant have no restrictions on the operation of light vans or trucks, all of which can be driven with a Class "G" licence. She does not recommend licensing for school buses or other large commercial vehicles.

In *Grismer*, the Court considered the onus on the regulator to prove its standard was reasonably necessary.

It identified two standards, the first where accommodation is impossible and the second where, while possible, accommodation may create undue hardship.

The Tribunal is of the view that no reasonable accommodation as outlined in the *Grismer* decision can be made to the Applicant's condition. There is currently no manner in which the Applicant can anticipate and accommodate for a sudden debilitating event. It is episodic and unpredictable. In this regard the Applicant's disability is fundamentally different from a person who has a disability that is of a constant and physical nature, such as a lack of peripheral vision or lack of hearing. Where a driver has knowledge of a blind spot, he or she can train to compensate or use prosthetic devices. The Applicant does not have that luxury. He can operate his vehicle in perfect safety up until the random point in time where he is debilitated. Were that debilitation to occur while he was operating a school bus, the consequences could be disastrous. In permitting the issuance of a "G" licence, the Minister has struck a balance between the Applicant's interests and the interests of the Ontario public.

The Tribunal finds as follows:

1. The Respondent was obligated to issue a downgrade of the Applicant's Class "B" licence to a Class "G" licence upon receiving a Medical Condition Report pursuant to Section 203 of the Act, which stated the Applicant has a significant cardiac condition that should preclude him from holding a Class "B" licence. Subsequent test results showed that he failed to meet the minimum E. F. of 35% required for commercial drivers.
2. The Respondent was justified in refusing to issue a waiver, under Ontario Regulation 340/94, Section (17)(1)(d) upon receipt of a report showing an E. F. of 32% on the most recent echocardiogram of July 30, 2007. This decision is supported by the Canadian Medical Association Driver's Guide, "Determining Medical Fitness to Operate Motor Vehicles, 7th Edition", Section 13.6 that requires an E. F. of 35% for NYHA Class I and Class II patients.

NYHA Class I is defined as:

Patients with cardiac disease but without resulting limitations of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation, dyspnea or anginal pain.

NYHA Class II is defined as:

Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea or anginal pain.

DECISION

Upon the application by the Applicant to appeal the Respondent's decision effective April 6, 2006, 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 Act, and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair, presiding

Kevin Flynn, M.D., Member

RELEASED: April 17, 2008

The decision will also be available on Quicklaw at a later date. The Applicant's name does not appear in the decision nor is 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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Decisions under Highway Traffic Act

Section 47(1) (b) - Medical

Fiscal Year 2008 - 2009

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

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4764-MED-NEUR-Neurological

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*,
R.S.O. 1990, C. 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

RUSSELL McKNIGHT
Agent for the Registrar of Motor Vehicles

DATE OF
HEARING: April 21, 2008 *by teleconference*

DECISION AND REASONS

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

FACTS

The Applicant is a 43-year old female who, on January 13, 2008, had an episode of loss of consciousness at work. She was revived by the paramedics and taken to the hospital. She had had no incontinence or tongue biting. A neurological examination was normal, as was a C.T. Scan.

The Applicant chose not to be admitted to the hospital, and was therefore referred to a neurologist because of the suspicion of seizure. She was also reported to the Ministry of

Transportation (“MTO”), which triggered the suspension of her driver’s licence. In testimony before the Tribunal, the Applicant gave a history of difficult social circumstances noting that she is a single mother with two autistic children. She was trying a new job, and was therefore exhausted and sleep deprived. She reports several similar recent episodes at home, which are ascribed to stress. She has recovered well from several routine surgical procedures and is currently taking oral Thyroxin for hypothyroidism.

The Applicant’s family doctor reported the results of an E.E.G., done on March 6, 2008, as normal. He felt that there was no convincing evidence of seizure and saw no reason to restrict her driving.

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) of the Act 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 MTO, in compliance with Section 203 of the Act, revealed that the Applicant suffers from a medical disability which may affect her ability to drive a motor vehicle safely. Since this contravenes O. Reg. 340/94, Section 14(a), the Registrar was obliged to suspend her driver's licence in accordance with Section 47(1) of the Act.

The neurological examination and tests have revealed no evidence of convulsive or epileptic cause for the Applicant's episodes of syncope, whereas the Applicant presents many obvious causes such as stress, fatigue, overwork.

The Applicant is unable to get an appointment to see a neurologist for several months. It is unfair to withhold the re-instatement of her driver's licence while awaiting this report, when the likelihood is very strong that the diagnosis will be the same.

This Tribunal is of the opinion that the Applicant's licence be re-instated.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective February 21, 2008, to suspend her driver's licence pursuant to Section 47(1) of the 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 set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: April 25, 2008

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



PRE-HEARING

4749-MED-DRUG-Drugs/Medication

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: KEVIN FLYNN, M.D., Presiding Member

PARTIES: THE APPLICANT, unrepresented

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

DATE OF
PRE-HEARING: April 16, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 16, 2008, in Toronto before this Tribunal in the presence of the Applicant and Kyle M. Biel, Agent for the Respondent.

The father of the Applicant was present for the pre-hearing but was advised that he could not give evidence at the hearing. The Member hearing the matter would make a ruling regarding exclusion.

Regarding Item #1 of the Respondent's submission relating to the Medical Condition Report under Section 203 of the *Highway Traffic Act*, the Applicant is concerned about the length of time the reporting physician knew him as a patient. He was a patient of the

clinic for approximately 10 years but the reporting physician stated that he was a locum Family Physician. The Applicant accepted that the physician was justified in making a Report under Section 203.

The Respondent clarified the requirements of the Registrar for consideration of re-instatement. Subject to those requirements being met the, Registrar may reduce the drug-free period to six months. In order to assist the Tribunal, and the Applicant's case, both parties may agree to request an adjournment of the hearing, currently set for May 21, 2008, to a date in June, 2008.

The Applicant understands that an up-to-date report from an Addictions Medicine specialist would be required and will take steps to obtain this report as soon as possible and will disclose it to the Respondent and to the Tribunal at least ten days in advance of the hearing.

The Applicant wishes to exclude certain portions of the letter sent by him to his regular Family Physician. He understands that he should make a motion at the commencement of the hearing to exclude from publication portions of the letter and a ruling will be made by the Member hearing the matter after considering any submissions from the Respondent.

Therefore the Tribunal orders as follows:

1. The Parties to the hearing are the Applicant and the Registrar of Motor Vehicles.
2. The Applicant must file new medical evidence with the Respondent and the Tribunal at least ten days prior to an agreed hearing date.
3. The Applicant will request exclusion of certain portions of correspondence submitted with his Reasons for Appeal at the commencement of the Hearing and a ruling will be made by the Member hearing the matter.
4. The father of the Applicant will not be a witness at the hearing.

LICENCE APPEAL TRIBUNAL

Kevin Flynn, M.D.,
Presiding Member

Released: April 30, 2008

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



4714-MED-ALCL-Alcohol

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: KEVIN FLYNN, M.D., Member

APPEARANCES: APPLICANT, Unrepresented

RUSSELL McKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF
HEARING: March 27, 2008

Ottawa

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).

PRELIMINARY MATTERS

The Applicant's spouse attended the hearing as a witness and was affirmed.

FACTS

The Respondent's Case:

On April 10, 2007, a Medical Condition Report was completed regarding the Applicant by an Emergency Room physician, pursuant to Section 203 of the *Highway Traffic Act*.

Condition listed: *Seizure(s)-Alcohol related*

Optional information: *Seizure – likely ETOH withdrawal. (1st episode seizure). Pt states has stopped ETOH – will no longer drink.*

The patient was aware of the Report, which was based on examinations on April 9 and 10, 2007. The Applicant was a patient of this physician for one day.

On May 7, 2007, the Registrar of Motor Vehicles notified the Applicant, by letter, that based on the Report her licence to drive was suspended under Section 47(1) of the *Highway Traffic Act*.

In order for her case to be reconsidered, she was requested to arrange for an up-to-date detailed report from a physician who is familiar with her medical history or from a neurologist, regarding her seizure. The report must include results of recent investigations (i.e. EEG, CT SCAN), prescribed treatment, cause for the seizure and a narrative of any previous seizure history. Also an Alcohol Assessment Form must be completed. She was advised of her right to request and Administrative Review and of her right to appeal.

On May 14, 2007, an Alcohol Assessment Form was completed by the Applicant's Family Physician of six years, Dr. C.

Physical Examination

Personal Health History:

Psychiatric Disorders
Addictions

Medical Consequences Related to Alcohol Use

Seizures

Physical Assessment and Laboratory Evaluation

Blood pressure: 156/85 Abnormal
Liver: AST=27 Normal
Neurological: Normal
GGT: 37 Normal
MCV: 100 Abnormal

Audit – Alcohol Use Disorders Identification Test

How often do you have a drink containing alcohol?
Two or four times a month (2)

Has a relative or friend or a doctor or other health worker been concerned about your drinking or suggested you cut down?

Yes but not in the past year (2)

Score: 4

DSM-IV Criteria For Alcohol Dependence

? Withdrawal (Tremor, sweating, morning relief drinking, seizures, hallucinations).

History of Alcohol Use

Age of First Use: 19

Age of First Regular Use: 48

Last Use: Saturday 12 May, 2007

First Intoxication: NEVER

Pattern of Use: Occasionally

Quantity over past month: Approx 12-15 beers (perhaps less)

Who do you drink with? Alone

Where do you drink: Home

Reasons for drinking: Stress

Reasons for stopping: Too much to live for. Am presently happy, Healthy and Content

Consequences of Drinking

Legal:

Alcohol related driving convictions/outstanding charge/prison time/probation:

None

Interpersonal: Has drinking affected relationships with spouses or family members?

Stressed at times but never threatened

Vocational: Has drinking affected work performance/caused job loss or demotion?

NO

Medical: Positive responses from page one should be reported here:

Hx of past alcohol abuse currently appears stable. ?one recent possible seizure 9 April 2007.

History of depression stable on citalopram.

TREATMENT

Previous treatment(s)/Reasons for Relapse (if applicable)

Goes to 2 AA Groups. I need the support.

DIAGNOSIS

(Alcohol dependent not circled but Withdrawal deemed diagnostic)

(Hazardous or Problem Drinker not circled).

RECOMMENDED GOAL FOR ALCOHOL CONSUMPTION

ABSTINENCE

Goal-No alcohol at all.

Support systems-2 AA groups, Family and Friends

On July 16, 2007, the Registrar informed the Applicant that a longer period of stability was required, and she was requested to arrange for an up-to-date detailed report from her treating physician or a specialist in addictions medicine confirming that she has remained seizure free and abstinent from alcohol for a period of twelve months. This period may be reduced with confirmation that she has successfully completed an alcohol treatment program, and upon a favourable recommendation from a physician specializing in addictions medicine, with interpretation of MCV and GGT markers.

The Applicant submitted laboratory reports dated October 30 and 31, 2007.

EKG is within normal limits

GGT: 47 (normal <36)

MCV: 96 (normal 80-99)

Laboratory results for November 14 and December 5, 2007, did not include MCV or GGT results.

On February 27, 2008, the Registrar informed the Applicant that it was necessary to file an up-to-date assessment, as previously requested on July 16, 2007.

The Respondent relies on:

Section 47(1) (b)(g) of the *Highway Traffic Act*
Ontario Regulation 340/94 Section 14
CCMTA Section 13.2

The Applicant's Case

The Applicant stated that she was sitting at home at around 8 p.m. on April 9, 2007, and after a couple of beers she suddenly had a seizure. Her husband gave evidence to the Tribunal that he observed her changing colour and noticed her legs twitching three or four times. After she lost consciousness for three or four minutes he called 911. He told the operator that his wife was unresponsive and had her eyes closed. There was no incontinence of urine or tongue biting. She was not on medication. The paramedics did not give him a diagnosis.

The Applicant stated that she would go for days without a drink prior to April 9, and had started going to Alcoholics Anonymous after her son became concerned at changes in her behaviour due to excessive drinking. She was depressed and had been trying to cope with a disabled spouse for 20 years. Their house was completely destroyed by fire during the time her husband was on life support and her children were in a serious car accident around that time.

About five years ago she saw an addictions medicine specialist on a recommendation by her former Family Physician, who has since died.

Following the Notice of Suspension, she visited her Family Physician, Dr. C. and showed him the letter from the Registrar. He informed her that he did not wish to submit a letter as requested by the Registrar due to a past negative experience in a similar situation but he did complete the Alcohol Assessment and arranged for laboratory tests. She did not arrange for the results of an EEG and CT SCAN to be forwarded, as she assumed that they would be requested by the Registrar. She states that she was told that the EEG and CT SCAN were normal.

She stated that she sees Dr. C. every three months and has an appointment with an addictions medicine specialist in May. She admitted that she is not currently totally abstinent, her last drink being two weeks ago.

In Reasons for Appeal, dated February 20, 2008, the Applicant stated that she has been seizure free since April 9, 2007. She stated that she has a clean driving record and has never had an accident, and has abstained from alcohol. Her husband is a quadriplegic and is totally dependent on her.

Letters of support from her husband and daughter were submitted.

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 Registrar was justified in issuing a suspension upon receipt of an unsolicited Medical Condition Report, dated April 10, 2007, from a physician pursuant to Section 203 of the *Highway Traffic Act*, stating that the Applicant had suffered a seizure due to alcohol withdrawal.

The Alcohol Assessment Report completed by the Applicant's family physician states that she meets the criteria for alcohol dependence and was recommended for complete abstinence. She has admitted to the Tribunal that she is not abstinent and she has not filed up-to-date reports of GGT and MCV tests that could confirm abstinence.

The Applicant has not arranged for detailed up-to-date reports from a physician familiar with her medical history or from a specialist in Addictions Medicine and there is no medical support for re-instatement.

CCMTA Section 13.2 states:

Patients with a diagnosis of alcohol dependence, including those with alcohol induced seizures, should not be allowed to drive any type of motor vehicle. Persons habitually

dependent on alcohol should not drive until evidence of alcoholism is no longer a problem. These patients must complete a recognised rehabilitation program for substance dependence and remain alcohol free and seizure free for a specified period of time before recommencing driving.

STANDARD: MAY NOT DRIVE ANY MOTOR VEHICLE FOR 12 MONTHS DURING WHICH TIME THE INDIVIDUAL MUST REMAIN 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 Applicant has an appointment with an Addictions Medicine specialist in May 2008 and is hopeful of a favourable report. However, the Tribunal is not satisfied that she fully understands the specific requirements as outlined to her by the Registrar in letters sent to her on May 7, 2007, July 16, 2007, and February 27, 2008, in order for her case to be considered for re-instatement. The Tribunal recommends that she consult with members of her family, as well as the Addictions Medicine specialist, to meet the Registrar's requirements.

The Tribunal finds as fact that:

1. the Registrar was justified in issuing a Suspension of the Applicant's licence to drive upon receipt of an unsolicited Medical Condition Report by a physician pursuant to Section 203 of the *Highway Traffic Act*, stating that she had suffered an alcohol withdrawal seizure.
2. the Registrar was justified in continuing the suspension upon receipt of an Alcohol Assessment Report that confirmed a diagnosis of alcohol dependence.
3. the Applicant has failed to submit up-to-date detailed reports from a physician familiar with her medical history, including confirmation that she has remained seizure-free and alcohol-free for a period of twelve months, or a report by an addictions medicine specialist supporting a shorter period of time.

DECISION

Upon the application by the Applicant to appeal the decision effective May 17, 2007, of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Kevin Flynn, M.D.,
Presiding Member

RELEASED: April 17, 2008

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

4668 – 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: THE APPLICANT, unrepresented

RUSSELL MCKNIGHT, Agent for the Respondent

DATE OF
HEARING: March 17, 2008

By Teleconference

DECISION AND REASONS

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

FACTS

Dr. J.B. sent in a Medical Condition Report to the Ministry of Transportation ("MTO") on April 9, 2007, indicating that the patient (the Applicant) is suffering from a condition that may make it dangerous for the person to operate a motor vehicle, specifically:

Condition: Alcohol Dependence

Seizure (s) - Alcohol related.

The MTO wrote to the Applicant informing him that, having received a medical report, it had been decided that his driving privilege should be suspended. The letter outlined the steps he would have to take for his case to be reconsidered.

The Applicant was admitted to hospital on April 9, 2007, and the history and physical was completed by Dr. K.G. In this report, he wrote that the Applicant's girlfriend, on the evening of the day of his admission, witnessed a grand mal seizure and said that the same thing happened about a week before. Another grand mal seizure was witnessed by Dr. K.G. just after he had finished examining the Applicant. The girlfriend reported that the Applicant "has normally about 20 ounces of rum per day and only had 4 ounces today" and the patient agreed with this. The laboratory investigations were normal with the exception that the AST (liver function test) was slightly raised at 40. The ethanol was reported as being "less than 1", but it was not described what units this was in. The chest X-ray was normal. The report stated that the Applicant is a 54-year-old man who presents with an ethanol withdrawal seizure and has been admitted to the Step Down Unit.

When the Applicant left the hospital on April 10, 2007, the Discharge Summary was completed by Dr. J.B. stated, in part:

In the absence of any history of head trauma, previous history of seizures or any other cause for seizure, I would assume it was alcohol related. The patient has been averaging about 20 ounces of rum over the last 4 - 5 days. On the day of this event he also in the morning had rum and orange juice, plus half a glass of wine at his mom's.

A CT scan of head was done on April 10, 2007, and the report read "No intracranial abnormality is identified".

The MTO Alcohol Assessment Form was signed by the Applicant's family physician Dr. G. on May 24, 2007. In this form, under Personal Health History was written "Celiac Disease". Physical examination was normal with the exception of the finding of an essential tremor. The Audit score came to 13. Under Criteria for Alcohol Dependence, all the questions were answered in the negative. Under Diagnosis, it was written "Hazardous or Problem Drinker". The Recommended Goal for Alcohol Consumption was "Reduced Drinking".

Laboratory testing was done on the Applicant on June 28, 2007. The pertinent results are as follows:

MCV 101 - very slightly raised.
GGT 24 - normal.
Alk.phosphatase (liver function test) 81 - normal.
AST (liver function test) 149 - markedly raised.

The Applicant attended an alcohol rehabilitation program. Mr. J.S., Counsellor at the rehabilitation centre wrote a letter, dated August 16, 2007, stating in part as follows:

This letter will serve to confirm that [the Applicant] completed our short-term Residential program for the commencement of his recovery from the disease of alcoholism and/or drug addiction.

He was admitted to our [name deleted] Centre on July 26, 2007 and on completion of the program was transferred to our follow-up program on August 16, 2007.

[...]

In our opinion, [the Applicant] will continue to remain clean and sober as long as he applies himself to the program to which he was introduced at [name of the centre deleted].

On September 25, 2007, the MTO wrote to the Applicant informing him that it had been decided that his driving privilege should remain suspended. The letter went on to say that it was necessary for the office to receive a detailed, up-to-date assessment from his treating physician or a physician specialising in addictions medicine and that the report should confirm that he has remained seizure-free and abstinent from alcohol for a year. The letter also informed him that this period might be reduced upon a favourable recommendation from a physician specialising in addictions medicine.

The Certified Driving Record for the Applicant, dated February 29, 2008, indicated that there were no convictions, discharges or other actions and zero demerits points.

APPLICANT'S EVIDENCE

The Applicant admitted that he abused alcohol for 10 days prior to April 9, 2007, the day he was admitted to hospital. It was pointed out to him at the hearing that his girlfriend told Dr. K.G. that he normally had 20 ounces of rum per day. The Applicant said that this amount of alcohol per day was only what he had for that 10 days, and that certainly was not his daily average prior to that time. He explained that the reason why he consumed that quantity of alcohol at that time was because of a crisis. He found that he lost his job and his house, and that his finances were in a very poor way; he was depressed. He has not had any alcohol since July 20, 2007. He was asked why he had decided to abstain altogether, when, in the Recommended Goal for Alcohol Consumption, on the Alcohol Assessment Form, it was written "Reduced Drinking" rather than "Abstinence". He seemed to think that a clean break was the best.

The Applicant expressed some doubt whether indeed he had a seizure on April 9, 2007, or whether this was just some type of blackout.

He voluntarily went on the alcohol rehabilitation program as a resident, at his own expense. He found that the time spent there was worthwhile, not just the instruction and guidance, but also the conversations with others enrolled in the program. The Applicant

has been attending AA meetings about three times a week and he has a flawless driving record.

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 Alcohol Withdrawal Seizures it is written:

Standard: May not drive any 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.

The Tribunal notes that the Applicant suffered one seizure on April 9, 2007, and one about a week before that. They were all witnessed, and the last one was witnessed by a medical doctor. From the descriptions of these, they were tonic/clonic or grand mal seizures and they were diagnosed as such by Dr. K.G. on April 10, 2007. The Tribunal also notes that in the medical reports of April 9, 2007, by Dr. J.B., April 10, 2007 by Dr. K.G., and of April 10, 2007 by Dr. J.B., the seizures were considered to be "alcohol related". The laboratory test results of May 24, 2007 showed the GGT to be normal, and the MCV only minimally elevated, but the AST was considerably raised.

The Tribunal recognizes that the Applicant suffered a crisis in his life at the time that he consumed the quantity of alcohol described.

The Tribunal also recognizes that the Applicant completed a short-term, residential, alcohol rehabilitation program, and that he has been attending AA meetings regularly. He has a good driving record, and there is no evidence of there having been another seizure since April 9, 2007 (almost a year ago). He has stated that he has not consumed alcohol since July 20, 2007 (about eight months ago). The Tribunal finds this commendable.

With respect to driving, the Tribunal takes alcohol seriously and takes seizures, which are alcohol related, very seriously. It considers that an adequate period of time for rehabilitation accompanied by the receipt of medical reports is of great importance in such cases. The Tribunal is aware that there is no evidence of any laboratory test results since

May 24, 2007, at which time the liver function test AST was quite highly raised, although the GGT and MCV were either normal or almost so. The Tribunal is also aware that there is no evidence of any medical follow-up report or communication from the Applicant's family physician, Dr. G., since the Alcohol Assessment report of May 25, 2007. The Tribunal is of the opinion that as soon as favourable medical report or reports, accompanied by GGT, MCV and liver function results have been received from either the Applicant's family physician or an addiction specialist, then serious consideration should be given to the reinstatement of the Applicant's driving privilege.

DECISION

Upon the application by the Applicant to appeal the decision of the Registrar to suspend his driver's licence pursuant to Section 47(1) of the 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 24, 2008

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

4569 – MED – Medical

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: LYNDA TANAKA, Chair

APPEARANCES: JOHN MORRIS, Counsel, representing the Applicant

SCOTT HATTIE, Agent, representing Registrar of Motor
Vehicles

DATE OF

PRE-HEARING: April 23, 2008

By Teleconference

DECISION AND REASONS

A pre-hearing was held in this matter by teleconference with the parties' representatives attending, John Morris, counsel for the Applicant and Scott Hattie, Agent for the Respondent.

The Applicant has raised a human rights issue that he is discriminated against because of the process he is required to follow to get his licence back as compared to the process available for others. He argues that this process is unfair and he should be allowed to use the normal process that others can use to get his licence back. The parties agreed to submit an agreed joint document brief containing the correspondence and medical reports relevant to the appeal. In addition, the panel hearing the matter will need a description of the process that a person without the Applicant's licence history would have to follow to get his licence back, to show the distinction between the two processes.

The Applicant is anxious to have this matter resolved as expeditiously as possible. The Agent for the Respondent is unavailable for a month. Counsel for the Applicant has provided dates when he is available for the hearing in this matter. He has undertaken to provide to the Respondent the human rights case law that he is relying on well prior to the hearing and the Respondent's agent will

provide the Applicant's counsel with the recent Tribunal decision on a human rights issue.

Therefore the Tribunal orders as follows:

1. The parties will submit a joint book of documents including a cover sheet which both will sign attesting to the agreement, containing the medical reports and the correspondence outlining the process requirement for the Applicant, and an agreed statement of the usual process requirements for others seeking their licences, as noted above.
2. The Tribunal will hold a hearing in this matter on a day in the week of May 26 or alternatively, in the week of June 9. The Respondent's Agent will advise the Tribunal of any constraints on counsel's availability in those weeks on or before April 30. In the event that the Tribunal is not so advised, the Tribunal will set the date to accommodate the schedule for the Applicant's Counsel alone.
3. The Chair will assign two members to the panel to hear the matter. The parties will call their evidence and make their submissions on all issues. The panel will consider the merits of the case on the evidence concerning the medical condition issues pertaining to the Applicant. If the Applicant is unsuccessful in his appeal on these grounds, then the panel will make a determination of the human rights issue, or any other issue in the matter, as seems just to the panel.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka,
Chair

RELEASED: April 29, 2008

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).

4590 – MED –PSYCH –Psychiatric

APPEAL UNDER SECTION 203 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, Representing the Registrar of Motor Vehicles

DATE OF
HEARING: March 27, 2008

DECISION AND REASONS

FACTS

The Applicant is a 50-year-old female, who on October 4, 2005, was taken to the local hospital emergency by the police after reports from her husband behaving strangely. She was discharged after three days with appropriate psychotropic medication, to be followed up by her psychiatrist. A report of her condition was also sent to the Registrar of Motor Vehicle as per section 203 of the *Highway Traffic Act*. This report triggered the suspension of her driver's licence for medical reasons. Reconsideration would depend on the receipt of favourable up to date medical information, with the possibility of reinstatement if the medical conditions were to improve.

On April 5, 2007, her psychiatrist advised that the Applicant was recovering from a recent gynaecological procedure, but was otherwise under control and able to drive a motor vehicle safely.

On February 13, 2008, her psychiatrist submitted another report, which asserts that the Applicant attends regularly, demonstrates good judgement and suffers no physical impairment. His opinion was that there are no medical contraindications to allow her to allow her to drive a motor vehicle safely.

On March 3, 2008, the Registrar advised the Applicant that her doctor's reports were received, but do not supply the complete information previously requested. Consideration for reinstatement would depend on receipt of a complete psychiatric summary.

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).

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 O. 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*.

The Applicant has submitted up to date follow-up reports from her attending psychiatrist, but these do not provide the relevant medical information requested. What is not made

clear or perhaps misunderstood by the attending doctor is that it is not he/she that determines the Applicant's fitness to drive safely. That is the function of the Registrar of Motor Vehicles with, of course, the necessary medical report from the attending doctor.

This Tribunal does not have the necessary psychiatric diagnoses history or course of events, all as set out in the Ministry correspondence of November 12, 2006, Exhibit 1, to decide the applicant's ability to drive safely.

DECISION

Upon the application by the Applicant to appeal the decision of the Registrar dated November 12, 2006, to suspend her/his driver's licence pursuant to Section 47(1) of the 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 203 of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.
Medical Practitioner

RELEASED: April 9, 2008

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).

4624-MED-CARD-Cardiac

APPEAL UNDER SECTION 50(1) OF THE *HIGHWAY TRAFFIC ACT*,
R.S.O. 1990, CHAPTER 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: APPLICANT, unrepresented

RUSSELL McKNIGHT
Agent for the Registrar of Motor Vehicles

DATE OF
HEARING: March 12, 2008 Teleconference

DECISION AND REASONS

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

PRELIMINARY MATTERS

There were no preliminary matters.

FACTS

The Ministry of Transportation (MTO) suspended the Applicant's licence on February 15, 2007, having received a letter dated December 12, 2006, from Dr. M.T., who wrote:

I was asked to see the Applicant in consultation with respect to frequent episodes of syncope. I believe this patient's syncope is cardiac in nature. He is having at least one episode daily. I have advised the patient not to drive until this issue is resolved.

The Applicant's family physician, Dr. M.E. wrote a medical note, dated August 19, 2004, in which he stated, in part:

17 yr. old with 10 yrs. of postural syncope presenting gradually over a few mins, and if he fights it will lose consciousness for a few mins. Frequency about 20 attacks per yr. No palpitations during the events and most episodes no loss of consciousness, no focal deficits or seizure activity. No post-icter state...
Reviewed Emerg. note and tox screening positive for marijuana. No cocaine or IUDU as per patient. No significant ETOH.

Family physician Dr. M.E. arranged tests for the Applicant and, first, he underwent an Exercise Stress Test on October 18, 2004, with the following results:

Under Overall Impression: Normal Stress Test.
Under Conclusions: 18 year old male with longstanding history of syncopal episodes, and more recent onset of retrosternal chest pain with rest prior to syncopal episode. EST (Exercise stress test) normal today. Test terminated due to back discomfort.

An Echocardiogram, Doppler and Colour Flow test was done on October 19, 2004. This was normal.

Lastly, Dr. M.E. arranged a Tilt Table Test, which was done on September 14, 2005. In the Assessment it was written:

This therefore is a negative tilt table test, failing to provoke any features of vaso-depressors or cardio-inhibitory type neurally mediated syncope or syndrome.

Dr. M.E. wrote to "To whom it may concern" on March 15, 2007 as follows:

<The Applicant> comes in today to review his syncopal episodes, schizophrenia today. He has had his licence revoked and wants medical information to support his claim to have this re-instated. I have no information regarding his recent syncopal episodes suffered in <name deleted> or subsequent workup. He does have a chronic history of orthostatic lightheadedness and syncope for most of his life and we investigated this extensively in 2005 - notes enclosed. Of note, he states he has never had a syncopal episode when not standing - so I fail to see how his chronic syncopal episodes when standing might affect his ability to drive. In terms of <the Applicant's> schizophrenia, he states he has not been experiencing any hallucinations, no suicidality or homicidal ideation. His mental illness has never resulted in an automobile accident or citation.

The Applicant suffered a compression fracture of the L5 vertebra of the lumbar spine, when he was a passenger in a car involved in an accident. The reports on file dated October 14, 2004, November 23, 2004 and January 14, 2005 describe the injury, the treatment and the follow-up. One report, that of October 14, 2004, made reference to the August 19, 2004 medical report from the Applicant's family physician, Dr. M.E. and described some of the symptoms felt by the Applicant during these "lightheaded spells".

The MTO wrote to the Applicant on January 22, 2008, informing him that it was necessary for him to file an up-to-date assessment from his treating physician or a cardiologist regarding his reported episodes of loss of consciousness.

Certified Driving Record for the Applicant January 22, 2008.

No convictions, discharges or other actions.

Demerit points: zero.

Applicant's Evidence

The Applicant, now aged 21, explained that he had been having episodes of light-headedness for many years when standing. But, he said that since about the time that he had the Tilt Table Test (2005), he has been getting better. Before this time, if he fought this feeling and kept standing, he would go through a "greyness" and eventually black out. He has reached the stage when he is not having any blackouts. In the past, he never had a blackout when he was not actually standing, for instance if he was sitting. He said that since about the age of 19 he has put on weight. At about that age, in spite of being over six feet tall, he weighed only 140 lbs. Now he weighs over 200 lbs. He feels well and enjoys bicycling very long distances. He suffers from schizophrenia. He was hospitalised because of this for two or three months, which was in 2005 as far as he remembers. He has been well from this viewpoint since.

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

APPLICATION OF THE LAW TO FACTS

In the CCMTA Medical Standards for Drivers, under Syncope, the following is written beside Standard: Recurrent Episodes (I.E. two or more episodes within 12 months) - may operate a Class 5 or 6 vehicle after 3 months and a Class 1, 2, 3, or 4 vehicle after 12 months provided there is no obvious cardiac or neurologic cause.

The Deputy Registrar was obligated to suspend the Applicant's driving privilege after receiving the medical report from Dr. M.T., dated December 12, 2006. The Deputy Registrar had no way of knowing this at the time, but evidence now shows that Dr. M.T. who wrote this report was unaware that the Applicant had already been through extensive cardiology and other tests to try and find the cause for the syncopal attacks and that these were normal.

The Tribunal notes that at the time the Applicant had his licence suspended, he had a history of lightheadedness or syncope, and there was also pre-existing schizophrenia. To rule out a cardiac cause for the syncope and to investigate into other causes, the Applicant went through the Exercise Stress Test, (October 18, 2004), the Echocardiogram, (October 19, 2004), and the Tilt Table Test (September 14, 2005). These were normal. The Tribunal is of the opinion that further delay would serve no purpose. The tests described above, admittedly, were done in 2004 and 2005, but were clearly normal and are not likely to be any different if repeated now. When the Applicant was suffering from the syncope episodes, (which he says he no longer has), he is adamant that he would have this feeling only when he was standing. The Tribunal concurs with the sentiment expressed by the Applicant's family physician, Dr. M.E., who in his medical report of March 15, 2007 wrote:

Of note, he states he has never had a syncopal episode when not standing - so I fail to see how his chronic syncopal episodes when standing might affect his ability to drive.

It is, therefore, the decision of the Tribunal that the Applicant's driving privilege be reinstated.

DECISION

Upon the application by the Applicant to appeal the Registrar's decision, effective February 25, 2007, to suspend his driver's licence pursuant to Section 47(1) of the 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 set aside.

LICENCE APPEAL TRIBUNAL

Patrick Coffey, M.D.
Presiding Member

RELEASED: April 8, 2008

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

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Decisions under Highway Traffic Act

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

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OVER THE ROAD TRANSPORTATION INC. AND ON THE DOUBLE WORLD-WIDE
COURIER LTD.

APPEAL FROM A DECISION OF THE DEPUTY REGISTRAR
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990 c. H.8

TO SUSPEND CVOR CERTIFICATES AND TO SEIZE THE
PLATE PORTION OF THE PERMITS

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: RICHARD MEYERS, Agent representing the Applicants

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

DATE OF
HEARING: February 23, 2009 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

By Notice dated June 18, 2008 Over The Road Transportation Inc. and On the Double World-Wide Courier Ltd. (the “Applicants”) appealed the decision of the Deputy Registrar of Motor Vehicles to issue a 30 day Suspension and Seizure Order of their Commercial Vehicle Operator Registration (“CVOR”) certificates pursuant to section 47 and 47(1) of the *Highway Traffic Act* (the “Act”).

The CVOR certificate permits a commercial carrier to legally transport goods over Ontario’s roads. One certificate covers a registered carrier’s entire fleet. The Applicants are Ontario-based trucking companies operating in Ontario and the U.S.

History at Tribunal

Following the pre-hearing in September 2008, a consent adjournment was granted the Parties from an original hearing date of October 11, 2008 to December 12, 2008. Under the Act, the Appeal operates as a stay of the Order and thus, the Applicants continued to operate their trucking business throughout this period.

At the commencement of the evidence on December 12, the Parties' Counsel advised a conditional Agreement had been negotiated which effectively would settle all issues. They requested the Tribunal adjourn until January 2, 2009 on which date it was expected the conditions would be met, a settlement finalized and a Consent Order sought from this Tribunal. Their request was granted.

On re-convening on January 2 the Tribunal was informed the conditions had not been met and the hearing was required. The matter was put over to be heard on February 11, 2009.

On February 11 the Applicants sought a further adjournment. The basis for the request was that their counsel no longer acted for them. A letter dated February 2, 2009 from that lawyer, directed to the Tribunal and copied to the lawyer for the Registrar, advised he was no longer retained and surmised that the Applicants intended to represent themselves.

Counsel for the Ministry opposed the request noting the Tribunal's Rules of Practice only allow adjournments in rare circumstances. Counsel also pointed to the extensive time period which had elapsed since the original Order of the Registrar, an Order, he noted, which was motivated by concerns for the safety of the provincial motorists. Counsel further advised that, given the lack of notice from the Applicants that they would be bringing such a request, witnesses had been made available at some cost in time and convenience.

Sympathetic to the Applicants' desire for representation, the Tribunal allowed the adjournment. Costs were, however, granted to the Registrar as a consequence of the Applicants' failure to provide notice of its intention to ask for an adjournment and its failure to take any steps to retain new counsel despite the time which had elapsed since the February 2 notice from its original counsel. The adjournment was granted until February 23 *peremptory* against the Applicants.

A motion was brought by April Brousseau, Counsel for the Applicants, at the commencement of the proceeding on February 23, for a third adjournment. Ms. Brousseau advised her firm had only been retained the previous Thursday and required a longer time period to effectively represent their clients.

This time the motion was denied. Rule 12 of the Tribunal's Rules specify such requests will be denied where the Applicant has unreasonably delayed finding counsel. The circumstances revealed that the Applicants had been aware of their need for alternate

Counsel since February 2, but had not retained a representative until February 20, 2009. In the meantime, the Registrar's witnesses and the Tribunal have, at the public purse, made themselves available on these two occasions to proceed. The Tribunal noted further that the Order of the Registrar, instigated due to concerns for public safety, had effectively been held in abeyance for eight months since originally initiated last June. The public interest weighed against any further delay.

EVIDENCE

Adele Di Paolo

Ms. Di Paolo is a Carrier Safety Rating Administrator employed with the Ministry of Transportation. Her employment duties include following-up on public complaints against carriers, interviewing carriers, and preparing files for the issuance of Orders against carriers. She testified that approximately 1% of the registered CVOR holders receive some sanction from the office of the Registrar. These sanctions arise where a carrier's file demonstrates a specific serious event (i.e. a bankruptcy or a fatality), or a violation rate of over 100%. Sanctions available include an audit of the carrier, an interview with the principal and/or warning letters.

In April, 2008 Ms Di Paolo completed her Review of the Applicants CVORs.¹ She found that On the Double World-Wide Courier Ltd. had no vehicles registered to it and outstanding fines totaling \$880 dating over five years. Since no events had been recorded on this carrier during this time period, she concluded that it had ceased operation. This conclusion was not disputed by the Applicant.

Over the Road Transportation Inc. (the "Carrier"), on the other hand, was operational. It had a significant violation rate of 176% which she testified was extremely high. Since both number of kilometers traveled and size of fleet impact on the calculations and formula used to arrive at the violation rate, she telephoned the President of the Carrier, Richard Meyers, a number of times to verify the figures earlier provided by him in January 2008. At no time did Mr. Meyers respond to these telephone calls.

In her Review Ms. Di Paolo notes that over the 11 months from April 2007 to March 2008 further points were registered against the Carrier arising out of collisions and convictions.

The Carrier remained indebted to the Province for an outstanding \$27, 314, the bulk of which is attributable to one unpaid fine.

A United States Department of transportation audit of the Carrier, undertaken in July of 2006, revealed findings of false logs by drivers. While a Conditional Satisfactory rating resulted, the Department issued 26 recommendations including a number concerning

¹ Exhibit 3, Tab 5

greater accountability by drivers to the Carrier and greater supervision by the Carrier of drivers².

Five months later the Ontario Ministry of Transport had conducted an audit of the Carrier which revealed over 35 violations, a number of which were triggered by evidence of false records by the same named driver as that identified in the United States audit months earlier.³

Based on all of the above Ms. Di Paolo took her review to her superiors. The consequence was the issuance by the Deputy Registrar of the Order which proposed a 30 day suspension continuing until all outstanding fines had been paid.

The Applicant requested a Show Cause Hearing with the Deputy Registrar. This took place on May 15, 2008 in the presence of both Ms. Di Paolo and her Program Manager. Ms. Di Paolo's notes⁴ of the meeting reference Mr. Meyers information that he had hired outside consultants to assist in meeting compliance with the Ministry standards, but the relationship had broken down over a dispute concerning the retainer fee. Since 2006 Mr. Meyers had also hired two separate individuals to provide assistance in safety and compliance concerns; the first had "not met expectations" and the second had proved weak in administrative skills and was since placed "in charge of fleet maintenance". Mr. Meyers advised he would seek the assistance of the Ontario Trucking Association to obtain a service provider who would assist him in improving compliance.

Mr. Meyers alleged that he had appealed certain of the outstanding convictions. If Mr. Meyers' appeals of outstanding convictions were to be successful, Ms. Di Paolo noted that the violation rate for the Carrier would remain over the 100% limit.

In response to the Applicants' query concerning a safety plan provided to the Registrar, Ms. Di Paolo noted it had been considered insufficient to allow continued registration in that it had failed to name the individual consultant allegedly hired to assist the Carrier achieve compliance and, contrary to the Registrar's specific request, it failed to include any timelines for achievement of proposed actions.

Mr. Meyers testified for the Applicants. He stated he was often not made aware of driver convictions and/or fines as his drivers failed to disclose their occurrence. His wife, who manages the office and books, frequently failed to alert him when a written notice that a fine was outstanding was directed to the attention of the business. It was as a consequence of this that he had failed to pay the fines promptly, leading to significant increases in the amount outstanding.

His attempts to improve this situation consisted of his having hired a consultant company to audit driver logs and two other individuals to work inside the Carrier's office. For the reasons given at the Show Cause Hearing last May, none of these actions had

² Exhibit 3, Tab 11

³ Exhibit 3, Tab 10

⁴ Exhibit 3, Tab 3

been effective. Since then he has been referred to an individual to provide driver training on log maintenance but this, he concluded, was but a “band aid” solution and unworkable given the distance from his operation where the consultant lived.

While Mr. Meyers acknowledged that the drivers were his responsibility as they operated under his CVOR certificate, it was his evidence that they were independent contractors who he brokered to run freight contracts for him. As they were covered under strict requirements of their insurance coverage, it was his position they were obligated to meet all legal compliance standards when hired by him.

Although he claimed to be a very hands-on owner, it was his position he was simply not able to oversee their actions at all times. Many cases of violations were simply beyond his control. For example, Mr. Meyers testified that the second consultant he hired had told the drivers that they were fully compliant with the Act, when this was obviously not the case. When this turned out to be wrong, he concluded that often the drivers’ incorrect logs were the result of ignorance rather than dishonesty.

He noted that the violations and convictions were largely for failures to maintain logs or hours, which he referred to as “Ministry nitpicking”, rather than actual safety risks such as accidents or improperly maintained vehicles. Most of his transport was within a 500 kilometer radius of metropolitan Toronto which meant that there was in fact no real safety issue regarding distance and time violations.

In cross examination Mr. Meyers again acknowledged he was responsible for the conduct of drivers operating under his CVOR. However, it is his position that he can not tell these drivers what to do while operating a vehicle as it is the driver who best knows his own limits and has ultimate responsibility for complying with the traffic safety standards for each state in which he operates.

THE LAW

Section 47(1) of the Act provides:

Subject to 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 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 (d), (e) or (f).

ANALYSIS

The Act provides the Registrar with a mandate to ensure Ontario roads are kept safe for public use. It authorizes him to seize or suspend an operator's licence where the operator has a safety record which provides reason to believe the carrier will not operate his registered vehicles safely. In this case the Registrar concluded from its review of the Carrier's safety record that a sanction of a 30 day suspension was appropriate. The Applicant appeals the sanction. He submits such a lengthy suspension effectively puts him out of business.

Although the onus of proof lies on the Registrar, the Divisional Court has clearly stated that it is this Tribunal who determines whether the evidence presented is sufficient to meet the Act's requirements.⁵

There are thus two questions for the Tribunal:

(a) whether the past safety record of the Applicant is one which reasonably establishes it is a risk to the public safety; and

(b) if so, is there a less severe sanction available which fairly balances the interest of the Applicant to remain in business with the responsibility of the Registrar to protect the public.

(a) Past Safety Record:

A review of the evidence illustrates a carrier which has repeatedly failed to meet the obligations and responsibilities demanded of it in its capacity as a regulated entity. The violations which alerted the American regulatory body to recommend it improve its operation in 2006 continued to exist as recently as the last audit by the Registrar in 2008 where a significantly high violation rate found to exist by Ms. Di Paolo.

There was no assertion by Mr. Meyers that any procedure, policy, regulation or training had been instituted or undertaken by his management to respond effectively to any of these warnings. At the Show Cause Hearing held with the Deputy Registrar in May of 2008, the Applicant alleged he had hired three consultants to improve his drivers' records of violations, convictions and fines and each was unsuccessful. At the Hearing into the issues ten months later, this Tribunal heard the same litany of alleged efforts. It was apparent that nothing new had been attempted save for the hiring of yet another consultant who, the Applicant claimed, had also proved ineffective.

⁵ *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017; *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales and Omar Hassan Rahim* [2003] O.J. No. 603

The Applicant submitted that the Carrier's record of infractions was not indicative of any safety threat as it was primarily based on inadequate record keeping by his drivers. The Tribunal rejects this assertion. The purpose of these records is to provide for oversight and accountability. Where drivers incorrectly complete their logs and thereby falsify their hours of their work, distances traveled and/or loads carried, the purpose of those records is compromised. The result is a compromise in safety of operation. This relationship was demonstrated by the evidence presented in this case where, not only were logs improperly maintained by drivers, but a number of convictions and accidents were also not recorded by his drivers.

The Tribunal concludes that the continued operation of the Carrier is unchanged from that found to exist in Ms. Di Paolo's audit of last year and the violation rate remains far above the threshold tolerated. This status quo has not improved and shows no indication of doing so. As a result, there is reason to believe the Carrier will not operate the vehicles under its CVOR Certificate safely.

(b) Appropriate Sanction:

Although he admitted he was responsible for the carriers, the Applicant claimed he had met this responsibility in alerting the drivers to their obligations under the Act because, in fact, he cannot control their actions. This position is unacceptable. Given his authority over these drivers by virtue of his control of the CVOR certification they require, it is his responsibility to ensure that they are properly trained so as to fill out the records properly. Where he has knowledge that this is not occurring, it is his responsibility to take action. To simply repeat that compliance is required without either assisting drivers with compliance with the Act or disciplining them when they fail, is indicative of such lax management as to be in effect no management.

The evidence is clear that Mr. Meyers, as director and manager of the Carrier, does not operate a system of management wherein he exerts effective and diligent control of the trucks and drivers which operate under his CVOR licence. Instead, Mr. Meyers operates what is in effect a brokerage of independent drivers with their own vehicles operating under their own control. As a consequence, the Applicant is unable to effectively comply with the form of oversight necessary to meet his obligations under the Act.

At the same time, Mr. Meyers claims he is a hands-on owner and director. He states he has already made what he believes to be appropriate attempts to improve the compliance rate of the company. He had done this by hiring others to provide the necessary managerial oversight on three different occasions. Not one of these proved to be effective. In the ten additional months he has been given since the Registrar's Order to instill some workable system, the only evidence presented by the Applicant was his having hired another consultant who he stated was inadequate due to being located some distance away. Based on this, this Tribunal is not persuaded that Mr. Meyers is capable of properly controlling the Carrier.

What is needed in this situation is a new system of checks and balances whereby drivers are required to meet minimum educational standards, maintain reporting requirements and be subject to specified discipline models. There was no evidence that Mr. Meyers on behalf of Carrier had made any effort to formulate any such modifications to his management structure or demand his drivers abide by such employment terms, despite the evidence that he had been given fair opportunity to do so, most recently in the adjournment of December. Nor is there any evidence that the Carrier is willing to consider such a significant change to its operational system.

As a result, the Tribunal is convinced that the Carrier is not willing and/or able to administer and manage its operation in a manner which will in fact improve its safety record. No alternate sanction has been suggested which will reduce the current risk to public safety that the Carrier poses.

DECISION

By the authority vested in it under subsection 50 (2) of the *Highway Traffic Act*, the Tribunal directs the Deputy Registrar of Motor Vehicles to carry out his Suspension and Seizure Order of June 6, 2008 against the Applicants Over the Road Transportation Inc. and On the Double World-Wide Courier Ltd.

LICENCE APPEAL TRIBUNAL

Jane Weary,
Vice-Chair

RELEASED: March 31, 2009

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



MOTION

FERNANDE (LISE) PAYEUR - Order

APPEAL FROM A NOTICE OF SUSPENSION AND SEIZURE
ORDER ISSUED BY THE REGISTRAR OF MOTOR VEHICLES
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: No one appearing for the Applicant

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles (the "Respondent")

DATE OF
HEARING: January 28, 2009 *by teleconference*

ORDER

This motion was requested by Counsel for the Respondent in order to seek costs against the Applicant pursuant to Rule 14 of this Tribunal's Rules of Practice.

This motion was heard by telephone conference and ample notice was given to the Applicant.

Numerous attempts were made to contact the Applicant prior to the scheduled time for the motion, being 9:30 a.m. on January 28, 2009, and voice-mail messages were left where possible. As late as 9:45 a.m. on the date of the motion, and during the motion, calls were made to all six telephone numbers that were in the file for Ms. Payeur or her Agent, Mr. Butler. While two telephone numbers were out of service, voice-mail messages were left at two other telephone numbers.

The motion proceeded without the attendance of Ms. Payeur or anyone on her behalf.

Mr. Forbes' representations on behalf of the Respondent referred to the request for adjournment two days prior to the December 18, 2008 hearing date, the non-attendance of the Applicant at the hearing, and the Applicant's conduct in not abiding by the Tribunal's Order from the pre-hearing conference in this matter. The Respondent had subpoenaed witnesses for the hearing and two individuals were required to travel from out of town for the hearing in Ottawa. Counsel for the Respondent suggested that there must be consequences for a party engaging in the appeal process without following through.

In the Tribunal's Order dated January 12, 2009, there is a detailed description of the Pre-Hearing Order and the action required by the Applicant thereafter, the request for the adjournment of the hearing by the Applicant and the resulting communications. The Tribunal's reasons for proceeding with the hearing in the absence of the Applicant were also discussed, as was the intention of the Respondent to seek costs against the Applicant.

The Rules of this Tribunal allow for an award of costs where a party has acted "unreasonably, frivolously, vexatiously, or in bad faith" [Rule 14.2 and 14.3]. In the current circumstances, the amount of costs may not exceed \$800.00 [Rule 14.4 (2)(b)].

It is this Tribunal's finding that the Applicant's conduct, as described above and in previous Orders, meets the threshold of acting "unreasonably, frivolously, vexatiously, or in bad faith".

Therefore, the Tribunal orders as follows:

1. The Applicant shall forthwith pay to the Respondent costs in the amount of \$800.00.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: February 5, 2009

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



OVER THE ROAD TRANSPORTATION INC. & ON THE DOUBLE WORLD-
WIDE COURIER LTD.

APPEAL FROM A NOTICE OF SUSPENSION AND
SEIZURE ORDER ISSUED BY THE REGISTRAR OF
MOTOR VEHICLES UNDER THE *HIGHWAY TRAFFIC*
ACT, R.S.O. 1990, c. H.8

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: RICHARD MEYERS, Agent representing the Applicants

MURRAY FORBES, Counsel appearing for the Registrar of
Motor Vehicles

DATE OF
HEARING: February 11, 2009 Toronto

ADJOURNMENT ORDER

Following this Tribunal's Order of January 2, 2009, the hearing into this appeal was to resume, on consent of both Parties, this morning at 9:30 a.m. On February 2, 2009 the Tribunal received a fax from the paralegal hitherto representing Over the Road Transportation Inc. and On the Double World-Wide Courier Ltd (the Applicants) advising his retainer in this matter had terminated.

At the commencement of this morning's proceeding, Mr. Meyers, Agent and Principal of the Applicant corporations, requested an adjournment be granted to allow him sufficient time to retain counsel. He stated that the majority of these proceedings to-date had been handled by the paralegal who was no longer working for him due to issues concerning fee payment. He had not enough time to arrange for alternate representation and was not confident in representing the Applicants himself.

Counsel for the Deputy Registrar opposed the request. Although faxed a copy of the February 2nd notice to the Tribunal from the paralegal, the Deputy Registrar's office had only been contacted by the Applicants' Agent yesterday that this adjournment request would be forthcoming. Witnesses from out of town had

already been arranged at some inconvenience to themselves. Mr. Forbes stressed that the Applicants had continued to operate their regulated business despite the Suspension and Seizure of last July as a direct consequence of the appeal, and subsequent settlement attempts, with the result that the public protection mandated by the *Highway Traffic Act* (the "Act") has been compromised.

In the event the request was granted, Mr. Forbes submitted that costs should be awarded against the Applicants under Rule 14, notice of which had been provided to the Applicants' Agent by letter dated February 10, 2009. Mr. Forbes requested the Tribunal order that payment of such costs be a condition of the adjournment.

Having considered the parties' positions and arguments, the Tribunal will allow the request to adjourn based on the fact that the Applicants' Agent believes himself inadequately prepared to proceed, the hearing is only scheduled for one day and the Registrar's witness was the sole witness. The Applicants are currently licensed such that it is their right to continue in business, which is at stake. Procedural fairness and natural justice might, therefore, require a longer time period than one week in which to arrange for representation.

However, the fact is that parties appearing before the Tribunal are provided with the Rules of the Tribunal Practice Directions which clearly state that adjournments are not granted as of right and that it is the party's responsibility to ensure retained counsel is available on a date that has been set by the Tribunal. The Tribunal is not satisfied that Mr. Meyers made reasonable efforts to retain alternate counsel promptly. Further, it is common courtesy, as well as stipulated in the Tribunal Rules, that adequate notice of an adjournment request be made to the other parties to the proceeding as well as to the Tribunal. Mr. Meyers made no attempt to contact either until the day before the appeal was scheduled to be heard. Given these considerations the Tribunal is satisfied that Mr. Meyers has acted unreasonably with the result that the Deputy Registrar, his witness and the Tribunal have been inconvenienced. Costs payable by the Applicants for the day's adjournment in the amount of \$800.00 are granted to the Deputy Registrar.

Mr. Meyers indicated he will have this sum paid before the appeal hearing resumes. Despite Mr. Forbes submissions to the contrary, the Tribunal is not persuaded its broad powers to manage its processes are adequate to support its making a cost award a condition of an applicant's substantive right to present an otherwise properly filed appeal. The argument that it does so is therefore rejected.

This appeal is adjourned *peremptory* on both parties to **February 23, 2009**, and will take place at the Tribunal offices commencing at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: February 20, 2009

FILE NAME: 4926.cvor.Over the Road.adj.order.doc

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



FERNANDE (LISE) PAYEUR

APPEAL FROM A NOTICE OF SUSPENSION AND SEIZURE
ORDER ISSUED BY THE REGISTRAR OF MOTOR VEHICLES
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: No one appearing for the Applicant

MURRAY FORBES, Counsel appearing for the Registrar of Motor
Vehicles (the "Respondent")

DATE OF
HEARING: December 18, 2008

Ottawa

ORDER

A hearing was scheduled in this matter for November 25, 2008, in Ottawa at 9:30 a.m., by Notice of Hearing from the Tribunal dated September 22, 2008.

A teleconference pre-hearing was held on October 15, 2008, in the presence of David Butler, Agent appearing for the Applicant and Murray Forbes, Counsel appearing for the Respondent.

By Order dated October 28, 2008, the hearing was adjourned to December 18 and 19, 2008, in Ottawa at 9:30 a.m.

This Order also noted, in paragraph 2, an undertaking on the part of the Applicant to file an appeal with fee in order to consolidate another matter with this appeal, by October 31, 2008. The consolidation was not effected, as the Applicant did not meet her undertaking.

The Respondent requested one summons to a witness. The Applicant made no request for summonses.

On December 16, 2008, the Applicant requested an adjournment of the hearing on the basis that "Due to the closeness of Christmas holidays, many of our witnesses advised us that they will not be available on the scheduled dates. Without witness it would be impossible to proceed from our point".

An exchange of correspondence (with all Parties copied) followed, as summarized here:

- 1) On December 16, 2008, the Tribunal advised the Applicant that the written consent of the other party and the availability of all Parties, in writing, were required prior to 4:00 p.m.;
- 2) The Respondent, by letter of Mr. Forbes, advised that it did not consent to the adjournment;
- 3) The Tribunal advised the Applicant that without the Respondent's consent, the hearing would be proceeding as scheduled; the Applicant was also advised that an adjournment could be requested in person at the onset of the hearing and if the panel did not grant the adjournment, then the hearing would proceed;
- 4) The Applicant advised Mr. Forbes that "I will be attending alone at the hearing this week to seek the adjournment that we need to proceed with our case";
- 5) The Applicant, under separate cover, made a settlement proposal to the Respondent;
- 6) The Respondent, by letter of Mr. Forbes, advised that the proposal was not acceptable and "it is our intention to support the Registrar's order before the Tribunal".

It is also noted that Mr. Butler, on behalf of the Applicant, contacted the Tribunal by telephone on December 16, in the afternoon, to ask what the consequences of either not being granted an adjournment or not appearing at the hearing would be. The consequences of each were explained to Mr. Butler in detail.

At 9:30 a.m., December 18, 2008, only Counsel for the Respondent, Mr. Forbes, the Respondent's representative, Ms. Adele DiPaolo, and a witness summoned by the Respondent, Mr. Chris McDonald, were in attendance at the hearing. The Applicant and her Agent were both absent.

At 9:35 a.m., the hearing commenced and the Applicant's absence was noted. The hearing was adjourned for thirty minutes. During this time, the Tribunal office attempted to contact the Applicant at all of the telephone numbers on file, and voicemail messages were left. Counsel for the Respondent also attempted to contact the Applicant and left voicemail messages.

At 10:10 a.m., the hearing resumed and the local site conditions (a transit strike and accumulation of snow making commuting and parking extremely difficult) were noted. As a result, the hearing was adjourned to 11:00 a.m.

At 11:00 a.m., the hearing resumed and it was noted that the Applicant had not contacted either the Tribunal office or the Gillespie Reporting Services where the hearing was being held, or the other party in this matter.

The Notice of Hearing states “upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you”. In addition, on December 16, 2008, the consequences of a failure to attend were explained to the Applicant’s Agent. Rule 2.10(1)(d) of the Tribunal’s Rules of Practice provides that the Tribunal may dismiss an appeal when it is abandoned. Rule 2.12 provides that when a party fails to attend before the Tribunal, the Tribunal may treat the party’s hearing as abandoned and dismiss the matter.

At 11:10 a.m., the hearing proceeded in the absence of the Applicant.

At 11:15 a.m., Counsel for the Respondent made a motion to treat the non-attendance of the Applicant, as abandonment by her of this appeal. Counsel for the Respondent also noted his intention to request costs against the Applicant, which he will do in writing shortly.

Therefore, the Tribunal orders as follows:

1. The motion of the Respondent is consistent with the LAT Rules of Practice, and in the circumstances, as stated above, the motion is, hereby, granted.
2. The matter of costs is reserved pending receipt of a notice of request for an order as to costs.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: January 12, 2009

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



T.B. CONCRETE & AGGREGATES LIMITED &
JOHN'S GARAGE (EAU CLAIRE) LTD.

IN THE MATTER OF an appeal by T.B. Concrete & Aggregates Limited & John's Garage (Eau Claire) Ltd. to 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 28th April, 2008, with respect to the CVOR Certificate Numbers 123-002-540 & 087-016-787 and Vehicle Permits of T.B. Concrete & Aggregates Limited & John's Garage (Eau Claire) Ltd.;

AND IN THE MATTER OF the Safety Record of T.B. Concrete & Aggregates Limited & John's Garage (Eau Claire) Ltd. and Unpaid Fines of T.B. Concrete & Aggregates Limited & John's Garage (Eau Claire) Ltd. & Marcel Houle.

TRIBUNAL: PATRICIA L. CASSIDY, Vice-Chair

APPEARANCES: MARCEL JOHN HOULE, Agent, representing the Applicants

MURRAY FORBES, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF
PRE-HEARING: September 22, 2008 North Bay

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by T.B. Aggregates Ltd. and John's Garage (Eau Claire) Ltd. (the "Applicant") respecting the decision of the Registrar of Motor Vehicles (the "Respondent") made pursuant to sections 47 and 47.1 of the Ontario *Highway Traffic Act* ("HTA").

On March 25, 2008, a Notice of Cancellation and Seizure was issued proposing the cancellation of CVOR certificates issued to the Applicant as well as the plate portion of permits for all commercial motor vehicles and trailers then registered in the names of T.B. Concrete & Aggregates Ltd. and John's Garage (Eau Claire) Ltd. for 30 days.

On April 24, 2008, the Applicant had the opportunity to make submissions to the Deputy Registrar to show cause why the Cancellation and Seizure Order should not be issued but was not persuasive. The Deputy Registrar advised he had considered the Applicant's submissions and safety record but remained concerned about highway safety. Therefore, the Deputy Registrar ordered that, pursuant to sections 47 and 47.1 of the *Highway Traffic Act*, that as of May 5, 2008, CVOR Certificates #123-002-540 and #087-016-787 and the plate portion of permits for all commercial motor vehicles and trailers issued to T.B. Concrete & Aggregates Ltd. and John's Garage (Eau Claire) Ltd. be suspended for 30 days and thereafter until all 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. The Suspension and Seizure was to be effective on May 5, 2008 at 9:00 a.m., Eastern Daylight Saving Time and was to remain in effect for 30 days and thereafter until the payment of all unpaid fines had been made, to the courts, for T.B. Concrete & Aggregates Ltd., John's Garage (Eau Claire) Ltd. and Marcel J. Houle. The order was dated April 28, 2008.

On May 8, 2008, the Applicant filed a Notice of Appeal of the Deputy Registrar's order dated April 28, 2008 with the Licence Appeal Tribunal ("LAT").

On July 25, 2008, a Pre-hearing was conducted by Simon Dann, Vice-Chair of LAT. No settlement was reached at the Pre-hearing and the matter was ordered to proceed to a hearing.

FACTS:

Mr. Marcel J. Houle owns the Appellant companies which consist of 10 commercial motor vehicles and 6 trailers, which are used for hauling logs and transporting sand and gravel. Presently, the Applicant is only operating one vehicle at a time since the only operator is Mr. Marcel Houle himself. In the fall of 2007, Mr. Houle terminated the employment of all of his drivers and now operates the vehicles himself. The vehicles operate on 10-day trip permits rather than being licensed in an attempt to keep operation costs down. Not all of the vehicles operate all of the time. The vehicles are all used for different things but the only operator is Marcel Houle. Since the vehicles are only being operated sporadically and as required, the Applicant chooses to operate on 10-day trip permits. The Applicant is based out of the Houle home in Mattawa, Ontario.

This matter has its roots in a history of the Applicant and their owner, Mr. Marcel Houle, not paying fines. Although Mr. Houle acknowledges the fines and says he is prepared to pay them, he has not done so. Neither has he made any partial payments nor has he presented a plan outlining how or when he proposes to pay the fines.

EVIDENCE:

The Ministry called only one witness, James Kirchner, who is a carrier safety-rating administrator with the Ministry. Essentially, he analyses carriers' files for sanctions. Mr. Kirchner testified about the CVOR automated system and explained that the system monitors activities and triggers files for sanctions review and how it does so.

Mr. Kirchner testified that the Applicant file was brought to his attention because of unpaid fines. He testified that, through his investigation, he determined that Mr. Marcel Houle was the president of John's Garage (Eau Claire) Ltd. and T.B. Concrete & Aggregates as well as the former Twin Bridge Aggregates Ltd. His investigation revealed that those companies and Mr. Houle personally, all had outstanding, unpaid fines. Mr. Kirchner testified that on October 22, 2007, an outstanding fines notice or Warning letter was issued to T.B. Concrete & Aggregates Ltd. indicating outstanding fines in the amount of \$7,270.00. All of those fines remain outstanding and, an additional amount, identified under the name of Twin Bridge Aggregates Ltd. is outstanding for \$1,595.00. Mr. Kirchner testified that Twin Bridge Aggregates Ltd. was owned by Mr. Houle and that articles of amendment changed the company name from Twin Bridge Aggregates Ltd. to T.B. Concrete & Aggregates Ltd. Further, Mr. Marcel Houle has outstanding fines in his own name in the amount of \$2,800.00. Mr. Houle is also the president of John's Garage (Eau Claire) Ltd., which has outstanding fines in the amount of \$2,926.25.

Mr. Kirchner testified that the Ministry feels strongly about the payments of fines and that fine payment is very important to the program as a deterrent. He testified that it is imperative that there be a level playing field and, therefore, people need to pay their fines. He further testified that a failure to pay fines raises questions about one's ability to maintain their vehicles. If the financial resources are not available to pay fines then the question is raised whether or not the resources are available to ensure proper maintenance and safety.

The Applicant did not dispute the evidence of the Ministry regarding outstanding unpaid fines nor the amount alleged to be outstanding. Rather, the evidence of Lise Houle, Marcel Houle's wife, is that she and the Applicants have incurred considerable costs as a result of vandalism on and to their property and they have not had the funds to pay the outstanding fines.

Mr. Marcel Houle testified that he attended this hearing to show why he hadn't paid the fines. Essentially, he affirmed the evidence of his wife, Lise Houle, that he has experienced financial difficulties due, in large part, to vandalism on and to his property and he has not had the funds to pay the fines. He testified that he intends to pay them but that he wanted time to do so stating he has lost time and money repairing the damages from the vandalism they have suffered. The vandalism, according to the testimony Lise and Marcel Houle began in 2000. The evidence is that it has included damage to the engine on the crusher, which caused it to explode; foreign matter was found in the oil. Altogether, Lise Houle estimates they have lost about \$500,000.00 to vandalism.

In addition to the equipment identified, Mr. Houle testified that they own a garage, which operates on a part-time basis, and a gravel and aggregate plant. The house, garage and business are located on 200 acres of land, which they own and the concrete plant is located on a separate 100-acre parcel of land.

ISSUES:

It is the position of the Registrar that the imposition of a 30-day suspension of the Applicants' operation, pursuant to the order, is appropriate having regard to the record of unpaid fines which the Applicant acknowledges. The Ministry takes the position that, if a fine is assessed, it has to be paid. That is the expectation for all carriers. Fines are designed to be a deterrent and must be paid if there is to be a level playing field.

The Applicant takes the position that, notwithstanding the fact that the fines have been outstanding for a considerable period of time and they have made no payments to reduce them or arrangements to re-pay them, they ought to be given more time to pay. As of the conclusion of the hearing, the Applicants had not presented any plan or proposal for the payment of the outstanding fines.

THE LAW:

The relevant provisions of the Highway Traffic Act state:

- 22. (1) The Lieutenant Governor in Council may make regulations,
 - (e) governing the suspension or cancellation of CVOR certificates under subsection 47 (1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47 (2);
- 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).
- (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.

This appeal comes to the Licence Appeal Tribunal by virtue of Section 50(1) of the H.T.A., which provides:

Appeal

50.(1) Every person aggrieved by a decision of the Minister made under subsection 32 (5) for which there is a right of appeal pursuant to a regulation made under clause 32 (14) (n) 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.

APPLICATION OF LAW TO THE FACTS:

As required by the legislature, the Respondent's primary concern is for highway safety, which it ensures by administering the legislative provisions imposed by the legislature. Those provisions provide for penalties, which include the levying of fines upon conviction for failure to comply with the legislative and requirements. In addition, the Respondent must consider the Applicant's right to operate its business and earn a livelihood. The Applicant has had a great deal of time to address the fines outstanding but has not done so. No evidence was given regarding attempts to negotiate a payment plan or of attempts to obtain funding or any attempts of any kind to pay the fines. In fact, the Applicant did not dispute the evidence of the Ministry at all and simply asked for more time to pay the fines.

ORDER:

For the reasons stated, the Applicant will have 30 days from the date of this order to settle and pay all of the fines outstanding. If the Applicant fails to resolve this matter within 30 days from the date of this order, the decision of the Registrar to issue the suspension and seizure order will be confirmed and will remain in effect until payment of all unpaid fines has been made for T.B. Concrete & Aggregates Ltd., John's Garage (Eau Claire) Ltd. and Marcel J. Houle. John's Garage (Eau Claire) Ltd.

LICENCE APPEAL TRIBUNAL

Patricia L. Cassidy
Vice-Chair

RELEASED: November 13, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



3394603 CANADA INCORPORATED, o/a HARMAN TRANSPORT AND 1445913
ONTARIO INCORPORATED, o/a HGC

APPEAL FROM A DECISION OF THE DEPUTY REGISTRAR
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990 c. H.8

TO SUSPEND CVOR CERTIFICATES AND TO SEIZE THE
PLATE PORTION OF THE PERMITS

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: CAROLE MCAFEE WALLACE, Counsel, appeared on behalf of the
Applicants

MURRAY G. FORBES, Counsel, appeared on behalf of the Deputy
Registrar

DATES OF
HEARING:

June 12, 2008
October 16, 2008

Toronto

DECISION AND ORDER

This is an appeal by 3394603 Canada Incorporated, o/a Harman Transport ("Harman Transport") and 1445913 Ontario Incorporated o/a HGC ("HGC") to the Licence Appeal Tribunal (the "Tribunal") from a suspension and seizure order by the Deputy Registrar under the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act").

FACTS

Mr. Jasvinder Singh Shoker is President of Harman Transport and, since January 2008, of HGC. Mr. Shoker started his trucking business in 1994/95 by obtaining his AZ trucking licence and driving a truck. After two years of learning the vehicular side of the business, Mr. Shoker bought five trucks which he leased to different companies. In May, 1999 he started Harman Transport and operated the five trucks himself. He specializes in sending general freight and perishables to and from America. His company grew quickly and by July 2007, he had a fleet of 38 trucks. Unfortunately, as the fleet grew, so did the problems.

The regime for granting Commercial Vehicle Operator's Registration ("CVOR") certificates and monitoring highway safety focuses on three principal measurements,

which the Ministry of Transport regards as a reasonable proxy for highway safety. The measurements are taken from police reports and from weight scale inspections. On-site facility audits are also done by the Ministry. The Ministry measures collisions, convictions - of drivers, and inspections - of drivers and vehicles - and arrives at a blended violation rate which is measured over a rolling 24-month period and which is compared to a threshold rate. If the blended violation rate reaches 35% of the threshold rate, then the CVOR holder is issued a warning letter. If the blended violation rate is between 65% and 80% of the threshold, then a facility audit is undertaken, which may result in further action being required. If the blended violation rate is between 80 and 100%, then the registrant is called in to the Ministry for an interview and is expected to produce an action plan for significant improvement. If the blended violation rate exceeds 100% of the threshold rate, which occurs in fewer than 1% of trucking fleets, then the Ministry enforces a series of sanctions, which are designed as punishments. These sanctions include suspensions of varying periods, usually between 7 and 30 days, and ultimately the termination of the CVOR certificate. When suspensions are proposed, the CVOR certificate holder has an opportunity to show cause why the suspension should not occur. This usually involves, among other things, an improvement action plan. However, the Ministry takes the position that it is not in the business of advising CVOR certificate holders how to run their business, so the Ministry does not coach CVOR certificate holders. Nor does the Ministry advise on the effectiveness of the proposed improvement action plans. There are industry associations to which the Ministry will refer CVOR certificate holders for such advice and coaching.

In May of 2000, the Ministry issued a warning letter to Harman Transport. The violation rate continued to deteriorate, and in March, 2001, the Deputy Registrar conducted an interview with Harman Transport. Harman Transport discussed actions they would take including training and testing of drivers, which was to be done by Mr. Shoker, and informing drivers of company policies. By November, 2002 the violation rate was deteriorating again and the Ministry conducted a facility audit, which Harman Transport failed. The facility audit was reviewed with Harman Transport but no specific actions were proposed. By June, 2004, Harman Transport had 22 trucks and a blended 24 month violation rate of 195%. This rate was deteriorating rapidly. In the six months preceding the report, the violation rate had reached an alarming 330.9% of the threshold rate. In 2004, a proposal to suspend Harman Transport's CVOR certificate was issued. During the show cause meeting, the Ministry was introduced to an insurance broker who had intervened to help Mr. Shoker put his operations in order. The broker advised that in his opinion, "Mr. Shoker was not aware of the many responsibilities required of him."¹ For example, Mr. Shoker was relying on inspections at the weighing scales to determine whether his trucks needed maintenance. These inspections are for the purpose of determining whether the truck is safe for use on the road and should not be part of any preventive maintenance program. The insurance broker advised that Harman Transport had hired a consultant and that, while a lot of work remained to be done, there was some improvement in the management of the operations. Mr. Shoker became a certified mechanic in 2004 so that he could

¹ Exhibit 3, Tab 13, p. 218

understand what was involved in maintaining his fleet. In the show cause meeting, Harman Transport produced a list of proposed actions, including greater education of drivers and greater scrutiny of vehicles. This was not considered adequate by the Deputy Registrar and in January, 2005 a Suspension and Seizure Order was issued for 7 days.

The violation rate of Harman Transport did improve, but the company was a revolving door for safety managers and the violation rate began to rise again. By the spring of 2007, the violation rate was back over 100%. In 2006, two drivers for Harman Transport were killed in an accident in America, and as a result, the cost of insurance for Harman Transport to operate in America became prohibitive. From July 2007, Harman Transport ceased operating its trucks and, instead, it leased some trucks in its fleet to HGC, a small trucking company owned by a relative of Mr. Shoker. HGC had a commendable safety rating but was in financial difficulty. In the fall, the operations of the two companies were merged, and in January, 2008 Mr. Shoker took over HGC and became its President. Prior to Mr. Shoker's assuming control of the company, HGC had a 24-month violation rate of about 20%, which is acceptable. However, the size of the operations has grown quickly to 70 trucks and the violation rate of HGC is deteriorating. For 24 months ending April 24, 2008 the blended violation rate is about 27% of the threshold rate. While this is still below the 35% violation rate which the Deputy Registrar normally considers acceptable, the rapid deterioration concerned the Deputy Registrar and he proposed to suspend the CVOR certificates of both Harman Transport and HGC. During the show cause meeting, the Deputy Registrar was introduced to Darryl Watson, the Safety and Compliance Manager hired by HGC in December, 2007.

Mr. Watson testified to his extensive experience in the area of safety compliance management. Since December, he has put in place basic management tools that are required to measure and manage safety compliance. He has introduced and is monitoring training for the drivers, has hired on-site mechanics and has introduced company policies and schedules for truck inspection and maintenance. He has also introduced an escalating set of disciplinary actions for drivers who are not properly inspecting their trucks or keeping proper records. During the show cause meeting, HGC submitted a full action plan to improve the safety management and compliance processes and procedures. Mr. Watson testified as to how this plan is being implemented. The plan has not been entirely implemented and some parts of it have evolved as Mr. Watson gained familiarity with the operations of HGC. Mr. Watson was continuing to add management processes, some of which were in addition to those proposed in the show cause meeting.

When asked what had caused the persistent unacceptable violation rates of Harman Transport and what actions would be required to improve matters, Mr. Shoker offered two thoughts. First, he testified that he had used best efforts to improve safety but had been let down by his drivers. He went on to opine that what was required now to improve matters was to instruct his drivers to appeal convictions they receive. Mr. Watson offered the opinion that much work remained to be done to train the drivers and oversee their conduct, specifically relating to proper truck inspections and routine

maintenance. However, Mr. Watson was optimistic that Mr. Shoker was beginning to understand what is required for a fleet of this size to comply with the safety requirements of the Ministry and the Act. Mr. Watson had been given a free hand to hire and fire drivers and mechanics, and Mr. Shoker had supported the actions he has taken to date.

The Deputy Registrar remains concerned about the safety of HGC's operations and is proposing a suspension of 30 days for both HGC and Harman Transport.

After the evidence was entered, there was an adjournment of several months before the closing submissions of counsel were heard. During the adjournment, Ms. McAfee Wallace, counsel for Harman Transport and HGC, advised the Tribunal that Mr. Watson had left the company and had been replaced by another safety manager. Ms. McAfee Wallace expressed the opinion that the replacement safety manager was equally qualified and experienced. Both Mr. Watson and his successor attended the resumption of the hearing, but Ms. McAfee Wallace did not seek to re-open the case and no further evidence was given.

LAW

Under the Act, the Registrar and, by extension the Deputy Registrar, has a wide mandate to regulate the trucking industry with the objective of ensuring the safe operation of commercial vehicles.

Subsection 47 of the Act reads, in part:

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

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

47(2) As an alternative to a suspension or cancellation under subsection (1), the Registrar may, subject to section 47.1, restrict the number of commercial motor vehicles that may be operated by a holder of a CVOR certificate during the period that the Registrar stipulates.

There is an appeal from the decision of the Registrar to the Tribunal. Section 50 of the Act provides, in part:

50 (1) Every person aggrieved by a decision of the Minister made under subsection 32 (5) for which there is a right of appeal pursuant to a regulation made under clause 32 (14) (n) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

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

Mr. Forbes, counsel for the Deputy Registrar, submitted that the right to appeal set out in Section 50 of the Act is restricted by the operation of Regulation 574 to the Act. Regulation 574 sets out detailed procedures for an appeal and subsection 3(7) of the Regulation reads:

At any hearing under this section, the Board shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.

Regulation 574 is an anachronism. It originally established procedural rules for an appeal to a predecessor board to the Tribunal. The operation and rules of the Tribunal are now set out in the *Licence Appeal Tribunal Act, 1999*, S.O. 1999 c.12 Schedule G and in the Tribunal's Rules of Practice, July 2008. Regulation 574 sets out a timeline for appeals which is not followed by either the Tribunal or the Ministry, and establishes fees which are outdated. Mr. Forbes does not argue that subsection 3(7) should apply as written to this appeal. He concedes, properly, that the Deputy Registrar is bound by a line of Divisional Court decisions establishing the nature of the appeal hearings before the Tribunal from decisions like those of the Deputy Registrar. These decisions may be summarised by the decision in *Zahariev (c.o.b. Janex) v. Registrar, Motor Vehicle Dealers Act* [2005] O.J. No. 5159. In *Zahariev*, the Divisional Court held:

The question that the Tribunal must ask itself is not whether the Registrar was wrong. Instead, the Tribunal is required to make an independent decision as to whether the criteria for depriving the Applicant of his license have been proven, showing no deference to the initial decision of the Registrar.

The court in *Zahariev* cites with approval the Divisional Court decision in *Registrar, Motor Vehicle Dealers Act v. Shine Car Sales* (2003), 40 M.V.R. (4th) 86 (Ont. Div. Ct.) where the court held:

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

Mr. Forbes concedes that the Tribunal may consider evidence that was not submitted to the Deputy Registrar at the time of his decision. However, Mr. Forbes submits that the Tribunal should only consider evidence that might have been before the Deputy Registry at the time of his decision. Specifically, Mr. Forbes submits that the overall safety rating of HGC after the date of the Deputy Registrar's decision should not be considered by the Tribunal. Mr. Forbes expressed the concern that if evidence was not cut off as at the date of the Deputy Registrar's decision, there is no way of temporally limiting the evidence which the Tribunal might consider. Mr. Forbes also expressed a concern about possible abuses of process by trucking companies. For example, applicants might seek to delay the appeal by repeated adjournments until their safety rating has improved.

While Mr. Forbes' submission is an attempt to achieve a pragmatic compromise between the wording of Regulation 574 and Section 50 of the Act, as interpreted by *Zahariev* and *Shine*, it has the fatal disadvantage of complying with neither the wording of the Regulation nor of the Act. The better course is to follow Section 50 of the Act, viewed through the prism of the Divisional Court decisions in *Zahariev* and *Shine*. The Tribunal has ample means to deal with the concern raised by Mr. Forbes about attempted abuses of process by a trucker. Mr. Forbes' concern about what new evidence will be considered is a matter that is routinely dealt with by the Tribunal. Usually, evidence that is heard during the hearing is weighed and considered. In this case, there were two matters that involve facts which arose after the evidence had been entered. The Tribunal requested a follow-up report of the 24-month safety record of HGC up-dated to the date of argument. The purpose of the request was to determine whether the actions taken by Mr. Watson were having an effect on the operations of HGC. It was open to Mr. Forbes to make submissions as to the weight the Tribunal ought to give this follow-on report, which he did. In the result, the follow-on report shows no significant improvement in HGC's safety rating. The second matter that arose after the evidence had been entered is the fact that Mr. Watson has left HGC. The significance of this will be dealt with below.

DECISION

There are two questions before the Tribunal. First, to paraphrase subsection 47(1) of the Act, does the Tribunal have reason to believe, having regard to the safety record of HGC or Harman Transport, and the other evidence that the Tribunal considers relevant, that the HGC will not operate a commercial motor vehicle safely or in accordance with the Act? Secondly, if the answer to the first question is yes, then what ought to be done?

The Tribunal has several concerns about the operations of HGC, as that company is being run by Mr. Shoker. Mr. Shoker demonstrated during his operation of Harman Transport that he was unable to operate a trucking company within the safety requirements of the Ministry. His attempts to address the safety issues were undermined by a revolving door of safety managers and by his own lack of

understanding of what is required to run a safe operation. Now that he has taken over the operations of HGC, there is disturbing evidence that he is bringing the same failings to the new operation. His continued refusal to accept responsibility for the safety shortcomings of his operations is a significant concern. He persists in blaming his drivers rather than managing them. Mr. Watson was an impressive witness who seemed to be gaining a firm understanding of what remedial actions were required to create and sustain a safe operation, but it had taken him months to reach that stage. Now Mr. Watson has left HGC and a new person must start again to familiarize himself with the safety challenges at HGC.

One must be cautious about reading too much into the fact that Mr. Watson has now left HGC, but it must be noted that the Applicants' appeal rested critically on Mr. Watson's action plan and on his continuing implementation of it. Mr. Watson is simply the latest in a growing list of safety managers hired by Mr. Shoker to improve safety, first at Harman Transport and now at HGC, who, for whatever reason, did not stay long enough to establish a culture of safety which would survive the departure of any one manager. It is safe to conclude that Mr. Shoker remains unable or unwilling to retain qualified safety managers. Mr. Shoker, while intelligent and interested in the business, has proved unable to perform this task himself.

Ms. McAfee Wallace submitted that a mitigating factor in the safety record of HGC was that the Ministry had been switching to a modified safety measurement system at the start of 2008 and HGC did not, therefore, have easy access to its safety record. However, it was noted that HGC could, on payment of a small fee, obtain its record. More important, there was no suggestion in Mr. Watson's evidence that the company was impeded in implementing its safety improvement plan due to the lack of access to the Ministry's records.

Mr. Shoker's past performance at Harman, the deterioration in the safety record of HGC, the continuing inability of Mr. Shoker to understand what is required for a safe operation or to attract and retain people who do, combine to give the Tribunal reason for concern that HGC cannot conduct its operations at the necessary level of safety.

Something must be done to address this. The obvious answer is for Mr. Shoker to commit himself to implementing a safety action plan. However, despite an escalating regime of warnings and sanctions, he has been unable to do this. Based on the facts, the Tribunal gave serious consideration to a termination of the CVOR certificate of HGC. The fact that HGC has not yet exceeded the minimum threshold for action by the Ministry and the fact that HGC's safety record, which deteriorated sharply after Mr. Shoker took over, appears to have stabilised were important factors in the Tribunal's conclusion that termination was not the appropriate remedy at this time. Mr. Shoker does appear to be intellectually capable of running a safe operation if he will commit himself to this goal.

Ms. McAfee Wallace suggested that a facility audit might be an appropriate remedy. However, a qualified safety manager could perform a facility audit or arrange for the

conduct of one by an independent body. There is nothing to be gained by having the Ministry do it. There has already been a facility audit of Harman Transport and a 7-day suspension. The Ministry's regime of CVOR management consists of an escalating series of sanctions, combined with opportunities for improvement, usually through the creation and implementation of a safety improvement action plan. To date, nothing has succeeded in creating a sustainable improvement in the safety of Mr. Shoker's businesses. A further suspension of his operation might give him the time to reflect on how to begin again. He gave evidence that a suspension would put him out of business. At a minimum, Mr. Shoker testified, many of his drivers will go elsewhere. There is no doubt that a suspension will cause Mr. Shoker economic hardship. However, he is an enterprising man who ought to be able to survive and re-build. A smaller operation might give him the opportunity to implement safety procedures more easily. In any event, the Tribunal must not be unduly swayed by the economic consequences to HGC; these must be balanced against the possible consequences to the travelling public of permitting HGC to continue unimpeded. As Mr. Watson testified, much work remains to be done to create a safe operation. In light of all of the above, the Tribunal is of the view that a 30-day suspension of the operation of HGC is the appropriate remedy. It is also necessary to suspend the CVOR certificate of Harman Transport to ensure that this company does not resume operation during the suspension period.

ORDER

By the authority vested in it under subsection 50(2) of the *Highway Traffic Act*, the Tribunal directs the Deputy Registrar of Motor Vehicles to carry out his Suspension and Seizure Order of March 7, 2008 against the Applicants 3394603 Canada Incorporated, o/a Harman Transport and 1445913 Ontario Incorporated, o/a HGC.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: November 18, 2008

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



PRE-HEARING

OVER-THE-ROAD TRANSPORTATION INC. and ON THE DOUBLE WORLD-WIDE
COURIER LTD.

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

TO SUSPEND CVOR CERTIFICATES AND TO SEIZE THE
PLATE PORTION OF THE PERMITS

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: MARK REYNOLDS, Paralegal, representing Over-The-Road
Transportation Inc. and On The Double World-Wide Courier Ltd.

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles

DATE OF
PRE-HEARING: September 2, 2008 Toronto

ORDER

A pre-hearing was held in this matter on September 2, 2008, in the presence of Mark Reynolds, Paralegal, representing Over-the-Road Transportation Inc. and On The Double World-Wide Courier Ltd. ("the Applicants") and Murray Forbes, Counsel, appearing on behalf of the Registrar of Motor Vehicles ("the Registrar").

The issues in this matter were briefly discussed. The representative of the Applicants indicated he would send further information to the Registrar for the Registrar's consideration. Both parties requested that the hearing date be rescheduled.

The Tribunal makes the following order respecting the hearing:

1. The Parties to this matter are the Applicants and the Registrar.

2. With the consent of both parties, the hearing in this matter originally scheduled to take place on October 1, 2008, is adjourned to December 12, 2008, commencing at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto.
3. The Applicants will call one witness at the hearing. The Registrar will also call one witness.
4. Both Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal.
5. The Parties agree that documents submitted to the Tribunal, specifically, the Registrar's book of documents dated July 27, 2008, are admissible at the hearing and may be reviewed by the hearing panel before the hearing commences.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Member

RELEASED: September 9, 2008

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).



PREHEARING

HAMM, (TOMMY), TODD and
ACKERMAN, JENNIFER L.

IN THE MATTER OF an appeal by HAMM, TOMMY, TODD and
ACKERMAN, JENNIFER L. dated May 30, 2008, 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;

AND IN THE MATTER OF a Suspension and Seizure Order by the
Deputy Registrar dated 21st May, 2008, with respect to the CVOR
Certificate Number 080-724-710 and RIN #018-140-662;

AND IN THE MATTER OF the plate portion of permits for all
commercial motor vehicles and trailers registered in the names of
HAMM, TOMMY, TODD and ACKERMAN, JENNIFER L.;

AND IN THE MATTERS OF the Safety Record and for the Unpaid
Fines of HAMM, TOMMY, TODD.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: DAVID CAVANAUGH, Counsel, representing the Applicants

PATRICK MOORE, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: August 1, 2008

Teleconference

ORDER

Following attendances on August 1, 2008, at an electronic pre-hearing before this Tribunal
of David Cavanaugh, Counsel, for Tommy Todd Hamm and Jennifer L. Ackerman (the
"Applicants"), and Patrick Moore, Counsel on behalf of the Registrar of Motor Vehicles (the
"Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence 9:30 a.m. on Monday, September 22, 2008 at the Taylor Reporting Services, 199 front Street, Suite 521, Belleville, Ontario:

1. The Parties to the hearing are:
 - (a) Tommy Todd Hamm and Jennifer L. Ackerman; and
 - (b) The Registrar of Motor Vehicles.
2. Mr. Moore advised that the Registrar was prepared to set the Notice of Suspension and Seizure aside upon receiving from the Applicant's counsel the following:
 - a. a formal verification that a payment plan was in place to confirm the Applicant's commitment to paying the outstanding fines;
 - b. a letter from Applicant's Counsel to confirm that the Applicants were aware that if they did not comply with the terms of the payment plan, the Registrar would thereupon proceed with the proposed Suspension and Seizure Order.
3. The Parties confirmed that the agreed upon communications would be completed by or before August 11, 2008.
4. In the event a settlement is reached between the Parties, they must each advise the Tribunal, in writing, that the matter has been settled and that a hearing will not be required.
5. The Parties were otherwise reminded of the Tribunal's disclosure rules and time limits, and they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal
6. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at the Taylor Reporting Services, 199 front Street, Suite 521, Belleville, Ontario, at 9:30 a.m. on Monday, September 22, 2008.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: August 8, 2008

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



PRE-HEARING

1414230 Ontario Inc. and Shiney Express Ltd.

APPEAL FROM AN ORDER DATED APRIL 14, 2008, OF THE
DEPUTY REGISTRAR OF MOTOR VEHICLES MADE
PURSUANT TO SECTION 47(1) OF THE *HIGHWAY TRAFFIC
ACT*, R.S.O. 1990, c. H.8

TO SUSPEND AND SEIZE CVOR CERTIFICATE

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: MARK REYNOLDS, Agent, representing the Applicants

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

DATE OF
PRE-HEARING: July 29, 2008

Toronto

ORDER

A pre-hearing was conducted on July 29, 2008, before this Tribunal, in the presence of Mark Reynolds, Agent, representing 1414230 Ontario Inc. and Shiney Express Ltd. (the "Applicants"), and by telephone, Patrick S. Moore, Counsel, representing the Registrar of Motor Vehicles (the "Registrar").

The Tribunal makes the following order:

1. The Parties to the hearing are the Applicants and the Registrar.
2. The Parties, if they have not already exchanged documents, shall make full disclosure of all documents to be relied upon by September 5, 2008.

3. The Applicants shall advise the Registrar whether the facts, contained in the Commercial Vehicle Operator Summary, Tab# 4, pages 8 to 22 of the book of documents provided by the Registrar, are in dispute and the reasons why, by no later than August 22, 2008, and the Registrar shall provide a response by no later than September 5, 2008.
4. Should this matter be resolved before the hearing date, the Parties shall advise each other with copies to the Tribunal that the dispute has been settled and that a hearing is not required and the hearing dates will be cancelled.
5. If the matter is not resolved, the hearing shall commence at 9:30 a.m., on September 23, 2008, and, if necessary, continue on September 24, 2008, at the Tribunal Chamber's, 1 St. Clair Ave. West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Donald Benninger, Presiding Member

RELEASED: August 1, 2008

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).



1531327 ONTARIO LTD.

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, c. H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: GORDON V. MEAKINGS, Counsel, appearing on behalf of 1531327 Ontario Ltd. (the "Applicant")

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

DATES OF
HEARING: July 16 & 17, 2008 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the decision of the Registrar to suspend its Commercial Vehicle Operator's Registration ("CVOR") for a period of thirty days pursuant to the provisions of section 47(1) of the *Highway Traffic Act* (the "Act"). The decision also provides for the seizure of the plate portion of permits issued by Ontario. The sole basis for the suspension and seizure is the relationship between the Applicant and two other transportation companies. One of those companies has an outstanding fine in the amount of \$635.00 and the other has outstanding fines and a poor safety record.

The relationship flows from three brothers. The owner of the Applicant is the son of one of the brothers. Accordingly, everyone related to this matter bears the surname "Gill." Further opportunity for confusion arises out of the fact that two of the entities involved in this matter are Ontario numbered corporations. The first is the Applicant, 1531327 Ontario Ltd. It is owned by Arwinder Gill. The second, 1275729 Ontario Inc., is a company owned by Arwinder's uncle, Iqbal Gill. The Tribunal will use the term "Applicant" to refer to 1531327 Ontario Ltd. and it will use the trade name used by 1275729 Ontario Inc., All Makes Logistics, to refer to that entity. One final area of potential confusion revolves around two other companies. The Suspension and Seizure Order refers to the Applicant, All Makes Logistics and H. A. S. Gill Trucking Ltd. U.S., which is a company incorporated in Michigan by all three brothers as officers and

incorporators, including Arwinder Gill's father, Jaswinder Gill. Jaswinder Gill is shown in the officer section of the application as manager. There is also an Ontario corporation, H. A. S. Gill Trucking Ltd. where the third brother, Sukhpal Gill, has acknowledged himself as president in proceedings before the predecessor of this Tribunal. This corporation did not figure to any great extent in the hearing and, where it is referred to the Tribunal will take steps to distinguish it from the Michigan company.

FACTS

Adele DiPaolo testified on behalf of the Registrar. Ms. DiPaolo has been a Carrier Safety Rating Administrator since 2005. Prior to that date she was a CVOR Analyst. She was involved in the analysis of the records of All Makes Logistics and H. A. S. Gill U.S. While reviewing these two corporations she became aware of the existence of the Applicant and formed the opinion that it was a related company.

Ms DiPaolo stated her understanding of the Registrar's policy for seeking to levy concurrent suspensions or penalties on related corporations. Quite simply, the aim is to avoid circumvention of the regulatory scheme and sanctions by a registrant simply moving business to a related company and carrying on business in the same unsafe manner as before. With respect to the current Applicant, it came to her attention after All Makes Logistics ran afoul of the Registrar. As a result of the regulatory difficulties encountered by All Makes Logistics, the Registrar flagged its file to identify transfers of trucks to related operators. Ms DiPaolo testified that she noted a number of transfers of drivers and plates from All Makes Logistics to the Applicant. All told there were six transfers including the transfer of one vehicle actually owned by Iqbal Gill. She then researched the Applicant and noted that Arwinder Gill resided at the same address as Jaswinder Gill, an officer of H. A. S. Gill U.S., and that Iqbal Gill lived several doors away on the same street. It was later confirmed that Jaswinder Gill was Arwinder Gill's father and Iqbal Gill was his uncle.¹ Ms DiPaolo reviewed the record of All Makes Logistics and H. A. S. Gill U.S.

All Makes Logistics was first granted a CVOR Certificate in April 1998. It experienced growth. It recorded changes in fleet size twice in 2002, once in 2004 and once in 2006. It also encountered regulatory difficulties. In September 2002 it failed a facility audit. The failed area involved its supervision of drivers. In November 2002 it had a vehicle impounded. In 2003 it was assigned a "Conditional" safety rating and a warning letter was issued by the Registrar on March 26, 2003. In February 2004, and again in November, it had vehicles impounded. Its safety record led to an interview with the Registrar's office on May 16, 2005, at which time it presented an "Action Plan" to improve its safety record.² At that time its safety violation rate (VR) was 83.3% of the maximum permitted threshold.³ All Makes Logistics had hired an outside consultant to address its safety record and a Safety and Compliance Officer. One issue discussed at

¹ Ex 3 Tab 6 page 24

² Ex 3 Tab 20

³ Ex 3 Tab 19

the interview was outstanding fines in the amount of \$1,397.50. Two months after the interview a vehicle was impounded.

Following the interview, All Makes Logistics did not experience an improved safety record. It experienced the opposite, as its VR soared to 121.3% and triggered the issuance of a Notice of Suspension and Seizure on June 29, 2006, proposing a thirty-day suspension. After the thirty days, the suspension was proposed to continue until all fines had been paid. Its outstanding unpaid fines had soared to \$51,459.50.⁴ The Registrar had identified H. A. S. Gill U.S. as an affiliated corporation, so it was included in the Notice of Suspension and Seizure. At that time the Michigan corporation was indicated as being dormant and no CVOR record was produced relating to it. Given that a CVOR records events over the preceding two years, it is safe to conclude that the Michigan corporation had not been active in Ontario since, at the latest, mid-2004. Outstanding fines in the amount of \$635.50 appear to date from 1993 and 1994.⁵ A Show Cause meeting was held on August 10, 2006. The Registrar was obviously impressed with the presentation as the proposed thirty-day suspension was set aside on conditions. For the year September 14, 2006 to September 14, 2007 All Makes Logistics and H. A. S. Gill U.S. were required to reduce the out-of-service rate to 35%, the overall VR to 65%, and to comply with undertakings given at the meeting with no further occurrence or accumulation of unpaid fines.

H. A. S. Gill U.S. was dormant, so the conditions imposed by the Registrar fell on the shoulders of All Makes Logistics. It did improve its record over the period, reducing its overall VR to 60.1%. In the year from September 14, 2006 to September 14, 2007, its out-of-service rate failed to meet the 35% condition. It sat at 42.3% just prior to the Show Cause meeting. Fines had been paid down to \$635.00 but a further approximately \$26,000.00 was due in May 2008. The Registrar issued a second Notice of Suspension and Seizure on January 15, 2008 and for the first time included the Applicant. It is of note that, up until that time, the address of the Applicant was shown as Burlington on the CVOR Abstract and the Registrar's records. At the Show Cause meeting on February 5, 2008, following the issuance of the Notice of Suspension and Seizure, the Applicant advised the Registrar that it operated out of 1221 North Service Road, Oakville and had done so since the commencement of business in 2004.⁶ The significance of this address is that it is also where All Makes Logistics carries on business.

At the Show Cause meeting, the Applicant asserted its independence from the other two corporations. It attended with counsel, whereas the others did not, and it advised the Registrar that it did not feel that it should be dealt with in common with the other two corporations but should have its own separate meeting. The Registrar acceded to this request and the separate meeting took place immediately following the meeting with the other two companies.⁷ The Registrar did not accept that the corporations were not related as that term is used in the legislation and levied a fourteen day suspension on

⁴ Ex 3 Tab 17

⁵ Ex 3 Tab 6A Pages 31-38

⁶ Ex 3 Tab 3 page 7

⁷ Ex 3 Tab 3

all three corporations with a provision that the suspension continue thereafter until the outstanding fines were paid.

At the time of the Show Cause meeting, the VR of the Applicant was 29.9%. It has now risen to 47.7%, which is above the level for the first step in the regulatory intervention. Several exhibits were introduced to indicate that drivers and plates had transferred from All Makes Logistics to the Applicant. With the exception of one driver, it appears that the drivers did not work simultaneously for the Applicant and All Makes Logistics. One driver was shown to have inspections recorded on a certain plate and charged against the record of All Makes Logistics at a time when the plate had been transferred to the Applicant. No satisfactory explanation was given for this inconsistency. By the date of the hearing, All Makes Logistics had paid its fines down to \$745.00, and Ms DiPaolo admitted that it is possible that they have been fully paid but the payment has not yet been entered in the computer system. She did advise that carriers are asked to forward proof of payment to the Registrar to ensure the Registrar has up-to-date information. She was unaware of any updated information on the status of unpaid fines. H. A. S. Gill US has not paid its fines.

In his evidence, Arwinder Gill described how he set up and operates the Applicant. He stated that when he was sixteen or seventeen years old he worked for his uncle Iqbal Gill during the summer. After high school he attended the University of Ottawa and earned a degree majoring in Political Science graduating in April 2002. He then worked for a magazine in accounting, followed by some temporary accounting jobs. He incorporated the Applicant in 2002, but did not start operations immediately due to financial constraints. In 2004 he used a line of credit, credit card debt and a small loan from his mother to start operating his first truck in November 2004. In fact, he managed to start with three trucks and built it up to twenty trucks within sixteen months. He now has two trucks operating between Ontario and Quebec, five trucks operating solely in Ontario and approximately thirty owner operators operating into the mid-western states, the southern states and to the east. The Applicant does not own any equipment. It uses the services of about thirty-five owner operators and leases trailers.

The Applicant has five employees including two dispatchers, a safety officer and an accounts receivable clerk. None of its employees works for All Makes Logistics. The company operates from a facility owned by Arwinder Gill's uncle Sukhpal Gill at 1221 North Service Road in Oakville. It was originally leased for a year under a formal lease agreement, but it is now on a month-to-month basis. All Makes Logistics also operated from the facility until January 2008. There was no evidence concerning the physical layout of the facility, or establishing that there was shared office space. Arwinder Gill stated that the two corporations were operated separately but occasionally the Applicant might subcontract loads to All Makes Logistics. There is one link between the corporations. The consultant who appeared with All Makes Logistics at the 2005 interview and the 2006 Show Cause hearing is a safety consultant for both the Applicant and All Makes Logistics. Arwinder Gill stated that this person consults for numerous trucking companies through her business operating out of Milton. One of Applicant's employees previously worked with the consultant before being hired full time by the Applicant.

When dealing with drivers who have worked with All Makes Logistics as well as the Applicant, Arwinder Gill identified only two who recently came directly. Others had left All Make Logistics and worked elsewhere before coming to work for the Applicant. One spent time in Alberta and then returned to the Greater Toronto Area (GTA). Several others came directly from All Makes Logistics, but made the move several years ago, when he had first started operating. Other owner operators came from numerous other trucking enterprises in the GTA.

When being cross-examined on his uncle Sukhpal Gill's business, Arwinder Gill identified it as real estate. He stated that Sukhpal Gill has other properties and he is in the business of leasing them out. Counsel for the Registrar asked him about H. A. S. Gill Trucking Ltd., an Ontario corporation incorporated in November 1987. The Applicant's counsel had produced the corporate profile for this corporation at the Show Cause meeting in February 2008. Arwinder Gill knew nothing about the corporation or its incorporating officers and directors, Amritpal Gill and Amripai Gill. Arwinder Gill also knew nothing of the addresses of the various parties or of the corporation. He stated that he was seven years old in 1987. It was subsequently revealed H. A. S. Gill Trucking Ltd. was subject to disciplinary suspension by the Registrar in 1994, a decision that was upheld by the predecessor of this Tribunal on June 14, 1994. Sukhpal Gill appeared at that hearing and identified himself as president. The Applicant was fourteen in 1994 and was unaware of Sukhpal Gill's involvement in the trucking business.

Arwinder Gill admitted that the family is a "trucking family." In addition to his father's and uncles' involvement in trucking, his brother also runs a trucking company. He does have other siblings who are not involved in the trucking industry. He denies, however, that they are a particularly close family, despite living a few doors from his uncle, Iqbal Gill. He stated that the family gets together at weddings, birthdays and funerals, but that they are not together on a weekly basis. He stated that the only reason he currently lives close to his uncle is because he moved to his parents' home after selling his own home. He will be moving into a new home with his wife later this year.

STATUTORY AUTHORITY

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 47, 47.1 and 50 of the *Highway Traffic Act* (the "Act"). The Tribunal will set them out here for clarity.

Suspension and cancellation of licence, etc., general

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

(a) the plate portion of a permit as defined in Part II; or

(c) a CVOR certificate,

on the grounds of,

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

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

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.

Subsection 17 (4) defines the term “person related to the holder” used in subsection 47 (1) (f) as follows:

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 is on the Registrar to establish that there are grounds for the proposed suspension. The Tribunal owes no deference to the Registrar, and must reach its decision based on the evidence presented at the hearing. It was conceded at the pre-hearing of this matter, and incorporated into the pre-hearing order, that the safety record of the Applicant, standing alone, does not establish grounds for the suspension and seizure of its CVOR. Grounds, if any, must be found in the interrelationship between the Applicant, All Makes Logistics and H. A. S. Gill Ltd. U.S. The Applicant submits that the power set out in the Act to tar one company with the brush of the sins of another is very broad. It submits that a close look at the jurisprudence is necessary to define the scope of an interrelationship that falls within the ambit of the Act.

The predecessor to this Tribunal, the Licence Suspension Appeal Board, examined a trucking conglomerate in the *Muscillo*⁸ case, a case that arose before the introduction of the “related person” provisions of the Act. There, four related corporations operated gravel trucks in Ontario. Evidence was led establishing that the companies operated a single fleet, and the businesses as a whole were treated as a single entity by the common owners. There was evidence that some of the corporations had poor safety records, which were showing signs of improvement, while others were at the point of sanction, but that, overall, the record was worsening. The Registrar sought to revoke the CVOR certificates of each of the corporations. The Board agreed and treated the conglomerate as a single entity and revoked the CVOR certificate of each corporation. An appeal was taken on the issue that each corporation was a separate legal entity and that, by piercing the corporate veil, the Tribunal had committed a reversible error. In upholding the decision of the Board, Madam Justice Chapnik stated:

Since the four companies operated as a single fleet, it would not, in my opinion, be appropriate to assess them separately. Furthermore, as pointed out by the respondents, it would serve no purpose cancelling the CVOR certificates of some of the appellants while allowing the others to continue to operate, because the same unsafe operation could simply be shifted to the operational companies.⁹

The first step is to review the degree of integration between the Applicant and the related entity. In doing so the Tribunal can determine whether it is necessary to pierce the corporate veil. In cases such as *Muscillo*, to fail to pierce the corporate veil is to permit circumvention of sanctions by the simple expedient of moving business from one corporate entity to another. Since the *Muscillo* decision, the definition of related person in section 17 (4) and its use as a ground for transferring sanctions in 47(1) (f) have been declared in force.

In all of the cases cited by the Applicant in support of the submission that it requires a great deal of corporate integration for the Tribunal to pierce the corporate veil, the relationship between the corporate entities was one of common shareholders, officers or directors. In each case the Tribunal concluded that the existence of corporations with

⁸ *Muscillo Transport Ltd.* LSAB decision released March 4, 1997

⁹ *Muscillo Transport Ltd. v. Ontario (Licence Suspension Appeal Board)* [1997] O.J. No. 3111, Court File 294/97 OCJ (Gen Div) at para. 64

common shareholders etc. was simply expediency to ensure continued, unsafe operations when the Registrar imposed a suspension and seizure order. Indeed this specific relationship is address directly in section 17 (4). Common ownership, however, does not automatically result in contemporaneous suspension and seizure. In *National Transportation Carriers*¹⁰ the Tribunal addressed three corporations sharing some measure of common ownership and control. The evidence before the Tribunal established that the corporations were engaged in totally unrelated trucking enterprises from separate locations in and around Sault Ste Marie. The major transportation company operated approximately forty trucks carrying loads eastern Canada and the northern United States. One of the other companies operated several trucks delivering building materials locally on behalf of a building materials supplier owned by one of National's owners. The second company operated a concrete pumping truck. That company was owned by the other National owner. There was no integration or commonality in the operations. The Tribunal declined to levy a joint suspension and seizure on all three companies. Circumvention was prevented by limiting the number of vehicles registered under the various CVOR certificates in the period leading up to and during the suspension.

None of the cases cited by counsel address corporations where, although there are no common owners, officers or directors, the owners of the corporations are themselves related in some manner. Notwithstanding the tautology in subsection 17 (4) (a) that persons are related if they are related, the subsection appears to track the three types of normal business organization, proprietorships in subsection (a), partnerships in subsection (b) and corporations in subsection (d). Only subsection 17 (4) (c) would appear to address the relationship between the Applicant, owned by Arwinder and Iqbal. The test in that subsection is one of common control. Should the Tribunal find that there is common control, section 47 (1) (f) provides that the Tribunal may consider All Makes Logistics' record in determining if there is reason to believe the Applicant will not operate safely.

There is no evidence of common control of the two numbered companies or the other companies referenced in the evidence. The evidence concerning the Applicant's operations established that the Applicant had its own staff, managed its own dispatch functions and sought its own contracts. The Registrar cites the use of the same warehouse, owned by another uncle, the use of the same consultant and Arwinder Gill's admission that he occasionally subcontracted loads to his uncle's company as proof that these entities are really a common family undertaking.

With respect, the Tribunal disagrees. The only involvement of Sukhpal Gill and Jaswinder Gill in operating a transportation company appears to have ended many years ago. The CVOR of H. A. S. Gill U.S. has been dormant since at least 2004. Given the dates of the outstanding fines, it is not unreasonable to conclude that it has been dormant since the mid 1990s. Similarly, the CVOR of the Ontario corporation, H. A. S. Gill Ltd., has been cancelled for many years. Only Iqbal Gill continues his involvement in trucking and there is no evidence of Iqbal Gill controlling the Applicant in any manner.

¹⁰ *National Transportation Carriers* [2007] O.L.A.T.D. No. 63

Even if Iqbal Gill's involvement in the Applicant has been greater than disclosed by the evidence, the Tribunal cannot conclude that the Applicant will operate unsafely. The Applicant has been operating now for three and a half years and has its own safety record based on extensive on road performance. While the Tribunal notes an increase in its violation rate from 29.9% to 47.7%, it is not a safety record that warrants an intervention at this time. It is also a safety record that has been maintained while that of All Makes Logistics ballooned to 121.3% in 2006. The disparate trends in the respective safety records exist despite the fact that both numbered companies use the services of the same safety consultant. Clearly the Applicant is benefiting from the consultant's advice while the other numbered company is not – evidence negating any suggestion of common control. The Tribunal cannot conclude on the facts that there are reasons to believe that the Applicant will not operate safely on the nation's highways.

In addressing the provisions of 47 (1) (g) the Registrar urges on the Tribunal the necessity of including the Applicant in the penalties levied against All Makes Logistics and H. A. S. Gill Trucking Ltd. U.S. as a means of avoiding circumvention of the regulatory sanctions. The Tribunal does not find this argument convincing. In subsections (d) through (g), section 47 (1) set outs the ground upon which the Registrar may suspend or cancel a CVOR certificate and seize the plate portions. Subsection (f) is the only subsection where the Registrar may consider the safety record of a related person as indicative of the future safety performance of a CVOR holder. By permitting the Registrar this power in one subsection the Legislature is clearly expressing its intention to exclude it from consideration when applying the other subsections. Indeed, the catchall provision in section 47 (1) (g) applies to “sufficient reason not referred to in (d), (e) or (f).” Having referred to the safety record of related persons in section 47 (1) (f) the Legislature has exhausted the extent to which the Registrar can use a relationship between CVOR holders as grounds for suspension or revocation. In short, if the relationship does not create a reason to believe that a CVOR holder will not operate in a safe manner, then the relationship itself is insufficient cause for suspension or revocation.

Assuming, however, that *Muscillo* stands for the proposition that the Tribunal can pierce the corporate veil with respect to any of the provisions of subsection 47 (1), the Tribunal does not see the indicia of an attempt to circumvent the sanctions. The Applicant employs about thirty-five owner operators. The evidence before the Tribunal indicated that about six had previously worked for All Makes Logistics. Of these six, a number had joined the Applicant several years ago and only two had joined at a time when All Makes Logistics was being called in for its second Show Cause meeting. The vast majority of owner operators came from various trucking companies throughout the GTA. It is the Tribunal's view that the hallmark of circumvention would be a widespread transfer of plates from the impugned company to the related company broadly contemporaneous with the imposition of a suspension and seizure order. Such facts are totally absent in the current appeal. The Tribunal can find nothing sinister in the fact that a couple of owner operators found work with the Applicant at a time when All Makes Logistics was winding down its operations.

DECISION

Having reviewed all of the evidence and taken into account the submissions of the parties, pursuant to the authority granted to it in section 50 of the Act, this Tribunal orders the Registrar not to carry out that part of his Suspension and Seizure Order dated February 15, 2008 relating to the suspension of the Applicant for a period of fourteen days and thereafter until all fines have been paid.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: August 5, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



K.J.S. TRANSPORT INCORPORATED

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, c. H.8 from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration (CVOR)

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: LARRY YOUNG, Agent, representing the Applicant, K.J.S. Transport Incorporated (the "Applicant")

MURRAY FORBES, Counsel, representing the Registrar of Motor Vehicles (the "Registrar")

DATE OF
HEARING: March 4 and June 23, 2008

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals a Suspension and Seizure Order issued by the Deputy Registrar of Motor Vehicles on November 28, 2007. The order provides for a seven day suspension and follows an October, 22 2007 Notice of Suspension and Seizure and a November 21, 2007 Show Cause meeting between the Applicant and the Deputy Registrar. The October 22 Notice proposed a thirty day suspension and this number was subsequently reduced to seven days based on submissions made by the Applicant at the November 21 meeting. The Applicant takes the position that it has invested a great deal of time and effort to improve its safety record and it feels that the proposed suspension can have no remedial effect on its efforts to improve its safety record, and indeed may be detrimental.

STATUTORY AUTHORITY:

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 47, 47.1 and 50 of the *Highway Traffic Act*. The Tribunal will set them out here for clarity.

Suspension and cancellation of licence, etc., general

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

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

on the grounds of,

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

(2.1) Subsection 17 (4) applies, with necessary modifications, for the purpose of determining who are related persons under clause (1) (f).

Power to seize number plates

(8.1) If the plate portion of a permit is suspended or cancelled under clause (1) (a), the Registrar may order that the plate portion of the permit or the number plates issued in connection with the plate portion of the permit be seized and any police officer or officer appointed for carrying out this Act may seize the plate portion of the permit and the number plates and deliver them to the Ministry.

Definitions, "commercial motor vehicle", etc

(9) For the purposes of this section and section 47.1, "commercial motor vehicle", "operator" and "safety record" have the same meanings as in subsection 16 (1).

Power to seize out-of-province permits and plates

(10) The Registrar may, at any time, for misconduct or contravention of this Act or the *Public Vehicles Act* or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized.

Notice of proposed action, s. 47

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

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

Powers of Tribunal

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

For the purposes of defining a related person, subsection 17.(4) states:

Interpretation

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

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

FACTS

Adele DiPaolo testified on behalf of the Registrar. Since 2005 Ms. DiPaolo has been a Carrier Safety Rating Administrator. Prior to that time she was a CVOR Analyst. In her current position, Ms. DiPaolo reviews files prepared by CVOR analysts to be forwarded to the CVOR Program Manager for consideration of the need for sanctions. The Program Manager may then forward the file to the Deputy Registrar who will make a decision on the application of sanctions.

Ms. DiPaolo reviewed the "Ontario Safety Rating and Commercial Vehicle Operator's Registration System" ("CVOR system") and the related CVOR safety threshold system.¹ The CVOR system started in 1986, and has safety rated carriers since 1999. A carrier's safety rating is calculated from data collected with respect to the carrier's collisions, convictions, Commercial Vehicle Safety Alliance (CVSA) vehicle inspections and facility audits. The program assigns a carrier a safety threshold level. Until April 2, 2007, the threshold level was calculated on the basis of the carrier's fleet size and kilometres travelled in Ontario. After that date, it has been based on total kilometres travelled. There have also been changes to the weighting given to violations. The changes resulted from research that suggested the current tracking system is a better indicator of future problems. It is a proactive approach and may better enhance highway safety. Any single violation is kept on the carrier's record for two years, so the carrier's violation rate (VR) expressed as a percentage of its safety threshold fluctuates as violations are accrued or drop off the record.

The system will generate reports at certain VR levels as follows: once an operator's VR level reaches 35% of the carrier's safety threshold, the file is referred to a CVOR

¹ Ex 3 Tab 16

Analyst, who then will send a warning letter. If the 65% level is reached, the Ministry may trigger an audit of the operator's facilities and consider further sanctions and may conduct an interview. Once the VR exceeds 100% of the safety threshold, the Registrar will seek to levy sanctions. Ms. DiPaolo stated that approximately 80% of carriers improve their safety performance after receipt of a warning letter. Of those that do not improve after a warning letter, 80% improve after an interview. Approximately 1% of carriers exceed the 100% level where sanctions are considered.

Ms. DiPaolo testified that the first step taken when reviewing a carrier's record is an integrity check. An integrity check involves ensuring that the information entered into the automatic computer system is correct. Once satisfied that the computer data is, in fact, correct, the file is then referred to the Program Manager for appropriate action: i.e. either an interview or proposal of sanctions. One difficulty Ms. DiPaolo identified in confirming the Applicant's record was confusing information concerning the Applicant's fleet size and kilometres traveled. Pursuant to section 18 (2) of the *Highway Traffic Act* R. S. O. 1990 c. H. 8 (the "Act"), it is the Applicant's responsibility to provide updated information on fleet size and kilometres traveled, a fact that is set out in the public guideline for CVOR registrants.²

Ms. DiPaolo reviewed the Applicant's record. The Applicant was originally certified on May 10, 2004. By December 8, 2005 a warning letter had been issued. A conditional safety rating was assessed on March 6, 2006 indicating a VR of between 65% and 100%.³ An interview was held on April 21, 2006 where the Applicant submitted an action plan to improve its on-road performance. By October 2007 when the Notice of Suspension and Seizure was issued, the Applicant's VR had deteriorated to 112.6% of threshold. In other words, the Applicant had joined that exclusive, if infamous, group of operators with a VR in excess of 100%.

In dealing with confusion over the Applicant's fleet size and kilometres traveled, Ms. DiPaolo reviewed extensive documentation produced by both the Applicant and the Ministry. She noted discrepancies between fuel tax reports and kilometres reported to the Registrar's office⁴ and long delays on the part of the Applicant in responding to requests for information. In one early example, around the time of the warning letter, where calculations had been made on the basis of one vehicle in the Applicant's fleet, Ms. DiPaolo had recalculated the VR based on updated information and determined that the Applicant's adjusted VR was over 59% thus amply justifying the warning letter.⁵ She also re-adjusted the figures prior to the interview and, using the company's figures, determined a VR on April 21, 2006 of 74.8%, less than the 80% threshold set out in the guidelines for an interview.⁶ Based on information previously provided by the Applicant, the figure calculated by the Registrar's office up to February 2006 was 97.6%, or almost

² Ex 3 Tab 16 page 224

³ Ex 3 Tab 16 page 209

⁴ Ex 5

⁵ Ex 7

⁶ Ex 8

to the 100% sanction threshold. Notwithstanding the confusion, there is no argument that the Applicant's VR exceeded 100% in October and November of 2007.

Kulwant Singh is a co-owner and the president of the Applicant. The other co-owner, Jinder Buttar, is the Secretary. Both men have a background driving tractor-trailers as owner/operators. In 2004 they started the Applicant with one truck and quickly built the business. Both act as dispatchers. There are two other dispatchers and a bookkeeper on staff.

By the date of receipt of the warning letter in December 2005 the company was operating thirteen trucks under its CVOR. Mr. Singh attended the interview on April 21, 2006 and was the proponent of the action plan put forward at that time. To help implement the action plan, Mr. Singh hired Maria in July 2006 to take responsibility for hiring drivers, check applications, check log books and teach defensive driving courses. Maria, whose last name Mr. Singh does not recall, worked three days per week. In April 2007 Maria left the Applicant. Following discussions with insurers, the Applicant hired Frank Screen, a consultant experienced in improving the safety of trucking operations. Mr. Screen was responsible for safety, defensive driving, logbooks, driver safety meetings and any other safety issues. Mr. Screen used the services of his son, Stuart Screen, who attended the offices of the Applicant three days per week. Stuart Screen performed the same functions as his father but had less experience. Frank Screen attended at the Show Cause Meeting in October 2007 and proposed the action plan prepared by Stuart Screen on behalf of the Applicant. In November 2007 the Applicant also hired the services of Tom Mead to oversee safety issues. Mr. Mead, who testified, took over the functions of both Frank and Stuart Screen in February 2008.

In cross-examination, Mr. Singh addressed his approach to safety and hiring drivers. He was of the view that if he hired drivers who were experienced then he need not train them in pre-trip inspections or the keeping of proper logbooks. He and his partner would conduct road tests. After the interview in April 2006 he hired Maria to oversee logbooks and conduct defensive driving courses. He has since hired Frank Screen, Stuart Screen and Tom Mead to more fully cover these functions.

Tom Mead is currently the safety manager of the Applicant. He is a consultant. He has driven transport trucks since the late 1970s. In 1995 he moved to a driver safety position at Thomson Terminals and in 2005 he was the safety manager overseeing a seven or eight person department tasked with safety and compliance issues arising out of a fleet of 180 trucks and 250 drivers. In 1995 he qualified as a Defensive Driving Instructor. He has had training in hours of service requirements from the Ontario Trucking Association and has taken a fleet driver course. He is also certified to issue licence upgrades where his employer has authority to issued upgraded licences.

Mr. Mead was hired by the Applicant one day per week shortly before the Suspension and Seizure Order was issued, so he had no evidence concerning the Applicant's corporate culture or behaviour leading up to the Show Cause meeting. He addressed the current culture of the Applicant with respect to safety. He stated that he has full

responsibility for hiring and firing of drivers and that he would not have it any other way. He has implemented a retraining program for all drivers with a curriculum that includes hours of service training and defensive driving and fatigue training. He prefers to have a class of no more than five to seven drivers at a time and has conducted the courses over five weekends. Two drivers were absent from part of the course and need to complete the defensive driving portion but otherwise every driver has been retrained.

Mr. Mead has instituted a discipline program. All incidents are reviewed and, if warranted, suspensions may be levied. All accidents are reviewed. If the driver was at fault then the driver's history is reviewed and an appropriate penalty assessed. Penalties may range from retraining through suspension and termination. He cited four recent cases of suspension as well as a termination.

Mr. Mead has instituted administrative changes. He has reviewed hours of service reports and backed up records to January 2008. He then sends the hours of service reports to an outside auditing service, Integrated Services, for audit. He conducts a CVOR abstract review every three months. He has reviewed December 2007 and March and June 2008 so far. The review may pick up incidents that drivers have not revealed. His focus is on a drop in the VR. He has noted a recent drop to 94.4%. In particular, he has noted a drop in collisions. Of concern is a rise in convictions but he feels this rise may be the result of incidents from before November 2007 now working through the courts and onto the CVOR. The number of inspections has risen recently to 62 and Mr. Mead thinks approximately 10 resulted in finding of an out-of-service condition. Overall, Mr. Mead feels his contributions are having a positive effect. He feels it will take time to reflect the better safety record because of the two-year retention of incidents on the Applicant's record.

Analysis

The evidence discloses the following facts. Starting in 2004 and continuing until October 2007, the Applicant's safety record declined in an alarming manner. The Registrar took reasonable steps to bring this decline to the attention of the Applicant through its program of escalating notice. All of the Registrar's efforts were to no avail in improving the record. While the Applicant asserts that it did take the Registrar's notifications seriously, commencing with the warning letter, no evidence was tendered showing changes as a result of receipt of the warning letter. In fact, before this Tribunal, the Applicant hinted that the warning letter was not justified because the threshold that triggered it was calculated on the basis of one truck whereas the Applicant was operating thirteen trucks. Ms. DiPaolo's recalculation on the basis of the newly reported fleet size clearly indicated that the warning letter was more than justified. What is of more concern is that the Applicant squandered an early opportunity to address its safety record by taking an overly technical approach to the threshold levels set out for the Registrar's intervention.

The first efforts made by the Applicant to address its escalating VR did not occur until after the interview in April 2006. In July 2006 the Applicant hired Maria to review

logbooks and conduct defensive driving courses. At that time the Registrar's calculation of the Applicant's VR, was 97.6%. A recalculation based on updated figures from the Applicant indicates that the adjusted figure was 74.8%. The Applicant appears to take the position that an interview was inappropriate because it had not yet reached the 80% threshold. Again, the Applicant misses the point. The initial calculation was based on figures provided by the Applicant. It was the Applicant's statutory obligation to provide updated figures. By taking a technical approach to the threshold levels, the Applicant squandered another opportunity to address a worsening record. The Tribunal is of the view that, while the hiring of Maria was a step in the right direction, it failed, and always would fail, to bring about the desired result because Maria's function was predominantly administrative. There was no evidence that she instituted regular safety meetings, created a defensive driving culture or even enforced proper logbook record keeping during her stay at the Applicant. The CVOR abstract from October 2007 shows a steady stream of logbook and hours of service violations during Maria's time at the Applicant.⁷ It is not even suggested that Maria had any role in addressing the mechanical out-of-service record of the company.

It was not until the Applicant's insurers intervened that there appears to have been a real focus of safety. The company hired experienced consultants who began an attempt to inculcate a culture of compliance and safety. These efforts were initially carried out by Frank and Stuart Screen and have been continued by Tom Mead. It appears that the efforts of these gentlemen are having some effect as the VR trend is finally downward after three years of escalation. The Tribunal was very impressed by Mr. Mead. He is amply qualified for the task in hand, has addressed the problems and garnered the authority necessary to remedy them, and has a clear vision of what steps are necessary to implement a remedial program. The Tribunal is confident that, with Mr. Mead's assistance, the Applicant can continue to improve its VR record to acceptable levels.

The Applicant submits that its recent remedial attempts indicate that the sanctions proposed by the Registrar are unnecessary in achieving the goal of highway safety. It submits that the record supports the position that the Applicant has learned its lesson and turned the corner. It asserts that the economic disruption resulting from a suspension, given that transportation is an industry with no inherent customer loyalty, may have a detrimental effect on the improving safety record. In support of those submissions, the Applicant relies on *Thistle town Motor Freight (2003) Inc. (Re) [2006] O.L.A.T.D. No. 580*, ("*Thistle town*") a decision of this Tribunal released on December 20, 2006. At page 12 of the decision, Vice-Chair Weary, in setting aside the Suspension and Seizure Order states:

If the aim of the Registrar's available sanctions is, as has been held in earlier decisions, to attain compliance, then the Registrar's actions up to the Show Cause Hearing effectively succeeded. In this regard, issuance of the original Order was appropriate and in keeping with the Registrar's duty under the Act. However, to continue to insist on applying a suspension in the face of credible and detailed evidence of actions undertaken to improve compliance, and, more importantly, the passage of time illustrating actual

⁷ Ex 3 Tab 8

improved performance outcomes, is indeed punitive.... Certainly, there are no grounds upon which the Tribunal can conclude the upholding of the seven day suspension as proposed will in some way improve public safety.

In *Thistle town* the management had immediately reacted to the warning letter by contacting the Ministry to attempt to see what steps were required. The record exceeded the 100% VR level very quickly thereafter, mainly as a result of a fatal accident involving one of the company's trucks. Fatal accidents were weighted double in the scheme in place at that time and that accident alone was enough to put the record over 100%. Following the show cause meeting, the company had an almost spotless record. Those facts are at odds with the facts in the present case. While there has been a recent improvement in the Applicant's approach to safety and a recent drop in its VR rate, the violations recorded are numerous and ongoing, many being due to improper logbook or hours of service infractions. The Tribunal is concerned that the record and management's earlier response to it indicate a cavalier attitude to the regulatory scheme governing highway transport. Only when backed into a corner, apparently by insurers and not by Ministry action, did the Applicant begin to take appropriate remedial steps. In the view of the Tribunal, the current facts are on all fours with this Tribunal's decision in *National Transportation Carriers Inc. (Re)* [2007] O.L.A.T.D. No. 63, ("*National*") a decision of this Tribunal released on February 22, 2007.

In *National* the applicant led extensive evidence to show that every aspect of their operation had been overhauled and safety was the prime focus of the company. Like the Applicant its recent VR had fallen below 100% and there were serious prospects for further continued decrease. Notwithstanding that fact, the Tribunal concluded that a ten-day suspension was in order. Similarly, in *Salerno & Son Haulage Ltd. (Re)* [2008] O.L.A.T.D. No. 202, ("*Salerno*") the applicant was able to show a dramatic drop in its VR to 74.6% in the period leading up to the hearing. The Tribunal took the improved record into consideration in reducing the suspension and seizure from thirty days to ten. While the Tribunal was impressed by the efforts of the applicants in each of the above cases, it must be on guard to ensure carriers take the various escalating warnings in the CVOR scheme seriously. Except in the rarest of circumstances, such as existed in *Thistle town*, the fact that a carrier has finally reacted to a Notice of Suspension and Seizure or a Show Cause meeting with an improved record should not insulate it from the abysmal record that triggered those events in the first place. The Act looks forward by looking back at the safety record. Where the safety record leading up to the Suspension Order warrants regulatory intervention, as it does here, the Tribunal will order that intervention. The record between the issuance of the Suspension Order and the hearing may be considered as a mitigating factor but does not excuse the earlier behaviour or obviate the need for intervention.

DECISION

Having considered all of the evidence and listened to the submissions of counsel for the Registrar and the agent for the Applicant, the Tribunal concludes that a seven-day

suspension is appropriate. In *National* a ten-day suspension was imposed. In that case, at an earlier show cause meeting, the carrier had presented an extensive plan to deal with its unacceptable VR. In reliance on that plan, the Registrar had reduced the proposed thirty-day suspension to zero. The carrier had failed to implement any portion of the plan. It had then represented the plan at both a subsequent show cause hearing and before this Tribunal. The Registrar reduced the proposed thirty-day suspension to ten days and the Tribunal concluded that ten days was appropriate. In *Salerno* the Tribunal was concerned that the remedial measures still had an air of impermanence about them and were not supported by changes in company management or policy manuals. Notwithstanding that concern, the Tribunal reduced a thirty-day suspension to ten days. In the current case, the Tribunal is impressed by the work of Mr. Mead and Frank and Stuart Screen. It is satisfied that there are permanent changes in policy and the approach to safety.

Accordingly, pursuant to the authority granted to it in section 50 of the Act, this Tribunal orders the Registrar to carry out the terms of the Suspension and Seizure Order dated November 28, 2007, the suspension to commence on a date to be set by the Registrar.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude,
Vice-Chair

RELEASED: July 14, 2008

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).



SALERNO & SON HAULAGE LTD.

Appeal under section 50(1) of the *Highway Traffic Act* R.S.O. 1990, c. H.8 as amended from a Suspension and Seizure Order, pursuant to section 47(1), in relation to a Commercial Vehicle Operator Registration

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: MARK REYNOLDS, Agent, appearing on behalf of Salerno & Son Haulage Ltd. (the "Applicant")

PATRICK MOORE, Counsel, appearing on behalf of the Registrar of Motor Vehicles

DATES OF
HEARING: April 15 & 16, 2008 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the decision of the Registrar to suspend its Commercial Vehicle Operator's Registration ("CVOR") for a period of thirty days. The decision also provides for the seizure of the plate portion of permits issued by Ontario. The Registrar cites a chronic poor safety rating in support of his position.

STATUTORY AUTHORITY

The statutory authority for the actions of the Registrar and the jurisdiction of the Tribunal are set out in sections 47, 47.1 and 50 of the *Highway Traffic Act* (the "Act"). The Tribunal will set them out here for clarity.

Suspension and cancellation of licence, etc., general

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

(a) the plate portion of a permit as defined in Part II; or

(c) a CVOR certificate,

on the grounds of,

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor

vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety;

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).

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.

EXHIBITS

The following exhibits were entered at the hearing:

- Exhibit 1: Suspension and Seizure Order of the Registrar dated November 23, 2007.
- Exhibit 2: Notice of Appeal of the Applicants
- Exhibit 3: Respondent’s Appeal Book.
- Exhibit 4: Respondent’s Supplementary Appeal Book.
- Exhibit 5: Commercial Motor Vehicle Operator’s Registration and Carrier Safety Rating Public Guideline
- Exhibit 6: Two Commercial Vehicle Accident Reports relating to events on February 8, 2008.

FACTS

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

Ms. DiPaolo reviewed the "Ontario Safety Rating and Commercial Vehicle Operator's Registration System" found at Tab 12 of Exhibit 3, and the related CVOR safety threshold system. The CVOR system started in 1986, and has safety rated carriers since 1999. A carrier's safety rating is calculated from data collected with respect to the carrier's collisions, convictions, Commercial Vehicle Safety Alliance (CVSA) vehicle inspections and facility audits. The program assigns a carrier a safety threshold level. Until April 2, 2007, the threshold level was calculated on the basis of the carrier's fleet size and kilometres travelled in Ontario. After that date, it has been based on kilometres travelled in Canada. Any single violation is kept on the carrier's record for two years so the carrier's violation rate (VR) as a percentage of its safety threshold fluctuates as violations are accrued or drop off the record.

The system will generate reports at certain VR levels as follows: once an operator's VR level reaches 35% of the carrier's safety threshold, the file is referred to a CVOR Analyst, who then will send a warning letter. If the 65% level is reached, the Ministry will trigger an audit of the operator's facilities and consider further sanctions and may conduct an interview. Once the VR exceeds 100% of the safety threshold, the Registrar will seek to levy sanctions. Ms. DiPaolo stated that 80% to 90% of carriers improve their safety performance after receipt of a warning letter. Of those that do not improve after a warning letter, 80% improve after an interview. Only 0.2% of carriers reach or exceed the 100% level where sanctions are considered.

Ms. DiPaolo testified that the first step taken is to do an integrity check. An integrity check involves ensuring that the information entered into the automatic computer system is correct. Once satisfied that the computer data is, in fact, correct, she will then refer the file to the Program Manager for appropriate action: i.e. either an interview or proposal of sanctions.

Ms. DiPaolo reviewed the Applicant's record. The Applicant was originally certified in 1989. By July 1990, a warning letter had been issued. A second warning letter was issued in 1994. In 1995, a facility audit was carried out, and in 1997, the Applicant was required to attend an interview. At the 1997 interview, the company put forward an action plan that involved a review of its CVOR abstract every six months, training of drivers on pre-trip inspections, random pre-trip inspections on all vehicles, increased mechanical inspection of the trucks, training of drivers on axle weight and overweight loads and formulation of a company discipline policy. There appears to have been some improvement over the next few years as there was no further regulatory intervention until 2001, when a warning letter was sent. The Applicant passed a facility audit in March 2004 scoring 100% on driver records and 57.6% with respect to its vehicles. The pass mark is 55% in each category. A third heading, not included in the

pass/fail determination, is entitled "Safety Programs and Training". Out of a potential nine points, the Applicant scored 1 point or 11% suggesting an almost total lack of training or safety programs.

By July 7, 2005, the Applicant's record had deteriorated to such a degree that the Registrar required it to attend at an interview. The Applicant set out another action plan for improving its record. This action plan required monthly driver safety meetings. It was stated that these meetings had started on June 1, 2005. The Applicant was to institute a discipline program incorporating a three-strike rule of escalating consequences against drivers for on-road infractions. Finally, vehicles were to be inspected every two weeks instead of once per month.

The Applicants record after the July 2005 interview did not improve as it had in the past when there had been regulatory intervention. In the two-year period from August 27, 2005, to April 1, 2007, assessing points under the older points system, the Applicant's overall safety violation rate (VR) was 126.4% of its safety threshold. For the period after the implementation of the new system on April 2, 2007 to August 26, 2007, the VR was 70.84%. As a result, the Registrar issued a Notice of Suspension and Seizure and invited the Applicant to attend at a show cause hearing on November 15, 2007. At the show cause, meeting the Applicant's president, Pasquale Salerno, stated that he has been ill and that his son, Luigi, is now running the company. Luigi Salerno outlined difficulties with replacing drivers who had been fired. He did name a number of drivers who had been fired, but had no explanation concerning other drivers with bad driving records who were still on staff other than a general difficulty with hiring new drivers. Luigi Salerno then outlined an action plan to try to address the problems. The action plan did include one item previously discussed at earlier meetings, inspections of vehicles every two weeks, but it also included a requirement that trucks be returned to the yard each night. To address load insecurity issues, the company was to institute a buddy system where each day trucks would be inspected by two drivers before going out on the road. Following the show cause meeting the Registrar issued a Suspension and Seizure order suspending the Applicant for 30 days and ordering the seizure of the plate portion of permits for that time.

In cross-examination, Ms. DiPaolo reviewed the manner in which accidents are recorded in the safety rating system. She stated that when an investigating police officer attends an accident scene, the officer is under an obligation to fill out an accident report. The accident report is in a standard format with entries for pre-determined codes relating to typical information included on these reports. The Registrar's office then enters this information into the system and points are assigned automatically if the right code entries are present. There is no independent analysis of the accident report information. Further, there is no way in which a carrier can question or appeal a finding of fault in an accident report. Only if the officer is convinced to change the accident report, as may happen after a court case arising out of charges for fault in an accident, will the Ministry alter its records.

The complete reliance on the accident reports leads to some anomalous and potentially unfair results. For instance, notwithstanding that the system assigns points for collisions, an officer filled out an accident report where a driver experienced a brake

seizure that caused a tire fire. The driver pulled safely to the side of the road without striking any other vehicle or object so no "collision" occurred. The incident was treated as a collision, and collision points assigned because the attending officer filled out an accident report and entered the appropriate code. In a second case, a driver rear-ended the vehicle ahead multiple times. The driver was charged, and points were assessed for the conviction, but, because of the manner in which the accident report was filled out, no points were assigned for the accident itself. In other words, the accident was recorded as a no fault accident in the rating system. It would appear that in the Applicant's case, the record has evened itself out with points being assigned where, perhaps, they should not, and points not assigned where they should.

The entry of points from the accident report form without further analysis or appeals also results in points being entered despite the factual background of the accident being disputed in the courts. As stated above, a carrier or the Registrar's office may approach an officer after a court hearing on the charges and ask the officer to amend the accident report to bring it in line with the findings of fact in court. There was no suggestion that an officer is obliged to do so, creating the anomaly that a carrier has been penalized for a collision that a court may ultimately determine was not its driver's fault.

Luigi Salerno testified on behalf of the Applicant. He is the son of the company president, Pasquale Salerno, but not the son referred to in the company name, Salerno & Son Haulage Ltd. That son is Peter Salerno. He is a mechanic, and for many years was the mechanic for the Applicant. Pasquale Salerno has become ill and, commencing about one year ago, Luigi Salerno now operates the company. Luigi Salerno has been involved with the Applicant as a driver and dispatcher over the years, and attended at both interviews and the show cause meeting with his father. The notes of those meetings indicate that he did most of the speaking on behalf of the company at the meetings but he stated that he was voicing his father's opinions. His role was simply to assist his father who has difficulty with English.

Mr. Salerno spoke about two collisions where he had personal knowledge. In the first case, he was riding with one of his drivers. The driver was making a left turn. The turn was commenced when the light turned red and traffic cleared. As the trailer was halfway through the intersection, a car running the red light was unable to stop and struck the trailer. The attending police officer felt the onus was on the driver to ensure that no traffic was coming before commencing his turn and charged the driver. The driver was out of town when the case came to court so he did not attend trial. Mr. Salerno got no notice of trial so he did not attend. A conviction was entered. Mr. Salerno stated that the driver was not disciplined as a result of this accident as he felt it was not the driver's fault. The second collision occurred while Mr. Salerno was driving. He stated that he was making a left turn at a T-junction. The rear of the trailer had cleared the roadway for crossing traffic and had stopped, when the car behind tried to squeeze between him and the median. It struck his rear wheel. When the officer attended, he sided with the car driver and charged Mr. Salerno with an improper left turn. A review of the accident report suggests that the trailer improperly crossed into the next lane. While the accident report is at odds with Mr. Salerno's story, it is worthy of note that the Act provides that large vehicles are permitted to use more than one lane

while turning without having breached the Act. Mr. Salerno is disputing the charge and is awaiting a court date.

Mr. Salerno stated that up until about one year before the hearing, his father had run the company. His father had been ill for some time. In the year since Luigi Salerno has been running the company, he has instituted a number of changes to ensure that the record improves. Of the drivers who were there in 2006, he is the only one remaining. He has gotten rid of the "bad apples", to use his words. The company is now reviewing its CVOR abstract every four months to pick up incidents where drivers have had their licences suspended. There had been a rash of incidents where drivers were caught driving with inappropriate licenses. Mr. Salerno now hopes to ensure this is caught earlier. Vehicles are now returned to the yard each night for inspection. Prior to his taking charge, drivers might take vehicles home each night. He has hired a new mechanic. Mr. Salerno and the mechanic now do a walk around check of the vehicles each night. To ensure drivers are doing a daily circle check, vehicle pre-trip inspection sheets must be handed in each day. Finally, Mr. Salerno is strictly enforcing the requirement of monthly safety meetings. The monthly meeting was instituted some time in the past but had been missed on occasion. Now it is strictly enforced.

Mr. Salerno feels his new regime is starting to show results. The latest CVOR Abstract supports his position. The VR immediately following the change to the new system had dropped to 74.6% from April 2, 2007 to August 2007. In the period from April 2, 2007 to February 17, 2007 it had further dropped to 51.27%.

In cross-examination, Mr. Salerno admitted that a number of the policies promised in earlier meetings with the Registrar's office were not strictly carried out. One such policy, monthly meetings, has been addressed above; a second, the three strike rule, was not strictly enforced. Mr. Salerno stated that there were two reasons for not enforcing this policy. One reason was the difficulty of finding replacement drivers. The second was common humanity. In a number of cases, the drivers in question had large families dependent on the drivers' income for support. First Pasquale Salerno and then Luigi Salerno, had grave concerns over depriving these drivers of their livelihood. As stated above, Luigi Salerno has since terminated all of the drivers in question. Mr. Salerno also took issue with a number of the convictions as grounds for discipline. Discussed above, is the left turn incident which Mr. Salerno does not believe was his driver's fault. Another conviction involved driving without mudguards. Mr. Salerno stated that mudguards come off very easily during the course of a day. The solution is to replace them at night, not write a ticket. Mr. Salerno feels discipline should be levied if a driver has failed to conduct a proper pre-trip inspection. He is of the view, however, that problems that develop on the road, that a proper pre-trip inspection could not determine, would not be the basis for discipline. Included in this group, is the seized brake incident. He stated that the brake in question suffered a sudden ruptured membrane, and no amount of pre-trip inspection could have prevented the rupture.

ANALYSIS

The record discloses two facts that are highly significant. The first fact is that the year 2006 was an abysmal year for the Applicant. It suffered numerous collisions, charges and out-of-service defects. The second fact is that since early 2007 the record of the Applicant has improved dramatically. The VR has been more than halved in the period from April 2, 2007 to February 2008. In the period just prior to the show cause meeting on November 15, 2007, it had dropped approximately 50% from over 121% to 74.6% for the period from April 2, 2007 to August 28, 2007. When added to the history of improvement after the previous interviews, the record supports a picture of the Applicant that indicates it is not beyond redemption. Rather, it is a carrier that takes the Registrar's interventions seriously, and makes efforts to improve. There is a problem sustaining the improvements. In the past, improved on-road performance lasted for approximately four years until the next intervention. The Registrar is of the view that the totality of the various lapses on the record warrants a thirty-day suspension. The Tribunal is of the view that thirty days is harsh when compared with other suspensions levied by this Tribunal. For reasons set out below, it is the Tribunal's view that a ten-day suspension and seizure are more in order.

The Tribunal formed a strong opinion that Luigi Salerno is sincere in his commitment to improving the safety record of the Applicant. It was also clear from the manner in which he delivered his evidence that he lacks the level of experience in advocacy necessary to convince the Registrar that the Applicant has, in fact, turned the corner. The programs he has put in place were delivered verbally. There was no sophistication in the presentation. Given that the Registrar did not reduce the length of the suspension following the show cause meeting indicates that the Registrar was not convinced that the proposed remedial measures put forward by Mr. Salerno had been or would continue to be effective. Yet the record discloses that they were and are. The Registrar's position is in acute contrast to the way in which it treated at least one carrier with a similar record. In the matter of *National Transportation Carriers* a decision of this Tribunal released on February 22, 2007, the carrier had a chronic high VR problem similar to the Applicant's. It had been called to a show cause meeting on two occasions because its VR was above 100%. On the first occasion, in December 2004, the carrier produced an extensive remedial plan and made submissions to the Registrar concerning both its intention and desire to improve its VR. The VR did not improve, so the Registrar again proposed a suspension, and the Applicant attended a show cause meeting in December 2005. At that meeting the carrier produced substantially the same plan. It took the position that key personnel had failed to carry out the proposed plan and had been fired. The company was now in a position to put into effect its proposal. Following the meeting, the Registrar reduced a thirty-day suspension to ten days. The ten-day suspension was upheld on appeal to this Tribunal.

The Tribunal is of the view that the significant improvement in the Applicant's record since Luigi Salerno took over control needs to be recognized. For this reason, the Tribunal is of the opinion that ten days is a more appropriate suspension. Unlike *National Transportation Carriers*, this Applicant has been the subject of only one Proposal from the Registrar, not two. It may lack the sophistication to make persuasive submissions, but the results achieved speak volumes. The Tribunal is left with one

concern, however. It would appear that the Applicant's remedial measures have been *ad hoc* steps, and have not been properly enshrined in company policy. The Tribunal was not shown any evidence of company policy manuals, safety manuals or company structures that will ensure the continued application of Mr. Salerno's policies should he, for any reason, not be available to run the company on a day-to-day basis. There is, for instance, no evidence of a safety officer. Indeed, there is no evidence of any support staff who could lift the heavy burden off Mr. Salerno's shoulders of running every aspect of the Applicant, including acting as driver and dispatcher. The Tribunal is of the view that to ensure continued improvement, the Applicant needs to ensure that the recent improvements are institutionalized.

DECISION

Having reviewed all of the evidence and taken into account the submissions of the parties, pursuant to the authority granted to it in section 50 of the Act, this Tribunal orders the Registrar not to carry out that part of his Suspension and Seizure Order relating to the suspension of the Applicant for a period of thirty days. Commencing on a date to be set by the Registrar, the Applicant's CVOR shall be suspended for a period of ten days, and, during that suspension, the Applicant shall surrender the plate portion of its permits.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: May 14, 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

3394603 CANADA INC. O/A HARMAN TRANSPORT AND 1445913 ONTARIO INC.
O/A HGC

IN THE MATTER OF AN ORDER BY THE DEPUTY REGISTRAR
OF MOTOR VEHICLES DATED JANUARY 11, 2008,
SUSPENDING THE CVOR CERTIFICATES OF 3394603 CANADA
INC., o/a HARMAN TRANSPORT, 1445913 ONTARIO INC., o/a
HGC

TRIBUNAL: ELIZABETH SPROULE, Presiding Member

APPEARANCES: CAROLE McAFEE WALLACE, Counsel representing the
Applicants

MURRAY FORBES, Counsel representing the Respondent

DATE OF
PRE-HEARING: April 16, 2008

Toronto

ORDER

A pre-hearing was held on April 16, 2008, before this Tribunal, in the presence of Carole McAfee Wallace, Counsel, representing the Applicants, and Murray Forbes, Counsel, representing the Respondent;

The Tribunal makes the following stipulations and order:

1. The two day hearing of this matter shall commence on June 11, 2008, at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, and continue, if necessary, on June 12, 2008.
2. The parties shall make full disclosure of all documents to be relied upon on or

before May 23, 2008.

3. The Applicant has confirmed that 3394063 Canada Inc. o/a Harman Transport and 1445913 Ontario Inc. o/a HGC are related companies.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule
Vice-Chair

RELEASED: April 29, 2008

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



PRE-HEARING

1531327 ONTARIO LIMITED, c.o.b. A.C. TRANSPORT

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

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

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: GORDON V. MEAKINGS, Counsel, appeared on behalf of the
Applicant

MURRAY G. FORBES, Counsel, appeared on behalf of the Deputy
Registrar

DATE OF
PRE-HEARING: April 7, 2008

Toronto

ORDER

This pre-hearing arises out of an appeal by 1531327 Ontario Limited c.o.b. A.C. Transport ("A.C. Transport") to the Licence Appeal Tribunal (the "Tribunal") from a suspension and seizure order by the Deputy Registrar under the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended (the "Act"). During the pre-hearing, the parties agreed that:

1. At issue in the hearing will be the question of whether A.C. Transport is a "related" corporation, within the meaning of the Act, to 1275729 Ontario Incorporated c.o.b. All Makes Logistics or to H.A.S. Gill Trucking Limited U.S.
2. Arwinder Gill, the owner of A.C. Transport, is the son of Jaswinder Gill and the nephew of Iqbal Gill.

3. The safety record of A.C. Transport, taken on its own, does not warrant sanction.

The parties also agreed on certain procedural matters. Accordingly, the Tribunal orders as follows:

1. The parties shall disclose all documents and things on which they intend to rely at the hearing to each other by June 16, 2008. In all other respects, the Tribunal's Rules of Practice, effective January, 2008 will apply to this proceeding.
2. The hearing will commence at **9:30 AM** on **July 16, 2008** at the offices of the Tribunal and will continue, if necessary, on July 17, 2008.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: April 25, 2008

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



PRE-HEARING

4668 - 1601617 ONTARIO LTD

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

TO REFUSE TO ISSUE A COMMERCIAL VEHICLE OPERATOR'S REGISTRATION CERTIFICATE

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JAMES LEE, Agent, appearing on behalf of the Applicant, 1601617 Ontario Inc.

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

DATE OF
PREHEARING: March 31, 2008 Toronto

ORDER

A pre-hearing was held on March 31, 2008, at the Tribunal's Chambers at 1 St. Clair Ave W., Toronto, Ontario in the presence of James Lee, agent, appearing on behalf of the Applicant and Murray Forbes, counsel, appearing on behalf of the Registrar.

The Tribunal makes the following order respecting the hearing:

1. The Parties to the hearing are 1601617 Ontario Ltd. (the "Applicant") and the Registrar.
2. The Applicant acknowledges that the documents contained in the Registrar's Book of Documents received by the Applicant and the Tribunal are true copies of business records from the Registrar's files and the Applicant

accepts the truth of the contents of such documents without the need for formal proof by the Registrar.

3. With respect to the allegation that the Applicant is a related company to three corporations, which are of concern to the Registrar, the Applicant admits that the sole officer and director of the Applicant is the son of the sole officer and director of three corporations.
4. The Registrar and the Applicants shall fully comply with Rule 6 of the Rules of Practice of this Tribunal and in regard to Rule 6.3 of such Rules disclosure shall be made at least 30 days before the hearing. The parties shall not less than 30 days prior to hearing serve on the other and file with the Tribunal a Book of Documents upon which they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: April 29, 2008

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



PRE-HEARING

FUNLAND OUTDOOR AMUSEMENTS LTD.

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*

TO CANCEL AND SEIZE THE COMMERCIAL VEHICLE
OPERATOR'S REGISTRATION CERTIFICATE (CVOR #123-495-
391) ISSUED TO FUNLAND OUTDOOR AMUSEMENTS LTD.
AND THE PLATE PORTION OF PERMITS FOR BOTH ITS
TRAILER AND ITS COMMERCIAL VEHICLES

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: HARVEY CAPP, Counsel, representing Funland Outdoor
Amusements Ltd. (the "Applicant")

MURRAY FORBES, Counsel, representing the Registrar of Motor
Vehicles (the "Respondent")

DATE OF

PRE-HEARING: April 1, 2008

Toronto

ORDER

An initial pre-hearing was held in this matter on February 12, 2008, before this Tribunal. On February 20, 2008, the Counsel for the Applicant requested that a second pre-hearing be conducted, and the Respondent consented.

Having heard the joint submissions of the Parties' Counsel and reviewing the Memorandum of Settlement, the Tribunal makes the following Order:

1. Upon the consent of the Parties, these proceedings are disposed of without a hearing, and concluded, on the basis of the Memorandum of Settlement executed on April 1, 2008, by the Parties, and filed with the Tribunal, pursuant to which:
 - a) the CVOR Certificate # 123-495-391, issued to the Applicant, is hereby cancelled; and,
 - b) the plate portion of permits will be re-activated on the basis of the Applicant meeting the requirements contained in the said Memorandum of Settlement.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: April 24, 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

1099261 ONTARIO LIMITED o/a FORESHEW TRUCKING – PRE-HEARING

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

TO SUSPEND THE CVOR CERTIFICATES AND SEIZE THE
PLATE PORTION OF PERMITS

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: IAN MCLEAN, counsel, representing the Applicant

MURRAY FORBES, counsel, representing the Deputy Registrar of
Motor Vehicles

DATE OF
PRE-HEARING: April 1, 2008

Toronto

ORDER

This pre-hearing was conducted electronically. During the pre-hearing, no settlement of the issues was reached. Mr. McLean undertook to contact Mr. Forbes, so that the parties could reach an understanding of the issues to be raised at the hearing, the number and the names of witnesses to be called and the expected length of the hearing.

The Licence Appeal Tribunal orders that:

1. The parties to this matter shall have until April 25, 2008, to disclose to each other any documents or things on which they intend to rely at the hearing. With the exception of the disclosure of documents, this appeal will be conducted in

accordance with the Licence Appeal Tribunal Rules of Practice, effective as of January 1, 2008.

2. The hearing in this matter will begin on **July 2, 2008**, at **9:30 a.m.** at **Heather E. Penfound Court Reporters, 116 McIntyre Street West, Main Floor, North Bay, Ontario**, and will continue on July 3, 7, 8, 9, 10 and 11, 2008, if necessary. If the parties agree that fewer days are required for the hearing, then the Applicant will advise the Licence Appeal Tribunal of the estimated number of days required.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice Chair

RELEASED: April 15, 2008

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

Licence Appeal Tribunal

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Decisions under Highway Traffic Act

Section 48.3(2) - Administrative Driver's Licence Suspension - (ADLS)

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Decisions under Highway Traffic Act

Section 82.1 - Commercial Vehicle Impoundment and Suspension Order - (CVIS)

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Section 95(1) - Motor Vehicle Inspection Licence - (GARAGE)

Fiscal Year 2008 - 2009

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>>	CLASSY AUTO SERVICE LTD. AND MARIO FARENGA	
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CLASSY AUTO SERVICE LTD. AND MARIO FARENGA

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY
TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE AND TO REFUSE TO ISSUE A MOTOR
VEHICLE INSPECTION STATION MECHANIC'S REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: JAMES F. LEE, Paralegal, representing Classy Auto Service Ltd.
and Mario Farenga (the "Applicants")

PATRICK S. MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATES OF
HEARING: January 22 and 23, 2009 Toronto

REASONS FOR DECISION AND ORDER

The Applicants appeal from a Notice issued under the provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act") by the Director of Vehicle Inspection Standards (the "Director") on October 24, 2008¹ proposing to refuse to issue a Motor Vehicle Inspection Station ("MVIS") licence to the corporate Applicant, Classy Auto Service Ltd. ("Classy") and an MVIS mechanic registration to the personal Applicant, Mario Farenga. Throughout its history, Mr. Farenga has been the sole registered MVIS mechanic of Classy. He is also the sole officer and director of Classy.²

¹ Exhibit #1

² Exhibit #3, Tab 5

The Notice sets out the allegations against Mr. Farenga and Classy. A number of the allegations relate to convictions between 1996 and 2005. The allegations are set out in paragraphs 1 and 2 of the Notice and they all relate to convictions under sections 90(3)(a) or 99(2) of the Act, that is, that the Applicants certified vehicles that did not meet the prescribed standards or that the Applicants made false statements in an inspection certificate or safety standards certificate.³

The Applicants do not dispute the convictions. The Applicants also do not dispute the rash of convictions, 10 as against Classy and 11 as against Mr. Farenga, entered on November 28, 2008, arising out of a move of the Applicants' business to an address at 24 Forwell Road in Kitchener.⁴ Forwell Road was never licensed under the Act.

The Applicants do dispute the allegations set out in paragraphs 3, 4, 5, 6 and 9 of the Notice. Paragraph 3 relates to the issuance of three safety certificates where convictions were not entered. Paragraph 4 relates to inspections carried out on heavy commercial vehicles where it is alleged that Mr. Farenga did not hold the correct qualifications under the *Apprenticeship and Certification Act, 1998*, S.O. 1998, c. 22 ("*Apprenticeship Act*"). In paragraph 5, it is alleged that the Applicants certified heavy vehicles without having a brake drum gauge capable of measuring the size of brake drums used on such vehicles. Paragraph 6 relates to the failure of the Applicant to affix an annual inspection sticker to a commercial vehicle. In paragraph 9, it is alleged that Mr. Farenga failed to cooperate with Ministry inspectors inquiring into the operation of his premises.

The Tribunal heard evidence from three Ministry of Transportation ("MTO") Enforcement Officers and from the Applicant. It heard further reply evidence from a fourth Enforcement Officer.

The first officer to testify was Officer David Halliwell. Officer Halliwell has been an Enforcement Officer for seven years. He apprenticed between 1976 and 1981 at the MTO Central Region Maintenance Garage and is a qualified small vehicle (310S) and heavy vehicle (310T) mechanic. After qualification, he worked at the Maintenance Garage until 1996, where he conducted safety inspections on a range of vehicles. After 1996 he was responsible for sending MTO vehicles to outside contract garages for maintenance. Based on his qualifications and experience, the Tribunal found that Officer Halliwell was qualified to provide expert opinion evidence on matters pertaining to automotive inspections and the application of standards.

³ Exhibit #1, paragraphs 1 and 2

⁴ Exhibit #1, paragraph 7 sets out the allegations and Exhibit #3, Tab 8 records the convictions against Classy and Tab 9 records the convictions against Mr. Farenga.

Officer Halliwell works out of the Halton Regional office. Among his duties is the inspection of certain vehicles such as cabs, school buses and coffee/catering trucks carrying on business in Halton. Halton by-laws require inspections twice per year. It is an inspection requirement that the vehicles have a safety standards certificate. Pursuant to his by-law inspection duties, Officer Halliwell had occasion to inspect a 2002 Chevrolet catering truck on October 24, 2007. The vehicle was brought to the MTO regional office and Officer Halliwell conducted the inspection in the parking lot. He did not have a hoist available to him to conduct this inspection, so he carried out what is referred to as a limited inspection.

The first thing that Officer Halliwell noted was the vehicle had a gross weight rating of 4,499 kg. This weight rating is below the weight requiring an annual inspection sticker to be affixed. As stated above, for the purposes of the by-law inspection, the vehicle did have a recent safety inspection. Officer Halliwell asked for and was given the vehicle registration, insurance and safety standards certificate ("SSC"). SSC #12032373 was produced. Officer Halliwell noted that it was issued by licensee #3342306, that is, Classy, on the 16th of October 2007, eight days before the inspection.⁵ He noted that, according to the odometer, it had driven 829 kms since it was inspected.

Officer Halliwell then carried out the limited inspection. He found three defects on the vehicle that, in his view, were present eight days earlier when the Applicants issued the SSC. It was his position that the defects were in breach of the standards set out in O. Reg. 611, R.R.O. 1990. The first thing he found, and from his evidence it would have been impossible to miss, was a steering box leaking fluid. He described the leak as excessive. He stated that it left a trail across the parking lot and a puddle amounting to several thimbles full of fluid under the vehicle during the time of inspection. He stated he formed the opinion that the leak had been present for some time because of the degree to which it had spread under the vehicle. He went on to say that no leaks are permitted by virtue of the provisions of O. Reg. 611, R.R.O. 1990.

Officer Halliwell also found vertical movement in the left outer side tie rod ball and socket joint. He described the vertical movement as the thickness of two pennies, or 0.125". The movement was not measured by the use of measuring equipment. It was an estimate only. He informed the Tribunal that the Regulation permits only 0.039" vertical movement in the ball joints in question. Officer Halliwell stated that movement, such as he found, may cause lateral steering movement and may lead to loss of steering on the vehicle. From his experience, Officer Halliwell was of the opinion that the movement he discovered in the ball joints would arise over an extended period, and would not develop in the 829 kms since the SSC was issued. In his view, the movement was present and should have been discovered by Mr. Farenga at the safety inspection.

⁵ Exhibit #3, Tab 20, page 178

The third defect discovered by Officer Halliwell was a loose front seat. He testified that all four bolts holding the seat to the frame of the vehicle were loose and could be worked with his fingers. The seat was free to move vertically about one quarter of an inch. If allowed to persist, continual movement could cause bolt failure. The seat might shift and the driver might lose control. Officer Halliwell found extensive debris behind the seat. This led him to conclude that the seat had not been removed recently, as any mechanic removing the seat would clear out the debris. He concluded that the loose condition had been present when Mr. Farenga had carried out his inspection eight days earlier. Seats do not come loose if the bolts are properly tightened, according to Officer Halliwell.

In cross-examination Officer Halliwell was taken to the provisions of Schedule 1, O. Reg. 611. He acknowledged that by the provisions of Schedule 1, section 3(1)(c) the inspection standard for power steering fluid leaks is that such leaks shall not be excessive and that the standard was not zero leaks, as he had stated in his examination-in-chief. He was of the opinion that the leak he observed was excessive. He confirmed that there was sufficient power steering fluid in the reservoir but felt the driver might have topped it up before coming to the inspection. The provisions of the same regulation regarding play in steering linkages, that is, the provisions relating to the left tie rod ball joint, are found at 6(1)(b) and were also pointed out to Officer Halliwell. He conceded that the standard was not zero movement, as he had stated in examination-in-chief, but was a lack of excessive movement. He was also shown the manufacturer's specifications regarding allowable movement in tie rod ball joints.⁶ He conceded that the 0.039" standard he had applied to vertical movement was the manufacturer's standard for lateral movement and that there was no standard for vertical movement.

Officer Andrew Brown has been an MTO Enforcement Officer since September 2001 working in the Waterloo office. He addressed two issues in his evidence. On February 3, 2006, Officer Brown attended at the Applicants' new business premises at 836 Courtland Avenue East in Kitchener. The Applicant had just recently moved from 162 Ottawa Street North, where he had been in business for a number of years. Since an MVIS licence is specific to a location, it was necessary for the Applicants to advise MTO of the move and for MTO to conduct an audit of the new premises to determine suitability of the premises. As part of the audit, Officer Brown reviewed Mr. Farenga's tools and mechanic registrations. He made two observations which he noted on his audit report. He noted that Mr. Farenga was not then certified under the *Apprenticeship Act* as a class 310T bus and truck mechanic. He had been certified but his certification had lapsed on March 3, 2001 and had not been renewed. Officer Brown noted that the Applicants had been issuing annual inspection stickers for large trucks. He concluded and noted that the premises were not suitable for large trucks. The bays were not large enough and there was no exterior hard standing surface. He felt the Applicants' tools were not capable of the measurements required of large trucks. He discussed his findings with the Applicant and advised him that inspections should be limited to light vehicles only. His MVIS Audit report notes: "No large or air brake vehicles". In full

⁶ Exhibit #4

knowledge of the Applicants' conviction record up to 2004, Officer Brown approved the Applicants' MVIS operation at Courtland Avenue.

In April 2008 Officer Brown was contacted by a Constable of the Waterloo Regional Police. The Constable had stopped a commercially registered Chevrolet dual rear wheel pick-up truck. She had asked the driver for an annual inspection certificate. The driver had reached into his briefcase and pulled out the inspection certificate dated September 8, 2008 and the annual inspection sticker still on the original backing.⁷

Under the regulations, the issuing inspection station and mechanic have a duty to affix inspection stickers to vehicles prior to returning them to their owners. The provision guarantees that the sticker is not misused by being attached to a vehicle that has not been inspected. The Constable reported the matter to MTO for follow-up. Officer Brown determined that the issuing station was Classy and the sticker was signed by Mr. Farenga. He further determined that the sticker was one of a book of stickers issued to the Applicants on September 11, 2008,⁸ a date three days after the effective date on the sticker. In Officer Brown's view, the Applicant must have back dated the certificate.

In cross-examination Officer Brown confirmed that the threshold for the legal requirement for an annual sticker is a gross vehicle weight of 4,500 kg. He further agreed that the registered gross vehicle weight of the Chevrolet pick-up in question was 4,000 kg, and that on the night in question, it was weighed by the Constable at 4,450 kg.⁹ He believed the manufacturer's gross vehicle weight sticker had been removed from the vehicle, but he was of the opinion that the Constable would have been familiar with the gross vehicle weight of this type of pick-up and know that it required an annual inspection sticker. He also stated that the gross vehicle weight of a vehicle includes any trailers being towed such that an annual sticker might be necessary. He stated that Mr. Farenga may not have known the gross vehicle weight of the vehicle or the intended use when he was requested to do the annual inspection. Charges were laid and the matter has yet to come to court.

Officer Robert Lickers has been an Enforcement Officer with MTO since 1997. He completed his automotive service technician apprenticeship in 1988 and holds both a Class 310S and a Class 310T designation. He works out of the Waterloo Regional Office. His duties include making mechanical judgments about vehicles which he inspects on roadside inspections, monitoring non-compliance issues with MVIS stations, dealing with telephone complaints and investigations referred to him from outside the Waterloo Region. He also represents MTO at trade meetings and driver training meetings in and around Waterloo, where he will give talks on the MVIS system and the Commercial Vehicle Operator's Registration system. The Tribunal found that he was qualified to give expert evidence relating to automotive mechanics and the application of the regulations.

⁷ Exhibit #3, Tab 23, page 206

⁸ Exhibit #3, Tab 23, page 210

⁹ Exhibit #3, Tab 23, page 211

Officer Lickers reviewed those documents in Exhibit #3 not previously dealt with by other witnesses. In particular, he reviewed the conviction history of Mr. Farenga and Classy. The record for Classy shows a conviction under s. 90(3)(a) of the Act relating to an inspection certificate issued on August 13, 2004. There is then a list of convictions dated November 11, 2008, relating to certificates issued in January and February 2008.¹⁰ The record with respect to Mr. Farenga is found at Tab 9. Mr. Farenga's first conviction was in April 1996 and was pursuant to s. 99(2) of the Act.¹¹ There are then convictions in January 1998 relating to an inspection conducted in September 1997,¹² and in June 1999 relating to an inspection conducted in November 1998.¹³ These investigations were conducted by an officer who has retired and since passed away. The documents in support of these convictions are business records from the MTO file prepared by Officer Lickers. In 2002 the Applicant again was charged and convicted of issuing a false safety certificate. This investigation originated in Windsor. On October 10, 2002, an MTO Officer, Officer M., had found a vehicle with rust perforation holes in the underbody for which the Applicants had issued a SSC on September 30, 2002. Officer M. determined that the holes must have been present when the vehicle was inspected. Following an investigation, charges were laid and a conviction was entered on August 11, 2003.¹⁴

Officer Lickers testified concerning a kit vehicle. In January 2003, he had been asked to inspect the vehicle for an insurance company. He noted the vehicle was lacking in most of the requirements for certification. He described it as a pair of steel channels with a fibreglass body and a high performance engine. The vehicle had no mufflers, no safety glass in the windshield, no wipers and no defroster. Its fenders were wide open to the rear. It had no seatbelts and its headlights were out of alignment. The car was equipped with radial tires on the front and bias ply tires on the rear. The tires were rubbing and the parking brake cable was improperly routed causing rubbing. The vehicle had an Ontario plate, but it was not then in use. Several months after Officer Lickers' inspection, the garage where it had been inspected informed him that it had been sold. The new owner permitted Officer Lickers to inspect the vehicle. Officer Lickers noted that the Applicants had issued an SSC for the vehicle dated March 25, 2003, despite none of the deficiencies he had noted in January being addressed or repaired. Officer Lickers laid charges and a conviction was entered against Mr. Farenga on March 1, 2004.¹⁵ A second conviction on the same day related to a 1992 Ford Mustang, where Officer Lickers had inspected the vehicle and found a number of defects including brake and suspension problems. At the inspection, Officer Lickers removed the plates from the vehicle.¹⁶

¹⁰ Exhibit #3, Tab 8, pages 51 and 52

¹¹ Exhibit #3, Tab 10

¹² Exhibit #3, Tab 11

¹³ Exhibit #3, Tab 12

¹⁴ Exhibit #3, Tab 13

¹⁵ Exhibit #3, Tab 14

¹⁶ Exhibit #3, Tab 15

On September 3, 2004, Officer Lickers responded to a consumer complaint regarding the purchase of a 1991 Cadillac. The vehicle had been purchased from a company related to Classy and operated by Mr. Farenga. It was sold certified and emission tested. While the consumer sets out a litany of complaints regarding his dealings with Mr. Farenga, at issue in this matter is the condition of the vehicle when inspected by Officer Lickers. He found a number of defects on the vehicle including worn ball joints, a broken stabilizer link, missing bushings, seized brake self-adjuster and rust holes in the fenders. The consumer had tried to work with Mr. Farenga to resolve the difficulties but had given up when Mr. Farenga had used obscenities and refused to take further steps to fix the problems. Officer Lickers then attended with another officer at the Applicants' premises to discuss the matter. He testified that Mr. Farenga was verbally abusive. His contemporaneous notes state: "Verbally abusive, threatening tones/gestures, already offended by MTO presence, accusing statements. I abandoned this attempted interview". Classy pleaded guilty to charges arising out of the inspection of this vehicle on April 27, 2004, and was fined \$850.00.¹⁷

One defective safety certificate that did not end in a conviction concerned a November 20, 2001 inspection of a 1989 Honda Accord. The reason it did not end in a conviction was due to a labour dispute where Officer Lickers was unable to attend the Applicants' premises until the six month limitation period for provincial offences had expired. Officer Lickers noted that the Applicants had issued the safety certificate 22 days and 896 kms prior to his inspection. He noted that the right front coil spring was broken in three places. He observed that the gaps at the breaks were separated and that rust and dirt had accumulated on the exposed fracture surfaces. The left coil spring was broken in two places with similar rust and dirt accumulation on the fracture surfaces. In his view, the condition of the fracture surfaces indicated that the defect had existed for a long period of time. The breaks were easily seen with the wheels removed. Officer Lickers issued a warning to the Applicants.¹⁸

Officer Lickers conducted an inspection relating to a 1988 Nissan 300Z on May 22, 2003. The Applicants had issued an SSC for this vehicle on May 3, 2003. Officer Lickers noted horizontal movement in the ball joint of .020". He noted movement in the rear cradle forward mounts of .375". He was of the view that the movement in both these areas was in breach of O. Reg. 611 and initiated a charge. The Tribunal has no record of a finding of guilt or other disposition of the charge and no conviction is recorded on the Applicants' records.¹⁹

On February 27, 2004, Officer Lickers inspected a 1992 Dodge where the Applicants had issued an SSC 35 days and 965 kms before the inspection. He found the car to be in such an unsafe condition that he removed the plates. The defects in this car included rusted and fatigued mounts, collision damage, leaky brake seals, inoperative seatbelts, broken windshield wipers and numerous others. Officer Lickers advised the Tribunal

¹⁷ Exhibit #3, Tab 17

¹⁸ Exhibit #3, Tab 18

¹⁹ Exhibit #3, Tab 19

that the owner of this vehicle was a single mother whose major concern was a safe affordable car. He stated that this car was not safe.

There was a long history of dealings between Officer Lickers and Mr. Farenga. Officer Lickers stated that it was his practice, based on information he was given when he first moved to the Waterloo Region, to attend on Mr. Farenga with another officer. He attended with another officer 90% of the time. He met with aggressive behaviour and animosity and a reaction to the MTO presence. He stated that Mr. Farenga felt he was being picked on. Officer Lickers has met with animosity in the past and stated that it was not unusual in the industry. On two occasions he has had very bitter reactions from garages.

As a general rule the garage owner knows that MTO Officers are going to attend because the owner will have had dealings with a consumer prior to the complaint being made.

Attendances at the Applicants' premises usually resulted in an audit inspection being conducted. There are numerous examples of audit reports in the evidentiary materials and there would appear to be two common themes. The first theme is that the inspecting officers found the space to be cluttered and untidy, and the second theme is the lack of tools or evidence of misuse of tools because of layers of dust on them. An example of the latter is the inspection report of February 3, 2006, issued by Officer Brown. Officer Brown notes a lack of tools and facilities for inspecting large vehicles.²⁰ On March 13, 2008, Officer Lickers noted during his inspection that the Applicants lacked a blue adapter for the Hoppy headlight aiming kit, a micrometer with a pointed measuring surface to measure the depth of brake rotor grooves and only had a 16" brake drum gauge. In Officer Lickers' view, the Applicant required a larger brake drum gauge to measure large vehicle brake drums, which he informed the Tribunal would be at least 18" and could be as large as 22" on tractor units. Officer Lickers also noted that the work space was "cluttered & disorganized".²¹

At Tab 21 of Exhibit #3, Officer Lickers drew the Tribunal's attention to three annual inspection certificates issued to heavy commercial vehicles in January and February, 2008. Two of these units were Volvo trucks and one was a Mercedes. The Volvo trucks had registered gross weights of 36,500 kg and 39,600 kg, and the Mercedes had a registered gross weight of 13,000 kg. The manufacturer's gross vehicle weight for the Volvo trucks was 52,500 kg and 52,350 kg respectively. No manufacturer's gross vehicle weight was provided for the Mercedes. The issuance of these certificates caused Officer Lickers two concerns. The first has been dealt with above. It is Officer Lickers' view that the Applicants do not possess a brake drum gauge sufficient to measure the drums on these vehicles. It is worthy of note that, in cross-examination, Officer Lickers admitted that he did not know the diameter of the brake drums on the Volvo trucks or the Mercedes truck but again insisted that highway tractors have at least

²⁰ Exhibit #3, Tab 25, page 222

²¹ Exhibit #3, Tab 25, page 223 - Other examples, the condition of the station is marked as unsatisfactory in the reports at Tab 14, page 101; Tab 16, page 125; and Tab 18, page 151

18" drums and a 16" gauge is insufficient. The second concern relates to Mr. Farenga's certification under the *Apprenticeship Act*. Mr. Farenga had apprenticed and qualified as a 310S and a 310T mechanic certified to work on light vehicles and heavy vehicles respectively. In 2001, he had allowed his registration as a 310T mechanic to lapse yet he still continued to work on heavy vehicles, even after his lack of certification had been pointed out by Officer Brown in 2006. In March 2008, he renewed his 310T certification by the payment of the certification fee and it was not in dispute that he is now certified to work on all classes of vehicle.²²

On receipt of the information from Officer Halliwell concerning the defects found on the catering truck in Halton Region, Officer Lickers attended at the registered premises of Classy on Courtland Avenue East in Kitchener. The date was February 28, 2008. He found that the Applicants had vacated the premises on January 6, 2008, and that the premises were now operated by a tire company. He immediately made an entry in the MTO records signifying that the business was no longer in operation at Courtland Avenue East. The effect of the new data was that no new SSC books or annual inspection sticker books would be issued to the Applicants at that address, and the MVIS registration was deemed terminated. Also on February 28, 2008, Officer Lickers received information that the Applicants were operating at a different, unlicensed premises on Forwell Road in Kitchener. Officer Lickers attended at the new premises on February 29, 2008, solely for the purposes of recouping Crown property in the possession of the Applicants.²³ When an MVIS is terminated, there is a requirement to return the MVIS binder, the MVIS sign and any unused SSC books or annual inspection books and stickers. After a heated debate with Mr. Farenga, Officer Lickers left Forwell Road without all of the Crown property. A number of charges were laid against the Applicants for the Forwell Road operation, including improperly issuing SSCs and annual inspection stickers when not licensed to do so and failure to return Crown property. As stated above, there were 21 convictions in total against both Classy and Mr. Farenga.

One of the charges laid arising out of the February 29, 2008 visit was a charge under s. 8 of O. Reg. 601, R.R.O. 1990 under the Act. This charge was premised on Mr. Farenga's lack of 310T certification when he had completed inspections on the three trucks. Officer Lickers acknowledged that the charges were dismissed. He stated, with the assistance of counsel, the judge determined that s. 8 does not create an offence. In cross-examination, Officer Lickers acknowledged that his inspection process in certain limited cases was not set out in the regulations. The use of a pry bar to determine the movement of the suspension with respect to the Nissan 300Z is one example. He also denied feeling any animosity towards Mr. Farenga or being intimidated by him. He did not feel that Mr. Farenga had the professionalism to properly represent the MVIS system.

²² Exhibit #3, Tab 22 sets out the certification history of Mario Farenga

²³ Exhibit #3, Tab 24 - Officer Lickers' written statement refers to 2007 but he corrected this in oral testimony

In his testimony, Mario Farenga reviewed his history in the automotive business. He has owned Classy since 1992. Originally he operated out of a service station where he had the maintenance business and someone else operated the gas retail business. He stated that he had many repeat customers. In 2006, it was discovered that there was contamination on the property so the gas company closed the premises. The Applicants moved to the Courtland Avenue East location and carried on business there. He called MTO and advised it of the move during the last week of January 2006. He asked for someone other than Officer Lickers to conduct the site inspection, so Officer Brown was sent out. The Applicants moved over the weekend and Officer Brown inspected and approved the location on Monday morning. The Tribunal notes that Officer Brown's Audit Report is dated February 3, 2006,²⁴ a Thursday. The Applicants operated out of the Courtland Avenue East premises for two years.

After about a year at the Courtland Avenue East premises, Mr. Farenga entered into an agreement to purchase the original service station. Because of the environmental contamination, the vendor advised Mr. Farenga that it would likely take about a year and a half to complete the transaction. When his lease at the Courtland Avenue East address came up for renewal, Mr. Farenga wanted to extend for a short period until he could move to the service station location, but the landlord would not agree, and, on December 4, 2007, he gave Mr. Farenga 30 days notice to quit. In the first week of January 2008, Mr. Farenga contacted MTO, he believes it was Andy Rombouts, and advised him of the move to Forwell Road. He recalls being advised that the Forwell Road premises would not be approved because MTO requires a lease of at least a year to approve premises, and Forwell Road was only leased on a temporary basis prior to the move back to the service station sometime in the summer of 2008. Thereafter, Mr. Farenga received no further calls from MTO until Officer Lickers' visit at the end of February 2008.

With respect to Officer Lickers' visit, Mr. Farenga stated that he was with a customer when Officer Lickers and Officer S. arrived. The customer immediately decided to leave as he did not like the MTO Enforcement Officers. Officer Lickers then became very demanding saying: "I am here for the Ministry's Crown property". Mr. Farenga testified he informed Officer Lickers that he had one book of SSCs and one book of annual inspection stickers, which he gave to Officer Lickers. The discussion then became heated and Officer Lickers left without the Ministry binder and MVIS sign.

It was with respect to the drum gauge that Mr. Farenga disputed Officer Lickers' expertise. Mr. Farenga stated that most highway tractors have 16" drums. Some have 16.5" drums, with an occasional White Freightliner tractor having 17" drums. Mr. Farenga stated that he has not given annual stickers to any Freightliners. He stated that both the Volvos and the Mercedes had 16" drums. He produced photographs of brake drums from Volvo trucks showing the drums measuring 16".

²⁴ Exhibit #3, Tab 25

Mr. Farenga also produced the brake drum gauge itself. The Tribunal noted that the brake drum gauge consists of three parts. There is a calibrated steel rod along which slide two sliders. One slider has a circular gauge attached to it, calibrated to measure in thousandths of an inch. The gauge is used by positioning one slider inside the drum to be measured and sliding the other out to the correct calibration mark across the diameter of the drum – say 16". The amount in thousandths of an inch by which the drum exceeds 16" may then be read off from the circular gauge. Mr. Farenga stated that the process is to record the highest deflection and the lowest deflection of the needle. The sliders are locked into place with tightening screws. Of note is the fact that the steel rod is notched where the tightening screws are located such that it can be tightened in predetermined positions according to the notches. The steel rod is calibrated to 16" but it was Mr. Farenga's evidence that he can actually measure up to 16.5" or 17" by counting the notches in excess of 16" and tightening the sliders when an extra half inch or inch is reached.

With respect to the history of charges, Mr. Farenga admitted that he had made mistakes over the years. Initially, following convictions in the late 1990s, Mr. Farenga's lawyer set up a meeting with the local MTO enforcement officials. At the meeting, attended by Mr. Hans Jons on behalf of the MTO, Mr. Farenga undertook to ensure improved performance but stated that he told MTO not to be so picky. Thereafter, the Applicant avoided trouble for the next four years, until 2002. Between 2002 and 2004 the Applicants were doing SSC inspections for a number of car dealers and mistakes were made as a result of volume. Given the number of cars inspected, the mistakes represent a very low level of mistake. In 2004, Mr. Farenga met with Mr. Jons' successor. Notwithstanding that this official was not as helpful as Mr. Jons in setting a strategy for improvement, his record improved for a further four year period, until 2008, and he avoided any problems with MTO. He had no problems while operating at the Courtland Avenue East premises.

In reviewing the evidence of Officer Halliwell concerning the inspection of the coffee truck in Halton Region, Mr. Farenga denied that there were any problems with the vehicle when he inspected it. He acknowledged that, in his view, ball joints must be tight with respect to both lateral and vertical movement. According to Mr. Farenga, the ball joints were tight. Also according to Mr. Farenga, the seat was properly secured when he inspected the vehicle. He has no idea how it became loose. Initially, Mr. Farenga stated that there was a minute sweating of steering fluid when he inspected the vehicle. He later changed this position to suggest that he had seen no evidence of leakage.

The Director elected to call reply evidence to address two issues that arose out of Mr. Farenga's testimony. The first issue concerned Mr. Farenga's evidence that he had spoken to the Enforcement Coordinator, Andy Rombouts, in early January, prior to his move to Forwell Road and was erroneously advised that MTO would not licence the Applicants because of a short term lease. Mr. Rombouts was contacted by telephone in London, where he is now based. He stated categorically that he did not speak to Mr. Farenga in and around January 2, 2008. He did not start at the Waterloo office until

January 7, 2008. He did not speak to Mr. Farenga until after Officer Lickers' attendance at Forwell Road on February 29, 2008. He stated that Mr. Farenga called him. He does believe that Mr. Farenga was advised about licensing at Forwell Road prior to his move.

The second issue concerned the use of the drum gauge to measure in excess of 16" brake drums. The Director recalled Officer Lickers. In Officer Lickers' view, the drum gauge is not accurate to measure in excess of 16" because of the lack of calibration. He deposed that the point of the gauge is to measure the diameter of the drums not whether they are out of round. Accordingly, they must be accurate to 16.5" and counting notches to determine accuracy was not, in Officer Lickers' view, sufficiently precise.

ANALYSIS

The tests for registration of an MVIS and an MVIS mechanic are set out in s. 91 and 92, respectively, of the Act 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.
- (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.
- (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.
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.

By virtue of ss 91(2) and 92(2) an applicant is entitled to registration unless the applicant runs afoul of the grounds for denial set out in the Act. The effect of the statutory wording is to place the burden of proof squarely on the shoulders of the Director. The Director must establish, on a balance of probabilities, that at least one of the provisions of ss 91(3) applies to Classy and at least one of the provisions of ss 92(4) applies to Mr. Farenga. The Director's submissions addressed the past conduct of the Applicants. There was no submission that the Applicants did not lack the technical competence for registration, notwithstanding that a great deal of hearing time was devoted to evidence concerning defects found in vehicles shortly after the Applicants had certified them as roadworthy. The Tribunal, then, will focus on the past conduct of the Applicants to determine if it affords reasonable grounds for belief that the Applicants will not carry on business in accordance with law and with integrity and honesty.

The Director led a great deal of evidence concerning the past record of the Applicants. That record is lengthy and demonstrates that the Applicants have consistently run afoul of the regulatory scheme almost since the start of business. There is evidence that the Applicants operated without serious problems after 2004 until the move to Forwell Road. The Applicants argue that the period between 2004 and 2008 shows that they did learn from past mistakes and improved performance. The Tribunal is seriously disturbed by the Applicants' actions around the move to Forwell Road. In the Tribunal's view, it shows an underlying animosity towards the regulatory scheme that is inconsistent with ongoing registration.

The Applicants moved to Forwell Road in January 2008. They had previously moved from Ottawa Street North to Courtland Avenue East. Mr. Farenga's evidence was that he had notified MTO of the move on Friday, he moved over the weekend, and Officer Brown attended to complete an audit of the new premises on Monday. Mr. Farenga did not suggest, at any point in his evidence, that he was unaware of the need for the premises to be approved prior to operating an MVIS. In fact, his evidence concerning

Forwell Road was that he called MTO and was told the premises could not be licensed as an MVIS because of the short term lease. It seems this information was incorrect. Incorrect or not, Mr. Farenga was aware from the outset that the Forwell Road premises were not licensed and the Applicants could not operate an MVIS until approval was obtained. They chose to ignore the regulations. They may have succeeded in operating under the regulatory radar until the move back to Ottawa Street North in a few months, had Officer Halliwell not forwarded his concerns about the catering truck.

The Tribunal formed the opinion that Mr. Farenga was generally an honest hard-working individual trying to provide a living for his family. He was clearly more at home plying his trade as a mechanic than getting involved in litigious proceedings over a part of his livelihood. Unfortunately, Mr. Farenga's attitude to the regulatory scheme throughout his dealings was wrong.

Of the meeting with Mr. Jons in his lawyer's office, Mr. Farenga stated that he advised MTO not to be so picky. His dealings with Officer Lickers were confrontational. His decision to carry on business at Forwell Road has already been discussed. When a problem was found on a vehicle that he had certified, Mr. Farenga responded with a belief that he was being picked on. The correct attitude should have been shock that he had let an unsafe vehicle on the highway. It was not. His long record of infringements indicates that he did not learn from his mistakes.

The Tribunal's finding in this regard is bolstered by Mr. Farenga's ongoing failure to renew his 310T certification under the *Apprenticeship Act*. This particular problem was specifically brought to his attention by Officer Brown in 2006. He totally ignored Officer Brown's remarks and continued to exercise the privileges of a 310T certification in the full knowledge that he was not entitled to do so. It was not until he was likely to lose his licence over this issue that he finally took the necessary steps to renew.

There are a number of specific issues raised by the evidence that the Tribunal should address. The Tribunal is satisfied, on the basis of the evidence before it, that the catering truck inspected by Officer Halliwell developed the leaking steering fluid after it had been inspected by the Applicant. Officer Halliwell's description of the extent of the leak virtually guarantees that, if present at the time, it would have been noticed by Mr. Farenga. The Tribunal can find no evidence that the ball joint was out of limits. Officer Halliwell himself conceded that the manufacturer's specification relates only to lateral movement of which there was none. He stated that he must have applied the commercial vehicle inspection standard without confirming that this was the standard required by the regulations or applicable to this type of vehicle. It was Officer Halliwell's evidence that he applied a zero vertical movement standard whereas the regulations speak to excessive movement. The Tribunal cannot conclude on the evidence that the seat was loose when inspected by the Applicant. The rationale for Officer Halliwell's finding was that a mechanic removing the seat would have cleared the debris from behind it. The Tribunal would add the word "good" before mechanic. It is not improbable that not all mechanics meet the high standard of training and quality of Officer Halliwell.

In reviewing the evidence concerning the brake drum gauge, the Tribunal must discount most of Officer Lickers' evidence. He admitted candidly in cross-examination that he did not know the exact size of tractor brake drums, but was of the view that they were at least 18". In light of photographs of the Volvo brake drums showing that they were 16", and in light of Mr. Farenga's evidence that tractor brake drums are mainly 16" - his number was 85%, with some at 16.5" and some White Freightliners at 17", the Tribunal must conclude that Officer Lickers was in error in his evidence concerning the size of tractor brake drums. The Tribunal also concludes that, in the hands of an experienced mechanic such as Mr. Farenga, the 16" gauge could accurately measure up to 16.5". This approach is not an ideal solution but it is not outside the realms of possibility.

The Tribunal agrees with the position advanced by the Director concerning the annual sticker. Officer Brown testified that an annual sticker is required if the combined gross vehicle weight exceeded 4,500 kg. While on the day it was stopped, the dual rear axle Chevrolet pick-up weighed less than 4,500 kg, it was extremely close to that weight such that any towed vehicle would put it over the threshold weight. Mr. Farenga gave no explanation of the state of his knowledge concerning the use to be made of the vehicle at the time he conducted the annual inspection, but it is fair to conclude that the owner was incurring the expense of an annual inspection because of an intention to operate the vehicle in combinations in excess of 4,500 kg. Whatever the owner's intention, the fact that the Applicants conducted an annual inspection and then failed to attach the sticker to the vehicle was a breach of their obligations under the regulations. The breach further supports the Tribunal's finding that the Applicants consider the regulations as something to be endured rather than something to be embraced. Until this attitude changes, the Tribunal has little hesitation in concluding that there are reasonable grounds for belief that the Applicants will not carry on business in accordance with law.

ORDER

Pursuant to the authority vested in it under the s. 95 of the Act, the Tribunal orders the Director to carry out the proposal to refuse the registration of Classy Auto Service Ltd. as a Motor Vehicle Inspection Station and to carry out the proposal to refuse to register Mario Farenga as a Motor Vehicle Inspection Station mechanic.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: February 13, 2009

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



1641349 ONTARIO INC. DBA S&S DIESEL SERVICE AND UTHAYAKUMAR RAJARATNAM

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR, VEHICLE INSPECTION STANDARDS,
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO REFUSE A MOTOR VEHICLE INSPECTION STATION
(MVIS) LICENCE IN THE NAME OF 1641349 ONTARIO
INC. DBA S&S DIESEL SERVICE

AND TO REFUSE A MVIS MECHANIC LICENCE IN THE
NAME OF UTHAYAKUMAR RAJARATNAM

TRIBUNAL: HARINDER GAHIR, Vice-Chair

APPEARANCES: JUSTIN JAKUBIAK, Counsel representing 1641349 Ontario Limited
doing business as S & S Diesel Service, and Uthayakumar
Rajaratnam

MURRAY FORBES, Counsel representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING: January 12, 2009 Toronto

REASONS FOR THE DECISION AND ORDER

BACKGROUND

This is an appeal by 1641349 Ontario Limited doing business as S & S Diesel Service, (the "Corporate Applicant"), and Uthayakumar Rajaratnam (the "Applicant") (and together, the "Applicants"), to the Licence Appeal Tribunal (the "Tribunal"), arising out of the Notice dated June 30, 2008, issued by the Director of Vehicle Inspection Standards (the "Director"), proposing to refuse to issue a Motor Vehicle Inspection Station (MVIS) licence to the Corporate Applicant and to refuse to register the Applicant as a MVIS mechanic, pursuant to Subsections 95(3)(a) and (c) and 92(4)(a) of the *Highway Traffic Act* (the "Act"). The Director issued the Notice due to the following reasons:

The Applicant was the president and registered mechanic of 1369698 Ontario Ltd dba Hi-Tech Auto ("Hi-Tech Auto"). The Applicant and Hi-Tech Auto violated the Act and its regulations as follows:

1. The Applicant was convicted on May 14, 1998 for a false statement in a safety standard certificate (offence date – December 31, 1997).
2. The Applicant was convicted on August 13, 1998 for a false statement in a safety standard certificate (offence date – October 23, 1997).
3. The Applicant and Hi-Tech Auto were convicted on June 2, 2005 for certifying a vehicle contrary to section 90(3)(a) of the Act (offence date – September 9, 2004).
4. The Applicant and Hi-Tech Auto were warned with respect to the improper issuance of safety standards certificate 2667066 on September 1, 2001.
5. Hi-Tech Auto has failed to comply with section 10(b) of Regulation 601 by failing to keeping the required records.
6. The Applicant and Hi-Tech Auto issued annual inspection certificates without a valid MVIS licence after having vacated the licensed premises, including the following certificates:
 - a) H862462 issued on or about July 15, 2005, and
 - b) H862515 issued on or about July 28, 2005.

ISSUES

The issues in this case are as follows:

1. Should the Proposal of the Director of Vehicle Inspection Standards to refuse the Motor Vehicle Inspection Station's licence be carried out?
2. Should the Proposal of the Director of Vehicle Inspection Standards to refuse the Motor Vehicle Inspection Station mechanic's licence be carried out?

EVIDENCE

The Director called Ministry of Transportation Officers Douglas Davies, John Tomasone and Glen Dodwell. All the Director's witnesses hold 310A, 310S and 310T mechanic licences and all have had dealings with the Applicant over a period of time. The Director tendered a Book of Documents, containing documents involving conviction records, station records and inspection records of the Applicant and Hi-Tech Auto, which the Tribunal marked as Exhibit 3. Uthayakumar Rajaratnam testified on his behalf and on behalf of the Corporate Applicant. The summary of the evidence is set out below.

John Tomasone

Mr. Tomasone has been licenced as a light and heavy equipment mechanic since 1975 and has been working with the Ministry of Transportation (the "Ministry") since 1992. He explained his past dealings with the Applicant. Due to a complaint from a car owner, to whom the Applicant had issued a safety standard certificate, in September 2001 Mr. Tomasone inspected the vehicle in question. He found four defects, including rear wheel cylinder fluid leak, broken rear stabilizer bar, broken rear spring coils and rusted

steel brake tubing. Upon being notified of the above defects, the Applicant agreed to fix the same. Mr. Tomasone issued the Applicant a warning for performing a faulty inspection.

Testimony of Douglas Davies

Douglas Davies has been employed with the Ministry as an enforcement officer since 2001. His duties include performing safety inspections of vehicles on an ongoing basis.

He reviewed the documents contained in Tab 9 of Exhibit 3, pertaining to an inspection of a vehicle to which the Applicant had issued an annual safety certificate on September 9, 2004. A few days after the Applicant had issued the annual safety standard certificate, Mr. Davies performed a random check of a cube van on September 14 2004. He did a full mechanical inspection and found that right rear brake light of the vehicle was not working and both front flex hoses had exposed cords. Mr. Davies concluded that the vehicle was not safe to drive and had it towed. He testified that the lights of the vehicle could have failed any time after the safety certification. However, the damage to the flex hoses must have been present at the time of annual safety certification (Exhibit 3, Tab 9). During his testimony, Mr. Davies explained that the flex hoses carry brake fluid and the damage to the hose can compromise the braking system, making the vehicle unsafe to drive.

As a result of this faulty inspection, the Applicant was subsequently 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.

Glen Dodwell

Glen Dodwell has been working with the Ministry since 2001. He is responsible for overseeing about 1000 motor vehicle inspection stations. He also reviews new applications for MVIS registrations.

Mr. Dodwell reviewed the documents contained in Exhibit 3 and provided a brief history of his dealings with the Applicant. Mr. Dodwell had terminated Applicant's and Hi-Tech's licence on August 17, 2005, retroactive from May 4, 2005 (Exhibit 3 page 28), as the Applicant had relocated his garage to Islington Avenue and he did not have an MVIS registration for the new location. On July 12, 2005 Mr. Dodwell interviewed the Martingrove Road landlord, who confirmed that the Applicants had moved out of the licenced premises on March 31, 2005. Mr. Dodwell testified that the licence is location specific and the Islington Avenue location was not licenced. In cross examination, he agreed that the Applicant's licences were renewed in 2005, although he had conviction records. After leasing a bigger unit at Islington Avenue, the Applicant had made an application for registration under the Act in September 2005. On the recommendation of Mr. Dodwell, the Director refused the Application on November 25, 2005. (Exhibit 3, Tab 4). Mr. Dodwell testified that the Applicant did not appeal the decision to Tribunal.

Mr. Dodwell went on to testify that, in response to the Applicants' latest application for registration, he had inspected the present location of the Applicant, at North Queen, on March 18, 2008, (Exhibit 3 page 18). He found the premises and tools suitable, but due

to the past history of the Applicant, he had recommended refusal of the application to the Director.

The Applicant

The Applicant studied at Centennial College and completed his automotive technician program. He obtained his mechanic's licence in 1997 and is presently a truck and heavy equipment mechanic.

The Applicant opened his MVIS, Hi-Tech Auto, in 1998 at the Martingrove Road location, which he operated until revocation of his licence in 2005. In March 2005, the Applicant started another business under the name S & S Diesel at the Islington location, in order to do heavy equipment repairs. He testified that although he opened the new location, he still shared space, at Martingrove Road, with the new tenant as a sub-tenant. He further testified that he had tools of inspection at Martingrove and issued inspection certificates from Martingrove. He testified that he used to go there at night.

The Applicant readily admitted most allegations against him which are laid down in the Notice. However, he testified that he has learned from his past mistakes and his practice has now changed. After the revocation of his MVIS licence at the Martingrove location, the Applicants previously applied for an MVIS licence for the Islington location, in September 2005 (Exhibit 3, Page 20).

Under cross examination, the Applicant testified that he shared the location at Martingrove location until December 2005. During this time, he started doing mobile repairs. In re-examination, the Applicant testified that after leasing the Islington Avenue location in January 2005, he went to City Hall for his municipal licence and was told by the City staff that the new location at Islington Avenue did not have proper zoning for an MVIS. Therefore, he kept sharing the location at Martingrove, where his MVIS was located. He stayed at the Islington location for about 2 ½ years, where he worked as a mobile mechanic and provided his services to a bus company.

Glen Dodwell

Mr. Dodwell took stand in reply to clarify issues raised in the testimony of the Applicant. Mr. Dodwell testified that he had interviewed the Martingrove Road landlord on July 6, 2005, after meeting with the Applicant on the same day at his Islington location. Mr. Dodwell did not produce any notes of his meeting with the Applicant or any of the tenants at Martingrove location. He testified that at this time he had a chance to look at unit number from which the Applicant used to operate his MVIS. He did not find any evidence of the Applicant still operating from there and he did not find a business sign of the Applicant.

In an answer to the Panel's questioning, Mr. Dodwell testified that the Ministry does not have a written policy with respect to dealing with the application of the people who were previously revoked. He further testified that he would recommend refusal to each and every applicant who was previously refused and has re-applied, irrespective of the time which has elapsed since revocation.

LAW

The *Highway Traffic Act*, R.S.O. 1990, c. 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 registration has been met, showing no deference to the decision of the Registrar as contained in his Notice. In order to reach a conclusion, the Tribunal is to find if the past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law, and with integrity and honesty.

The evidence of the Director is that the Applicant and his previous MVIS station, Hi-Tech, were convicted of false statements in two safety standard certificates in May and August 1998. Less than seven years after these convictions, he was convicted in June 2005, for certifying a vehicle contrary to section 90(3)(a) of the Act. In addition, the Ministry had warned the Applicant in September 2001 for issuing a safety standard certificate for a vehicle which did not meet the requirements of the Act. Similarly, the Ministry had charged him in July 2005, for issuing safety standard certificates to two vehicles, at the time when he had moved from the licenced premises at Martingrove

Road, and did not have an MVIS licence for the new location at Islington Avenue. These charges are still pending before the courts.

Although the Applicant readily admitted most allegations against him, he denied moving his MVIS to Islington Avenue and testified that he had subleased one of the units with the new tenant at old location. He further testified that he was operating his MVIS for certification purposes from the licenced premises, although he had leased a new bigger unit at Islington Avenue, in order to repair heavy vehicles. On the other hand, the Director's witness, Mr. Dodwell, testified that after meeting with the Applicant, he had interviewed the Martingrove Road landlord on July 12, 2005. This landlord had informed Mr. Dodwell that the Applicant had totally vacated the licenced location on March 31, 2008. He also testified that on the same day he met other tenants in the building, who confirmed that the Applicant had moved his operations from this location. Mr. Dodwell referred the Tribunal to Exhibit 3, page 30, which are his notes, pertaining to his interview with the landlord. However, the Tribunal noted that Mr. Dodwell did not take notes of his conversation with the tenants and the Applicant.

The Tribunal has consistently taken the view 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 by requiring that these licensees adhere to the provisions relating to vehicle safety before safety standard certificates are issued. The Applicant, a licenced MVIS operator and mechanic, deviated significantly from the responsibilities imposed upon him under the Act and Regulations on at least three times, over a period of seven years, when he was convicted for performing faulty inspections, and another time when he was issued a warning.

Mr. Dodwell had testified that he would recommend revocation or refusal if the MVIS mechanic is convicted of three or more times for violations of the Act. In answer to Panel's question, Mr. Dodwell testified that presently the Director does not have a written policy with respect to dealing with the application of a person whose licence was previously revoked. However, he stressed that he would recommend refusal to each and every applicant who was previously refused irrespective of the time elapsed since revocation. However, the Tribunal is of the view that it is not the number of convictions, but the severity of the violations, which should be a factor in the refusal or revocation of a licence.

Vice Chair, Mr. Flude dealing with the issue of revocation in *Little City Auto Service Inc.* [2007] O.L.A.T.D. No. 526 held:

"..... Ontario invests them (MVIS) 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, wilful blindness or just plain dishonesty".

In analysing the past conduct of the Applicant, even if the Director's position regarding revocation of registration of Hi-tech is accepted, the issue of the Applicant moving the MVIS to the new location without getting approval of the Director does not indicate that the Applicant acted to avoid detection of illegal acts, but simply that the Applicant was not able to fulfil the administrative functions of a licence. Similarly, Applicant's three

convictions and one warning, in a period of seven years, does not show a pattern of total disregard for the regulations, negligence, wilful blindness or just plain dishonesty.

The Tribunal notes that the convictions against the Applicant until June 2005 did not trigger a proposal to revoke, notwithstanding that all three convictions related directly to improper inspections that resulted unsafe vehicles using the Ontario roads. The Tribunal notes that the Applicant, during his testimony, readily admitted his past mistakes and did not try to make any excuses. The Tribunal also notes that the Applicant has been without registration since May 2005, albeit as a result of his own mistakes. This period should be sufficient deterrent in his future conduct.

Although section 93 of the Act gives the Director the power to revoke or refuse a licence for a single violation, the Tribunal finds that the evidence here does not support on the balance of probabilities the conclusion 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. However, the Tribunal expects that the Applicant will be very careful in carrying out his future obligations under the Act and Regulations, as the Director will not condone any further omissions or violations.

ORDER

The Tribunal, therefore, orders the Director to refrain from carrying out his Proposal to refuse the Motor Vehicle Inspection Station licence of 1641349 Ontario Limited dba S & S Diesel Service and the motor vehicle inspection station mechanic registration of Uthayakumar Rajaratnam and directs the Director to issue the licences applied for.

LICENCE APPEAL TRIBUNAL

Harinder Gahir,
Vice-Chair

RELEASED: February 19, 2009

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1244146 ONTARIO LTD. dba PJ'S AUTO SERVICE
ETTON LLOYD JOHNSON

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR, VEHICLE INSPECTION STANDARDS,
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO REVOKE A MOTOR VEHICLE INSPECTION STATION
(MVIS) LICENCE IN THE NAME OF 1244146 ONTARIO
LTD. dba PJ'S AUTO SERVICE

AND TO REVOKE A MVIS MECHANIC LICENCE IN THE
NAME OF ETTON LLOYD JOHNSON

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: ETTON LLOYD JOHNSON, Applicant, representing himself and
1244146 Ontario Ltd. dba PJ's Auto Service

MURRAY FORBES, Counsel, representing the Director, Vehicle
Inspection Standards

DATE OF
HEARING: November 20, 2008

TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant appeals a Proposal of the Director, Vehicle Inspection Standards (the "Director"), dated July 14, 2008, to revoke the registration of his company, 1244146 dba PJ's Auto Service (the "Corporate Applicant") and his registration as a motor vehicle inspection mechanic for the said Corporate Applicant.

The Proposal alleges that the Applicant and the Corporate Applicant have each been convicted on four (4) separate occasions commencing in June 2004, and continuing

until December 2007 of issuing false Safety Standard Certificates under the *Highway Traffic Act* (the "Act"). The Applicant was earlier licensed under the Act as a sole proprietor from 1984 through to 2004, wherein he received twelve convictions for similar offences. These latter convictions occurred despite two written warning letters, in 1985 and 1997 respectively, from the Ministry of Transportation. The Director is of the opinion that the Applicant and the Corporate Applicant have established an inability to carry on business in accordance with the Act and are thus not suitable as registrants.

The Applicant acknowledged the various past convictions but claimed he had paid all fines imposed upon him and the Corporate Applicant by the Courts. He further relied on evidence he had instituted reforms and improvements in the operation of his business such that it would be unfair to remove his licenses.

EVIDENCE

Michael Jansen has worked as an Enforcement Officer for the Ministry of Transportation for eight years. Part of his duties is to enforce the Regulations under the Act regarding MVIS. Before joining the Ministry Mr. Jansen worked as a licensed vehicle mechanic, a qualification he has held since 1983.

Mr. Jansen explained that the Ministry of Transportation instituted the MVIS program in order to ensure used vehicles on provincial roads meet minimum safety standards of operation. Standards required of buses and trucks are more stringent than those demanded of personal vehicles – however all must be mechanically inspected and certified prior to being driven. The Ministry allows private mechanics to issue the certificates subject to registration of both the issuing MVIS as well as the mechanic.

Exhibit 3, Tab 3 consist of a summary of provincial conviction records held by the Applicants as compiled by Mr. Jansen in preparation for this hearing. The summary discloses convictions against both the Applicant and the Corporate Applicant, referencing offence dates in July 2004, July 2006, December 2006 and January 2007. In each case Certificates were issued despite safety standards not met on the vehicle(s) in question. In each case the Applicants pled guilty to the charges.

Mr. Jansen also provided a summary of similar convictions entered against the Applicant in 1985 and 1997 (Exhibit 3, Tab 4) as well as two related warning letters to the Applicant maintained in the Ministry files. These letters (Exhibit 3, Tab 14, page 106 and 121) noted the convictions and advise that continued failure by the Applicant of the requirements to meet the Act's provisions may result in revocation of the licence. They further invite the Applicant to seek assistance of the Ministry enforcement official in the event he required advice or information. No such request was forthcoming.

Disclosed material was explained by Mr. Jansen as consisting of the Applicant's original application for registration as a MVIS on January 1983 and the related audit form as created by the Ministry inspector who attended at the Applicant's station prior to

issuance of the licence. The Audit Form thereby created (Exhibit 3 Tab 14) discloses the premises are in order and that the Applicant has been provided with a Manual and advised to attend the Ministry training.

A follow up audit undertaken the following year discloses that the Applicant was warned only the licensed mechanic is authorized to sign any Safety Standard Certificate (SSC) entered by the MVIS. An investigation undertaken later that year revealed a Certificate issued by the Applicant which failed to disclose rust holes in the body of the vehicle and resulted in the 1985 conviction for making a false statement.

An investigation of a consumer complaint in April 1987 concluded that the Certificate issued by the Applicant contained false information and the Applicant was cautioned by the investigating officer to be more careful in issuing the SSCs (page 120). Nonetheless, a year later a complaint led to an investigation wherein the Applicant explained he had overlooked a number of mechanical failings at the time of his inspection. On repairing the problems he was again cautioned by the investigating officer (page 119). In 1989 an investigation revealed a false SSC issued by the Applicant. A charge was laid. In 1991 an investigation resulted in ten (10) charges against the Applicant for issuing SSCs not in compliance with the Act as an unregistered mechanic using the Applicant's name signed all. In 1992, the investigator removed the MVIS Manual and SSCs for one month while the Applicant was required to bring the station into compliance.

Mr. Jansen testified to Ministry documentation revealing a 1997 investigation against the Applicant generated from a consumer complaint that a vehicle with a SSC issued by the Applicant actually had faulty ball joints. The notes of the investigating Officer reveal the Applicant's admission that he may have inspected the vehicle at a location other than his licensed garage. He was cautioned. No charges were laid. (Exhibit 3, Tab 13).

In his application for licence renewal in 1999, the Applicant requested licensing in the name of the newly incorporated garage. Ministry documents reveal a similar process of approval undertaken by its staff as had occurred in 1984, whereby the Applicant received a Manual and an audit, as well as a review of the requirements for operation as a registrant (Exhibit 3, Tab 6).

Since then a number of convictions for violations of the requirements have been registered. Mr. Jansen testified to an incident with which he was familiar occurring in July 2004. It involved the issuance by the Corporate Applicant, signed by the mechanic Applicant, of a SSC for a Nissan Sentra (Tab 11). It originated with a consumer complaint alleging an inspection of the vehicle post purchase revealed frame problems making the vehicle unsafe to drive. Mr. Jansen's own inspection, which found significant rust on the body frame, supported this conclusion. In an interview with the Applicant it was admitted that the SSC had been provided as a favour and the vehicle had never been inspected. The Applicant and the Corporate Applicant were both charged and pled guilty.

Mr. Glen Dodwell testified he is a licensed mechanic who has worked as an enforcement officer with the Ministry of Transportation since January 2001. On June 13, 2007 he received a consumer complaint that a vehicle recently purchased had been issued a SSC by the Applicant and the Corporate Applicant notwithstanding significant stone chips in the front window, impairing the driver's vision. Mr. Dodwell confirmed the violation at the time of his inspection of the vehicle, 28 days past the issuance of the SSC by the Applicants. While other vehicle complaints made by the consumer (ie. brake lamp and wheelbearings) were later repaired by the Applicants, the windshield failure was not.

Mr. John Tomasone has been licensed as a mechanic since 1975. He has worked as an enforcement officer with the Ministry since 1982. He testified to the investigations leading to the convictions against the Applicants in June 2007. These stemmed from an investigation he undertook arising from a consumer complaint for the SSC issued for her 1995 Toyota (Exhibit 3, Tab 8). Mr. Tomasone's inspection of the vehicle ten days after the issuance of the SSC by the Applicants revealed a number of technical failings, including severe rusting of the brake lines, which the witness testified would have been clear to any mechanic observing the vehicle's brake components. The Applicants pled guilty to the charge of issuing a false SSC.

Mr. Ivor Johnson has been a licensed mechanic since 1995 and an enforcement officer with the Ministry since 2001. It was he who inspected the 1971 Chevy truck for which the Applicants pled guilty to a false SSC in June 1997. The vehicle was found to have numerous failings including: broken springs, missing gas pedal, free play in the steering, severe cab rust and a rear axle leak. All of these failings were present at the time of his inspection, which took place one month after the Applicants had issued the SSC.

Mr. Johnson also testified to earlier charge laid because of a false SSC issued by the Applicants for a 1983 Oldsmobile in late July 2006 (Exhibit 3, Tab 10). Mr. Johnson was present when the vehicle was inspected by Kyle Gray, who also testified. Mr. Gray has been an enforcement officer with the Ministry for eleven years. He stopped the vehicle on the highway during a holiday weekend safety initiative undertaken by the Ministry. His inspection revealed an exhaust leak in the vehicle, an inoperable parking brake, a fuel leak and a number of rust holes in the floor. When queried, the driver produced a SSC issued by the Applicants some sixteen days prior. The Applicants pled guilty and were convicted of issuing a false certificate in October of 2006.

The Applicant testified on his own behalf. He immigrated to England in the late 1950s and apprenticed in auto mechanics in that country. He came to Canada in 1972, obtained his mechanic licence and has been employed in the business ever since. He opened his own garage in 1983. Although he has employed other mechanics at various times over the years, he is the only full-time employee today. On occasion, Mr. Davey and another mechanic will assist him on a part-time basis.

The Applicant testified that his problems with compliance stem from his being too "lax" with the requirements of the Ministry program. He stated that he realized about a year

ago that this attitude was threatening his ability to retain his licence and he has since begun to be more careful in checking the vehicles brought to him for certification. The last incident where charges were laid occurred as a result of a consumer complaint in May 2007 – over a year ago. The Applicant testified he has since read the Ministry Manual and knows what he should have been doing for years.

The Applicant advised that the most recent conviction concerning the 1995 Toyota was the result of his conclusion that the rust on the vehicle was not sufficiently severe to refuse to issue the SSC. With regard to both the 1971 Chevrolet and the 1983 Oldsmobile, the Applicant stated these were favours to the recipients who had both promised him the vehicles would be taken in for repairs needed and not driven. He had provided the same favour in the case of the 1993 Nissan. In all cases, it was clear the vehicles did not meet the standards required and he only provided the SSCs in an effort to be helpful.

The Applicant provided four written reference letters (Exhibit 4) from satisfied repeat customers attesting to satisfactory mechanic services over a number of years. In general these letters speak to the honesty and integrity of the Applicant, as well as his expertise in auto repair. Mr. T.M. testified that he had known the Applicant for over fifteen years and had the Applicant provide him with vehicle maintenance service for his cars. He, too, was a satisfied customer.

Mr. Kevin Davey also testified. He has been a certified mechanic since 1976 and works for a large Ford dealership. He has worked for the Applicant since 1981 as a mechanic and at the Corporate Applicant from time to time when needed on a part time basis. It was Mr. Davey's testimony that he had worked with the Applicant on the repairs of a number of the vehicles for which SSCs were issued. He testified that the Applicant was a "very good" mechanic. He noted that the atmosphere at the Corporate Applicant had improved recently such that over the last year he has noted a qualitative change.

THE LAW

Subsections 93 (a) and (c) of the Act set out certain situations where the Director can revoke a registrant's registration as follows:

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) the registrant does not comply with this Act or the regulations.

Subsection 95(4) provides:

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

DECISION AND ORDER

The onus falls upon the Director to prove his case on a balance of probabilities. The Tribunal is required to make an independent assessment as to whether the criteria for depriving the Applicants of their registrations has been proven, showing no deference to the Proposal of the Director.

The evidence is clear and indeed not disputed that the Applicants have furnished false certificates as a result of negligence, from a lax attitude or, more recently, as a result of a mis-applied concept of being helpful. This has occurred on numerous occasions over more than twenty years of operation. The Director has also brought forward evidence demonstrating that four such convictions have been registered since 2004. All four stem from serious and significant mechanical failings on vehicles inspected by the Applicants, which directly and clearly establish a risk to the general public. The purpose of the legislation is to protect the public from such risks. The legislation requires persons in the province to operate vehicles that are safe. The method provided by the Legislature is to licence certified mechanics to adhere to certain standards of inspection before issuing Safety Standard Certificates for such vehicles. In all four cases, vehicles which were mechanically compromised to the extent they were unsafe in more than one particular were certified by the Applicants and thus operating on public roads.

The Applicant acknowledges past contraventions. He has supplied evidence he is a good and thorough mechanic. He submits he has learned his lesson and will no longer issue false certificates, as he now realizes doing so might threaten his ability to retain his registration. This evidence does not convince the Tribunal. While it acknowledges that there is ample evidence that the Applicant is a competent mechanic with some very loyal customers, the evidence is clear that he has created a long track record of ignoring the responsibilities required in the registration status provided to both himself and the corporation for which he is the directing mind. He has been warned in the past such behaviour might threaten the license he now wishes to retain. It may be that such threats led to the clean record he established between 1997 and 2004. Since that time, however, he – on four different occasions despite being charged each time – opted to overlook his responsibilities in order to do a favour. In doing so he has shown his willingness to overlook his obligations under the Act and thereby compromise the public's safety. While he appears contrite today and has not been charged with any violations of the Act for over 14 months, given this long record of violation, such is

insufficient evidence for this Tribunal to conclude he will not overlook the requirements again tomorrow, should such a “favour” be requested.

The fact is that the Ontario public rely on the integrity of licensed mechanics and stations to ensure our roads are safe from mechanically compromised vehicular traffic. History establishes that the Applicants have not provided such. As a consequence the Tribunal finds that the Applicants should not be registered under the Act to issue SSCs. It notes however that this revocation has no effect on the Applicants’ ability and right to run a garage repair service.

The Tribunal therefore Orders the Director to carry out his Proposal to revoke the registrations of the Applicants to issue SSCs.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: December 9, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DELTA AUTO LTD.

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR, VEHICLE INSPECTION STANDARDS,
UNDER THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, c. H.8

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION (MVIS) LICENCE IN THE NAME OF DELTA
AUTO LTD.

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: ALI GHOLAMI, Agent, representing Delta Auto Ltd.

PATRICK MOORE, Counsel representing the Director of
Vehicle Inspection Standards

DATE OF
HEARING: November 18, 2008 Toronto

DECISION AND REASONS

BACKGROUND

This is an appeal to the Licence Appeal Tribunal (LAT) of a Proposal issued by the Director of Vehicle Inspection Standards to refuse to register Delta Auto Ltd. ('Delta') as a Motor Vehicle Inspection Station pursuant to s. 91(3)(a) and (c) of the *Highway Traffic Act* ('the Act') dated June 20, 2008.

The original Notice of Proposal was addressed to Delta Auto Ltd. and an individual mechanic, ('X'), who had made application for registration as a motor vehicle inspection station mechanic with Delta. The individual mechanic named is not appealing the Proposal.

The grounds for refusal were set out in the Proposal as follows:

1. The following violations occurred while Delta Auto Ltd. was licensed as an MVIS station and "X" was registered as a mechanic at that MVIS station:
 - (a) On or about November 22, 2007, Delta Auto Ltd. and "X" issued safety standards certificate #12161499 to a 1991 Acura that did not comply with standards, contrary to s.90 and s.99 of the Act.
 - (b) Delta Auto Ltd. did not maintain proper work orders for safety standards certificates issued, contrary to Regulation 601.
 - (c) Delta Auto Ltd. did not maintain proper tools on the premises, contrary to Regulation 601.
 - (d) In January 2008, Delta Auto Ltd. and "X" issued several safety standards certificates without valid licence or registration.

EVIDENCE

The evidence of the Director consisted of documentation and the oral testimony of Glen Dodwell, Provincial Offences Officer.

The evidence of the Applicant consisted of documentation as well as the oral testimony of Ali Gholami, the president of the Applicant, and the testimony of Witness A, the previous owner of the vehicle referred to in paragraph 1(a) of the Notice of Proposal. Mr. Gholami was assisted throughout the proceedings by an interpreter of his choice.

Below is a summary of the relevant testimony.

Officer Glen Dodwell

Officer Dodwell is a Ministry of Transportation Inspector and Provincial Offences Officer. He has been with the Ministry since January 2, 2001. He was licenced as a mechanic in 1990 and worked as such until 2000. In his current position he inspects motor vehicle inspection stations. There are over 1000 in his jurisdiction.

It was Officer Dodwell who recommended that the Applicant be refused renewal in June of 2008 after carrying out an inspection in April of 2008. The Applicant had previously been refused registration in January 2007. This was primarily because of the history of the mechanic 'X' Delta was proposing to work with. An agreement was reached that 'X' would reduce the number of stations he would work in and he would be monitored.

Delta was then registered and granted a licence for a Motor Vehicle Inspection Station. Officer Dodwell was involved in the opening of the station and reviewed the manual given to licencees, the renewal process and the obligations to keep records. This manual contains the forms necessary for the business, how to request certificates, circulars for updates, and parts of the Act, in particular Regulations 601 and 611.

Officer Dodwell reviewed Regulation 601 which requires that a copy of each safety standard certificate be kept on the premises for 1 year.

Delta's licence was required to be on display to the public. The expiry date of the licence was stated on the face of the licence. Delta's licence expired on December 31, 2007. Mr. Dodwell had a discussion with Mr. Gholami to the effect that he would receive notice to renew on a yellow paper and if he did not receive it by December he was to contact Officer Dodwell.

At the time of opening Delta had the proper tools on its premises. There are numerous tools required to be used for carrying out inspections for issuing safety standards certificates and these tools are required, pursuant to regulation 601 s. 4, to be kept on the premises.

On October 31, 2007, Officer Dodwell attended at the Applicant's place of business. At that time Mr. Gholami asked him to order six more safety certificate books and register another mechanic. He agreed to do that. Mr. Gholami asked the officer to fill out the cheque and he did so and made a notation on the face of the cheque as follows, "Order Books & Register Mechanic". The books are \$100 apiece and the registration of a mechanic is \$14. Officer Dodwell completed the cheque for \$614.00. He delivered the cheque and the mechanic was registered November 6, 2007. (A copy of the cheque was produced by the Applicant and entered as Exhibit 5). At this October meeting Officer Dodwell asked Mr. Gholami if he had received the renewal form. He had not. At that point there were still two months until the expiry date; therefore, Officer Dodwell did nothing about the renewal.

The Applicant's licence was not renewed. This was discovered during an investigation in January 2008. The investigation was launched after a complaint had been received and had been investigated by another officer, now retired. The previous investigating officer had inspected a vehicle on December 28, 2007, and found that it had been issued a Safety Standards Certificate by Delta 36 days earlier. In that officer's opinion, there were a number of defects, which would have been present at the time it was inspected. These defects included a 3"x 2" hole in the rear trunk floor, which could allow exhaust from the tail pipe to enter the trunk and into the interior. Other defects included: no rear licence plate light, a loose battery, non-retracting passenger seat belt, no horn, left front signal not working, and right rear brake light out.

Officer Dodwell attended Delta's place of business three times before he was provided with a copy of the Safety Standards Certificate relating to the car which had been the subject of the complaint. The first time Officer Dodwell attended, he was told by Mr. Gholami that the documents were at his home for safekeeping. The second time Mr. Gholami said he had not had the time to get them together. He was then issued a charge for not having the documents on the premises. Officer Dodwell then met with Mr. Gholami on March 4, 2008, at which time he did have the work order and Safety Standards Certificate for the car in question. On the back of the certificate there was a

handwritten note signed by the owner of the car at the time to the effect that he “will fix up under the car”. It was the subsequent purchaser of this car who had registered the complaint. The car must meet the standard of repair at the time the safety certificate is signed. Officer Dodwell asked Mr. Gholami why the safety certificate was issued before the rust was repaired and it was Officer Dodwell’s evidence that Mr. Gholami stated “I trusted the owner to repair it later”.

At this March meeting Officer Dodwell inspected the tools and found that three important tools were missing, and other tools were still wrapped in plastic and had never been used. Mr. Gholami’s explanation for this was that the mechanic had his own tools which he kept in his trunk.

On March 19, 2008, Officer Dodwell did a follow up regarding the licence expiry. He found that from January 1 to January 22, 2008, a total of eighteen Safety Standards Certificates had been issued. Also it was found that there was still an important tool missing, namely a brake drum gauge. While he was there, on March 19, 2008, an individual associated with Delta went out and purchased a new brake drum gauge and produced the sales receipt for Officer Dodwell.

Witness A

This witness took his car for a safety inspection at Delta’s station prior to selling it. He testified that there were only a couple of tiny rust spots on the bottom of the car which did not cause him concern with respect to safety, but that Mr. Gholami thought he should address it so he, the witness, agreed he would fix the rust before he sold the car and wrote a note to that effect on the back of the Safety Standards Certificate issued by Delta.

He testified that there was nothing wrong with the car, that it was in ‘perfect’ condition and that the hole in the underneath of the car, mentioned by the inspector, was the drain hole made by the manufacturer. None of the other defects mentioned in the inspection report relating to the front signal light, rear brake light, passenger seat belt, taped broken bumper, etc., existed. The car was in perfect condition.

Immediately after selling the car, it was the family of the buyer, not the buyer himself, who was dissatisfied with the transaction. According to the witness, the basis of their dissatisfaction was that the buyer, who was quite young, did not know how to drive standard and, because of this, the family demanded the return of the buyer’s money in full. According to the witness, when he refused to comply, the family members indicated they would call the Ministry, as they knew someone who worked there, and would ‘go after’ his mechanic.

In cross-examination, the witness testified that he sold the car for \$2,700. When asked what is the going price for 1991 Acura in perfect condition the witness indicated \$5,500. He explained that he sold it for less than half as he needed the money.

Ali Gholami

Mr. Gholami indicated that his problems started after Witness A sold the above noted car. He received a call from the uncle of the purchaser who told him he would go to the Ministry if they were unable to return the car.

There was then a complaint made and an inspector came to his business and asked him three questions about a hole in the trunk, the licence on the bumper and a cracked bumper. Mr. Gholami explained that there was nothing wrong with the car, that there was a little bit of "rusting" on the trunk and that he had asked the customer to do an undercoating.

In March Mr. Gholami was told by Officer Dodwell that his licence was not renewed. Mr. Gholami testified that he told Officer Dodwell that he had paid for the licence in October. He had given a cheque for \$614.00 on October 31, 2007, and he had asked Officer Dodwell to calculate the amount.

At one point the car, which was the subject of the complaint, was in the Applicant's place of business and Mr. Gholami called Officer Dodwell and asked him to come and take a look at the car, but Officer Dodwell refused to do so.

In cross-examination the witness explained that he had received a fine for not keeping the safety books in Delta's place of business. The mechanic kept the safety forms and work orders in his car. The witness testified that this was because Delta had been broken into.

He testified that he was under the assumption he had a licence for 2008 because of the \$614.00 cheque he had given Officer Dodwell in October. The application he signed in March was a second one.

When asked why the cheque of October 31, 2007, refers only to 'ordering books and mechanic' the witness stated that the cheque was for 5 books, (\$100 apiece), \$50 for his licence, \$14 for the mechanic, and \$50 for bringing a new mechanic from one place to another. The witness was shown a list of the statutory fees which does not include any fee for the transfer of a mechanic. He stated he believes there is a fee to transfer a mechanic from one garage to another.

With respect to the signed notation on the back of the safety certificate of the Acura Mr. Gholami testified that the car had a little bit of rust and he suggests to all customers that they undercoat, although, he does not have everyone sign such a statement. He testified, "Usually, when customer does not do it (undercoat), I do it myself".

Mr. Gholami acknowledged that he was involved in the inspection of the Acura on approximately November 22, 2008, and that the owner and buyer were present. The mechanic was also involved. He testified that after the owner was given the safety certificate, he advertised it for sale in the Auto Trader. Mr. Gholami was asked if it

made sense that it was advertised after the seller and the buyer came to obtain a safety certificate. He did not provide a clear answer.

Mr. Gholami was asked why he let the mechanic keep the safety records and books. He replied that he is “one of the owners” and he had to do something to keep them safe.

In response to the Tribunal’s question as to how the car complained of came to be in Delta’s place of business. Mr. Gholami indicated that it was quite miraculous. About four months after the car had been sold to the buyer, the buyer called and told him it did not run and Mr. Gholami sent a tow truck to pick it up and bring it to Delta. Mr. Gholami was very surprised that the buyer had called Delta and testified to the effect that the buyer may not have knowingly called Delta. Mr. Gholami stated that he called Officer Dodwell right away, but he would not come. He had the buyer’s car for about three weeks and had some painting done, a custom bumper – in all the buyer spent about \$1,000.00 fixing up the car. He stated that the buyer did not have a problem with Delta.

LAW

Section 91 of the *Highway Traffic Act* provides as follow:

- (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).

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.

REASONS

The Act is designed to protect the Ontario public by ensuring that motor vehicles operating on Ontario highways meet a certain minimum standard. The inspection requirement for non-commercial vehicles is triggered by a transfer of title. Trust is then placed in the licenced Motor Vehicle Inspection Stations and their mechanics, to ensure that the required inspections are carried out carefully and thoroughly and that Safety Standard Certificates will not be issued until all required work is completed and the vehicle meets Ontario's safety standards. To ensure that a Motor Vehicle Inspection Station is operating in this way the Ministry must be able to inspect its premises, its tools of trade, and its records. This is what is required under the law.

In order to refuse Delta a licence to operate an MVIS the Tribunal must be satisfied that the past conduct of the officer or director of Delta 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.

In his Proposal to refuse registration dated June 20, 2008, the Director set out four grounds for refusing Delta's registration. With respect to grounds 1 b, c, and d, the Tribunal accepts the evidence of Officer Dodwell and finds that Delta has not maintained proper work orders for safety standards in accordance with Regulation 601, has not maintained proper tools on the premises, and issued safety standard without proper registration.

Mr. Gholami's explanation as to the lack of documentation being maintained at the station, that it was in the trunk of the mechanic's car for safekeeping, illustrates, if

nothing else, his lack of understanding of Delta's obligations under the law. His explanation that the tools actually being used by the mechanic were also in the possession of the mechanic, in his trunk, again illustrates his lack of understanding of Delta's obligations to maintain the tools being used so they may be inspected. The only tools available for inspection were incomplete and some were unused, this raises serious concern as to whether the inspections were being properly carried out.

With respect to issuing certificates after Delta's licence had expired, Mr. Gholami insisted in his testimony that he thought that Delta's licence renewal had been paid for on October 31, 2007. His evidence on this matter was not credible. The explanation of Officer Dodwell as to the purpose for the cheque given on October 31, 2007, was supported by the notes on the face of the cheque made at the time and was reasonable and sensible. Mr. Gholami's explanation was not. It was noted that, although not raised in his testimony, Mr. Gholami in his final submissions argued that Delta's licence was not renewed because he believed the licence was good for one year. Had this been the only argument, and had it been put forth in his evidence, this might have appeared to have some validity, but it does not appear valid after the lengthy and contradictory sworn testimony that he believed the renewal was completed in October of 2007.

With respect to the grounds for refusal set out in paragraph 1 (a) of the Proposal relating to the 1991 Acura, the testimony of the Witness 'A' and Mr. Gholami was found by the Tribunal to lack credibility. Witness 'A' testified that the car was in perfect condition when sold and it was only due to disgruntled relatives of the purchaser with contacts in the Ministry that caused problems for Delta. The Tribunal does not accept his explanation that the statement he signed, "I, witness A, the owner of 1991 Acura Integra will fix up under the car", on the back of the Safety Standard Certificate issued by Delta was not evidence that there was anything wrong with the car, but merely a reassurance to Mr. Gholami that he would address the latter's concern that he get the vehicle undercoated. As well, his and Mr. Gholami's evidence that the inspection officer who dealt with the initial complaint of the buyer, a licenced mechanic with decades of experience, mistook a manufacturer's drainage hole, with a round plug insert, for a "3"x 2" hole in the trunk floor is not accepted either. The Tribunal finds that Delta issued the Safety Standard Certificate relying on the owner to make necessary repairs, rather than ensuring the repairs were done before issuing the Certificate. This was a serious breach of Delta's obligations under the law and of public trust.

The Tribunal finds that Delta has breached its obligations under the Act and Regulations in a number of ways. The Tribunal also finds that in addition to demonstrating a lack of understanding of Delta's regulatory obligations, Mr. Gholami's past conduct as well as his incredible testimony before this Tribunal has brought his honesty and integrity into serious doubt. The previous failure of Delta to comply with the law combined with the lack of confidence in the honesty of Delta's principal provides, in the Tribunal's opinion, reasonable grounds for belief that Delta would not be operated in accordance with the law and with honesty and integrity.

ORDER

On all of the evidence, this Tribunal finds that there are reasonable grounds for the belief that the Applicant will not operate with integrity and honesty and in accordance with law. Accordingly, the Tribunal orders the Director to carry out the provisions of his Proposal dated June 20, 2008, to refuse the registration of the Applicant as a Motor Vehicle Inspection Station.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: December 29, 2008.

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

FREDERICK SUTHERLAND and
SUTHERLAND AUTOMOTIVE

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990
c. H.8;

AND IN THE MATTER OF a Notice of Proposal by the
Director, Vehicle Inspection Standards, with respect to
Motor Vehicle Inspection Station ("MVIS") Licence in
the Name of Sutherland's Automotive;

AND IN THE MATTER OF a Notice of Proposal to
refuse an Application for a Motor Vehicle Inspection
Station Licence by Frederick Sutherland and to Revoke
the MVIS mechanic's Registration of Frederick Sutherland.

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: Neither the Applicant nor anyone on behalf of the Applicant
appeared

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
HEARING: October 16, 2008 London

ORDER

The hearing in this matter was scheduled to commence on Thursday, October 16, 2008, at 9:30 a.m., in London, Ontario.

Neither the Applicant nor anyone on behalf of the Applicant appeared at this hearing.

Mr. Moore, Counsel for the Director, advised the Tribunal that, on October 15, 2008, he had received a letter from the solicitor for the Applicant stating that the Applicant could not attend for medical reasons. Mr. Moore also filed with this Tribunal a medical report dated September 30, 2008, from the Applicant's physician, confirming the Applicant's medical condition.

The Tribunal considered that the filed medical report was sufficient to satisfy the requirements of Rule 12.6 of the Rules of this Tribunal.

Counsel for the Director also advised this Tribunal that staff at the office of the Applicant's solicitor informed him by telephone that they attempted to have someone attend at this hearing today to speak on behalf of the Applicant, although no one appeared.

Counsel for the Director also advised this Tribunal that the costs of \$400.00 which this Tribunal, on September 10, 2008, ordered the Applicant to pay to the Respondent before October 16, 2008 had not yet been paid.

Counsel for the Director did not seek an adjournment of this hearing nor did he consent to any such adjournment but stated that he would be hard pressed to oppose the adjournment of this hearing considering the Applicant's medical condition.

Counsel for the Director did not seek an Order for costs of this adjournment.

Upon hearing Counsel for the Director, and upon reading the medical report dated September 30, 2008, and, further, upon considering the provisions relating to adjournments and the Practice Direction relating to adjournments, both contained in the Rules of Practice of this Tribunal, and considering that the Applicant was faced with exceptional circumstances, and considering that adjournments must be made to specific dates, this Tribunal makes the following Order:

1. The hearing of this matter is adjourned to Thursday, December 11, 2008, at 9:30 a.m. at London Verbatim Reporting, 495 Richmond Street, Suite 503, London, Ontario, peremptory on the Applicant, and, if necessary, will continue on Friday, December 12, 2008.
2. A copy of this Order is to be sent to the Applicant's solicitor, Robert W. McFadden, Barrister and Solicitor, Suite 104, Northgate Plaza, 560 Exmouth Street, Sarnia, Ontario, N7T 5P5.
3. The Order granted on September 10, 2008, that the Applicant be prohibited from issuing Safety Standard Certificates and that he shall surrender to the Respondent all certificates that the Applicant holds from the Director shall remain in effect.
4. The medical report dated September 30, 2008, shall not be accessible to the public, in accordance with Rule 7.3 of the Rules of Practice of this Tribunal.

5. On or before November 24, 2008, the Applicant shall pay to the Respondent the costs of \$400.00 awarded on September 10, 2008.
6. This Tribunal makes no order as to costs in today's proceedings.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski, Vice-Chair

RELEASED: October 23, 2008

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



PRE-HEARING

DELTA AUTO LTD. and KEYHAN KALANPOUR

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
ISSUED PURSUANT TO CLAUSES 91(3)(a), (c), AND 92(4)
(a) AND (b) OF THE *HIGHWAY TRAFFIC ACT*.

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION LICENCE TO DELTA AUTO LTD., AND TO
REGISTER KEYHAN KALANPOUR AS A MOTOR
VEHICLE INSPECTION MECHANIC.

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: HARVEY DENNIS, Agent, representing Delta Auto Ltd.

ADETAYO AKINYEMI, Counsel, representing Keyhan
Kalanpour

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: September 11, 2008

Toronto

ORDER

Following attendances on September 11, 2008 at a pre-hearing before this
Tribunal of Harvey Dennis, Agent for Delta Auto Ltd., Adetayo Akinyemi, Counsel
for Keyhan Kalanpour, (together, the "Applicants") and Patrick Moore, Counsel,
for the Director of Vehicle Inspection Standards ("the Director");

Mr. Akinyemi, Counsel for Mr. Kalanpour, advised that as he only received
disclosure documents at the pre-hearing, and as Mr. Kalanpour is reviewing
whether he wishes to maintain his application for registration as a motor vehicle

inspection station mechanic with Delta Auto, he may require additional time to enable Mr. Kalanpour to review his situation with the Director.

As the Parties were unable to arrive at a resolution, the Tribunal makes the following Order respecting the hearing scheduled to be held at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m. on October 10, 2008.

1. The Parties to the hearing are:
 - (a) Delta Auto Ltd. ("Delta Auto") and Keyhan Kalanpour;
 - (b) The Director of Vehicle Inspection Standards.
2. Mr. Moore advised that he intends to present testimony and evidence from 2 witnesses.
3. Mr. Dennis advised he would be seeking to subpoena one witness in addition to 2 other witnesses while Mr. Akinyemi said he would only present one witness.
4. In order to provide Mr. Kalanpour with additional time to review his application for registration as a motor vehicle inspection station mechanic with Delta Auto, and as there was no objection for an adjournment of the October 10, 2008 hearing date, the hearing was rescheduled to commence at 9:30 A.M. on November 5, 2008.
5. The Parties were reminded of the Tribunal's disclosure rules and timing, and that they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: September 18, 2008

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



FREDERICK SUTHERLAND and
SUTHERLAND'S AUTOMOTIVE

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990
c. H.8;

AND IN THE MATTER OF a Notice of Proposal by the
Director, Vehicle Inspection Standards, with respect to
Motor Vehicle Inspection Station ("MVIS") Licence in
the Name of Sutherland's Automotive;

AND IN THE MATTER OF a Notice of Proposal to
refuse an Application for a Motor Vehicle Inspection
Station Licence by Frederick Sutherland and to Revoke
the MVIS mechanic's Registration of Frederick Sutherland.

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: SIMON WARDER, paralegal, representing the Applicant

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATES OF
HEARING: September 10, 2008 London

ORDER

The hearing in this matter was scheduled to commence on Wednesday,
September 10, 2008, at 10:00 a.m., in London, Ontario.

On September 10, 2008 at the commencement of this hearing, the Applicant,
Frederick Sutherland, requested that this hearing be adjourned so that he could
retain a lawyer to represent him, to replace the paralegal who had heretofore
been representing him in this matter.

Mr. Moore, Counsel for the Director, opposed the adjournment request, but
requested that, if an adjournment be granted, terms be imposed.

Upon hearing the Parties, and upon considering the reason for the adjournment request and, further, upon considering the provisions relating to adjournments and upon considering the Practice Direction relating to adjournments, both contained in the Rules of Practice of this Tribunal, this Tribunal makes the following Order:

1. The hearing of this matter is adjourned to Thursday, October 16, 2008, at 9:30 a.m. at London Verbatim Reporting, 495 Richmond Street, Suite 503, London, Ontario, peremptory on the Applicant, and, if necessary, will continue on Friday, October 17, 2008.
2. The Applicant shall pay to the Respondent, before October 16, 2008, costs in the sum of \$400.00 by way of bank draft or money order or by certified cheque.
3. Pending the commencement on October 16, 2008 of the hearing in this matter, the Applicant, Frederick Sutherland, shall be prohibited from issuing Safety Standard Certificates and shall surrender to the Respondent all certificates that the Applicant holds from the Director.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski, Vice-Chair

RELEASED: September 12, 2008

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



ERNEST JONES

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR,
VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY
TRAFFIC ACT*, R.S.O.1990 c. H 8

TO REVOKE A MOTOR VEHICLE INSPECTION STATION
MECHANIC LICENCE

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: ERNEST JONES, Applicant, unrepresented

MURRAY G. FORBES, Counsel, representing the Director, Vehicle
Inspection Standards

DATE OF
HEARING: July 28, 2008

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The Applicant appeals a Proposal of the Director of Vehicle Standards (the "Director"), dated March 20, 2008, to revoke his registration as a motor vehicle inspection mechanic under the *Highway Traffic Act* (the "Act"). The Proposal alleges the Applicant is disentitled to such registration given his reliance on numerous false insurance statements in issuing structural inspection certificates, his signing of blank certificates, and his preparation of such certificates absent the required record review, all of which resulted in repeated issuance of false certification to the Ministry. As a consequence of enforcement proceedings taken against him for these breaches of the legislation, the Applicant has been convicted under the Act on December 6 and 17, 2007, and again on February 7 and March 13, 2008.

The Applicant appeals the Director's Proposal claiming that he had no training in how to recognize false insurance certificates and has been unfairly prosecuted for having failed to properly assess the veracity of such certificates.

EVIDENCE

The Director's evidence was presented by two witnesses.

Alan Gibson

Employed by the Ministry of Transportation as an enforcement officer, Mr. Gibson has been a structural inspector advisor with the Vehicle Branding Unit since May of 2004. He is a licensed mechanic who apprenticed originally in the U.K. where he worked in mechanical and body structure vehicle mechanics for over eight years before joining the London Metro Police Force specializing in auto theft and fraud cases and frequently testifying in criminal court. He came to Canada in 1979 as a vehicle technician but soon joined the Metro Toronto Police where he continued his work in auto theft and fraud.

In 1998 Mr. Gibson worked with police forces, insurance companies and other interested parties to create a voluntary program, later known as the Station 6 Program (the "Program"), which aimed to reduce fraudulent vehicle repair activity involving stolen auto parts. An essential part of the program involved branding, as a consequence of which certain vehicles are classified as "salvage" and others "irreplaceable". Salvage vehicles can be repaired to go back on the roads with parts from unrepairable vehicles, but such repair work must be performed at a class 6 garage under the direction of a registered motor vehicle inspection mechanic. The Program relies on the mechanic performing auto repairs on such vehicles to generate documentation for the Ministry that accurately references the Vehicle Identification Numbers (VINs) for each one of the replacement parts, and for the vehicle on which these parts were placed. In this way all repaired vehicles, as well as those parts used in their repair, could be traced. In March of 2003 this program became mandatory.

The Regulations under the Act set out what documentation is required to be submitted to the Ministry by the mechanic. The primary documentation required is first of all, the invoice for the replaced parts; secondly, the original estimate from the insurance company declaring the vehicle branded; and thirdly, evidence of the mechanic's own observations, which determine whether the vehicle being repaired is indeed the same vehicle as the vehicle branded by the insurer.

Once the mechanic has completed the paperwork he signs a Safety Inspection Certificate, which is then sent to the Mandatory Branding Unit of the Ministry for review. On arrival at the Unit the certificate is date-stamped. The review by the Unit then determines whether the VIN stamped parts, as recorded, have been recorded as used elsewhere, or whether they are legitimate.

Mr. Gibson stressed the importance of the insurance estimate to this process in that it provides information regarding what particular components on the vehicle required replacement, and the scope and nature of the accident. This, in turn, determines whether the mechanic has performed the correct repair.

Mr. Gibson also stressed the pivotal role played by the mechanic in ensuring the success of the program. The mechanic's inspection of the vehicle and documentation of the repair is relied upon to determine that the vehicle is, in fact, the vehicle it purports to be, and also that the documentation generated by the insurer and the repairer accurately reflect the vehicle condition.

In June of 2007 Mr. Gibson attended at the Inspection Station that employed the Applicant to sign the station and Applicant under Regulation 601 of the Act. The Applicant had a number of years experience as an auto mechanic, but required verification that he was able to use the additional equipment employed in the Program and had the requisite knowledge to perform inspections needed to properly complete a Safety Inspection Certificate. Mr. Gibson explained all the elements of the Program to the Applicant at the time. He also reviewed the legislation and the requirements it demands of the mechanic. He left a standard Motor Vehicle Inspection Station (MVIS) manual for the Applicant's use, as well as copies of the relevant Regulations under the Act. He further provided the Applicant with his business card, and advised he was available at any time should the Applicant have questions or concerns. Mr. Gibson stated he provided all necessary information, answered questions, and invited further interaction, if required, in the same manner as he has done with over 500 similarly registered mechanics in the province.

John Gee

Mr. Gee is an employee of the Ministry of Transportation. He was assigned to the Mandatory Branding Unit in 2004. He holds mechanic qualifications and, prior to joining the Ministry, worked for a number of years in a MVIS setting.

Mr. Gee noted that the Proposal against the Applicant is merely to revoke his registration as a certified mechanic for the Program, and will not impinge on his general license as a motor vehicle mechanic. He stated that the authority provided to the Applicant to issue the Safety Inspection Certificate would thus be lost. The Applicant has, on a number of occasions, improperly completed these certificates and, on other occasions, has issued certificates based on fraudulent or deceptive insurance estimates. In either case, the result is to make the Program ineffective, as well as putting the public at risk by placing vehicles that may have been repaired improperly on the Ontario roads.

Mr. Gee went through the Applicant's conviction record from March of 2006 through to January of 2008. He testified that, in each case, the Applicant and the MVIS for which he worked would have received "warning letters" from the Ministry, and were given time to comply with the inadequacy alleged on the documentation, prior to the laying of any charge against them.

The witness referenced documentation submitted to the Ministry by the Applicant verifying his vehicle measurements as being the same as those noted on the manufacturer specifications on every single file reviewed by Mr. Gee during his MVIS

audit of May 2006. This was extremely unusual and, when such measurements were checked, clearly incorrect. The Applicant's response to this finding was that his measurements were 'approximate' and he had never been told "exactly" how to take measurements. Mr. Gee testified that, in one instance, of the 27 separate measurements required, over 20 were out, and some of these were off by over 20mm, when 3mm is the maximum discrepancy allowed.

One of the requirements is that photographs of the vehicle must be taken and included in the inspection record created by the registered mechanic. The Applicant advised the Ministry inspector that his employer would rent similar model vehicles from a rental agency and take photographs of these vehicles instead of the ones being documented. A review of the photos compared with the vehicle descriptions in the insurance estimates clearly revealed the vehicles were not the same in numerous instances. For example, when the insurance description referenced a two-door model, the vehicle photographed was in fact a four-door model (Tab 8, p. 62); or a convertible when the vehicle actually certified by the Applicant was in fact a hard top (p.70).

When Mr. Gee asked the Applicant if he had reviewed the requirements for measurements contained in the Regulations, the Applicant responded he had not. Mr. Gee determined no further Certificates should be issued until the MVIS was brought into compliance. At the time, the Applicant blamed the inadequacy of the station on his employer, and claimed he was operating under some duress. The employer, in turn, blamed all the non-compliance findings on the Applicant. Charges laid against the Applicant resulted in a plea bargain, which included a number of convictions and readmission of the Applicant into the Program.

Mr. Gee returned to review the Applicant's compliance when numerous pre-signed Certificates were in evidence that had been left blank. The Applicant advised these were for his employer to complete if the need arose over the weekend when he was not available. Again, the Inspector reviewed all requirements and satisfied himself that the Applicant understood what was needed from him to operate as intended. Nonetheless, on returning on August 11, 2006 three new pre-signed certificates were noted, as were other falsified documents. The Applicant eventually pled guilty to additional charges laid against him under the Act.

In June of 2007, Mr. Gee and Mr. Gibson performed an audit of the Applicant's new employer. Again, all items required of the Applicant in providing documents and reviewing material relating to a structural repair were discussed. Further, another manual, detailing the requirements and legislation pertinent to MVIS's and their mechanics was again supplied to the Applicant, who had just completed a related updated training course. Mr. Gee testified that, as a consequence, he has spent more time with the Applicant than with any other registered Section six mechanic in order to ensure no further breaches would inadvertently occur as a result of the Applicant not understanding the requirements.

Nonetheless, during an inspection undertaken by Mr. Gee and Mr. Gibson in January 2008, numerous false documents relied upon by the Applicant, and created by the Applicant, were in evidence (Tabs 12, 13 and 14). These included vehicle repairs to models different from those described in the documents. These differences were either visually obvious, such as vehicles that clearly did not fit the vehicle description, or ones that should be mechanically obvious to an experienced auto technician, such as a rear-wheel drive vehicle being described as having front wheel drive. In another instance, the insurance documents relied upon by the Applicant were obviously invalid as they purported to describe an accident to a vehicle occurring before the vehicle had been built (Tab 13).

The observations of the Ministry employees resulted in more charges being laid against the Applicant, to which he again pled guilty.

In response to questions posed by the Tribunal, Mr. Gee stated that many garages in the province are performing the Station 6 Program without apparent problems, and that he did not believe Program expectations were improperly communicated or set too high for individual registrants to meet compliance standards.

The Applicant

The Applicant claimed his first employer under the Program was R, who had him sign the mechanic qualification papers and then advised that the Applicant was to perform the mechanical work, but that he, R, would complete the paperwork. The Applicant asserted he had begun to look for a new employer even before the charges against himself and R were initially laid because he had been uncomfortable with R's insistence he sign blank paperwork. He had offered to testify against R in later discussions with Mr. Gee.

At the next employer, F, the Applicant stated he wanted to prove to Mr. Gee as well as to himself that he was indeed capable of performing the functions of a Station 6 mechanic. However, he was warned that R was going to send him vehicles anonymously, which would cause him problems. This is what, he claimed, occurred and led to his further convictions in 2007.

Not highly educated, the Applicant is not able to read wheel alignment papers and insurance estimates. He acknowledged that Mr. Gee assisted him in deducing what he should be looking for in the paperwork to alert him to potential suspicions, and he also conceded that Mr. Gee suggested he might not be sufficiently competent with paper work to do this line of mechanical work. However, he believed otherwise. Unfortunately he made more errors and was charged again more recently.

He has learned he cannot trust other dealers, nor can he rely on information provided to him by customers. He has created a checklist to help him remember everything he needs to be on the look out for. He has, recently, called insurance companies to verify some of the VINs of vehicles. However, he finds the requirements imposed by the

Ministry extremely onerous and “scary”. The Applicant concluded he no longer really wants to be doing this kind of work, as he can not afford the number of convictions he has received to date.

THE LAW

Subsections 93 (a) and (c) of the Act set out certain situations where the Director can revoke a registrants registration as follows:

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) the registrant does not comply with this Act or the regulations.

Subsection 95(4) provides:

(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.

ANAYLSIS

The evidence in this case clearly demonstrated the Applicant is, by his own admission, not able to meet the reporting requirements imposed on Program mechanics under the Regulations under the Act. There is no doubt that he has, on repeated occasions, issued false and misleading certificates and has not been able to properly comply with the Act and regulations. These requirements are necessarily paperwork orientated, due to reliance on documentation by insurance, police and government interests hoping to reduce unsafe vehicles on the province’s roads and reduce the amount of unrecovered stolen auto parts. A paper trail is an essential part of the scheme by which it is hoped this public goal can be achieved.

However, paperwork is not the Applicant’s forte. He is not comfortable relying on paper descriptions and acknowledges he has found the expectations of him in maintaining, completing, relying and reviewing the paperwork “scary”. He has, very regrettably, also suffered the severe consequences of his failed attempts to properly perform the function by having a large number of provincial offences convictions registered against him.

Despite the suggestion made by the Applicant that the Ministry is at fault for not properly preparing or training him to meet the expectations of registration, the Tribunal finds from the testimony of both Ministry witnesses, who appeared credible and whose evidence was not, in any event, contradicted, such was not the case. Indeed, the Applicant received more training and support than was given most registrants – if not prior to his initial registration, then between his two employers. In fact it appeared he had a positive relationship with Mr. Gee, whereby both individuals worked very hard to make the Applicant's registration successful. Through no clear indication of bad faith or unlawful motives, it is clear the Applicant simply is not suited to the position.

ORDER

Based on all the evidence before me I find that the Applicant has made false statements on safety standards certificates and other documentation required under the Act, and that the Applicant has failed to comply with the Act and regulations. Therefore, I am in agreement with the Director that the Applicant is not an appropriate candidate for registration as a motor vehicle inspection mechanic. As a consequence, the Tribunal concludes the Proposal of the Director should be upheld and the Applicant's registration as a motor vehicle inspection station mechanic under Regulation 610 of the Act revoked.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: September 17, 2008

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).



PRE-HEARING

FARENGA, MARIO and CLASSY AUTO SERVICES LTD

APPEAL FROM A NOTICE OF PROPOSAL OF THE DIRECTOR,
VEHICLE INSPECTION STANDARDS UNDER THE *HIGHWAY
TRAFFIC ACT*, R.S.O.1990 c. H 8

TO REFUSE TO ISSUE A MOTOR VEHICLE INSPECTION
STATION ("MVIS") TO LICENCE CLASSY AUTO SERVICES LTD.
AND TO REFUSE MARIO FARENGA AS A MVIS MECHANIC AT
THE PROPOSED STATION.

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: THOMAS L. BROCK, Counsel, representing the Applicant

PATRICK MOORE, Counsel, representing the Director, Vehicle
Inspection Standards

DATE OF
PRE-HEARING: August 11, 2008 *Teleconference*

ORDER

A pre-hearing was held in this matter on August 11, 2008 by telephone with Thomas L. Brock, Counsel, representing the Applicant (the "Applicant"), and Patrick Moore, Counsel, representing the Director, Vehicle Inspection Standards ("the Director").

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Director.
2. The issues to be addressed at the hearing are set out in the Director's Notice of Proposal to Refuse Registration and an MVIS Mechanics Licence dated May 20, 2008.
3. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal. Specifically, disclosure of all

documents to be used at the hearing shall be made by the Parties to each other by no later than September 19, 2008.

4. Both Parties will discuss and develop an agreed statement of facts before the hearing.
5. Counsel for the Director indicated his intention to call up to three witnesses including two expert witnesses at the hearing. The Counsel for the Applicant indicated he potentially would call three witnesses, two of whom would be expert witnesses. Both Parties were reminded of the Rules of the Tribunal regarding disclosure with respect to the expert witnesses.
6. The hearing is scheduled to commence at 9:30 a.m. on Monday, September 29, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Presiding Member

Released: August 13, 2008

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



PREHEARING

FREDERICK SUTHERLAND and
SUTHERLAND'S AUTOMOTIVE.

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990
c. H.8;

AND IN THE MATTER OF a Notice of Proposal by the
Director, Vehicle Inspection Standards, with respect to
Motor Vehicle Inspection Station ("MVIS") Licence in the
name of Sutherland's Automotive;

AND IN THE MATTER OF a Notice of Proposal to Refuse an
application for a Motor Vehicle Inspection Station Licence
by Frederick Sutherland to Revoke the MVIS mechanic's
registration of Frederick Sutherland .

TRIBUNAL: SIMON DANN, Presiding Member

APPEARANCES: SIMON WARDER, Agent, representing the Applicant

PATRICK MOORE, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: August 20, 2008 *by teleconference*

ORDER

Following attendances on August 20, 2008, at an electronic pre-hearing before this
Tribunal of Simon Warder, Agent, for Frederick Sutherland dba Sutherland's Automotive
(the "Applicant"), and Patrick Moore, Counsel on behalf of the Director of Vehicle
Inspection Standards (the "Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence
10:00 a.m. on Wednesday, September 10, 2008:

1. The Parties to the hearing are:
 - (a) Frederick Sutherland and Sutherland's Automotive; and
 - (b) The Director of Vehicle Inspection Standards.
2. The Parties advised that they may each present two witnesses in addition to their respective materials.
3. As the Tribunal recorded that there was no resolution of the issues between the Parties, the Parties were reminded of the Tribunal's disclosure rules and timing, and that they shall fully comply with the requirements of disclosure of all documents or things as set out under Rule 6 of the Rules of Practice of the Tribunal.
4. In the absence of a settlement being reached by the Parties prior to the hearing, the hearing will commence at 10:00 a.m. on Wednesday, September 10, 2008, at London Verbatim Reporting, 495 Richmond Street, Suite 503, London, Ontario.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

Released: August 25, 2008

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



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Section 55.1(3) - Motor Vehicle Impoundment - (MVIA)

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- >> [4779-MVIA-EXHP-Exceptional Hardship](#) 
- >> [4763-MVIA-EXHP-DUDI-Exceptional Hardship and Due Diligence](#) 
- >> [4743-MVIA-Samari Towing Inc.-EXHP-Exceptional Hardship](#) 
- >> [4641-MVIA-EXHP-Exceptional Hardship](#) 

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4779-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: APPLICANT, unrepresented

VICTORIA BEDROSSIAN,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 21, 2008 *teleconference*

REASONS FOR DECISION

A teleconference hearing was held on April 21, 2008, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2002 BMW X5 (the “vehicle”)
Date of Appeal:	April 2, 2008

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 21, 2008, 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 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 written submission filed with the Tribunal and affirmed testimony follows.

The Applicant and her 5-year-old daughter live with her brother and sister-in-law on the outskirts of a large metropolitan community.

The Applicant returned from holidays from the U.S. with her daughter the day after the vehicle had been impounded. The Applicant's ex-boyfriend, the suspended driver at the time the vehicle was impounded, took care and control of the Applicant's vehicle when she was out of town.

Apparently, the suspended driver visits with the Applicant and her family regularly. He is the father of the Applicant's child. The Applicant has known the suspended driver for approximately 7 years. She has lived with him in the past and may possibly still be living with him. The address for the driver, on the copy of the Notice to Registrar provided by the Representative for the Registrar of Motor Vehicles, is the same as the Applicant's current address.

On the day the Applicant returned home from holidays, the suspended driver was waiting for her at her apartment to inform her that he had driven her vehicle, which had now been impounded. The Applicant did not know why the police stopped him but assumes speed was a factor.

Evidence for the Registrar

A summary of the Registrar's evidence follows (Exhibit 3).

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the person convicted of the offence under the *Criminal Code* of Canada outlined in point 4 below;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until July 24, 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 of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant filed an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific. It provides the Tribunal with the criteria that the Applicant must meet to determine if “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in exceptional hardship as described by section 22(2).

Subsection 22(1) requires that the Tribunal consider whether no alternative to the impounded motor vehicle is available to determine whether exceptional hardship will result from an order to impound.

The Applicant is aware that her ex-boyfriend is a suspended driver. In the past he has committed other motor vehicle infractions while driving the Applicant's vehicle. She does not know if he has a separate set of keys for her vehicle or whether he took them from where they are hung on the wall inside her apartment. Her vehicle is kept in the parking lot of her apartment building. Her brother did not notice her vehicle missing. No measures were taken to ensure that the suspended driver did not have access to her vehicle.

Reference is made to the Owner's Position attached to the Notice of Appeal (Exhibit 1) where the Applicant wrote: "...away on vacation and without my permission <name deleted> took my vehicle. Now it's very inconvenient for me to go to work and take my daughter to school".

About two months ago, the Applicant was hired full time to perform general office duties for a painting contractor during the hours of 9:30 a.m. to 5 p.m. By her own admission, she worked for 2 weeks, was away in the U.S. for 2 weeks and has been home since the vehicle's impoundment. She has not made the effort to go to work because of "inconvenience".

The Applicant's parents live within the same community. Her mother, who took the Applicant's daughter to school each day, is currently out of the country.

The Applicant's father, who owns his own vehicle, drives the Applicant's brother to work each day since his vehicle is driven by his wife to work. The Applicant's brother takes public transit home after work each day.

The child starts school each day at 8:40 a.m. and the school is located 20 minutes from home by public transit. The Applicant could take public transit to work, which allegedly would take her one hour, but chooses not to. The safety and security of her child is not in jeopardy after school since a friend of the Applicant picks the child up after school and brings her home.

The Applicant found the disruption in her daily routine overwhelming and chose to stay home. There are taxis available to her as well as rental vehicles, which she has not looked into.

The Applicant and her child are in good health and have not missed any medical appointments. In the event of a medical emergency, 911 is accessible and a hospital is in the vicinity.

The Applicant may pursue compensation from 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".

The Tribunal finds that the Applicant has alternatives to the impounded vehicle and therefore finds that the Applicant has not established exceptional hardship as set out in subsection 50.2(3)(d) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle, and it will remain at the impound facility for 45 days.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 30, 2008

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).



4763-MVIA-EXHP-DUDI-Exceptional Hardship and 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: APPLICANT, unrepresented

SONIA DE SANTIS,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: April 15, 2008

REASONS FOR DECISION

A teleconference hearing was held on April 15, 2008, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the Applicant
Motor Vehicle:	2000 Dodge Caravan (the “vehicle”)
Date of Appeal:	March 27, 2008

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on April 15, 2008, and proceeded as teleconference 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 submissions and affirmed testimony follow.

The Applicant is a single mother of five children aged 9, 8, 6, 4 and 21 months who are generally in good health. She is currently expecting her sixth child in July.

She has been employed part-time at a retirement home as a nurse since December 2005. She is currently on sick leave from her place of employment due to being "beaten" last November by one of the residents at the retirement home. She is experiencing back problems as well as difficulties with her pregnancy. She has testified that she "can barely walk and is not in good health". She will be off work until after the birth of her child.

Prior to the vehicle's impoundment, she was able to see her doctor and physiotherapist, who are located out of town, on a regular basis. These appointments have had to be rescheduled since she cannot afford the cost of the taxi fares.

The Applicant has sacrificed her well-being by paying for the taxi fares for her three eldest children to be transported to and from school for three weeks after the vehicle was impounded until she was unable to do so financially. The children's school was sympathetic to the Applicant's situation and arranged for a school bus to transport them during this interim period.

The Applicant is currently receiving unemployment insurance benefits as well as \$400 per month for child support. She is "hardly able to pay rent" and has not been able to go to the food bank in a while.

The Applicant's parents reside about a half-hour away and can provide limited assistance as they are employed full-time. She has no friends, co-workers or siblings that can assist her. The Applicant and the children's father do not have a good relationship and he is not aware that the vehicle has been impounded. There is no possibility of renting a vehicle since she "has no money".

The suspended driver together with his wife, two children and two nephews (whom they are currently caring for) moved into her community about a year ago from Manitoba.

One day last summer, the suspended driver asked the Applicant if he could borrow her vehicle. She asked to see his driver's licence. He produced the picture portion of the Manitoba driver's licence. She did not realize there was a second portion. She viewed what he provided her and everything seemed in order. He advised the Applicant that since he did not have a vehicle, he did not give much thought to applying for an Ontario driver's licence.

On the day the vehicle was impounded, the suspended driver borrowed the Applicant's vehicle to bring one of his children to a medical appointment. The police stopped the vehicle because the driver "ran a red light".

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 Dangerous Driving under the *Criminal Code* of Canada pursuant to which the driver's licence of the driver was then under suspension until August 12, 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

The Applicant filed under two grounds for this appeal, one being exceptional hardship and the other being due diligence. Although the entirety of the evidence presented before the Tribunal was considered, the following reasons are based on the appeal for due diligence.

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.

As noted above, the Tribunal looked to the 6th edition of Black's Law Dictionary, in order to accurately define the meaning of "due diligence", being:

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.

The Applicant is a responsible and intelligent woman. She became acquainted with a new family which moved to her community from another province. Given their new relationship last summer, the Applicant sensibly asked to see a driver's licence when the suspended driver asked to borrow her vehicle. He produced a Manitoba driver's licence, a copy of which has been provided and entered as Exhibit 1 as part of her evidence in support of this appeal.

Although a Manitoba driver's licence is different from an Ontario driver's licence, the Applicant quickly viewed what was provided to her. She did not have reason to suspect that the licence was suspended. His wife did not drive and they did not have a vehicle.

The Representative for the Registrar of Motor Vehicles indicated that it is the Applicant's responsibility to take further steps to verify the validity of the driver's licence of any driver of her vehicle other than just viewing the picture portion of the driver's licence card.

Due diligence requires that the Applicant take further steps to verify the validity of an Ontario's 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 by accessing the MTO website at www.mto.gov.on.ca. What reasonable measures are in place for an owner of a vehicle to determine the validity of an out-of-province driver's licence?

The police advised the Applicant that there is a "1/800" phone number available to call to verify driver's licences. He unfortunately may not have mentioned that it was only for verifying Ontario driver's licences. There is no evidence that, making reasonable efforts, a lay person in Ontario can determine the validity of an out-of-province licence in Ontario with the same ease as for an Ontario licence.

On the evidence before it, the Tribunal concludes that the Applicant acted in a reasonable and responsible manner in exercising due diligence with regard to the relevant facts in this appeal.

The Tribunal therefore sets aside the Registrar's decision.

There is no need for the Tribunal to address the issue of exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: April 24, 2008

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



4743-MVIA-Samari Towing Inc.-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: AGENT for the APPLICANT

SONIA DE SANTIS,
Agent for the Registrar of Motor Vehicles

DATE OF HEARING: April 3, 2008

REASONS FOR DECISION

A hearing was held on April 3, 2008, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA. As a result the Applicant's motor vehicle will remain detained at the impound facility for 45 days.

BACKGROUND

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: the “Applicant”
Motor Vehicle: 1999 GMC Sierra (the “vehicle”)
Date of Appeal: February 29, 2008

The Owner appeals on the basis that the loss of the vehicle will result in exceptional hardship, as provided in Subsection 50.2(3)(d) of the Act.

This matter came before this Tribunal on April 3, 2008, and proceeded as an in-person hearing.

The Agent appearing on behalf of the Registrar provided the Tribunal with original copies of the Registrar’s documented evidence.

The documents tendered were entered into evidence as exhibits with the consent of both parties.

The Interpreter was sworn.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

The Applicant is a corporation. The second page of the Notice of Appeal contains the printed name of the Agent for the Applicant but the Notice is unsigned and is dated “11

Nov 02" (sic). The written submissions contain information regarding loss of income due to loss of customers and who was driving the vehicle at the time of impoundment.

A handwritten letter, dated March 11, 2008 and signed by the Agent, together with several photocopied pages comprised of bills, a medical note concerning her husband, and disability benefit stubs, was also filed in support of the appeal, and was filed at the hearing as Exhibit #1. The letter is signed by the Agent and relates to personal income and expenses of the Agent's household.

At the hearing, the "owner" appeared as Agent for the company, accompanied by her husband who served as interpreter and testified on behalf of the company.

Through her interpreter, the Agent stated that she quit her full time job to start a business, and now only has a part-time job. Since the impoundment there is no income, and no money to pay for insurance or the household bills.

In response to information requested by the Respondent as to who was driving, the Agent provided details of the events surrounding the impoundment, and stated that she was driving. She also confirmed that the only income is now from her husband's disability and her part-time job. She is not able to increase her work hours.

According to the Agent, the option to rent a tow truck was not pursued. The tow truck is used solely for business and not for personal transportation. The company started three or four months ago. The Agent's husband helps out with the paperwork and the son-in-law sometimes help with the driving.

There are no health and safety concerns.

The suspended driver testified that he started and operated the business until his mental health deteriorated. Presently, his wife looks after the company. He sometimes answers the phones. The family does not have enough income to cover the expenses.

In cross-examination, the suspended driver stated that he was sitting in the passenger seat and got out when the vehicle was stopped. The officer told him to go back to the vehicle. Subsequently, the officer did not believe that he was not driving, and charged him. The matter is before the courts.

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 filed as Exhibit # 3.

The Respondent was sworn and testified as to information she received from the officer involved in the incident, which was that the vehicle was pulled over to be investigated for mechanical problems. At the time the vehicle was stopped the suspended driver was in the driver's seat. He then got out of the vehicle and sat in the passenger seat.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

In closing, the Applicant's Agent expressed her desire to have her truck returned so that she can continue with her businesses

The Respondent's Agent submitted that there is no evidence that anyone other than the suspended driver was driving at the time of impoundment. Thus, the Respondent's Agent maintained that the vehicle was properly impounded.

There is no question that there are alternative modes of transportation available. Also, the Applicant has made no attempt to rent a vehicle. According to the Respondent's Agent, there are still two incomes in the household, and no losses that could be considered significant and lasting have been incurred. The Agent for the Applicant has made no attempts to increase her part-time hours.

The Tribunal considered the information regarding the issue of who was driving the vehicle at the time of impoundment. The Tribunal does not accept the evidence of the suspended driver that he was not driving at the time the vehicle was stopped. The Tribunal accepts the argument that the impoundment was proper.

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;

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 there are alternate modes of transportation available.

There is no doubt that the vehicle impounded, being a tow truck, fulfills a very specific purpose, one not met by an ordinary vehicle. Nonetheless, the Registrar's Agent contends that the person affected by the impoundment, the owner of the corporation, has been able to get to and from work. The Tribunal agrees. The owner has used other modes of transportation, which have enabled her to keep her part-time job. Thus, the criteria for consideration under Section 22.3 are not met.

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...

Several bills were provided in support of the appeal but there was no statement of the actual loss suffered by the Applicant. Thus, the Tribunal cannot find that the losses were significant and long lasting.

After assessing the evidence presented, the Tribunal finds that exceptional hardship has not been established, 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 Aouad, M.D.,
Presiding Member

RELEASED: April 22, 2008

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



4641-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: APPLICANT, unrepresented

RUSSELL McKNIGHT,
Representative for the Registrar of Motor Vehicles

DATE OF HEARING: March 19, 2008 Teleconference

REASONS FOR DECISION

A teleconference hearing was held on March 19, 2008, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle for a period of 45 days. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	the “Applicant”
Motor Vehicle:	2000 Dodge Caravan (the “vehicle”)
Date of Appeal:	February 27, 2008

This matter came before this Tribunal on March 19, 2008, and proceeded as an electronic hearing.

As the appropriate boxes in the Notice of Appeal were not selected, the Applicant was requested to specify the grounds for appeal. The Applicant confirmed that she was appealing on exceptional hardship.

Confirming an earlier request made by letter received by the Tribunal on March 18, 2008, the Applicant sought an adjournment in order to present further evidence from the towing company, regarding damages that occurred while the vehicle was being towed. The Applicant maintained that the vehicle has been damaged to such an extent that it cannot be driven, thus aggravating the hardship.

The Registrar’s Agent countered that the issue was extraneous to the hearing, as the Tribunal is empowered to make a decision based on evidence confined to the impoundment.

The Tribunal denied the request to adjourn, on the grounds that the issue is a private matter between the Applicant and the towing company and beyond the jurisdiction of the Tribunal.

Documents on file were entered into evidence as exhibits with the consent of both parties.

There were no other 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.

Page two of the Notice of Appeal signed by the Applicant offers no grounds to support the appeal. In a handwritten letter from the Applicant dated February 7, 2008, the Applicant states:

“I am a single mother who is on ODSP, who relays (sic) on transportation to support my sone (sic) who is special needs, & work part time.”

According to the Applicant she is currently awaiting surgery and needs the vehicle to attend rehabilitation and neurologist's appointments. Further there is no transportation in the area to enable the Applicant to shop for groceries. The February 7 letter and attached documents were filed as Exhibit 3.

At the hearing, the Applicant testified that she has a “muscle disease”; that her son has epilepsy; and that both need to attend medical appointments as well as counseling. There are no drugstores or grocery stores in the area and the Applicant feels that she is imposing on her neighbours by asking them for help.

Under cross-examination the Applicant provided further information regarding the impoundment. The suspended driver went out in order to pick up medication for the Applicant who is afflicted with several ailments. There were tools in the vehicle, some purchased by the Applicant and others that belong to the suspended driver that the Applicant claims are missing. The period of impoundment has lapsed, but the Applicant has not as yet picked up the car. She has been told that she will not have to pay the usual storage fee to pick up the vehicle. She is to call the company after the hearing, and the car will be towed to the transmission shop.

The Applicant purchased another car in February, but two weeks later, the transmission was damaged. There are two other vehicles registered in the Applicant's name, which, according to the Applicant are “garbage”, and in need of repair.

The Applicant owns a cleaning business but does not do the hard work and works only when she is able.

With respect to the late filing, the Applicant attested that after a conversation with an employee of the Tribunal, she had assumed she did not have to pay the one hundred dollar fee.

Questioned specifically regarding her finances, the Applicant stated that she had to borrow money to purchase the car, pay the transfer fee, and the appeal fee. The Applicant was not able to provide information regarding mortgage and utility payments. She admitted

that she is reimbursed for gas each time she needs to attend doctor's appointments. Further the suspended driver has been able to cover some of the expenses.

Four medical appointments have been missed due to lack of transportation. Neighbours have been helping the Applicant whenever possible.

The Applicant called the suspended driver as a witness. The witness admitted responsibility for the impoundment and stated that he has been trying to assist the Applicant. He feels that the letters from the towing company, which are not available for today's hearing would have been essential to the case, as they prove the damage done by the towing company and that there are tools missing.

No charges have as yet been laid with respect to the missing tools.

Evidence for the Registrar

The documents tendered by the Registrar and admitted into the record, on consent of the Applicant, were filed as Exhibit # 4.

The Respondent did not call any witnesses.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

In her summary statement, the Applicant emphasized that she wants her van back. She just wants to get this matter over with, so that she can get her life back on track.

The Registrar's Agent pointed out that there is no doubt that the driver was disqualified at the time he was caught at the wheel of the Applicant's vehicle.

The Registrar's Agent gave a chronology of events:

March 2, 2005

Disqualified driver's licence suspended for three years

January 1, 2008

Vehicle impounded for 45 days

January 12, 2008

Owner of 1996 GMC Safari, the vehicle now registered to the Applicant, removed the plates from the vehicle, and had the status changed from "fit" to "sold". Meaning, he no longer had possession of the vehicle, and the new owner is waiting to register the vehicle.

January 18, 2008

Three days after the prescribed period for appeal, the Ministry of Transportation received the Notice of Appeal without the \$100.00 fee. Notice forwarded to Tribunal on the same day. Applicant informed, by Tribunal, fee must be received by January 23, 2008

February 12, 2008

Applicant provides a four-page letter to the Tribunal, but fails to enclose the required fee. By her own testimony the Applicant received her ODBS payment during this period.

February 13, 2008

The Tribunal issued notice of Intent to dismiss the proceedings. Applicant given until February 28, to submit fee together with written submissions.

February 15, 2008

Ministry of Transportation ordered the vehicle released.

February 22, 2008

Applicant registered purchased vehicle with the Ministry of Transportation.

February 26, 2008

Applicant forwarded \$100.00 fee to the Tribunal.

February 28, 2008

Plates and sticker purchased for new vehicle.

The criteria for exceptional hardship require that the Applicant has no alternative modes of transportation. Clearly the Applicant owns another vehicle, which being recently registered, suggests is in a "fit condition".

According to the Registrar's Agent, the Applicant opted to purchase another vehicle, prior to filing an appeal and to register and plate the vehicle before paying the required fee to the Tribunal.

With respect to health and safety issues, there are medical facilities within ten kilometers from the Applicant's place of residence, as well as 911 service available. The Applicant complained that she missed four appointments due to lack of transportation, yet the impoundment period had lapsed and the vehicle has not been picked up.

Regarding the impoundment fee, the Applicant has testified that whether successful or not with the hearing, she will not be required to pay.

In rebuttal, the Applicant stated that the police told her that her driver's licence will be suspended for 45 days if she does not pay the impoundment fee. When asked to clarify her statement the Applicant stated that she was told her licence would be suspended if she "did not pick her vehicle after 45 days". Further she denied her previous testimony asserting that she will in fact have to pay \$614.00.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3) and (d) of the Act.

As both the Applicant and her sons have conditions, which require medical attention, the Tribunal will address the health and safety issue first. The Applicant maintains that four medical appointments were missed. Yet, there is no evidence before the Tribunal, as to any consequences resulting from non-attendance. As such there are no grounds, enabling the Tribunal to conclude that either the Applicant's health or her son's was in danger during the impoundment period.

While it appears that the Applicant still does not have the use of her vehicle, the Tribunal notes that the vehicle was released by the Ministry on February 15, 2008. The Tribunal has no mandate to and will not deal with issues subsequent to the period of impoundment.

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

Evidence before the Tribunal indicates that the Applicant has other vehicles registered to her name. There was no direct evidence before the Tribunal as to when the vehicle plated on February 28, 2008, was actually purchased. From the date of registration, the Tribunal can surmise that this particular vehicle was not available to the Applicant during the impoundment period. The Tribunal accepts the Applicant's evidence that the other two vehicles are in need of repair, as in fact neither appears to be plated at this time.

Nonetheless, the issue is not just whether or not the Applicant owns other vehicles, but whether she has alternate modes of transportation. The Applicant testified that she does not wish to impose on her neighbours; yet she was able to avail herself of their assistance from time to time. Thus, the Tribunal finds that alternate transportation was available to the Applicant. Therefore, the criterion for consideration under Section 22.3 is not met.

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 testified that she has not been able to work for medical reasons. There is no indication that she lost any work due to lack of transportation.

As to expenses incurred, according to the towing company, storage charges as of February 15, 2008, are \$959.81. The Applicant made no mention of this amount, adamantly asserting that that she is required to pay \$614.00 or she will lose her licence. The Applicant's testimony was inconsistent and at times contradictory and the Tribunal is at a loss to understand the explanation for this expense.

The Tribunal is unable to determine loss and finds that the Applicant did not establish that any sustained losses would be significant and long lasting.

As any losses the Applicant may have sustained are neither significant nor long lasting, the Tribunal cannot find that there is exceptional hardship as defined under the Regulation.

After assessing the evidence presented, although the Tribunal recognizes that the Applicant has been inconvenienced by the loss of the vehicle, it finds that the Applicant has not established exceptional hardship, 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.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 9, 2008

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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PRE-HEARING

GTA LEASING CORPORATION AND JAMES PROSSER

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: JAMES PROSSER, representing himself and the corporate
Applicant

AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
PRE-HEARING: April 9, 2008 Toronto

ORDER

A pre-hearing was held in this matter before the Tribunal on April 9, 2008, in the presence of the Applicant and Aviva Harari, Counsel, appearing on behalf of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"). The Applicant was accompanied by a solicitor, Mr. Morris, who indicated he was not appearing as a solicitor of record but merely to assist the Applicant during the pre-hearing.

At the outset of the pre-hearing a request was made by Counsel for the Registrar that the pre-hearing be open to the public in accordance with Rule 9.9 the Tribunal's Rules of Practice. Members of the media had been advised of the proceeding and were in fact waiting for permission to enter the hearing room. The purpose of the request was not given. The Tribunal was of the opinion that, in the absence of some compelling reason, to open the pre-hearing to the public would prevent a candid and confidential discussion of the issues, thus defeating the primary purpose of the pre-hearing. The Applicant had no notice of such a request and was not prepared to participate in a public proceeding. The request was denied for these reasons.

The Parties settled none of the issues raised in the Notice of Proposal or the Notice of Appeal.

The Tribunal makes the following order with respect to the hearing of this matter:

1. The hearing has been scheduled to commence on May 29, 2008, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and shall continue May 30 and June 2, 2008, if required.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: April 28, 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

ALBERT COHEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: MAURICE VATURI, Counsel, representing the Applicant

AVIVA R. HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
PRE-HEARING: April 3, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 3, 2008, before the Licence Appeal Tribunal (the "Tribunal"), in the presence of Maurice Vaturi, Counsel, appearing on behalf of Albert Cohen (the "Applicant"), and Aviva R. Harari, Counsel, appearing on behalf of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar").

The Tribunal makes the following order with respect to the hearing of this matter:

1. The Applicant shall take all possible steps to obtain a copy of his original probation order and provide it to the Registrar as soon as possible.
2. The Applicant shall provide the Registrar with a letter from his current employer confirming the employer's knowledge of the Applicant's criminal convictions.
3. The Registrar shall provide the Applicant with the following documents, as soon as possible:
 - i) a copy of the Registrar's letter dated November 16, 2007, asking the Applicant for more particulars.

- ii) a copy of the Registrar's letter dated January 12, 2007, enclosing the terms and conditions of registration.
- 4. The hearing is scheduled to commence at 9:30 a.m. on Monday, May 5, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and will continue on May 6, 2008, at 9:30 a.m., if necessary.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: April 24, 2008

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

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

DARRYL FELIX DUFRESNE - Consent Order

IN THE MATTER OF
DARRYL FELIX DUFRESNE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 27, 2007

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

DARRYL FELIX DUFRESNE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Darryl Felix Dufresne, 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,
Chair

RELEASED: April 17, 2008

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
800-789 Don Mills Road
Toronto, ON M3C 1T5

AND TO: The Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Darryl Dufresne
915 Elmsmere Road, Apt. 813
Ottawa, ON K1J 8H8

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, Darryl Dufresne (the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees, if he is criminally charged in the future, he will immediately notify his sponsoring dealer, in writing of the charges against him and provide a copy of the notification signed by his sponsoring dealer to the Registrar forthwith.
2. The Applicant agrees to provide full and complete disclosure on all future applications, correspondence and in all discussions with the Registrar regardless of whether or not disclosure has been made previously to the Registrar.
3. The Applicant confirms that the particulars and circumstances of his convictions are substantially as disclosed to the Registrar and further acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
4. The Registrant agrees not to be the final signatory on any sales or lease contracts on behalf of the dealer, for a period of not less than two years from the date of this order.
5. The Applicant agrees not to be a partner, shareholder, officer, director or controlling mind of a dealer and further agrees not to apply as a motor vehicle dealer for a period of not less than five years from the date of this order.
6. The Applicant agrees not to transfer his registration as a salesperson under the Act to another motor vehicle dealer without having first obtained the prior written consent of the Registrar.
7. The Applicant agrees not to act as a salesperson on behalf any dealer other than the dealer to whom he is registered.

(Initials) Darryl Dufresne

8. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
9. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
10. The Applicant understands that the Registrar is relying on the accuracy and completeness of all documents, statements or information provided by the Applicant in support of the Registrants application for registration. The Applicant confirms that all documents, information or statements provided to the Registrar are true to the best of the Registrant's knowledge and belief and that the Applicant has given full answer to all questions and requests made by the Registrar in connection with the Registrants application.
11. The Applicant acknowledges that the Registrar may take further administrative action, including a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
12. The Applicant will provide a copy of this order to his employer forthwith.
13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of April 2008.

(Signature) Darryl Dufresne

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*



GORDON OSWALD KELLAR

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT* R. S. O.
1990 C.M. 42

TO REFUSE REGISTRATION

TRIBUNAL: HARINDER S. GAHIR, Vice-Chair

APPEARANCES: GORDON OSWALD KELLAR, representing himself

AVIVA HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE
OF HEARING: March 10, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises out of a Notice of Proposal to Refuse Registration (the "Proposal") dated November 5, 2007 and Notice of Further and other Particulars dated February 5, 2008, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively), to revoke the registration of Gordon Oswald Kellar (the "Applicant") as a Motor Vehicle Salesperson under the Act.

The Registrar bases his Proposal under section 7 of the Act as read with section 5 (1)(b) and 6 (1) of the Act.

The reason given by the Registrar in his Proposal is follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and

honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to continue to register Gordon Oswald Kellar under the Motor Vehicle Dealers Act.

In support of his Proposal the Registrar furnished the following particulars:

1. Gordon Oswald Kellar is registered as a motor vehicle salesperson.
2. Kellar has Terms and Conditions attached to his registration.
3. Keller was convicted, on or about October 25, 2007, pursuant to the Motor Vehicle Dealers Act for selling vehicles as a motor vehicle dealer when not registered as a dealer.

The Registrar furnished following further particulars:

1. Kellar completed the OMVIC certification course on or about July 12, 2005.
2. Kellar was previously registered on Terms and Conditions because of earlier convictions.
3. Kellar acted as an unregistered dealer.

The Applicant filed an appeal against the Proposal on November 19, 2007.

THE EVIDENCE

The Registrar's evidence included the Respondent's Book of Documents, which the Tribunal marked as Exhibit #3, as well the testimony of Carey Smith and Ralph Bayley. The evidence of the Applicant included his own testimony. The summary of evidence is as follows:

Testimony of Ralph Bayley

Mr. Bayley has been employed by OMVIC for the last seven years as an Investigator. He has 32 years experience gained as a member of a regional police service prior to joining OMVIC, and he has spent his career investigating criminal activities. He is familiar with the motor vehicle industry in Ontario, and the statutory requirements and procedures followed by the Registrar in carrying out his obligations under the Act. He explained the significance of OMVIC's regulation of the automobile industry. OMVIC, a public protection body, was created in 1997 to administer the Act.

Mr. Bayley testified that he is familiar with the business of the Applicant. In September 2007, he was in Peterborough for OMVIC business, when he noticed a car parked on the roadside with a sale sign displayed. He stopped and noted its identification number and performed a system check. He found out that the Applicant had purchased this vehicle from a dealer, other than the dealer he was working for. The system also showed that the Applicant had purchased and sold about eight cars in the same manner, since April 2005. Mr. Bayley went on to testify that the Applicant never put any

plates on these vehicles, which further showed that he had purchased these vehicles for the sole purpose of selling them. Mr. Bayley, explaining the Applicant's obligations under the Act, testified that the Applicant was licensed as a salesperson, which permits him to buy and sell vehicles only for the dealer he was registered with. By buying and selling the vehicles outside the business of his dealer, the Applicant was acting as an unlicensed dealer.

As a result of this investigation, OMVIC charged the Applicant under section 3(1)(a) and section 22 of the Act for committing the offence of carrying on business as a motor vehicle dealer by buying and or selling motor vehicles, when he was not registered to do so as required by the Act. In October 2008, the Applicant pleaded guilty to three of eight counts and the remaining charges were withdrawn as part of a plea bargain.

Testimony of Carey Smith

Mr. Smith has been employed by OMVIC for the last five years as a Director of Industry Conduct Investigations. He has 30 years experience gained as a member of a regional police service prior to joining OMVIC, and he has spent his career investigating criminal activities since 1980. From 1997 to 2003, he led a task force, funded by the Federal and Provincial Governments, to investigate organized crime in the auto industry. He is familiar with the motor vehicle industry in Ontario, and the statutory requirements and procedures followed by the Registrar in carrying out his obligations under the Act. He explained the significance of OMVIC's regulation of the automobile industry. OMVIC, a public protection body, was created in 1997 to administer the Act. Mr. Smith runs the investigation section of the OMVIC. He identified documents contained in Exhibit # 3.

Explaining the importance of regulation of the industry he testified that OMVIC holds dealers to a high degree of scrutiny. A registered salesperson can only purchase and sell vehicles for the sponsoring dealer. He further testified that OMVIC has a compensation fund to protect the consumers from any damage suffered due to malpractice of the dealer. He stated that curbsiders deal without oversight, put the consumers at risk, and are unfair competition with the registered dealers.

Mr. Smith referred the Tribunal to Tab 4 of Exhibit 3, which are terms and conditions associated with the registration of Applicant as a salesperson. Mr. Smith testified that these terms were placed because of Applicant's prior criminal record. The relevant conditions are:

4. The Registrant agrees to surrender his/her registration if he/she is found guilty of a criminal offence or any industry specific offence.
5. The Registrant agrees not to be a partner, shareholder, officer, director or controlling mind of a dealer.
6. The Registrant agrees not to be the final signatory on any sales or lease contracts on behalf of the dealer.

The Applicant privately sold all the eight cars after signing of the terms and conditions and obtaining the salesperson registration.

Mr. Smith went on to testify that the Applicant, before getting registered as a salesperson was required to take an automotive certification program, which he successfully completed at Georgian College in July 2005 (Tab 5 of Exhibit 3) Mr. Smith himself has taken this course, and testified that this course teaches OMVIC regulations and the problem of curbsiding within the industry.

Explaining the Applicant's industry related offences, Mr. Smith testified that the serious issue is that the cars were high risk as they were very old with high mileage and would have been sold to vulnerable consumers, including the poor and new immigrants. The bottom line is that if the dealer had sold them, there is recourse under consumer protection legislation. He testified that there are seven types of inspectors going to locations to oversee registered dealers, who are bound to obey laws while curbsiders are subject to no oversight.

Testimony of the Applicant

The Applicant is an auto mechanic and rents an auto body shop apart from working as a registered salesperson. He was registered as a dealer about 17-18 years ago, and dealt in the sale and purchase of cars and trucks. He kept this dealership for about three years and thereafter worked as an auto mechanic for about ten years. The Applicant did not dispute the testimony of the OMVIC witnesses, however, he pleaded that he needs to keep his licence to sell cars for his living. He testified to having 25 years experience in the auto industry and that he has knowledge of curbsiding and its impact on the industry and consumers. He agreed that as a curbsider, he was unauthorized competitor to his employer and other registered dealers. The Applicant stated that he would only sell one to two vehicles per month with his dealer. Since he was convicted in October 2007, he has not sold any vehicles outside his employment.

THE LAW

Section 7 of the *Motor Vehicle Dealers Act* states as follows:

3. (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of 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; or

- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

Subsections 7(1) to (5) of the Act provides as follows:

7. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal together with written reasons therefore, on the applicant or registrant.
- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing
- (3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1).
- (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.
- (5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 22 of the Act states as follows:

22(1) Every person who, knowingly,

- (a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
- (b) fails to comply with any order, direction or other requirement made under this Act; or
- (c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or to both. R.S.O. 1990, c. M.42, s. 22 (1).

Corporations

(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$100,000 and

not as provided therein. R.S.O. 1990, c. M.42, s. 22 (2).

(3) Repealed: 1994, c. 27, s. 92 (2).

Limitation

(4) No proceeding under clause (1) (a) shall be commenced more than one year after the facts upon which the proceeding is based first came to the knowledge of the Director. R.S.O. 1990, c. M.42, s. 22 (4).

Idem

(5) No proceeding under clause (1) (b) or (c) shall be commenced more than two years after the time when the subject-matter of the proceeding arose. R.S.O. 1990, c. M.42, s. 22 (5).

Regulation 801 provides as follows:

Exemptions

14. The following classes of persons are exempt from the Act:

1. A person who purchases motor vehicles for the purpose of wrecking or dismantling them and not for resale.
2. A person who conducts auctions for registered motor vehicle dealers if the person has no property interest in the motor vehicles being sold and sales are made only to registered motor vehicle dealers.
3. An assignee, custodian, liquidator, receiver, trustee or other person acting under the *Bankruptcy Act* (Canada), the *Business Corporations Act*, the *Courts of Justice Act*, or the *Winding-up Act* (Canada) or a person acting under the order of any court or an executor or trustee who sells a motor vehicle in the course of the person's duties.
4. A barrister and solicitor where the sale of a motor vehicle is made in the course of his or her practice.
5. A person who, on his or her own account, sells his or her own motor vehicle that was purchased and used for his or her personal or family use.
6. A leasing company that is a subsidiary or an associate of a registered motor vehicle dealer, if the leasing company has filed with the Registrar a declaration that all lease-expired vehicles will be sold through the registered motor vehicle dealership and not offered to the public by the leasing company.
7. A person who sells a power-assisted bicycle equipped with a pedalling device having an auxiliary motor attached and who is not otherwise engaged in the business of buying or selling motor vehicles. R.R.O. 1990, Reg. 801, s. 14.

REASONS FOR DECISION

The governing legislation, the *Motor Vehicle Dealers Act*, is a consumer protection Statute which regulates the retail sales of motor vehicles in Ontario. The legislation requires that people involved in that industry be registered under the Act. While the Act gives an entitlement to registration, it also allows the Registrar to revoke registration on the specified grounds. Those grounds are set forth in section 5 of the Act and the registrant or the Applicant is informed of the refusal by the issuance of a Notice of Proposal. An appeal from the Registrar's Proposal lies to the Tribunal by way of a hearing.

The issue for consideration in this matter is whether or not, based on the evidence before the Tribunal, the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The evidence before the Tribunal is clear and uncontradicted. The Applicant obtained his salesperson's licence in August 2005. Prior to that, he had spent many years of his life in the auto industry as a mechanic and a dealer. He completed an automotive certification course at Georgian College in July 2005. After obtaining his license as a salesperson, he unlawfully purchased and sold eight vehicles in violation of section 3(1)(a) of the Act. Any person, on his or her own account, may sell his or her own motor vehicle that was purchased and used for his or her personal use. In contrast, the buying and selling of vehicles without registration as a dealer or salesperson is prohibited except when a person falls under the exceptions of O. Reg. 801. The people who violate these provisions are called curbsiders. As held in *Ferguson (Re)* [2006] O.L.A.T.D. No. 581, "curbsiding" is a term used in the motor industry to refer to an individual who buys or sells vehicles when that person is not registered as a salesperson under the Act. "Curbsiding" is in contravention of section 3(1)(b) of the Act because only a person who is registered as a salesperson is entitled to sell a motor vehicle acting for, or on behalf of, a motor vehicle dealer to whom the salesperson is registered.

The Applicant committed this offence, while he himself was a registered salesperson, having knowledge of the regulation of the industry. He, as a curbsider, purchased and sold eight vehicles over a short period of time.

The violation of section 3(1) (b) of the Act, particularly by a person who is registered as a salesperson is a serious matter. In a recent case of *OZ Auto Sales Ltd. (Re)* [2007] O.L.T.D. No. 353 Vice Chair D. Israel, dealing with a similar situation, held:

The Tribunal noted that in Omar's application for registration which he submitted to OMVIC he completed section C thereof and in doing so, he stated that he had "completed the certification course" thereby referring to the Automotive course offered by Georgian College. Before an applicant can be approved for registration she/he must pass this course. The course specifically deals with the requirements of registration under the Act by all persons applying for registration as salespersons and dealers. Posing as a salesperson or dealer by an unregistered person is clearly in contravention of section 3 of the Act and such person is widely referred to as a "curbsider". The Tribunal finds that Omar acted repeatedly as an unregistered salesperson as is evidenced by the transactions in which he bought and sold motor vehicles. Having completed the Automotive Certification Course and having been tutored in the terms of the Act before completing the course, it is inexcusable for Omar to have knowingly carried on business as a dealer and/or salesperson without the benefit of registration. His actions show contempt for the law and a lack of honesty and integrity.

There is no doubt that the Applicant needs to keep his salesperson licence to earn a living, but this does not forgive his breaking of the law. The Applicant has certainly engaged in unlawful practices to achieve his business goals. He is a registered salesperson and has admitted having knowledge of the OMVIC regulation. He knowingly posed as a private individual but was actually in the business of selling

vehicles without being registered as a dealer under the Act. Curbsiding is considered as a serious matter within the industry. Apart from putting the consumers at risk, curbsiders have an unfair competitive advantage over registered dealers as they do not have the same overhead expenses as registered dealers. They often ignore industry regulations and consumers often do not have recourse against them.

The Tribunal finds that Applicant's repeated violations of the Act afford reasonable grounds for belief that the Applicant will not carry on business in accordance with law, and with integrity and honesty.

DECISION

The Tribunal, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, upon carefully considering of the evidence, directs the Registrar to carry out his proposal to revoke registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Harinder S. Gahir
Vice-Chair

Released: April 29, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



4333 - PHILLIP LIP FEE CHAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*, R. S. O.
1990 C.M. 42

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-chair

APPEARANCES: No one appeared on behalf of the Applicant

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 19, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The proposal dated July 25, 2007 sets out the Registrar's reasons for refusing to register Phillip Lip Fee Chan as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's conduct is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act.

The particulars upon which the Registrar relies are stated in the proposal, as follows:

1. Phillip Lip Fee Chan ("Chan") is currently registered as a motor vehicle salesperson was reinstated as such on about August 9, 2008.
2. Chan was previously registered under the Act between 1990 and 1992.
3. Between January 1996 and February 2005 Chan was registered in Ontario as a mutual fund salesperson with the Mutual Fund Dealers Association (MFDA) of Canada as an Approved Person of the MFDA.
4. On or about January 17, 2007, the MFDA imposed a lifetime ban on Chan prohibiting him from conducting securities related business in any capacity while in the employ of or sponsored by any Member.
5. Chan was also fined \$150,000.00 and ordered to costs of \$7,500.00
6. In its reasons dated February 28, 2007 the MFDA found as follows:
 - a) Chan offered investments to clients without the required knowledge and consent of his employer.
 - b) Chan failed to maintain a record of all funds received and investments made on behalf of his clients.
 - c) Chan failed to segregate clients' funds from his own personal account.
 - d) Chan misappropriated client's funds resulting in a loss of \$98,000.00 to his client.
7. Chan failed to pay the fine and costs awarded against him in the MFDA's Decision.

The Applicant gave the following reasons for his Appeal:

1. The Registrar failed to consider that the revocation of my licence by the Mutual Fund Dealers Association was voluntary and unopposed.
2. The Registrar has failed to consider relevant evidence of my good character and standing in the motor vehicle industry.
3. The Registrar is proposing to act on insufficient grounds to warrant the revocation of my registration as a motor vehicle salesperson.
4. The Registrar failed to provide me with an opportunity to present evidence and information regarding the proposed revocation of my registration.
5. The Registrar failed to consider alternative solutions or sanctions to the concerns evidence in his Notice of Proposal to Revoke Registration.

EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of documentary evidence as well as the oral testimony of Hugh Corbett and Mary Jane South.

The Applicant presented no evidence.

Evidence of Hugh Corbett

Mr. Corbett is the Director of Litigation at MFDA and in charge of prosecutions. The Applicant was a registered mutual fund salesperson. He was prosecuted for dealings he undertook on behalf of a client. He received substantial funds from a client, which he invested, in part, in investments not known or approved for sale by his employer. He did not provide proper accounting; he did not return the funds, and approximately one hundred thousand dollars of the client's money went directly into his own pocket.

A disciplinary hearing was held January 19, 2007. The panel hearing the matter consisted of a judge and two industry members. They found that the Applicant had breached MFDA rules in that he had invested funds outside the accounts and facilities of his employer, he had failed to make investments and he had misappropriated some of the clients' funds. The sanctions imposed included a permanent ban from securities related business in any capacity as well as fines.

The Applicant did not attend the MFDA hearing, although he was personally served with a notice of hearing.

Evidence of Mary Jane South

Ms. South is the Deputy Registrar of OMVIC. Part of her responsibility is to oversee registrations. The Applicant's application for registration was received on August 4, 2006. In answer to question 3, which asks:

Have you ever had a commercial, professional or business registration, certification or licence of any kind refused, suspended revoked or cancelled, or are you currently involved in such proceeding? If yes please provide details.

The Applicant wrote in the following response, "MFDA for mutual funds, at present no sponsor for lic. & not active"

This response did not raise concern and the Applicant was registered. The true nature of the matter with the MFDA came to light when one of OMVIC's lead investigators received an email with respect to Mr. Chan and other investigations. Mr. Chan had not appeared at the MFDA hearing, and because of this, he was asked by OMVIC to provide details of the matter. He was given a deadline. He asked for an extension. A letter was received from his solicitor indicating that Mr. Chan's conduct with respect to his investment dealings were not deceitful. An interview was held where the Applicant attended with his solicitor. He provided an explanation at that time as to all his dealings. He was asked for documentation to verify what he said. He indicated that he did not keep any records regarding his unregulated activities. He also indicated that he had decided not tell his employer about the MFDA matter unless it became an issue. This caused concern to the Registrar.

Ms. South was of the opinion that the Applicant's answer to question three was misleading and his conduct with respect to investors demonstrated a lack of honesty and integrity. She described it as the mutual fund version of curb-siding, when a salesperson carries on business outside of the rules. It was Ms. South's understanding that the sponsoring dealer terminated the Applicant in November of 2007.

THE LAW:

The Motor Vehicle Dealer Act states as follows:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- a) having regard to financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business: or
- b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty: or

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

THE ISSUE:

Does the past conduct of the Applicant afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty?

APPLICATION OF THE LAW TO THE FACTS:

The Registrar's evidence before this Tribunal is uncontradicted and is accepted in its entirety. The Applicant, in his capacity as a mutual fund salesperson breached the rules of the MFDA by making improper investments and misappropriating the funds of a client. This conduct, in the Tribunal's opinion, was of a serious nature and clearly demonstrated a lack of honesty and integrity.

As a result of these improper dealings, the Applicant was permanently banned from conducting securities related business. In his answer to question three of the application for registration as a motor vehicle salesperson the Applicant provided an answer which was untrue and misleading. His licence under the MFDA was not inactive simply for want of a sponsor. By providing such an answer the Tribunal finds the Applicant has clearly demonstrated an unwillingness to be forthright and a lack of honesty.

The motor vehicle industry requires that those who work in the industry act with honesty and integrity. Based on the past conduct of the Applicant described above, the Tribunal does not have confidence that the Applicant will conduct business with honesty and integrity and in accordance with the law. There was no evidence submitted by the Applicant as to his character or otherwise, which the Tribunal could consider in forming a more favorable opinion of the Applicant.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7. (4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated March 20, 2007, to revoke the registration of Phillip Lip Fee Chan as a motor vehicle salesperson.

The Registrar has asked for costs in this matter in accordance with Rule 14. This matter was scheduled for a previous date, at which time the Applicant appeared and requested an adjournment so that he may properly retain counsel. (An award of costs in the amount of \$400.00 was made at that time which has remained unpaid.) The Applicant did not retain counsel and did not appear in these proceedings. Neither the Registrar nor the Tribunal was contacted prior to the commencement of the hearing. The Tribunal finds that the Applicant has not acted reasonably and orders that he pay the Registrar additional costs in the amount of \$400.00.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-chair

RELEASED: April 30, 2008

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

1249592 ONTARIO LTD. O/A QUALITY AUTO WHOLESALERS, ABBAS BIGDELI, HAMID REZA SAMANIAN and ALIREZA ARSHADNEJAD

APPEAL UNDER SECTION 7 OF THE *MOTOR VEHICLE DEALERS ACT* R. S. O. 1990 C. M. 42 AS AMENDED FROM A NOTICE OF PROPOSAL TO REVOKE AND REFUSE REGISTRATIONS DATED FEBRUARY 20, 2007

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: AVIVA R. HARARI, Counsel, appearing on behalf of the Registrar, *Motor Vehicle Dealers Act*

SYMON ZUCKER, Counsel, appearing on behalf of the Applicants, 1249592 Ontario Ltd. o/a Quality Auto Wholesalers, Abbas Bigdeli and Hamid Reza Samanian

No one appearing for Alireza Arshadnejad

DATE OF HEARING: MARCH 31, 2008 TORONTO

MOTION

At the initial commencement of this matter before the Licence Appeal Tribunal in September 2007, Alireza Arshadnejad advised the Tribunal he was withdrawing his appeal from the Registrar's Proposal. His appeal in this matter was thereby dismissed and he is no longer a Party to these proceedings.

This hearing originally commenced in September 2007 (4 days) and continued in October (2 days) and December (1 day). At that time Counsel for both Parties informed the Tribunal of their mutual concern that prior attendances and evidence had failed to properly be recorded. They jointly requested the Tribunal to adjourn the matter for a sufficient time to order transcripts, ascertain the extent of the failure and determine the next steps. The Tribunal granted the request and, after canvassing the Parties and their Counsel, the dates of March 31, April 1 and April 2, 2008, were scheduled for resumption of the matter.

On February 25, 2008, a Motion was received at the Tribunal offices requesting a date be set to hear the Registrar's request for an Order for Directions as to how

the matter should proceed. Attached to the Motion were two written communications received from two separate Court Reporting offices advising of significant gaps in almost all of the earlier recordings. No responding material was filed by Counsel for the Applicants. The Motion was set to be heard at the recommencement of the hearing on March 31, 2008.

Ms. Harari relied on the written communications received by her in response to her requests for transcription of the Tribunal's tapes. The first advised that the hearing record of October 19, 2007 failed to record any of the evidence provided by the first two witnesses and only partially recorded the third. A separate letter dated January 31, 2008, from a separate Court Reporter discloses that 13 of the 18 tapes made during the proceeding five days of evidence were blank; of the remaining 5 tapes, only two completely recorded the witness testimony.

Based on the significant inadequacy of recording, Ms. Harari submitted that a reviewing court would have no option but to require the entire matter be reheard. This would cause substantial hardship to all Parties in time and cost and would therefore, be inequitable and a breach of natural justice. She requested the Tribunal minimize this by terminating the hearing and re-scheduling the matter to commence de novo.

Counsel for the Applicants agreed that the failure of the recordings resulted in his clients being unfairly positioned should the matter proceed to appeal. He further agreed with Ms. Harari that there would, in these circumstances, be an automatic right to a re-hearing which would require substantial costs, and thereby undue prejudice to his clients. He submitted that the Tribunal should, as a result, stay the proceedings.

Authority provided to the Tribunal comprised two cases where reviewing courts had occasion to consider the ramifications caused by inadequate tribunal recordings. In *Canadian Union of Public Employees, Local 301 v. Montreal (City)* [1997] 1 S.C.R. 793 the Supreme Court of Canada considered a situation similar to the one before this Tribunal where Parties had been advised at the outset of the hearing that the proceedings would be recorded, but, due to some mechanical malfunction, such a record was never made. The legislation under which the tribunal proceeded did not require that a record be made; however, it was the tribunal's practice to do so.

In articulating the tests to be applied before it can be concluded that faulty or incomplete recordings impair the natural justice requirement inherent in tribunal proceedings, L'Heureux-Dube J., writing for the Court, found firstly that, where there is a statutory requirement for such a recording set out in the legislation under which the hearing proceeds, the absence of a viable record may amount to a breach of natural justice:

"As such, a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of the ground of appeal or review, before a new hearing will be ordered."

However, where there is no legislated requirement that the proceedings before the administrative tribunal be recorded, then the Court found that an absence of a transcript does not violate the rules of natural justice. Rather, such a breach will only be found if the reviewing court has an inadequate record upon which to base its review. In the circumstances of the *Local 301* case, the material made available to the reviewing court included affidavit material of various individuals who had provided similar testimony before the tribunal. The Supreme Court found that the respondent failed to establish this evidence was insufficient to provide the reviewing court with adequate evidence upon which to base its review. In doing so the Court noted the deference due an administrative tribunal on a standard of review:

Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable." (para.85)

The second case provided by Counsel is the more recent Federal Court, Trial Division decision of Lemieux J. in *Goodman v. Canada (Minister of Citizenship and Immigration)* [2000] FCJ No. 342. In the circumstances of this case there was a transcript made and provided. It did, however, contain a defect or gap. Reviewing a decision of the Convention Refugee Division, which had denied the appellant his refugee claim, the Court applied the principles articulated in *Local 301*, supra. After noting that not all gaps will be automatically considered sufficient for a new hearing, the Federal Court advanced the following six factors to be considered in order to determine whether the transcript gaps amounted to a breach of natural justice:

1. The grounds advanced for the review;
2. The importance of the impugned findings to the appellant's original hearing;
3. The basis on which the tribunal arrived at its conclusion i.e. did it base its decision on credibility, on facts or on law;
4. The subject matter of the impugned evidence (direct evidence, cross-examination, side bars) and the significance or materiality of it;
5. What other means did the tribunal use to fill the gap; and
6. What other means were available to the reviewing court to determine what went on at the tribunal hearing.

The Court concluded that the tribunal, in denying the claim, had relied partially on its finding that certain exclusionary clauses denied Mr. Goodman protection. The factual foundation for this finding was the appellant's knowledge of specific crimes. The recordings contained no evidence on this precise issue, nor had the tribunal made any findings on the issue of credibility such that the Court concluded the evidence could have only been forthcoming during the appellant's

cross-examination at the tribunal, which was missing as a result of the recording defect. Although Mr. Goodman had supported his judicial review application with affidavit evidence, the reviewing court found this "...did not address the specific crimes in such a manner as would permit me to say the tribunal was wrong and thereby quash the decision." The judicial review was allowed in part and a re-hearing ordered limited to the factual findings of the tribunal on the narrow issue of Mr. Goodman's knowledge of these specified crimes.

DECISION AND ANALYSIS

After having heard the submissions and reviewed the authorities made available by Counsel, the Tribunal denied the Motion. It has now been six months after commencing this hearing and there are only a few witnesses left to testify. Much time and scheduling acrobatics have been required to see this matter to where it is now. In the meantime, all the Applicants continue to remain registered and continue to operate, notwithstanding the public interest in timely and cost-effective proceedings envisioned by the legislature of the province in creating this Tribunal and providing it with authority over motor vehicle registrations. In addition there is the public interest in expeditiously determining an applicant's fitness for registration. The statute, it must be noted, is, at its heart, consumer protection legislation. There is consequently a fair amount of justice in proceeding expeditiously to its conclusion. There is a right of appeal.

This right of appeal cannot be simply a theoretical right, but must be meaningful to ensure the principles of natural justice are respected. To be meaningful, a reviewing court must be able to reflect on the considerations and reasoning undertaken by the Tribunal in reaching its conclusions in order to determine whether those considerations and that reasoning were correctly applied.

While Counsel argued that such a review and reflection is not possible where there are substantial defects in the recording of the evidence upon which the Tribunal relied, and that, as a result, the reviewing court will automatically require a complete re-hearing of the case, it is my conclusion that the authorities state differently.

Before reviewing the authorities however, there are two observations which are relevant to this inquiry. Firstly, I note that I have taken extensive notes on all the evidence placed before the Tribunal to date as it is my usual practice to rely exclusively upon them in formulating my decisions as a Vice Chair of this Tribunal. Further, in mid-December, recognizing the lengthy adjournment of the proceeding, I drafted a clear summary of all the evidence then before me from these notes. I note these occurrences in recognition of the fifth factor articulated in *Goodman*, supra, and my confidence that any gaps or blanks in the recordings will not impair my ability to formulate a reasoned decision in this matter.

It is also relevant to observe that there is no requirement in the *Motor Vehicle Dealers Act* that proceedings before this Tribunal be recorded. Neither is such a

requirement contained in the *Licence Appeal Tribunal Act, 1999* our governing legislation. The latter stipulates in section 5 that a party may, upon filing a fee for the purpose, request that a proceeding be recorded. That did not occur in this instance. There are, however, public informational pamphlets provided to Parties generally as well as information disclosed on hearing notices advising the Tribunal's proceedings are recorded. It seems to me then, that the circumstances here are not unlike those which existed in *Local 301* where no statutory requirement to record existed; however, the tribunal's practice and advice was that such recordings existed.

In any event, the effect of the higher court decisions results in the requirement that a reasonable determination must first be made as to whether the unrecorded evidence is firstly, germane to the appeal/review being sought because it was material to that aspect of the tribunal's process of decision making which is the trigger for the review/appeal. Where this question is answered in the affirmative, then the question becomes what means are available to the reviewing court to adequately determine the evidence relied upon by the Tribunal to make its determination. Whether there are other means – other than ordering a re-hearing – which will provide the reviewing court with the necessary information then becomes a necessary query. In the case of *Local 301*, this third requirement was met by affidavit evidence supplied at the appeal level; in the case of *Goodman*, there was insufficient evidence available at that level, such that a re-hearing was required, albeit specifically limited to only that evidence found to be material, germane and missing from the review court. In neither situation was an entire re-hearing required.

As a result, I reject the submission that such a re-hearing would be required as of right or automatically as argued. I further reject that such would therefore automatically require substantial and prejudicial costs such that this hearing should be terminated and/or stayed.

In the first place the Motion is premature as the Tribunal cannot determine the outcome of the hearing at this point in the evidence, let alone on what grounds one of the Parties may decide to seek a review. Consequently, there is no way to determine whether the part of the transcript that is missing is relevant or necessary to a potential reviewing court. The Supreme Court in *Local 301* was clear that simply the inadequate or faulty recording per se is not sufficient to require an automatic re-hearing as was submitted by Counsel. Rather it is necessary to demonstrate how that fault or inadequacy is necessary to the reviewing court's ability to perform its function before a conclusion can be drawn that there is some breach of natural justice. If the Tribunal, for example, bases its decision on a finding of credibility, the missing recording may not be relevant. If, on the other hand, the Tribunal bases its eventual decision on a specific fact dispute by the parties in their evidence, then gaps in the record on that evidence may well be highly relevant and necessary to the reviewing court in its determination of the correctness of the tribunal's decision. If so, that court will have to inquire as to how it can best inform itself of this and may determine it can do so in a more expeditious and efficient manner than ordering a re-hearing.

Even if it can not and there is a need to re-hear some portion of the case, there is no reason to expect the entire matter will need to be re-heard, but rather only the portion of the testimony and evidence which is found by the reviewing court to be relevant to its inquiry.

As a consequence, it is this Tribunal's conclusion that any Order requiring this proceeding be re-heard is unnecessary and wasteful of resources and the Parties' costs. As well, any Order concluding the hearing to date is tainted due to the failures in the recording devices is incorrect. Neither is acceptable to the Tribunal.

After orally advising the Parties of the Tribunal's decision to deny the Registrar's Motion, Counsel advised they were not prepared to proceed. This was despite the matter having been set down for three days with their express consent some four months previously. By not being prepared to proceed, the Tribunal, its staff and Chair have been significantly inconvenienced – notwithstanding that Counsels advised they had informed Tribunal staff of their inability to proceed the week prior. As the Tribunal has no authority to award itself costs, no such award will be made. However, having been found acceptable to both Parties and their Counsel, this proceeding has been adjourned to September 22 through 24, 2008 inclusive and are peremptory on both.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: April 29, 2008

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



RAFIK YASSO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: RAFIK YASSO, Applicant, representing himself

A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: February 20, 2008 Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND

This hearing arises out of a written Notice of Proposal (the "Proposal") dated October 26, 2007, issued by the Registrar under the *Motor Vehicle Dealers Act* R.S.O. 1990 c. M. 42 (the "Registrar" and the "Act" respectively) to refuse the registration of Rafik Yasso (the "Applicant") as a motor vehicle salesperson.

The Registrar based his Proposal on section 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 reasons that the Registrar issued the Proposal, and the Particulars thereof, are stated in the Proposal itself.

In effect, the Registrar alleged that there were reasonable grounds to believe that the Applicant would not carry on business in accordance with the law and with integrity and honesty. The Proposal states:

NOTICE OF PROPOSAL TO REFUSE REGISTRATION

Take notice that pursuant to section 7 of the *Motor Vehicle Dealers Act* (the "Act") the Registrar is proposing to refuse the registration of Rafik Yasso under the Act.

REASONS

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disqualification to registration under the Act. Therefore, the Registrar is unwilling to continue to register Rafik Yasso under the Motor Vehicle Dealers Act.

The Registrar relied on three arguments:

1. The Applicant's conduct has resulted in convictions and charges under both the Criminal Code of Canada and under the *Controlled Drugs and Substances Act* of Canada, thereby demonstrating inappropriate past conduct.
2. The Applicant minimized his past conduct and did not make full and complete disclosure of his conviction record and pending charges to the Registrar.
3. At the time that he applied to be registered, the Applicant was still serving a time of probation, imposed on four of his convictions, so that he could not demonstrate a period of positive conduct that would normally follow the end of a probation period.

The Registrar set out, in the Proposal, the particulars of the grounds for the refusal as follows:

PARTICULARS

The reasons for this proposal are:

1. On or about June 18, 2007 Rafik Yasso ("Yasso") applied for registration as a motor vehicle salesperson. He proposes to work for [a named dealership].
2. On the application to become a registered salesperson question 9 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered)."

Yasso indicated "possession of marijuana".
3. A criminal record search revealed Yasso has engaged in conduct which resulted in the following convictions:

September 8, 2000 February 7, 2007 (X4)	Fail to comply with Recognizance Possession of Controlled Substance

4. A criminal record search revealed Yasso has engaged in conduct which resulted in the following charges:

March 22, 2006	Possession of Controlled Substance Possession of Controlled Substance for trafficking

Sections 7(1) and 7(2) of the Act require that notice of the proposal be given to the Applicant as well as notice that he has a right to appeal to this Tribunal:

7 (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

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

The powers of this Tribunal are specifically stated in section 7(4) as follows:

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

The Applicant appealed the Registrar's Proposal to this Tribunal and that is the matter now before it.

ISSUE

The issue that this Tribunal is called upon to determine is whether 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

FINDING

This Tribunal finds, on the evidence before it that 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.

EVIDENCE

The Applicant did not dispute the facts in this case.

EVIDENCE ON BEHALF OF THE REGISTRAR

Evidence of the Police Officer

For twenty years, this police officer has been a member of the police department of the major community that is near the community in which the Applicant resides. The officer was familiar with the Applicant, and reviewed the relevant portions of the Applicant's police record for this Tribunal.

The police officer reviewed the criminal records search that the Registrar requested in the Applicant's name. It is found at Tab 4 of the Respondent's Book of Documents, filed as Exhibit 3. The search revealed that, on September 8, 2000, the Applicant had been convicted of failing to comply with a Recognizance that he had entered into at the time of his release from police custody. The Recognizance required the Applicant to reside at a particular address during his release, pending disposition of an outstanding charge. The charge itself was not specified.

The Applicant's record also revealed that, on February 7, 2007, he had been convicted on four counts of possession of drugs contrary to the *Controlled Drugs and Substances Act* of Canada. He had originally been charged with two counts of possession of illegal drugs, and two counts of possession of illegal drugs for the purposes of trafficking. However, subsequently, the Applicant entered guilty pleas to four counts of simple possession. He was sentenced on each count to a period of Probation for two years, to run concurrently with each other. He was also fined the sum of \$500.00 on each count, together with a Victim Surcharge of \$75.00 on each count. There were four different classifications of drugs involved; namely, cocaine, crack cocaine, cannabis marijuana and cannabis resin.

The period of probation began February 7, 2007, and would end on February 6, 2009. This period is significant, because the date of the Applicant's application for registration to be registered as an automobile salesman was June 11, 2007, four months after the probation period began.

The events that resulted in the above four convictions were alleged to have occurred on February 11, 2006. Yet, on the 18th day of the following month, March, 2006, the Applicant was again charged with one count of possession of an illegal drug, Percocet, and one count of possession of cocaine for the purposes of trafficking, once again contrary to the *Controlled Drugs and Substances Act*. The latter two charges were still outstanding as at the date of this hearing. The Applicant indicated that the charges would be heard in October, 2008.

Although the police officer went into the details of the circumstances that led to the arrest of the Applicant on February 11, 2006, it is not necessary, for the purposes of this case, to set out those details. Suffice it to say that the police found that the Applicant had overdosed on drugs. The police did find, at the time of the arrest, 29.4 grams of marijuana, 0.5 grams of crack cocaine and 0.5 grams of cocaine. The officer indicated that these amounts were significant.

The police also found in the residence a prohibited firearm; namely, a sawed-off shotgun. It still needed a trigger and lock mechanism to be fired. They also found various other drug paraphernalia and a "debt list," which the officer explained was a list of names of people and the amounts that they owed for drugs.

With regard to the two charges on March 18, 2006, the officer indicated that the Applicant had been arrested as a result of a driving offence and an outstanding arrest warrant. While in the police cruiser en route to the police station, the Applicant pulled out of his pocket and dropped onto the floor of the cruiser a bag containing 12.1 grams of cocaine, having a value, according to the officer, of over \$1,200.00.

At the end of the police officer's testimony, the Applicant chose not to cross-examine him.

Evidence of Mary Jane South

This witness had been the Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC") for the two years immediately preceding this hearing, and continued to hold that position as at the date of this hearing. OMVIC is a not-for-profit organization that administers the Act. Ms. South's duties included the oversight of the registration of dealers and salespersons under that Act.

Ms. South referred to the Registrar's Proposal, filed as Exhibit #1, and also found at Tab 1 of Exhibit #3. It is dated October 26, 2007. She confirmed that the Proposal was based on the Applicant's prior convictions, his current outstanding charges, and on his lack of disclosure of these matters to the Registrar, both in his application form and in his two subsequent letters to the Registrar.

She pointed out to this Tribunal that the Application form, a copy of which is found at Tab 3 of Exhibit #3, contains several questions that any applicant must answer. In particular, question 9 poses the following question to an applicant:

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).

Space is provided for an applicant to give details of any convictions and charges. Below that space there is an explanatory note that states:

Note: Applicants are subject to background and criminal record searches. **Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification.** Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

(Emphasis is added)

To this question, the Applicant answered, "Yes". However, his only explanatory comment was a reference to possession of marijuana. This Tribunal notes that his response did not include his convictions for breach of recognizance, or for his possession of cocaine, crack cocaine or the other form of cannabis. Further, he does not mention, as the question requires him to do, his two outstanding charges arising from the incident on March 18, 2006. Nor does he make mention of his period of probation that began February 7, 2007, nor of the fines that had been levied on his four drug convictions.

Considering the matters that were left out, this Tribunal considers that the Applicant's answer was incomplete, to say the least. The warning in question 9, emphasized above, is very clear that incomplete disclosure will result in disqualification.

About two months after OMVIC received the Applicant's application form, OMVIC received the criminal record search which revealed all his convictions and the outstanding charges, and the period of probation and fines that the Applicant left out of question 9. As a result, the Registrar sent a letter to the dealership that was supporting the Applicant in his application, and asked the dealer to discuss the matter with the Applicant.

The Applicant responded by sending a letter back, dated September 10, 2007, which he and a representative of the sponsoring dealership signed. A copy of this letter is found on page 19, Tab 5 of Exhibit #3. In that letter, the Applicant does, in fact, refer to a conviction for possession of marijuana on which he received a fine and a two-year period of probation. He stated that the conviction was on February 11, 2006, but that was the date of the offence. He was actually convicted on February 7, 2007. However, the Applicant still did not refer to the

fact that there was more than the one conviction or to the fact that there were still two outstanding charges or to the fact that fines had been imposed.

After receipt of that letter, the Registrar, knowing that other matters were referred to in the criminal records search, contacted the Applicant by telephone and told him that he had to disclose all his convictions and outstanding charges. This resulted in yet another letter from the Applicant, undated, but received by OMVIC on September 13, 2007. A copy of it is found at page 20, Tab 5 of Exhibit #3. It, too, is signed by the Applicant and by a representative of the sponsoring dealership. In that letter, the Applicant tells about a charge of robbery and assault causing bodily harm. The alleged victim did not appear in Court so that the letter seems to say that the charge was dismissed. But, this matter did not even appear on the criminal records search.

The letter goes on to mention a charge of possession for the purpose of trafficking "in the year 2006 of Feb. 11," to quote from the letter, but does not state that there were actually two of those charges originally plus two charges of simple possession. The Applicant further states in the letter that the amount of marijuana found was small, and that it was really for his personal use. It will be recalled that the police officer's testimony was that 29.4 grams of marijuana were found and that this was a significant amount.

The letter goes on to state that on March 18, 2006, the Applicant was charged "for failure to ident from the charges on Feb. 11". This does not correspond to the fact that the charges arising from the incident on March 18, 2006, were actually a possession charge and a charge of possession for the purposes of trafficking.

By the time the Registrar received the Applicant's second letter, the Applicant still had not reported an accurate history of convictions and outstanding charges. Therefore, the Registrar issued its Proposal to refuse the Applicant's registration. The reasons included the fact that the Applicant was not forthcoming with his criminal record. He had three opportunities, but still failed to provide full disclosure. Furthermore, the Registrar felt that the Applicant's criminal conduct was very recent, so that he was unable to show a pattern of positive conduct since his last misdeed.

As was the case with the police officer, the Applicant chose not to cross-examine Ms. South.

EVIDENCE ON BEHALF OF THE APPLICANT

Evidence of the Applicant

The Applicant himself was the only person to give evidence on his behalf.

He stated that, when he filled in the application form, his reading and writing levels were not high, so that he did not understand that he had to reply in full. He did not explain, however, why he had no difficulties answering the other questions on the application form. He further stated that he could not understand why the Registrar would want him to list his charges "from day one," to quote his testimony.

Concerning the charges that arose from the incident on February 11, 2006, he frankly stated that he was going through a rough time and was dealing with his problems in the wrong way. He also confirmed that, in the very next month, he was arrested a second time and charged with additional drug offences.

He then showed to this Tribunal various letters of reference written on his behalf, and found at Tab 2 of Exhibit #3. There was a letter dated November 2, 2007, written by the CEO and Chairman of an Automotive group that was made up of several automobile dealerships. The author of the letter stated that he was willing to take his chances with the Applicant and urged this Tribunal to do the same.

A letter, dated October 25, 2007, from a Family Service Worker at the Children's Aid Society states that the Applicant completed an outpatient drug treatment program in early 2006, and voluntarily provided drug screens, with very good results. It also goes on to state that he also attended meetings of Narcotics Anonymous in 2006, as directed. The letter also states that the Applicant has a strong desire to succeed in his career path with the dealership where he was employed as at the date of the letter.

A letter dated October 26, 2007, from the Applicant's Probation Officer states simply that the Applicant has complied with the terms of his probation as of October 26, 2007. It will be recalled that his two-year probation period began on February 7, 2007.

The Applicant himself wrote a letter dated October 31, 2007, on his own behalf. A copy of it is found on page 8, Tab 2 of Exhibit #3. In it, he acknowledges that he has made several mistakes, but wishes to accomplish a new beginning. He states that he has cleaned up his act in the previous 18 months (presumably since the last set of charges in March, 2006), and wishes to hold a respectable job.

Finally, the Applicant referred this Tribunal to a Certificate of Completion of a particular educational course through a community addiction assessment and outpatient service. The Certificate is dated April 25, 2006, which is a date that is slightly more than one month after he had been charged with his most recent offences in March, 2006. The Applicant stated that the course required him to attend sessions once a week for the length of the course. He could not recall whether the course was one month long or two months. Considering that he

started the course only after the March, 2006 charges, and that the Certificate is dated April 25, 2006, it is apparent that the course was only one month long. He confirmed that the two outstanding charges would be dealt with in Court in October, 2008.

On cross-examination, the Applicant confirmed that, before he filled in the application form, he completed the OMVIC Certificate course, so that he should have been aware of the standards of honesty required in the motor vehicle industry and under the Act. He also knew that, when he sent in his application form, the Registrar would rely on the information contained in it. Despite the wording in question 9, already referred to, the Applicant did not contact OMVIC for assistance in filling out the form.

The Applicant further confirmed that the information in the criminal records search about his past convictions and outstanding charges was correct. He stated that it was difficult for him to bring up his past all the time. Ultimately, after he had the telephone discussion with an OMVIC representative, which took place after he had sent in his letter of September 10, 2007, he understood that he had to reveal even his outstanding charges, and not just his convictions. However, in the letter that he wrote after this conversation, he still did not refer to the outstanding charges from March, 2006.

As well, when questioned by counsel for the Registrar, the Applicant stated that he had a small amount of marijuana when he was arrested on February 11, 2006. However, this conflicted with the evidence of the police officer who had stated that he found 29.4 grams of marijuana, and 0.5 grams of cocaine, and 0.5 grams of crack cocaine, and that these amounts were significant.

ANALYSIS

The evidence before this Tribunal on behalf of the Registrar is clear and totally unchallenged.

The Applicant filled in an application form to be registered as a motor vehicle salesperson. He completed the OMVIC Certificate course, thereby becoming familiar with the industry standards of honesty.

On three separate occasions, he had an opportunity to make full disclosure of all of his past convictions and his outstanding charges, but failed to do so.

His first opportunity was the application form itself. Question 9 on that form specifically stated that submitting a false or incomplete disclosure is an offence under the Act, and will result in disqualification. The application was dated June 11, 2007. He referred only to a conviction for the possession of marijuana. However, he failed to mention his conviction for breach of recognizance on

September 9, 2000. He failed to mention three other convictions on February 7, 2007, all involving the possession of illegal drugs and all the result of his guilty pleas. He also failed to mention that he had been placed on probation for a period of two years, beginning February 7, 2007, and ending February 6, 2009. Nor did he mention the fines of \$500.00 imposed on each conviction. He also failed to mention two outstanding charges, both involving the possession of illegal drugs, and both of which had yet to be dealt with in Court.

The Applicant's second opportunity was in his letter of September 20, 2007. In it, he refers to his conviction for possession of marijuana, but fails to mention his convictions for the possession of cocaine and crack cocaine on the same date. He refers to a two-year period of probation but still did not mention his two outstanding charges, or his conviction on September 8, 2000, or his fines.

His third opportunity arose after he had a telephone discussion with a representative of OMVIC. After that discussion, he knew that he had to provide disclosure of both his past convictions and of his current charges. The letter that he sent after that discussion was undated but received by OMVIC on September 13, 2007. The letter still did not refer to the two outstanding possession charges arising from the March 18, 2006, incident. Rather, he refers to a charge on March 18, 2006, for "failure to ident from the charge on Feb. 11". Also, the Applicant still did not refer to the fact that he was convicted on four counts of possession on February 7, 2007, nor does he refer to the particular drugs that were involved, other than the marijuana that he continuously refers to. Again, the Applicant failed to mention the fines that had been imposed.

Question 9 on the application form was the only question he did not answer correctly. This Tribunal would conclude, therefore, that the Applicant understood much more of the questions on the application form than he would have this Tribunal believe.

Counsel for the Registrar submitted that the Applicant's immediate past conduct, the seriousness of the offences and the repeated nature of the offences all provide reasonable grounds for belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty. The Registrar submitted that he needs only "reasonable" grounds for this belief. For this principle, counsel for the Registrar referred this Tribunal to the case *Khan v. Registrar, Motor Vehicle Dealers Act* [2007] O.J. No. 1459, a decision of the Divisional Court of the Ontario Superior Court of Justice. That case also dealt with a refusal to register an applicant under the *Motor Vehicle Dealers Act*, based on section 5(1)(b) of the Act. In his oral Judgment, Swinton J. states, at paragraph 4:

4. The Tribunal applied the wrong test, as is shown by the conclusion at page 7 of its reasons:

Therefore the Tribunal is unable to conclude that the applicant's past conduct when considered in whole is such that he would not carry on business in accordance with law and with integrity and honesty.

The Tribunal's task was to determine if the past conduct of the respondent afforded "reasonable grounds" for belief that he would not carry on business in accordance with law and with integrity and honesty. See *Brenner v. Ontario Registrar of Motor Vehicle Dealers and Salesmen*, [1983] O.J. No. 1017 (Div. Ct.) at para. 9. (Emphasis is added)

This Tribunal will adopt that reasoning and apply it to the facts of this case. This Tribunal concludes, on all the evidence before it, outlined earlier in these Reasons, that the Registrar has proved, on a balance of probabilities, that there are such reasonable grounds for belief in this case.

In addition, counsel for the Registrar also pointed out that the Applicant is currently serving a period of probation, which is not scheduled to end until February 6, 2009. Therefore, counsel submitted that the Applicant has failed to demonstrate a period of positive conduct of his own doing from the date of his convictions because, currently, he is under the scrutiny of a Probation Officer. Counsel, in making that submission, referred this Tribunal to the case *Re: Mavroudis* [1998] O.C.R.A.T.D., a decision of Vice-Chair B.J. Reade. That case was an appeal from a Notice of Proposal to refuse to grant registration of an applicant as a motor vehicle salesperson under the provisions of the *Motor Vehicle Dealers Act*. The refusal was based, among other reasons, on section 5(1)(b) of that Act, on the grounds that the past conduct of the Applicant afforded reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. At paragraph 26, the learned Vice-Chair states:

26 The Tribunal is also not satisfied that sufficient time has elapsed from the time of Mr. Mavroudis' sentencing to demonstrate conduct to override the magnitude of his recent criminal activity. In the case of Ripani, 18 CRAT 356, the Tribunal discussed a number of cases dealing with this issue and stated:

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 [...]
(Emphasis is added)

Again, this Tribunal would agree with that reasoning and would conclude that the Applicant in this case has not shown a "sufficient period of reformation".

Finally, counsel for the Registrar submitted that the Applicant tried to minimize the seriousness of his convictions. The Applicant referred to only one conviction of possession of marijuana, whereas there had been four. He stated that he had only a small amount, whereas the police officer indicated that the amount was

significant. Furthermore, the Applicant referred only to marijuana, but failed to mention that cocaine and crack cocaine were also involved. The Applicant also failed to mention at any time that fines had been imposed on those very same convictions. Counsel for the Registrar submitted that such omissions are a sign that the Applicant intended to mislead the Registrar.

In support of that argument, counsel referred this Tribunal to the case of *Anthony Ottolino v. MVDA*, heard before this Tribunal and released June 30, 2004. He referred to the Registrar's assertion in that case that the Applicant's information with respect to the conviction was false. The Tribunal in *Ottolino* found as follows:

If there are deliberate, significant and relevant inconsistencies in the application material submitted by the Applicant this would reflect an attempt to mislead. Such an attempt would suggest that the Applicant could not be counted on to function with honesty, integrity and within the law if registered.

Counsel for the Registrar submitted that the Tribunal should so find in this case as well.

This Tribunal would accept that principle as applicable to the case now before it.

For his part, the Applicant submitted that the more information that he disclosed to the Registrar, the more he began to understand just what he had to provide.

However, the wording in question 9, outlined earlier, is very clear and unambiguous. The Applicant had to provide details about not only his convictions but also about charges that were pending. On the application form, he provided only one of the former and none of the latter. Even after an additional letter and a subsequent conversation with a representative of OMVIC and a further letter after that, he still had not provided information about his pending charges, nor had he given complete information about all his prior convictions or about the penalties that were imposed or levied following those convictions. This Tribunal finds it difficult to understand just why, after three chances, the Applicant still could not understand the requirement to disclose the information requested.

The Applicant further submitted that he is being judged on a form that he filled out. He stated that there were a lot of things that he could not understand.

However, despite the clearly stated instructions in question 9, and outlined earlier, this Tribunal cannot understand why the Applicant failed to contact OMVIC in order to clarify any of his stated lack of understanding. The conclusion that this Tribunal has come to, in light of all the evidence before it, is that the Applicant did not want to disclose all the information about his past convictions and pending charges.

CONCLUSION

Considering the overwhelming weight of evidence against the Applicant, and considering the provisions of section 5(1)(b) of the *Motor Vehicle Dealers Act*, and the reasoning in the cases referred to, this Tribunal finds 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.

DECISION

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal of October 26, 2007, to refuse the registration of Rafik Yasso.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski
Vice-Chair

RELEASED: April 2, 2008

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

MOHAMMED JAWED YOUSUFZAY

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: RAJ PANNU, Vice-Chair

APPEARANCES: MOHAMMED JAWED YOUSUFZAY, Applicant

AVIVA HARARI, Counsel, representing the Registrar under
the *Motor Vehicle Dealers Act*

DATE OF
HEARING: January 3, 2008 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 August 29, 2007 proposed to revoke the registration of Mohammed Jawed Yousufzay (the "Applicant"), as a salesperson under the Act.

FACTS

The Registrar furnished the following particulars in support of his Proposal.

1. The Applicant was the sole officer and director of Consumer's Choice Auto Sales #2 ("Consumer's #2"). He was the sole officer and director since November 3, 2003.

2. The Applicant submitted two applications on November 24, 2004; an application for registration (which accompanied the new dealer application for Consumer's #2) and an application to transfer his then current registration to Consumer's #2. The transfer was held in abeyance until the possible registration of Consumer's #2. In the interim, the Applicant's registration expired on May 25, 2004. As a result of the expiry of the registration, the individual application received by the Registrar's office from the Applicant on November 24, 2003, was deemed to be a reinstatement application.
3. The Consumer's Choice Auto Sales Inc. ("Consumer's") was registered as a motor vehicle dealer under the Act, however, the registration expired May 3, 2004. Consumer's failed to submit its renewal prior to the expiry date of the registration. Consumer's submitted a renewal on May 10, 2004 and also submitted a reinstatement application on May 10, 2004.
4. The Applicant was an officer and director of Consumer's from February 1, 2002, until July 16, 2003.
5. When Consumer's was originally registered, it was subject to terms and conditions. The terms and conditions are signed by the Applicant on behalf of Consumer's.
6. The Applicant breached the terms of conditions of registration, in particular, clauses 12, 13, and 17.
7. Consumer's included "TKU" owned contracts, which was contrary to the *Ontario Motor Vehicle Dealers Act* (OMVIC) Code of Ethics, Standards of Business Practice.

THE LAW

The *Motor Vehicle Dealers Act* states as follows:

- 5.(1) An applicant is entitled to registration or renewal of registration by the registrar except where,
 - (a) Having regard to financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business: or
 - (b) The past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty: or
 - (c) The applicant is a corporation and,

- (1) Having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business: or
 - (2) The past conduct of its officers or directors afford reasonable grounds for beliefs that it will not be carried on in accordance with law and with integrity and honesty: or
- (d) The applicant is carrying on activities that are or will be, if the applicant is registered in contravention of this Act or the regulations.

BACKGROUND

The Tribunal's decision released on January 12, 2005, directed the Registrar to carry out his proposal to refuse registration of the Applicant, his brother Hamad Yousoufzay and two corporations of which the Applicant was an Officer and Director.

The Applicant thereupon appealed the Tribunal's decision to the Divisional Court, Superior Court of Justice. The Applicant subsequently abandoned his appeal. He sought registration as a motor vehicle salesperson once again. The Registrar proposed to refuse this registration under section 7 of the Act. The Applicant appealed this proposal to the Tribunal. A hearing date was scheduled for October 6, 2005.

On September 9, 2005 a Motion was brought by the Registrar, Motor Vehicle Dealers Act for an order that the application for registration as a motor vehicle salesperson made by the Applicant on April 13, 2005, be dismissed as it was premature. The Vice-Chair of the Tribunal granted the motion. There were two appeals pending at the Divisional Court at that particular time. Both these appeals had been filed by the Applicant and were related to his registration.

The present proposal is in response to a further application for registration by the Applicant.

ISSUES

Does the past conduct of the Applicant give reasonable grounds to believe that the Applicant will not conduct business with honesty and integrity and in accordance with the law?

Has the Applicant shown clearly a material change in circumstances or new or other evidence, pursuant to Section 8 of the Act?

EVIDENCE

The evidence presented by the Registrar consisted of the testimony of Laura Halbert, the Director of Compliance with OMVIC. The Applicant also testified. In addition to the testimony of the above persons, the Registrar relied upon his Book of Documents filed with the Tribunal and entered as Exhibit 3.

Testimony of Laura Halbert

Laura Halbert, the Director of Compliance, stated in her testimony that she has been with OMVIC since 1997. On or about May 30, 2007, The Applicant applied for registration as a motor vehicle salesperson. Halbert further stated that the Applicant had previously failed to comply with the Terms and Conditions of registration.

Halbert went on to refer to Consumer's #2. She stated that this party made a new application for registration as a dealer, which application was signed by the Applicant as the sole Officer and Director of Consumer's #2. The Applicant also led an application for transfer of his registration to Consumer's #2 based on the assumption that the latter received its registration as a dealer. Halbert also noted that OMVIC's Standard of Business Practice had been distributed to all dealerships and were incorporated in the certification course in December 2001, a course, which was compulsory for all applicants to pass prior to being certified. The Standard of Business Practice was reviewed with the Applicant at the time of the first inspection by OMVIC. These Terms and Conditions were applied to the Applicant who was the sole Director and Officer of Consumer's #2.

Halbert expressed her concerns with the Applicant's application for registration as a salesperson stating that OMVIC should be able to rely on the authenticity of documents in a dealer's records when inspected by OMVIC. This was not the case when OMVIC obtained documentation from the Applicant.

Testimony of The Applicant

The Applicant testified that he has been in Canada since August 1997. He was registered in May 2002, as a motor vehicle dealer and as a salesperson under the Act. He stated that he enrolled in OMVIC's Automotive Certification Course in February 2002, which course he duly passed. After registration as a dealer, he was the sole owner of the business. The Applicant also stated that he made many mistakes in the past due to his association with his younger brother, Hamad Yousufzay. Hamad Yousoufzay worked at Consumer's #2 since April 2003. In July 2003, the Applicant gave Consumer's #2 to Hamad Yousoufzay and left that business. The Applicant could not provide any documents to show a material change or new evidence, which could support his application for registration as an auto sales person.

FACTS FOUND PROVEN

The following are the facts found proven by this Tribunal:

1. The Applicant was the sole Officer, Director and controlling mind of Consumer's, commencing from February 1, 2002 until July 16, 2003.
2. The Applicant became the sole Officer and Director of Consumer's #2 on November 3, 2003.
3. The Applicant gave the business to his brother Hamad Yousoufzay, who became an officer, director, and controlling mind of Consumer's on April 16, 2003.
4. Terms and conditions dated April 24, 2002, were signed by Consumer's on April 24, 2004. The Applicant was the authorized representative of Consumer's when signing the Terms and Conditions. Consumer's breached clauses 13 and 17 of the Terms and Conditions.

The Tribunal finds that the Applicant was at all material times the sole Officer and Director of Consumer's and Consumer's #2, respectively. The Terms and Conditions dated April 24, 2002, were duly executed by the Applicant in his capacity as authorized representative of Consumer's.

Subsequent to the execution of those Terms and Conditions, the Applicant represented Consumers when it sold a certain 1995 Honda Odyssey Motor Vehicle to a consumer with the words "Car sold as is" written by the Applicant on the face of the bill of sale. This notation on the bill of sale is in direct contradiction of paragraph 2.5 of the Standards of Business Practice of OMVIC. Reference is made to the findings of Derek Israel, Vice-Chair, in the Tribunal's decision dated January 12, 2005, in which the Applicant testified that he was aware of these standards which, he conceded, were part of the Automotive Certification Course he enrolled in and passed at Georgian College. In addition to the Terms and Conditions, which the Applicant admitted to having signed, was a specific notation which incorporated the obligation on both the Applicant and Consumer's to comply with Standards of Business Practice. The Applicant violated one of the basic requirements of the ethical standards imposed on him.

In addition, Consumer's was again represented by the Applicant who sold a Honda Accord motor vehicle to a consumer without making any disclosure whatsoever on the bill of sale that the vehicle was "Salvage". The Applicant attended an auction and represented Consumer's when he purchased the Honda Accord. He signed the bill of sale on behalf of Consumer's. The auction bill of sale clearly noted that the vehicle was sold as "Salvage", a condition defined in the Standards of Business Practice and which condition is clearly a material fact

that should have been brought to the purchasing consumer's notice, but the fact was ignored by the Applicant when the vehicle was sold. The Applicant had an obligation to disclose the fact that the vehicle was a "Salvage" vehicle and it was immaterial whether or not the purchasing consumer may not have complained about the nondisclosure, for the Act is a consumer's statute and is for the benefit and protection of the public. The failure of the Applicant, in his capacity as an office of Consumer's, to disclose the material fact to the purchaser of the Honda Accord reflects adversely on the integrity of the Applicant and all his ability to be registered as a motor vehicle sales person or dealer under the Act.

Reference is also made to the fact that the Applicant breached clause 13 of the Terms and Conditions that were signed as recently as 2002. This also speaks negatively as to the future conduct of the Applicant and whether he is governable at all under the Act. Clause 13 contains an undertaking to disclose "all material facts in writing".

It is clearly material to the purchaser of a vehicle, such as in the case of the Honda Accord, to know that the vehicle he is buying is a "branded" vehicle that has suffered serious damage. This goes to the very root of the contract and could, if known to the purchaser, affect his decision whether or not to purchase the vehicle.

APPLICATION OF LAW TO FACTS

The Registrar bases his Proposal to refuse the registration under section 7 of the Act as read with Section 5. (1)(b)(c)(ii) and Section 6.(1). The Tribunal relied upon the findings and reasons of Tribunal's decision of January 12, 2005. The Applicant and his brother had filed an appeal from a Proposal of the Registrar under the *Motor Vehicle Dealers Act* dated July 16, 2004.

This Tribunal sees no reason to permit the Applicant to be registered as a salesperson. To allow the Applicant to be registered would be to condone his past set out in this decision and would constitute a dis-service to persons who may in the future have dealings with him in the industry. There have been serious non-compliance issues with the Act in this case. It should also be noted that the Applicant's previous license had been revoked and he had transferred the corporation to his brother. Past behavior is the best indicator of an individual's future behaviour.

The intention and objective of the *Motor Vehicle Dealers Act* is to protect the public interest. The requirements of this Act include that the registrants are financially responsible in the conduct of business and that the registrants carry on business in accordance with the law and with integrity and honesty. The Tribunal finds that the past conduct of the Registrant is inconsistent with the intention and objectives of the Act and therefore warrants disqualification to

registration under the Act. The Applicant has contravened the requirements of the Act, which include that the registrants be financially responsible in the conduct of business and act in accordance with law and with integrity and honesty.

APPLICATION FOR COSTS AWARD

There was a discussion of an award of costs brought forward by the Registrar's counsel. The Tribunal finds the counsel's submissions to be persuasive. The repeated attempts by the Applicant to be registered as a motor vehicle salesperson without any evidence of material change in his circumstances constitute a waste of public resources and this is contrary to public policy. The Applicant did not meet the requirements of section 8 of the Act, which provides:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed. R.S.O. 1990, c.M.42, s.8

The Tribunal finds that the Applicant has acted in a vexatious manner and this was an intentional abuse of the system. Under Rule 14.3 the Tribunal awards costs to the respondent in the amount of \$ 400.00.

DECISION:

Therefore, by the virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated August 29, 2007, to Refuse the Registration of the Applicant as a motor vehicle salesperson. The Tribunal also awards costs of \$400 to the Registrar of *Motor Vehicle Dealer's Act* to be paid by the Applicant by April 30, 2008.

LICENCE APPEAL TRIBUNAL

Raj Pannu, Vice-Chair

Released: April 1, 2008

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



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PRE-HEARING

4691 – ONHWPA – CLAIM

APPEAL FROM A DECISION OF THE TARION
WARRANTY CORPORATION UNDER THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*, RSO, 1990, CH.
0.31

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: OWEN THOMAS, Counsel, appeared on behalf of the
Applicant

BRENT ARNOLD, Counsel, appeared on behalf of Tarion
Warranty Corporation, the Respondent

BRIAN CAMPBELL, Counsel, appeared on behalf of the
Added Party

DATE OF
PRE-HEARING: April 15, 2008 *By teleconference*

DECISION AND ORDER

A pre-hearing was held in this matter by teleconference, with appearances by Owen Thomas, counsel for the Applicant, Brent Arnold, Counsel for the Respondent, and Brian Campbell, counsel for the Added Party. Two of the Respondent's staff also attended.

The parties advised that the Applicant had served an expert report as required by the Tribunal order of January 23, 2008, but that no other party had served an expert report. The Respondent and Added Party advised that they will not be serving an expert report.

The parties canvassed whether or not the anticipated length of the hearing could be reduced at this time, and concluded that it could not. The parties agreed that, absent the agreement of the Respondent and Added Party, those parties may object to the admissibility of the estimates produced by the Applicant if the author of the estimates is not called to appear. There will be opportunities in the intervening weeks to narrow the issues through an exchange of information on the estimates, so that the Applicant can assess what witnesses need to be called.

The parties discussed the process to be followed leading up to the hearing scheduled to be held in June 2008. Counsel for the Added Party indicated that he is seeking instructions with respect to a motion to have counsel for the Claimant removed on the basis of a conflict of interest.

Also, the parties discussed a process of further disclosure concerning their respective positions and developed a schedule of disclosure to be incorporated into the Tribunal's order.

Therefore, the Tribunal orders that:

1. On or before June 3, 2008, the Respondent and Added Party will
 - a) review the estimates disclosed by the Applicant and
 - b) inform the Applicant as to which estimates or, alternatively, what parts of the estimates (including component parts such as daily/hourly rate, quantities of supplies, scope of work, time to complete, etc.) are agreed to by them, without formal proof, or alternatively are disputed. Any agreement on the quantum of the claim or the estimates is without prejudice to the parties' rights to dispute the liability for the claim or damages outlined in such estimates.
2. On or before May 15, 2008, the Added Party will provide to the other parties a breakdown of the calculation of the \$2,000 which the Added Party offered to the Applicant and on which the Respondent relies, including:
 - a) details as to which claims/items of the Decision Letter are addressed by the \$2,000,
 - b) the amount assigned to each such claim/item, and
 - c) the basis of the calculation of the amount assigned to the claim/item, including daily/hourly rates, quantities of supplies, scope of work, time to complete, etc.

3. On or before May 27, 2008, the Applicant will provide to the other parties a table showing the Decision Letter items in dispute, a reference to the part of the expert report served by the Applicant that addresses each such item, and an allocation and particulars of the expert's estimate of \$20,000 to each of the items in the Decision Letter for repair and rectification of such items.
4. In the event that the Added Party wishes to bring a motion that the Applicant's counsel be removed on the basis of a conflict of interest, the Added Party shall serve and file the Notice of Motion and supporting materials on or before 10:00 a.m., on Monday, April 28, 2008. The Applicant shall serve and file any responding materials on or before 12:00 p.m. noon, on Thursday May 1, 2008. The motion shall be heard by teleconference on Friday, May 2, 2008, at 11:30 a.m.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Chair

RELEASED: April 22, 2008

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



PRE-HEARING

4656 – ONHWPA – Claim

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: SHAWN M. FILBERT, Counsel, represented the Applicants

NATALIE MULLINS, counsel, represented Tarion Warranty
Corporation ("Tarion")

RENALDO BENAQUISTA, represented the Added Party, Mattamy
(Brownridge) Ltd. (the "Added Party")

DATE OF
PRE-HEARING: April 3, 2008

Toronto

ORDER

The Applicants, Tarion and the Added Party attended a pre-hearing before this Tribunal on April 3, 2008.

The Tribunal makes the following order respecting the hearing;

1. The Parties to the hearing are the Applicants, Tarion and the Added Party.
2. There will be a further pre-hearing of this matter at the Tribunal's Chambers, 1 St. Clair Ave West, Toronto, Ontario at 9:30 a.m. on May 22, 2008. Counsel may attend the further pre-hearing without the presence of their clients provided that they have telephone access to their clients for settlement purposes or, in the alternative, full authority to settle.

3. The hearing of this matter shall commence on June 2, 2008, at 9:30 a.m. and continue, as necessary, on June 3 and June 4, 2008, at the Tribunal's Chambers.
4. The Parties shall fully disclose any and all documents they intend to rely on at the hearing of this matter by providing a copy of such documents to the other Parties, in accordance with the Tribunal's Rules of Practice. The Parties shall also provide copies of all such documents to the Tribunal at the hearing.
5. Tarion and the Added Party may attend at the Applicants' home for the purposes of re-inspection and preparation of expert reports. They shall make their best efforts to schedule such attendances outside of normal business hours but, in the event it is not possible to attend outside normal business hours, they may attend at any mutually convenient time. Notwithstanding the provisions of the Tribunal's Rules of Practice, Tarion and the Added Party shall have until May 21, 2008, to produce expert reports and applicable *curricula vitae* of any expert witnesses relied upon. In the event that it is necessary, the Applicants may deliver responding expert reports up to three days before the hearing.
6. The Applicants withdraw the following items set out in the Notice of Appeal:
 - a. Items 1, 20 and 33(35) from the first year section; and
 - b. Item 1(4) from the second year list.
7. In the event the parties settle this matter prior to the hearing, they shall notify the Tribunal forthwith.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

RELEASED: April 22, 2008

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



PRE-HEARING

4655 – ONHWPA – CLAIM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: THE APPLICANT, unrepresented

NEIL ABBOTT, Counsel, representing Tarion Warranty
Corporation

RON ATKINS, Agent, representing Castlemore Hills
Estates Inc.

DATE OF
PRE-HEARING: April 22, 2008 Toronto

ORDER

A pre-hearing was held on April 22, 2008 before this Tribunal in the presence of the Applicant, Neil Abbott, Counsel, representing Tarion Warranty Corporation ("Tarion") and Ron Atkins, Agent, representing Castlemore Hills Estates Inc. ("the Added Party").

The Tribunal Orders that:

1. The Parties to the hearing are the Applicant, Tarion and the Added Party;
2. The issue resulting from Tarion's decision letter dated January 22, 2008 was not resolved.
3. This matter will proceed in accordance with the Tribunal's Rules of Practice, effective January 1, 2008.

4. A motion to clarify the name of the Added Party will be submitted in writing by the Applicant in accordance with the Tribunal's Rules of Practice to be dealt with by the panel at the hearing.
5. The Parties shall comply with the disclosure requirements set out in Rule 6 of the above noted Rules of Practice. The Parties will exchange any documents to be used at the hearing by May 30, 2008. Copies of any such documents shall be provided to the Tribunal at the hearing.
6. The Applicant does not intend to call any witnesses. Tarion intends to call one witness.
7. The Parties will attempt to resolve the issue before the hearing. In the event a settlement has been reached prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Parties, that the matter has been resolved and the scheduled hearing, no longer being required, will be cancelled.
8. Should the issue not be resolved the hearing will occur on June 10, 2008, commencing at 9:30 a.m. at the Tribunal Chamber's, 1 St. Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Presiding Member

RELEASED: April 29, 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

KSK CONSTRUCTION LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: KYLIE COLLIER, Agent, representing KSK Construction Limited

MARIO C. GRAVEL, Counsel, representing the Registrar, *Ontario
New Home Warranties Plan Act*

DATE OF
PRE-HEARING: March 25, 2008

Ottawa

ORDER

A pre-hearing was held in this matter in Ottawa on March 25, 2008, before the Licence Appeal Tribunal (the "Tribunal"), in the presence of Kylie Collier, Agent, appearing on behalf of KSK Construction Limited (the "Applicant"), Mario C. Gravel, Counsel, and Adil Darr, appearing on behalf of the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar").

The hearing of this matter had been scheduled for May 20, 2008, and the Parties were notified by Notice of Hearing dated February 21, 2008.

In order to provide more time for the Parties to resolve the outstanding issues directly with one another, an adjournment of the hearing date was proposed during the pre-hearing.

Therefore, the Tribunal orders as follows:

1. Upon agreement by all Parties present, the hearing of this matter is adjourned to commence at 9:30 a.m., on Monday, June 9, 2008, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario.
2. The Registrar and the Applicant will work together to resolve the security issue by May 20, 2008.
3. The Parties shall file with the Tribunal, an Agreed Statement of Facts, by May 20, 2008. The Respondent has already filed a Respondent's Book of Documents for the purposes of the hearing.
4. Any other documents that any of the Parties wish to rely on at the hearing shall be disclosed to the other party by no later than May 30, 2008, and a copy filed with the Tribunal at the hearing.
5. The Parties shall exchange their respective list of witnesses, by no later than May 30, 2008.
6. In respect of all other procedural matters, the Parties shall abide by the Tribunal's Rules of Practice, currently in force.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: April 25, 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

KSK CONSTRUCTION LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SHU-TAI CHENG, Vice-Chair

APPEARANCES: KYLIE COLLIER, Agent, representing KSK Construction Limited

MARIO C. GRAVEL, Counsel, representing the Registrar, *Ontario
New Home Warranties Plan Act*

DATE OF
PRE-HEARING: March 25, 2008

Ottawa

ORDER

A pre-hearing was held in this matter in Ottawa on March 25, 2008, before the Licence Appeal Tribunal (the "Tribunal"), in the presence of Kylie Collier, Agent, appearing on behalf of KSK Construction Limited (the "Applicant"), Mario C. Gravel, Counsel, and Adil Darr, appearing on behalf of the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar").

The hearing of this matter had been scheduled for May 20, 2008, and the Parties were notified by Notice of Hearing dated February 21, 2008.

In order to provide more time for the Parties to resolve the outstanding issues directly with one another, an adjournment of the hearing date was proposed during the pre-hearing.

Therefore, the Tribunal orders as follows:

1. Upon agreement by all Parties present, the hearing of this matter is adjourned to commence at 9:30 a.m., on Monday, June 9, 2008, at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario.
2. The Registrar and the Applicant will work together to resolve the security issue by May 20, 2008.
3. The Parties shall file with the Tribunal, an Agreed Statement of Facts, by May 20, 2008. The Respondent has already filed a Respondent's Book of Documents for the purposes of the hearing.
4. Any other documents that any of the Parties wish to rely on at the hearing shall be disclosed to the other party by no later than May 30, 2008, and a copy filed with the Tribunal at the hearing.
5. The Parties shall exchange their respective list of witnesses, by no later than May 30, 2008.
6. In respect of all other procedural matters, the Parties shall abide by the Tribunal's Rules of Practice, currently in force.

LICENCE APPEAL TRIBUNAL

Shu-Tai Cheng, Vice-Chair

RELEASED: April 25, 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

4574-ONHWPA-CLAIM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: PETER SENGBUSCH, Counsel, representing the Applicant

MICHAEL ODUMODU, Counsel, representing Tarion Warranty
Corporation

SHAWN GRAHAM, Counsel, representing the Added Party,
Stoneybrook Club Inc.

DATE OF
PRE-HEARING: March 7, 2008 *by teleconference*

ORDER

A pre-hearing was held in this matter on March 7, 2008, in the presence of Peter Sengbusch, Counsel, appearing on behalf of the Applicant, Michael Odumodu, Counsel, appearing on behalf of Tarion Warranty Corporation (the "Respondent"), and Shawn Graham, Counsel, appearing on behalf of Stoneybrook Club Inc. (the "Added Party").

This was the second pre-hearing held in this matter. Further to the first pre-hearing, the new Counsel representing the Added Party advised the other Parties and the Tribunal that representation of the Added Party may be subject to further change.

Counsel for the Applicant advised that he required further time to retain experts and make the required disclosure, and Counsel for the Added Party advised that he intended to file a motion for an adjournment of the hearing. In view of these facts, all Parties consented to an adjournment of the hearing dates, and requested the scheduling of an additional day given the potential for further witnesses.

The issue to be addressed in this matter was discussed in detail but not resolved. The Parties indicated their preparedness to participate in a further pre-hearing conference to discuss resolution subject to their review of further disclosure documents.

The Tribunal makes the following order:

1. The Parties to this matter are the Applicant, the Respondent and the Added Party.
2. The issue to be addressed in this matter, as set out in the Respondent's Decision Letter dated November 20, 2007, is whether the cause of flooding in the Applicant's home is the result of a major structural defect.
3. This matter will proceed in accordance with the Tribunal's Rules of Practice dated November 3, 2003.
4. All Parties shall comply with the disclosure requirements set out in Rule 6 of the above-noted Rules of Practice. In particular, the Parties will endeavour to obtain and disclose expert witness reports in accordance with Rule 6.4.
5. The Parties will advise the Tribunal, in writing, as soon as possible, should they mutually agree to participate in a further pre-hearing conference, which the Tribunal will then schedule.
6. With the consent of all Parties, the hearing originally scheduled to commence on April 10, 2008, is adjourned to Wednesday, May 21, 2008, commencing at 9:30 a.m., at the London Verbatim Reporting, 495 Richmond Street, Suite 503, London, Ontario, and will continue on May 22 and 23, 2008, if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Member

RELEASED: April 30, 2008

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



PRE-HEARING

4562-ONHWP-Claim

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: ELIZABETH SPROULE, Presiding Member

APPEARANCES: JAMES McINTOSH, Counsel appearing on behalf of the Applicants

MICHAEL DOYLE, Counsel appearing on behalf of
Tarion Warranty Corporation,

709551 Ontario Inc., no one appeared

DATE OF
PRE-HEARING: April 9, 2008

Toronto

ORDER

A second teleconference pre-hearing before this Tribunal was conducted on April 9, 2008, in the presence of James McIntosh, Counsel representing the Applicants and Michael Doyle, Counsel, representing Tarion Warranty Corporation ("Tarion"). The Added Party was given proper notice of this pre-hearing and all attempts to contact a representative at the telephone numbers provided for the same were unsuccessful.

The Tribunal makes the following stipulations and Order respecting this matter:

1. Tarion and the Applicants agreed and confirmed that claim number 1 in the Tarion Decision Letter dated December 24, 2007, is no longer in issue.
2. Tarion and the Applicants agreed and confirmed that claim number 2 in the Tarion Decision Letter dated December 24, 2007, is warranted and the agreed claim amount is \$6,000.00 plus GST.
3. The Applicants acknowledged that they have received a benefit in that the full contract price of their home was not paid. The exact value of that benefit was not agreed to or confirmed.

4. There are two issues remaining to be determined by the Tribunal:
 - a) Does Tarion have the right to offset the monies it has agreed to pay the Applicants, for warranted claims, by the value of the benefit referred to in paragraph 3 herein?
 - b) Is claim number 3 of Tarion's decision letter dated December 24, 2007, relating to defects in the radiant heating system in the basement floor warranted?
5. The parties agreed and the Tribunal orders the consolidation of Appeal no. 4730 received March 4, 2008, and Appeal 4562 received December 3, 2007.
6. Tarion shall provide the Applicants with a copy of the manufacturer's installation material with respect to the basement floor radiant heating system on or before April 30, 2008.
7. It was understood by the parties that the Added Party has made an assignment in bankruptcy. If Tarion wishes the Trustee in Bankruptcy to receive notice of these proceedings it shall provide the Tribunal of the name and address of such Trustee at its earliest convenience.
8. The parties have agreed to a further telephone conference between themselves, in an effort to resolve the outstanding issues, to commence at 10:00 a.m. on May 6, 2008.
9. A two-day hearing of this matter is scheduled for June 24 and 25, 2008, to commence at 9:30 in the City of North Bay, at the Heather E. Penfound Court Reporter, 116 McIntyre Street West, Main Floor.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: April 28, 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

4546 - ONHWPA - CLAIM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: MARY ANN SPENCER, Member

APPEARANCES: DEREK SCHMUCK, Counsel, representing the Applicant

NEIL ABBOTT, Counsel, representing Tarion Warranty Corporation

KEITH BAIRD, Agent, representing K.G. Baird General Contracting
Ltd.

DATE OF
PRE-HEARING: April 1, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 1, 2008, at the Tribunal's Chambers, 1st. Clair Avenue West, Toronto, Ontario in the presence of Derek Schmuck, Counsel, representing the Applicant; Neil Abbott, Counsel, representing Tarion Warranty Corporation (the "Respondent"), and Keith Baird, Agent, representing K.G. Baird General Contracting Ltd. (the "Added Party").

The Tribunal makes the following order:

1. The Parties to this matter are the Applicant, the Respondent and the Added Party.
2. The sole issue to be addressed in this matter is whether the Applicant's home is eligible for warranty coverage under the *Ontario New Home Warranties Plan Act*.

3. This matter will proceed in accordance with the Tribunal's Rules of Practice dated November 3, 2003.
4. The Added Party will disclose to the Tribunal and all other Parties by no later than April 22, 2008, any plans, photographs, contracts, listing agreement and written offers to purchase relating to the Applicant's home.
5. The Applicant will disclose to the Tribunal and all other Parties any expert reports by June 15, 2008.
6. All Parties will make any disclosure in addition to the above-noted disclosure in accordance with Rule 6 of the Tribunal's Rules of Practice dated November 3, 2003.
7. With the consent of all Parties, the hearing originally scheduled on April 23 and 24, 2008, is adjourned to July 29, 2008, commencing at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and will continue on July 31 and August 1, 2008, if necessary.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Member

RELEASED: April 28, 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

4500 - ONHWPA - CLAIM

APPEAL FROM A DECISION OF TARION WARRANTY
CORPORATION, UNDER THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT* R.S.O. 1990, CHAPTER
O.31, AS AMENDED

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: THE APPLICANTS, unrepresented

NEIL ABBOTT, Counsel, representing Tarion Warranty Corporation

No one appeared for Royal Vista Homes Ltd., the Added Party

DATE OF
PRE-HEARING: March 31, 2008

Toronto

ORDER

The Applicants have appealed to the Licence Appeal Tribunal (the "Tribunal") from a decision letter dated October 12, 2007 (the "2007 Decision Letter"), issued by Tarion Warranty Corporation ("Tarion") denying their claims. At the outset of this second pre-hearing into this matter, Tarion advised that the parties were pursuing settlement on those items which Tarion deemed "warranted" in its 2007 Decision Letter. The amount of the compensation has been agreed to and the outstanding issues are being addressed.

Also at the outset of the hearing, Tarion delivered a further decision letter, dated March 30, 2008 (the "2008 Decision Letter"), addressing certain unresolved items which the

homeowners believe should be warranted by Tarion. The letter was reviewed and certain actions were agreed to.

Accordingly, the Tribunal orders that:

1. Tarion and the Tribunal will waive the Notice of Appeal requirements for the 2008 Decision Letter and, on consent of the parties, the appeal from the 2008 Decision Letter will be merged with the present appeal from the 2007 Decision Letter.
2. On or before April 30, 2008, the Applicants shall send to Mr. Abbott, Counsel for Tarion, an item-by-item estimate of the cost to repair the items listed in the 2008 Decision Letter, to be prepared by a contractor. GST and PST should be included only on the total amount of the estimate.
3. On or before April 30, 2008, Tarion will do the following:
 - a. Schedule a re-inspection at a mutually convenient time, to re-inspect items 115, 116, 122 and 231 of the 2008 Decision Letter.
 - b. Provide a written confirmation to the Applicants that item 160 of the 2008 Decision Letter is addressed as part of the settlement of the Applicants' second year claim, which is not the subject of this appeal.
 - c. In light of the evidence provided by the Applicants, reconsider Tarion's position regarding claim 124 and 174 of the 2008 Decision Letter.
4. There will be a further pre-hearing in this matter on **June 27, 2008**, commencing at **9:30 a.m.** at the offices of the Licence Appeal Tribunal. If the parties settle the issues between them prior to this date, the Applicants will notify the Tribunal that the second pre-hearing is not required.
2. If necessary, a hearing date in this matter will be set at the June 27, 2008 pre-hearing.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: April 23, 2008

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

PRE-HEARING

4099 – ONHWPA – CLAIM

APPEAL FROM A DECISION OF THE TARION
WARRANTY CORPORATION UNDER THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*, RSO, 1990, CH.
0.31

TO DISALLOW A CLAIM

TRIBUNAL: LYNDA TANAKA, Chair

APPEARANCES: OWEN THOMAS, Counsel, appeared on behalf of the
Applicant

BRENT ARNOLD, Counsel, appeared on behalf of Tarion
Warranty Corporation, the Respondent

BRIAN CAMPBELL, Counsel, appeared on behalf of the
Added Party

DATE OF
PRE-HEARING: April 15, 2008

By teleconference

DECISION AND ORDER

A pre-hearing was held in this matter by teleconference, with appearances by Owen Thomas, counsel for the Applicant, Brent Arnold, Counsel for the Respondent, and Brian Campbell, counsel for the Added Party. Two of the Respondent's staff also attended.

The parties advised that the Applicant had served an expert report as required by the Tribunal order of January 23, 2008, but that no other party had served an expert report. The Respondent and Added Party advised that they will not be serving an expert report.

The parties canvassed whether or not the anticipated length of the hearing could be reduced at this time, and concluded that it could not. The parties agreed that, absent the agreement of the Respondent and Added Party, those parties may object to the admissibility of the estimates produced by the Applicant if the author of the estimates is not called to appear. There will be opportunities in the intervening weeks to narrow the issues through an exchange of information on the estimates, so that the Applicant can assess what witnesses need to be called.

The parties discussed the process to be followed leading up to the hearing scheduled to be held in June 2008. Counsel for the Added Party indicated that he is seeking instructions with respect to a motion to have counsel for the Claimant removed on the basis of a conflict of interest.

Also, the parties discussed a process of further disclosure concerning their respective positions and developed a schedule of disclosure to be incorporated into the Tribunal's order.

Therefore, the Tribunal orders that:

1. On or before June 3, 2008, the Respondent and Added Party will
 - a) review the estimates disclosed by the Applicant and
 - b) inform the Applicant as to which estimates or, alternatively, what parts of the estimates (including component parts such as daily/hourly rate, quantities of supplies, scope of work, time to complete, etc.) are agreed to by them, without formal proof, or alternatively are disputed. Any agreement on the quantum of the claim or the estimates is without prejudice to the parties' rights to dispute the liability for the claim or damages outlined in such estimates.
2. On or before May 15, 2008, the Added Party will provide to the other parties a breakdown of the calculation of the \$2,000 which the Added Party offered to the Applicant and on which the Respondent relies, including:
 - a) details as to which claims/items of the Decision Letter are addressed by the \$2,000,
 - b) the amount assigned to each such claim/item, and
 - c) the basis of the calculation of the amount assigned to the claim/item, including daily/hourly rates, quantities of supplies, scope of work, time to complete, etc.

3. On or before May 27, 2008, the Applicant will provide to the other parties a table showing the Decision Letter items in dispute, a reference to the part of the expert report served by the Applicant that addresses each such item, and an allocation and particulars of the expert's estimate of \$20,000 to each of the items in the Decision Letter for repair and rectification of such items.
4. In the event that the Added Party wishes to bring a motion that the Applicant's counsel be removed on the basis of a conflict of interest, the Added Party shall serve and file the Notice of Motion and supporting materials on or before 10:00 a.m., on Monday, April 28, 2008. The Applicant shall serve and file any responding materials on or before 12:00 p.m. noon, on Thursday May 1, 2008. The motion shall be heard by teleconference on Friday, May 2, 2008, at 11:30 a.m.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka
Chair

RELEASED: April 22, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



4713-ONHWP-TALISMAN DEVELOPMENT CORP. - Dismissal

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, c. O.31

IN THE MATTER OF the REGISTRATION of
TALISMAN DEVELOPMENT CORP.

AND IN THE MATTER OF the PROPOSAL by
the Registrar, *Ontario New Home Warranties Plan Act*,
made pursuant to Section 9(1) of the Act
TO REFUSE REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting the said Proposal
pursuant to Section 9(2)

TALISMAN DEVELOPMENT CORP.

Applicant

- and -

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 as amended (the "Act"), Talisman Development Corp. (the "Applicant") initiated an appeal under Section 9(2) of the Act from a Notice of Proposal issued by the Registrar, *Ontario New Home Warranties Plan Act* (the "Registrar") dated February 6, 2008, in terms of which the Registrar refused the Applicant's registration;

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

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

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under Section 4.6 of the *Statutory Powers Procedure Act*, as amended, this proceeding initiated by the Applicant's request for a hearing before this Tribunal is dismissed;
2. Pursuant to the authority vested in it under Section 9(4) of the Act, this Tribunal directs the Registrar to refuse the Applicant's registration.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka, Chair

RELEASED: April 4, 2008

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



PRE-HEARING

4667 – ONHWPA – CLAIM – PRE-HEARING

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: APPLICANT, representing himself

GENA ARGITIS, counsel, representing Tarion Warranty
Corporation

RICHARD BELSITO, counsel, representing Troi Construction
Limited

DATE OF
PRE-HEARING: April 2, 2008

Toronto

ORDER

Following attendances on April 2, 2008, at a pre-hearing before this Tribunal of the Applicant, who represented herself, and Gena Argitis, counsel representing Tarion Warranty Corporation (“Tarion”), and Richard Belsito, counsel, representing Troi Construction Corporation (the “Added Party”);

Pursuant to the resolution of all the issues in this matter and upon the consent of the parties, the Tribunal orders that:

The proceedings in this matter are hereby disposed of without a hearing on the basis of the resolution of all issues and the withdrawal of the Applicant's appeal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 4, 2008

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



PRE-HEARING

4648 -ONHWPA-CLAIM – PRE-HEARING

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: APPLICANT, representing himself

NATALIE MULLINS, counsel, representing Tarion Warranty
Corporation

ANTHONY KAOUNIS, agent, representing The Townhouses of
Hogg's Hollow Inc.

DATE OF
PRE-HEARING: April 1, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 1, 2008, in the presence of the Applicant, Natalie Mullins, counsel, representing Tarion Warranty Corporation ("Tarion") and Anthony Kaounis, agent, representing The Townhouses of Hogg's Hollow Inc. (the "Added Party");

The Tribunal makes the following order respecting the hearing:

1. The Parties to the hearing are the Applicant, Tarion and the Added Party;
2. The hearing of this matter shall commence at 9:30 a.m. on May 23, 2008 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto;

3. The Parties advised the Tribunal that Claims 2 and 4 on Tarion's Decision Letter dated January 14, 2008 have been resolved and are no longer in issue;
4. The Applicant advised the Tribunal that at this stage Claim 1 on Tarion's Decision Letter of January 14, 2008 remains in contention;
5. By no later than April 15, 2008, the Applicant shall furnish the other parties with a proposed written plan (including details thereof and the costs of implementing such plan) for dealing with the issue of the furnace filter insert in Claim 1;
6. By no later than April 30, 2008, the Applicant shall be advised in writing by the other parties whether or not they accept or reject the proposed plan or any modification thereof;
7. The Applicant and the Added Party shall fully and in timely manner comply with the Disclosure provisions set forth in Rule 6 of the Tribunal's Rules of Practice, effective January 1, 2008;
8. The Applicant's attention was drawn to the disclosure provisions in Rule 6 above as they relate to Expert Witnesses;
9. The date of hearing, namely May 23, 2008, is peremptory against all Parties.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 2, 2008

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



PRE-HEARING

4647-ONHWP-CLAIM – PRE-HEARING

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: APPLICANT, appeared on her own behalf and on behalf of the
other Applicant

SCOTT KIRKPATRICK, Counsel, appeared on behalf of Tarion
Warranty Corporation

ROBERT AND KAREN YOUNG, Agents, appeared on behalf of
RAYMAC Corporation

DATE OF

PRE-HEARING: April 2, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 2, 2008, before the Licence Appeal Tribunal (the “Tribunal”), in the presence of the Applicant, representing herself and her husband (the “Applicants”), and Scott Kirkpatrick, Counsel, representing Tarion Warranty Corporation (“Tarion”), as well as Robert and Karen Young, Agents, representing RAYMAC Corporation (the “Added Party”).

It was noted that there were two separate Decision Letters issued by Tarion in this matter both dated January 2, 2008, only one of which had been disclosed at Tab 13 in Tarion’s Book of Documents. Counsel for Tarion advised the Tribunal that the Decision Letter disclosed at Tab 13 of its Book of Documents was inadvertently included in that Book of Documents, and explained that it contained reference to six claims, whereas there was a further Decision Letter issued under the same date in which reference was made to seven claims.

This second Decision Letter was, by consent of the Parties, inserted at Tab 13 and it was acknowledged by the Parties that such Decision Letter was in fact the relevant one. Accordingly, the pre-hearing was conducted on the basis of the second Decision Letter which refers to seven claims.

A full discussion of the issues then followed.

Pursuant to the pre-hearing the Tribunal orders that:

1. The Parties to the hearing are the Applicants, Tarion and the Added Party.
2. There were no issues that were resolved at the pre-hearing. However, the Applicants advised that they were not pursuing claim five relating to the fan and light switch in the home's main bathroom and accordingly such claim is withdrawn.
3. The Applicants and the Added Party are to make full disclosure by no later than April 15, 2008, in terms of Rule 6.1 (3) of the Tribunal's Rules of Practice. In the event of the Applicants or the Added Party intending to call expert witnesses, they shall fully comply with the requirements of Rule 6.4, by no later than April 15, 2008.
4. By no later than April 22, 2008, all Parties shall, in writing, advise the others of the full names and occupations of witnesses they intend to call to testify at the hearing. Such written advice shall be accompanied with a short synopsis of the intended witnesses' testimony.
5. The hearing of this matter set down for May 22 and 23, 2008, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, is peremptory against all Parties.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 9, 2008

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



PRE-HEARING

4636-ONHWPA-CLAIM – PRE-HEARING

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: APPLICANT, appeared on his own behalf and on behalf of the
other Applicant

JAMES CAMP, Counsel, appeared on behalf of Tarion Warranty
Corporation

ASHLEY MASON, Counsel, appeared on behalf of Mason Homes
Limited

DATE OF
PRE-HEARING: April 1, 2008

Toronto

ORDER

A pre-hearing was held in this matter on April 1, 2008, before the Licence Appeal Tribunal (the “Tribunal”), in the presence of the Applicant, representing himself and his wife (the “Applicants”), and James Camp, Counsel, representing Tarion Warranty Corporation (“Tarion”), as well as Ashley Mason, Counsel, representing Mason Homes Limited (the “Added Party”).

Following negotiations between the Parties at the pre-hearing, all of the issues in dispute in this matter were resolved to the satisfaction of all the Parties. Pursuant to the resolution of all of the issues, the Applicants withdrew their appeal to the Tribunal.

Upon the consent of all the Parties, this Tribunal orders that:

1. The proceedings in this matter are hereby disposed of without a hearing on the basis of the withdrawal of the Applicants' appeal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 8, 2008

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

PRE-HEARING

4615-ONHWP-CLAIM – PRE-HEARING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: LYNDA TANAKA, Chair

APPEARANCES: APPLICANTS

ELLIE CHOI, Counsel, representing Tarion Warranty
Corporation

SHELDON KOWIEWSKI, Agent for the Added Party,
1209011 Ontario Inc.

DATE OF
PRE-HEARING: March 31, 2008

ORDER

A pre-hearing was held in this matter on March 31, 2008, at the offices of the Alcohol and Gaming Commission of Ontario in Toronto, Ontario, in the presence of the Applicants, Ellie Choi, Counsel for Tarion Warranty Corporation (“Tarion”) and Sheldon Kowiewski, appearing as agent for the Added Party, 1209011 Ontario Inc. (“the builder”).

The parties reached a settlement of the claim.

The Tribunal makes the following order:

1. Tarion shall pay to the Applicants \$4800 plus GST.

2. The Applicants have withdrawn their appeal in consideration of the payment of the settlement funds by Tarion, and this matter is therefore concluded.

LICENCE APPEAL TRIBUNAL

Lynda Tanaka, Chair

RELEASED: April 3, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



HALTON STANDARD CONDOMINIUM CORPORATION #386

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: MARKO DJURDJEVAC, Counsel, representing the Applicant,
Halton Standard Condominium Corporation #386, and appearing as
Agent for Tarion Warranty Corporation and Palomino Hill Realty
Corporation, the Added Party

DATE OF
HEARING: February 25, 2008 Toronto

ORDER

Tarion Warranty Corporation issued a Decision Letter dated September 21, 2007, denying the Applicant's claim. The Applicant filed a Notice of Appeal on October 9, 2007, requesting a hearing before the Licence Appeal Tribunal (the "Tribunal") to appeal that decision.

The hearing of this appeal was scheduled to commence on February 25, 2008.

Although the Minutes of Settlement had not been executed, the Applicant, through its Counsel, advised the Tribunal that the Parties had settled the matter and requested that the appeal be deemed withdrawn. The Applicant's Counsel then noted that the Parties had reached a further agreement that they felt could place the matter back before the Tribunal, in the event the settlement was not finalized.

Having subsequently received the Applicant's duly signed withdrawal form on April 10, 2008, this Tribunal orders that:

1. The appeal is withdrawn and these proceedings are concluded.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

RELEASED: April 15, 2008

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



PRE-HEARING

4408 – ONHWPA – CLAIM – PRE-HEARING

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: THE APPLICANTS, unrepresented

DANIELLE PECK, Counsel, representing Tarion Warranty
Corporation

BRIAN CAMPBELL, Counsel, Londonderry Residential Group Inc.

DATE OF
PRE-HEARING: March 31, 2008 Toronto

ORDER

Following attendances on March 31, 2008, at a pre-hearing before this Tribunal of the Applicants, Danielle Peck, Counsel, representing Tarion Warranty Corporation ("Tarion") and Brian Campbell, Counsel, representing Londonderry Residential Group Inc. ("the Added Party").

The Tribunal Orders that:

1. The Parties to the hearing are the Applicants, Tarion and the Added Party;
2. None of the issues resulting from the first year or the second year inspection findings, Tarion's decision and the compensation offers were resolved.
3. This matter will proceed in accordance with the Tribunal's Rules of Practice dated November 3, 2003.
4. The Parties shall comply with the disclosure requirements set out in Rule 6 of the above noted Rules of Practice. The Parties will exchange any documents to be used at the hearing with copies to the Tribunal by April 25, 2008, and their responses shall be exchanged by May 9, 2008.

5. The Applicants intends to call up to fourteen witnesses including several expert witnesses. Tarion intend to call two witnesses including one expert witness. The Added Party intends to call two witnesses including one expert witness. The Parties were reminder of the Rules of the Tribunal regarding expert witnesses.
6. The Parties will attempt to resolve as many issues as possible before the hearing. In the event a settlement has been reached prior to the hearing date, it will be necessary for each Party to advise the Tribunal in writing, with copies to the other Parties, that the matters have been resolved and the scheduled hearing, no longer being required, will be cancelled.
7. Should the issues not be resolved the hearing will occur on May 26, 2008, commencing at 9:30 a.m., and continue on May 27, 28, 29, 30, 2008, at the Tribunal Chamber's, 1 St Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Presiding Member

RELEASED: April 4, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



4363-ONHWPA-CLAIM

APPEAL FROM A DECISION OF THE TARION WARRANTY
CORPORATION UNDER THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*, RSO, 1990, CH. 0.31

TO DISALLOW A CLAIM

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: ONE APPLICANT appeared on her own behalf and on behalf of the
second Applicant

NEIL ABBOTT, Counsel, appeared on behalf of Tarion Warranty
Corporation

No One appeared on behalf of CAN-DI Home Builders Ltd., the
Added Party

DATE OF
HEARING: March 10, 2008 Toronto

DECISION AND ORDER

This is an appeal by two people who, to preserve their privacy, shall not be named in this order but who shall be referred to as “Ms. S.” and “Mr. G.” Ms. S. and Mr. G. have appealed to the Licence Appeal Tribunal (the “Tribunal”) from a decision of the Tarion Warranty Corporation (“Tarion”) under the *Ontario New Home Warranties Plan Act*, (the “Act”) dated August 8, 2007 to deny their claim.

FACTS

Ms. S., with Mr. G., bought a home and she took possession of it on January 29, 2004. Since then, she has faced a myriad of problems with the house. Her builder has gone out of business and is no longer accepting responsibility for repairing the house.

About 18 months after she took possession of the house, Ms. S. began to notice cracks in the brick veneer of her home and in the foundation. The first crack appeared over the garage and the builder did attempt a repair. The repair was poorly done and the material used did not match the mortar. In the second year of possession, Ms. S. noticed more cracks in the mortar and observed brick pieces cracking in the middle of

the bricks. Numerous pictures of these cracks were introduced both by Ms. S. and by Tarion's witnesses. On April 30, 2007, Ms. S. filed a claim with Tarion, claiming that two cracks extending from the foundation through the brick work on each of the south and north walls and a third crack in the foundation wall on the north wall constituted a major structural defect. In support of her claim, Ms. S. consulted with a number of contractors, not only about the cracks complained of but also about the many other mortar and brick cracks she has observed. These contractors were not called to testify, but Ms. S. testified that they had said that the cracks were unusual and should be investigated by digging up the foundation. Contractors' estimates for investigating the foundation and repairing the cracks and the brick veneer range from \$10,000 to \$25,000. One home inspection company retained by Ms. S. produced a written report stating that the number of foundation and brick veneer cracks was unusual for a house this new, but that the cracks themselves did not constitute a major structural defect.

Tarion denied Ms. S.'s claim. Tarion called Tony Alexander, an engineer with Construction Control Inc., and he is considered by the Tribunal to be an expert witness in the area of concrete material and foundation construction. He produced a report (Exhibit 8) which concluded that the cracks complained of are not major structural defects within the meaning in the Act.

Mr. Alexander was a highly credible witness and he concluded that the majority of the foundation cracks are normal shrinkage cracks which are not structurally significant. The brick veneer cracks are also not structural in nature as the brick veneer itself is not a structural element of the house, in Mr. Alexander's opinion.

If Mr. Alexander were the homeowner, he would do the following:

1. chemically inject the cracks in the foundation to avoid the possibility of water penetration;
2. tuckpoint the cracks in the brickwork, for aesthetic reasons, and
3. monitor the cracks to check for any additional significant crack development.

Mr. Alexander estimates the costs of these repairs at between \$1,000 and \$2,000. He would not excavate the foundation of the house, as he does not regard it as necessary. Most shrinkage cracks develop in the first two years after house completion and he sees no evidence of structural cracks. The Tribunal accepts his opinion.

LAW

The Act sets three time periods for claims against Tarion. Under Section 13 of the Act, the builder warrants to the homeowner that the home is constructed in a workmanlike manner and is free from defects in material. Warranty claims under this section of the Act must be made in the first year of possession. Second year claims are covered under Sections 14 and 15 of Regulation 892 of the Act. These claims are restricted to claims for water penetration of the building envelope, mechanical and electrical systems, the exterior cladding, health and safety issues and major structural defects.

Within seven years of possession, a homeowner may make a claim for a major structural defect, which is defined in Regulation 892 as including significant failures in the structure of the home or a material inability to use the building for the purpose for which it was intended. Specifically, Section 892 of the Act defines a major structural defect as follows:

“major structural defect” means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of a load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.”

Under this definition, an Applicant must show:

1. that there has been a defect in the builder’s work or materials;
2. that this defect gives rise to one or more of the specific results set out in the definition, and
3. that the exclusions specified in the definition do not apply.

The Applicant must then satisfy the Tribunal that, on the balance of probabilities, the claim is otherwise valid under the Act.

DECISION

The passage of time since she took possession of the home leaves Ms. S. in the unenviable position of having to demonstrate that her home is subject to a major structural defect. She has failed to do this. Not only does the expert witness called by Tarion conclude that the cracks complained of are neither major nor structural but Ms. S.’s own home inspector concludes that the cracks are not a major structural defect. Therefore, Ms. S.’s claim must fail.

However, under the unique circumstances of this case, and without in any way admitting liability, Tarion has agreed to a consent order that would require Tarion to hire contractors, at its expense, and to cause these contractors to perform certain repairs on Ms. S.’s home.

ORDER

Accordingly, the Tribunal orders as follows:

1. Based on the evidence and pursuant to the authority vested in it by section 16 (3) of the Act, the Tribunal directs Tarion to disallow the claim made by Ms. S. and Mr. G. under section 15(2) of Regulation 892 to the Act.
2. On consent of the parties, Tarion will hire contractors and direct them, at Tarion's expense, to perform the following work on Ms. S.'s home:
 - a. chemically inject the cracks in the foundation walls;
 - b. tuckpoint the cracks in the brickwork;
 - c. replace the approximately 50 bricks which have been cracked through, and
 - d. re-do the repair which was performed by the builder over the garage door.
3. Ms. S. will supply the bricks to be replaced and will grant reasonable access to her home to permit the Tarion contractors to do the work being ordered.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: April 10, 2008

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



MOTION

ENGLISH LANE HOMES INC.

APPEAL UNDER S 9 (2) OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: JEFFREY KAUFMAN and RICHARD BUTLER, Counsel,
representing English Lane Homes Inc. (the "Applicant")

CAROL STREET, Counsel, representing Tarion Warranty
Corporation ("Tarion")

DATE OF
PRE-HEARING: February 27 and 28, 2008 Toronto

ORDER

On or about January 12, 2007, Tarion served a Notice of Proposal on the Applicant giving notice of its intention to refuse to renew the Applicant's registration.

Two grounds were set out:

1. It was alleged that the Applicant had poor after sales service demonstrated by a high ratio of chargeable conciliations to closing possessions. The specific allegation is that the Applicant had ten chargeable conciliations for one hundred and nineteen possessions.
2. It was further alleged that an Officer and Director of the Applicant, Mohammed Ghasem Ghods, had a history of financial irresponsibility at another company, Sonata Developments Inc. The substance of the financial irresponsibility was that Sonata was in breach of its warranties and had failed to indemnify Tarion for resulting losses.

As a result of a pre-hearing of this matter these two allegations were amended. The financial irresponsibility allegation has been dropped, and the allegation regarding poor after sales service has been changed to reflect ten chargeable conciliations in two hundred and eight possessions or a rate of 4.8 chargeable conciliations per 100 possessions.

On September 15, 2006, Toronto Standard Condominium Corporation No. 1575 (TSCC 1575) issued a statement of claim against a company related to the Applicant, Sonata Developments Inc., as well as its Officer and Director, Ghasem Ghods, a number of his family members and associates and, more importantly, Tarion Warranty Corporation. Ghasem Ghods is the same person as the Officer and Director of the Applicant, Mohammed Ghasem Ghods. He operates his business under an umbrella group known as Ghods Builders Inc. Ghods Builders Inc. was subsequently added to the legal proceedings in a later amendment. Tarion defended the action in May 2007. It cross-claimed against the other defendants making itself adverse in interest to them in the litigation. At that time Tarion was represented by its in-house legal department.

During the summer of 2007, Tarion requested that its counsel review the statement of claim in the litigation and Tarion's related documents and make recommendations concerning amendments to the Notice of Proposal arising out of allegations made in the statement of claim. A Supplemental Notice of Proposal was issued on September 14, 2007, incorporating the allegations in the original proposal and adding five substantive new allegations arising out of the behaviour of Sonata Developments Inc. in the construction and sale of TSCC 1575. Four of these allegations are derived directly from the plaintiff's allegations in the statement of claim. The other allegation relates to the failure of Sonata to register the project with Tarion, prior to the commencement of construction and its subsequent conviction on 21 counts related to contraventions of s. 12 of the *Ontario New Home Warranty Act* (the "Act").

The Applicant brings this motion taking the position that the Supplemental Notice of Proposal is improper and ought to be struck. It further takes the position that the sole remaining issue in the original Notice of Proposal, its claims records, is not properly before this Tribunal, because Tarion has failed to follow its published procedure for dealing with an unacceptable claims procedure. In Builder Bulletin 43, Tarion sets out a procedure for reviewing builder claims records on a monthly basis and commencing a series of escalating consequences, should the ratio of chargeable conciliations to possessions exceed 0.04. As stated above, the Applicant's ratio is 0.048. Affidavits were filed in support of the motion and they, of themselves, triggered preliminary motions that required a decision of the Tribunal prior to proceeding with the main motion. Although it was necessary to give oral reasons for the decisions in the preliminary motions, the Tribunal will set out its decisions here.

Motion to Exclude the Supplementary Motion Record of Tarion

On January 15, 2008, Adil Darr, Manager of Licensing and Underwriting at Tarion, swore an affidavit dealing, among other things, with the issuance of the Supplemental Notice of Proposal in September 2007. Addressing the civil litigation at paragraph 34 he stated:

“By the summer of 2007 Tarion had the documents of the parties and reviewed them. The contents of those documents led Tarion to conclude that it was appropriate to include the Plaintiff’s allegations in the civil proceedings before the Tribunal”.

On reviewing this statement, the Applicant was of the opinion that it evidenced a serious breach of the “Deemed Undertaking Rule.” The Deemed Undertaking Rule was a common law doctrine that provided that documents compelled to be disclosed in the course of litigation could not be used for any purpose other than the purpose for which they were disclosed. This has been codified in the Province of Ontario as Rule 30.1 of the *Rules of Civil Procedure*. The Applicant raised this alleged breach of the Deemed Undertaking Rule for the first time in its factum, received by the Tribunal on January 28, 2008. On February 4, Tarion responded to the allegation by filing a supplementary motion record with an affidavit from Mr. Darr, stating that his earlier statement was in error. It also contained an affidavit of Ben Millard. Ben Millard is an associate at the law firm of Symes & Street and had prepared a review of documents upon which Tarion had based its decision to issue the Supplementary Notice of Proposal. He deposed that the only documents available to him were documents from Tarion’s files, bound in four volumes for the civil litigation. There is an exception to the Deemed Undertaking Rule for documents not obtained as a result of the litigation. Since these documents came from Tarion’s own files, they were excluded from the ambit of Rule 30.1. The Applicant moved to exclude the supplementary motion record.

It was the Applicant’s position on the motion to exclude that it was not permissible for Tarion to submit further affidavit material after the Applicant had crystallized its legal argument. That point was reached, according to the Applicant, once the factum was served. In support of this position, the Applicant relied on three cases: *Chitel v. Rothbart* [1984] O. J. No 2228 (Ont. Supr. Ct), *NRS London Realty Ltd. V. Glenn et al.* 67 O.R. (2d) 704, [1989] O. J. No. 108 (Ont. Dist. Ct) and *Grant v. Kerr* [2001] O. J. 5162. In each of these cases supplementary affidavit material was rejected by the court after the commencement of argument. In *Chitel*, Master Sandler stated at paragraph 34:

“I think it is wrong, except in the most unusual circumstances, to allow counsel to repair damage to his case by allowing further evidence to be introduced as the motion is being argued because holes are being punched into the structure by opposing counsel’s submissions”.

Both *NRS London Realty* and *Grant v. Kerr* come to similar conclusions. Each case is a summary judgment motion, where following submissions by the moving party, the respondent tried to introduce new affidavit evidence. The cases, however, do not go so

far as to prohibit new evidence before the commencement of oral argument. In fact, in *Chitel*, Master Sandler specifically limits the prohibition to the period after argument had commenced. Argument had commenced at 3:00 p.m. on March 21, 1984 and at 5:00 p.m. adjourned until 11:00 a.m. the next morning. It was in this overnight period that the Applicant produced its new evidence. However, with respect to the period leading up to the commencement of the motion, Master Sandler had this to say:

“I decided to reject the affidavit. The applicants launched their motions on March 9, originally returnable on March 12. They chose the evidence they wished to rely on and the deponent of that evidence. **They had from March 12 to March 21 to tender additional evidence, but chose not to do so** [emphasis added]”.

It is clear then, that in the Honourable Master’s view, in the Ontario courts, the applicants could tender new evidence up to the commencement of the hearing, by which time facta would have been filed and legal positions on the evidence thus far would have crystallized. The direct analogy to the current facts is that it was open to Tarion to submit further evidence up to the commencement of argument. The Tribunal found the practice outlined by Master Sandler persuasive and accordingly, permitted the use of Tarion’s supplementary motion record at the hearing. Prior to the hearing, the introduction of new evidence can be accommodated by adjournments and the filing of additional facta. There must be some cut-off point. The courts, and now this Tribunal, set that point at the start of argument.

The finding that the supplementary motion record was admissible spawned two new preliminary motions. The first concerned the document summary prepared by Ben Millard, and relied on by Tarion in the preparation of the Supplemental Notice of Proposal. Mr. Millard refers to this document in his affidavit, and it is the position of the Applicant that by so doing he has waived privilege over the document. The Tribunal disagrees. The document referred to is not in issue in the application. It is nothing more than a summary of the four volumes of documents that Tarion prepared for the litigation. It is the Tribunal’s understanding that those four volumes have been fully disclosed to the Applicant. The mere mention of the fact that Mr. Millard reviewed and summarized the four volumes does not waive privilege over his efforts on behalf of his client any more than a litigant stating that he started a law suit after seeking legal advice is a waiver of the privilege attached to the legal advice.

The second preliminary motion arising from the admissibility of the supplementary motion record concerned the right of the Applicant to cross-examine Mr. Darr and Mr. Millard, *viva voce*, at the hearing of the motion. In the Applicant’s view, Mr. Darr’s contradiction of himself over the issue of what documents were reviewed by Tarion in the preparation of the Supplemental Notice of Proposal was sufficient for the Tribunal to grant the right to cross-examine Mr. Darr at the hearing of the motion. The Applicant sought leave to cross-examine Mr. Darr. The Tribunal denied that leave. While Mr. Darr’s affidavits are contradictory, it is clear that he did not have first hand knowledge of the facts leading to the preparation of the Supplemental Notice of Proposal. It is equally clear from the affidavit of Mr. Millard that the chronology is such that the law firm of Symes & Street was only in possession of Tarion documents, when it conducted its

review. It was not retained in the civil litigation until some time later. Indeed, it still has not received the plaintiff's documents.

It follows from the findings in the paragraph above, that Tarion did not breach the Deemed Undertaking Rule when it drafted the Supplemental Notice of Proposal in September 2007. Mr. Millard gives examples of letters of complaint sent to Tarion by various unit holders in TSCC 1575. These letters are addressed to Tarion and predate the exchange of documents in the litigation. In an extensive affidavit, Mr. Ghods does not point to a single fact that Tarion would not have had in its possession from its files. He does not identify any document that came solely from disclosure made by the Ghods' defendants in the litigation. On the evidence before it, the Tribunal must conclude that Tarion based its allegations in the Supplemental Notice of Proposal on documents in its files and allegations from the pleadings.

The Tribunal then proceeded to hear the Applicant's main motion.

With respect to the original Notice of Proposal, it is the Applicant's position that Tarion has breached its duty of fairness to the Applicant by failing to follow its own procedure for dealing with a deteriorating customer service standard. Builder Bulletin 43 sets out a procedure to be followed by the Registrar in the event a registrant's chargeable conciliations rise in proportion to their possessions.

The Applicant takes the position that the Supplemental Notice of Proposal should be struck on a number of grounds. It is the Applicant's position that the issues raised are complex and better dealt with in the context of the civil litigation process. The Applicant submits that the parties to the litigation are sophisticated commercial parties, and that the summary procedure before this Tribunal is not the appropriate procedure. The Applicant further submits that should this Tribunal proceed to conduct a hearing into allegations first raised in the civil litigation there is a risk of inconsistent findings. Finally, it is the Applicant's position that the whole procedure is tainted by a reasonable apprehension of bias. It is the Applicant's position that the Registrar is wearing two inconsistent hats: a party at interest in the civil litigation, and a person bringing regulatory proceedings against the Applicant in circumstances where a finding adverse to the Applicant in this proceeding may well give the Registrar an advantage in the civil litigation.

The Tribunal's authority to deal with the issues raised on this motion flows from the provisions of the *Statutory Powers Procedure Act* R. S. O. 1990 c. S. 22 ("SPPA"). Section 4.6 of the SPPA, which states:

4.6(1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

(a) the proceeding is frivolous, vexatious or is commenced in bad faith.

Section 23.1 of the SPPA states:

Abuse of processes

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The former provisions have been codified in the Tribunal's Rules of Practice as Rule 2.10. Section 23 has not been specifically codified in the Tribunal's Rules, but remains the statutory authority for the Tribunal to act in the event it determines there has been an abuse of its process. For the Applicant to succeed, it must demonstrate that the Registrar's actions are frivolous and vexatious or commenced in bad faith or are otherwise an abuse of process requiring the intervention of the Tribunal.

It is immediately apparent that the fact that a proceeding is complex, is not a ground for dismissing it without a hearing. In addition, the Tribunal can find no merit in the submission that TSCC 1575 is a sophisticated commercial party. TSCC 1575 is a corporation owned and controlled by the condominium owners. The Tribunal cannot conclude that the status of condominium ownership imbues the owners or their director representatives with commercial sophistication. It is much more likely that condominium directors are willing amateurs seeking to have some level of input into the operation of their joint investment.

The issue of the overriding obligation of the Tribunal to hold a hearing, despite concurrent civil proceedings, was the subject matter of an appeal to the Divisional Court in *Carleton Condominium Corp. No. 441 v. Ontario New Home Warranty Program* [1996] O. J. No. 1345, 28 O. R. (3d) 394. In that case, a condominium corporation had sued the general contractor, the architect, and others involved in the building's construction. It had also advanced warranty claims against the Ontario New Home Warranty Program to the forerunner of this Tribunal, the Commercial Registration Appeal Tribunal. At the request of the Program, the Tribunal stayed the appeal pending the resolution of the civil litigation on the grounds that it was preferable to avoid a multiplicity of proceedings. In delivering the judgment of the Court, Justice Southey stated at paragraphs 9 and 10 of the decision:

"The duty of the Tribunal in this case was to hold a hearing.... That statutory duty, in my opinion, overrides the general rule against multiplicity of proceedings that was applied by the Tribunal."

While the case dealt with a claim under the statutory warranty, the applicable statutory wording establishing the Tribunal's duty in a builder's registration case, such as the current matter, is virtually identical.

It is not in dispute that Tarion did not follow the procedure set out in Builder Bulletin 43 with respect to the Applicant's claims record. The Applicant takes the position that Tarion's failure to do so strips the Registrar of jurisdiction to issue the Notice of Proposal. It asks the Tribunal to order the Registrar to comply with its published

procedure set out in Builder Bulletin 43. In support of this position it cites the powers of the Tribunal as set out in the Act at s. 9 (4), which provides that:

“The Tribunal 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 regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar “.

Assuming for the purposes of this motion that there is no explanation why the Registrar did not follow its own internal procedure, the question then arises concerning the effect of that failure. In *Canada Employment and Immigration Commission v. Dale Lewis* [1986] 1 F. C. 70, it was alleged that Lewis had been denied procedural fairness in an investigation of wrongdoing in the workplace that ultimately led to his dismissal. Lewis had available to him a statutory procedure to adjudicate his dismissal. The Court, at page 23, held that this independent adjudicative procedure cured the procedural defect in the following words:

“The pursuit of a full hearing made available to him under the adjudication process including the possibility of being absolved of misconduct and of being restored to his former position could, in my judgment, have cured the procedural defect in the investigation which led to that decision. If the denial of natural justice by the inferior Committee could be cured by a new hearing before a superior Committee as was held in the Harelkin case, in my view the denial of procedural fairness by the employer in this case could have been cured by a full hearing before an adjudicator”.

In *McNamara v. Ontario (Racing Commission)* [1998] O. J. No. 3238 (CA) the appellant argued that a denial of natural justice in an earlier proceeding before the track judges rendered the further appeal proceeding to the Racing Commission a nullity. Madam Justice Abella disagreed. At paragraph 26 she states:

“The more apposite analysis is that the procedure they followed represented, arguably, an infringement of natural justice. Such procedural defects, however, are amenable to rectification on appeal, they do not render the proceeding void. The jurisprudence is clear that they can be cured by a subsequent hearing, in which natural justice is accorded”.

Proceedings before this Tribunal accord the full panoply of natural justice. The Tribunal itself is independent of the Registrar. It owes no deference to the Registrar, as the courts of Ontario have made clear on a number of occasions. Proceedings are governed by the provisions of the SPPA with documentary disclosure and the right to call and cross-examine witnesses. At the hearing, the applicability or not of Builder Bulletin 43 can be fully canvassed. It is the position of the Tribunal that the procedural rights accorded the parties cure any procedural defect in the investigative stage resulting from a failure to follow Builder Bulletin 43.

It remains to be determined if the positions of the Registrar, as both adverse litigant and regulator, create a reasonable apprehension of bias. If they do, then it is argued that all of the allegations should be struck, or, in the alternative, those allegations that are

repeated from the pleadings should be struck. It is admitted by Tarion in its affidavit evidence that receipt of the statement of claim stimulated an examination of its files to determine if there were grounds for the Supplemental Notice of Proposal. It is of note that the documents referred to in the Millard affidavit, in support of the fact that Tarion referred only to its own file, indicate that Tarion was well aware of the problems alleged in the statement of claim in 2002 and 2003. Not until September 2007, did these allegations find their way into a proposal. Given the almost five-year lapse in time, the Tribunal concludes that, but for the litigation, these issues would not have been used as grounds for a termination of the Applicant's registration.

The test for a reasonable apprehension of bias was formulated in English law. It used, as a construct, the man on the Clapham omnibus. The more applicable standard nowadays is, perhaps, the person on the Yonge Street subway. Of importance in the construct is that the test is one of common sense in the mind of the public at large. The test was considered by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S. C. R. 817, [1999] S. C. J. No. 39. At paragraphs 45 to 47, Madam Justice L'Heureux-Dube cites with approval Mr. Justice de Grandpre writing in dissent in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S. C. R. 369 at p. 394 as follows:

"...the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an [page 850] informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly".

In *Kaburda v. College of Dental Surgeons of British Columbia* [1997] B. C. J. No. 488, a dental surgeon attended at the emergency room of the Burnaby Hospital to consult about a seriously injured patient. During his attendance, a confrontation occurred between the dental surgeon and a friend of the patient over payment of the dental surgeon's account, and whether the friend and the patient were homosexual. As a result of the confrontation, the patient sued the hospital and the dental surgeon. The hospital cross-claimed against the dental surgeon. The patient then reported the dental surgeon to the College. The Deputy Registrar of the College referred the matter to a review panel, and that panel then recommended an inquiry. Dr. Kaburda sought relief in the courts on the ground of reasonable apprehension of bias. The law firm retained by the College to advise it about the complaints in issue also acted for the hospital in the litigation. There was a perception that it was in the hospital's interest to throw blame on Dr. Kaburda to gain an advantage in the litigation. At first instance, the chambers judge held that neither the Deputy Registrar nor the Review Panel had any final power of decision, their function being limited to investigation and report. He denied the relief sought. On appeal, the B.C. Court of Appeal took a different view. They were of the opinion that there was a reasonable apprehension of bias, and stayed the proceedings. At paragraph 29 of the decision, Chief Justice McEachern sets out the consequences of a finding of a reasonable apprehension of bias:

“Once there has been a finding of a reasonable apprehension of bias, it is unnecessary to enquire whether the result might have been the same but for the unfairness....it follows, in my view, that the proceedings on these complaints to this date must be set aside”.

The facts in the instant case are remarkably similar to those in *Kaburda*. If anything, they are stronger. In *Kaburda*, the College itself had no direct interest in the outcome of the litigation. It was the perception that the legal advice given to the College by the lawyers for an adverse party in the litigation was sufficient to taint the process. The *Kaburda* decision impugns the conduct of the investigation notwithstanding a right of appeal to an independent inquiry panel. In the instant case, Tarion itself has a direct interest in the litigation. While Tarion has a statutory duty to investigate the Applicant and bring matters before the Tribunal, it took no steps to do so for a period of four to five years until the commencement of the litigation. It then reviewed the statement of claim and used it as the basis for further allegations. The Tribunal is forced to the conclusion that any reasonable person looking at these facts would conclude that it is more likely than not that the decision to draft further allegations arising out of the litigation was not made fairly. Once the investigation is tainted by a reasonable apprehension of bias, then, to pursue it through a hearing is an abuse of the process of this Tribunal.

Having reviewed all of the material filed on the Applicant's motion, the Tribunal orders those parts of the Supplemental Notice of Motion that relate to allegations raised in the pleadings in the civil action brought by TSCC 1575 to be struck. Accordingly, the hearing will proceed on the allegations set out in paragraphs 1 and 3 (a) (i) of the Supplemental Notice of Proposal, dated September 14, 2007. Tarion has abandoned the allegations in paragraph 2.

LICENCE APPEAL TRIBUNAL

David Gregory Flude, Vice-Chair

Released: April 3, 2008

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



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IKEMEFUNA AYALOGU

APPEAL FROM A DECISION OF THE REGISTRAR UNDER
SECTIONS 13 AND 15 OF THE *PRIVATE SECURITY AND
INVESTIGATIVE SERVICES ACT, 2005*, S.O. 2005, c.34

TO REVOKE A LICENCE

TRIBUNAL: GENEVIÈVE BLAIS, Member

APPEARANCES: PAUL LEWANDOWSKI, Counsel, representing the Applicant,
Ikemefuna Ayalogu

DUDLEY CORDELL, Counsel, representing the Registrar under
the *Private Security and Investigative Services Act, 2005*

DATES OF
HEARING: November 17 and 18, 2008 Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal (the “Tribunal”) from a written decision of the Registrar under the *Private Security and Investigative Services Act, 2005* (the “Registrar” and the “Act” respectively) dated March 19, 2008.

Mr. Ayalogu was a licenced security guard from June 1, 2007 to October 12, 2007. His licence was revoked by the Registrar under the provisions of the Act. The Registrar received information from the Ottawa police that identified Mr. Ayalogu as a member of a street gang. The Registrar found it to be not in the public interest for Mr. Ayalogu to continue as a licenced security guard.

Mr. Ayalogu denies being a member of a street gang, and confirms that if there was any association, it was several years ago. He claims that his current lifestyle is positive and crime free. He does not see himself as a risk to public safety and believes that he can be trusted to perform the duties as a licenced security guard. He is asking for his licence to be reinstated.

FACTS

The evidence for the Registrar consisted of the testimony of two witnesses. The first witness was Detective Constable Christopher O'Brien and the second witness was the Deputy Registrar, Richard Newburn.

Detective Constable O'Brien outlined his Curriculum Vitae¹ which demonstrates his experience and current employment as an Investigator with the Guns and Gangs Unit of the Ottawa Police Service. He has been a police officer since April 21, 2001. From August 2001 to September 2006, he was a patrol officer in Ottawa South, an area of high gang activity. He transferred into the Guns and Gangs Unit in September 2006. His principal duties with this Unit are to investigate street gang related crimes, the illegal use and possession of firearms, to collect, maintain and disseminate street gang intelligence to other police departments, to engage in the classification of gang members for court purposes, and to provide educational and training programs for law enforcement personnel.

Detective Constable O'Brien has attended numerous courses and training in the areas of guns and gangs, criminal investigative techniques, and weapons and firearms issues. This training and his related work experience have qualified him as an expert on the membership of street gangs, and specifically, in the composition and nature of street gang membership in Ottawa.² Mr. Ayalogu's Counsel raised no objection to the witness being qualified as an expert in the area.

In the period between 2001 and 2004, Mr. Ayalogu was classified as a member of the Crips street gang by Detective Constable O'Brien's predecessors. In August 2007, this information was provided to the Registrar by Detective Constable B. of the Ottawa Police and was part of the information used by the Registrar in revoking Mr. Ayalogu's licence.

In August 2008, Detective Constable O'Brien was asked by the Deputy Registrar to review this classification for Mr. Ayalogu's appeal before the Tribunal.

Detective Constable O'Brien provided the background of the Crips gang in Ottawa. It is believed that the Crips have been in Ottawa since the early to mid 1990's and began in the south side of the city. Over the years, several subsets have developed based on geographical locations. Membership between the subsets is very fluid. Members are known to move back and forth between areas and the loosely based dynamics give them strength in numbers. The Crips have identified themselves with the colour blue, and traditionally wear a blue bandana somewhere on their person. They distinguish themselves from a rival group known as the Bloods who frequent the west end of Ottawa and traditionally wear red bandanas. Although most members of the Crips are male, some females have also been identified.

¹ Exhibit 5

² Exhibit 5

Detective Constable O'Brien stated that the Crips are considered a hard core street gang.³ The Ottawa Police Service considers them the most volatile street gang in Ottawa. They have been involved in violent crimes from murder to robberies to assaults. The Crips' main criminal activity is the sale of crack cocaine, which is their main source of income. They are known to have firearms.

The Ottawa Police have identified over 100 persons as members or associates of the Crips. They believe that as many as 550 persons in Ottawa have street gang affiliations.

Detective Constable O'Brien stated that since 2001, the Ottawa Police have classified persons as gang members by using a two part process. The first part is their definition of a street gang and the second part is a six point criteria adopted from the Criminal Intelligence Service of Canada ("CISC"), who developed the criteria in 1991 to provide standardization for police services across Canada.

The Ottawa Police Services defines a street gang as "a self-formed group of juveniles and/or adults interacting with each other, who engage in a range of criminal behaviour. It may be loosely or well organized with established rules of conduct".⁴ The Ottawa Police believe the Crips meet this definition.

The six point criteria for use in classifying persons as gang members are:⁵

1. Reliable source of information that a person is a gang member;
2. Police officer observes person associating with known gang member(s);
3. Person acknowledges gang membership;
4. Person is involved directly or indirectly in a gang motivated crime;
5. The court finds the person to be a gang member;
6. The person is found to be displaying Common or symbolic gang identification or paraphernalia (name, turf, colors, signs, hand signs, symbols, and/or distinctive dress, tattoos, weapons, poems, rituals, graffiti, Etc.). (*sic*)

The CISC standard requires three of the six criteria to be met before a person is classified as a gang member. Criteria #4 is obligatory. If the full test is not met, the person can be classified as a gang associate only.

As an expert in the classification of gang members, Detective Constable O'Brien followed the six point criteria to review the classification of Mr. Ayalogu as a member of the Crips.

³ Exhibit 6

⁴ Exhibit 6

⁵ Exhibit 6

He accessed the Ottawa Police Services Records Management System ("RMS") and reviewed 117 entries between 2001 and 2008 involving Mr. Ayalogu. These entries were either general occurrences or street checks.

A general occurrence is a report or a type of documentation of an ongoing police investigation. A street check is a sighting usually filed by a patrol officer walking the beat in an area, and is considered overall intelligence for the police in their investigations and policing duties.

Detective Constable O'Brien isolated 45 of 117 entries which he deemed relevant to his review of the classification of Mr. Ayalogu as a member of the Crips street gang.

The review on criteria #1, reliable source of information that a person is a gang member, links one general occurrence in 2003 and five street checks⁶ between February 2003 and June 2006. Detective Constable O'Brien stated that many sources of information are confidential informants. Some may be paid for information that leads to an arrest or may be helpful in an investigation. Others are sources where information may or may not be corroborated.

The review on criteria #2, police information provided as a result of direct observed association with other known gang members, links eight general occurrences between July 2002 and April 2004 and eight street checks⁷ between May 2001 and October 2006. Detective Constable O'Brien noted that many of the names in these reports are well known members of the Crips and some are considered to be senior members of the street gang. Uniformed police officers, in the performance of their general duties, log these observations on the RMS of the Ottawa Police.

Criteria #3 is not applicable to Mr. Ayalogu, as he has never admitted to being a gang member or acknowledged gang association.

The review on criteria #4, involvement directly or indirectly in a gang motivated crime, links twelve general occurrences between July 2002 to August 2006 and eight street checks between October 2003 and July 2008.⁸ While Detective Constable O'Brien was not certain about the extent of Mr. Ayalogu's involvement in some of the above occurrences, he noted that Mr. Ayalogu was the subject of ten criminal charges laid by the Ottawa Police between 2000 and 2003. However there are no convictions registered against him. Detective Constable O'Brien stressed the point that a person need not be charged or convicted of a criminal offence to meet criteria #4.

Detective Constable O'Brien spoke to the challenges faced by the police in obtaining convictions. Prospective witnesses are often intimidated and remain reluctant or unwilling to testify in cases involving gang activity.

⁶ Exhibit 6, Flag Record, Page 1

⁷ Exhibit 6, Flag Record, Page 1

⁸ Exhibit 6, Flag Record, Page 2

The notion of “snitching” on a gang member or associate is more than seriously frowned upon. Those who do testify often do so at their own peril.

The review of criteria #5, requiring that a court find the person to be a gang member, was addressed by Detective Constable O’Brien. He noted that Mr. Ayalogu was found to be a gang member during an immigration hearing of February 28, 2007.⁹ Detective Constable O’Brien places the same weight on a decision of the Immigration and Refugee Board of Canada, as that of a court, for the purpose of classification of gang membership.

The review of criteria #6, the person is found to be displaying common or symbolic gang identification, relates to three street checks in 2004.¹⁰ On these occasions, Mr. Ayalogu was reported to be wearing a blue bandana.

Based on his review of the reports related to the required criteria, Detective Constable O’Brien offered his expert opinion that Mr. Ayalogu is a confirmed member of the Crips street gang. His analysis shows that Mr. Ayalogu has associated with persons who are members of the Crips and that he has been involved in gang motivated crimes over a period of seven years.

In support of his classification of Mr. Ayalogu, Detective Constable O’Brien referred the Tribunal to the decision of the Immigration and Refugee Board of Canada. The Board reviewed considerable documentary evidence, heard 40 hours of testimonial evidence over eight days of hearing, and concluded by stating:¹¹

I therefore find Mr. Ayalogu described under section 37(1)(a) of the *Immigration and Refugee Protection Act* for being a member of an organization that is believed on reasonable grounds to be engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, and, find that he has been engaging in activity that is part of such a pattern.

Detective Constable O’Brien elaborated on Mr. Ayalogu’s reported pattern of behaviour. He noted that there are a number of cases where Mr. Ayalogu is a suspect, where intimidating behaviour over debts is reported, where firearms and the trafficking of drugs were involved. He adds that, to his knowledge, Mr. Ayalogu has generally been cooperative with the police. He most often presents himself well. However, Detective Constable O’Brien believes that Mr. Ayalogu often knows more than he wishes to tell the police and is afraid to be known as a “snitch” on street gang activity.

He gave, as an example, of Mr. Ayalogu knowing more than he is willing to tell police, the case which he personally investigated of Mr. Ayalogu as the victim of an assault in March 2007. Mr. Ayalogu was struck on the head and stabbed at his former residence, by persons he claimed were unknown to him.

⁹ Exhibit 6, Flag Record, Page 2

¹⁰ Exhibit 6, Flag Record, Page 3

¹¹ Exhibit 7, Tab 4, Page 63

He was also unable to provide police with a motive for the attack. To date, the case is unsolved. Although random attacks are known to occur, Detective Constable O'Brien finds it unusual that Mr. Ayalogu would be attacked for no reason by people unknown to him.

Detective Constable O'Brien believes that a person acting as a security guard is being asked to perform various duties associated with law enforcement activity in securing private property. The police expect a security guard to be fully cooperative with the police in the investigation of occurrences. Given his past history and track record, Detective Constable O'Brien is not convinced that the police could rely on Mr. Ayalogu's cooperation during their investigations.

Referring to Mr. Ayalogu's proposal to the Tribunal that he be permitted to work as a bouncer at a local bar, which is known by Ottawa Police to be a hangout for the Crips gang members, the witness questioned Mr. Ayalogu's judgement. The witness concluded that Mr. Ayalogu is not committed to fully disassociating himself from gang members, and he questions his ability to act in the public interest in this role.

On cross-examination, Counsel for Mr. Ayalogu challenged the veracity of some of the information provided to the police by confidential informants, and the weight given to this information in the classification of gang members. He suggested that police reports contain errors, speculations and conjecture. He questioned the reliability of information that leads to flagging and labelling persons as gang members. He remains puzzled as to how Mr. Ayalogu has avoided criminal convictions to date, despite police efforts and the volume of information and data on Mr. Ayalogu's activities.

Counsel for Mr. Ayalogu alleged that Mr. Ayalogu's classification as a gang member results solely from living in social housing, in high crime areas. He claims that Mr. Ayalogu is a victim of circumstances and the police have, by default, linked him to gang activities and criminal affiliations. Mr. Ayalogu believes that despite his efforts at improving his personal situation by returning to school, relocating to another area of the city, getting married and maintaining employment, he faces an impossible task of ever removing the gang classification label of the Ottawa Police.

Detective Constable O'Brien challenged some of the allegations made by Counsel for Mr. Ayalogu. He explained that informants used by the police can be gang members or associates and as such, they are not identified as there is often reason to believe that they could be the subject of planned retaliations. Without the confidential informants and street intelligence, police investigations would be stymied. He accepted that, on occasion, errors in reports have been identified, but emphasized that police officers are required, as professionals, to be accurate and fact oriented. To report false information and engage in self serving activity can lead to disciplinary action under the *Police Act*. A wide variety of police officers wrote the reports that he used to review this case, and he believes the reports to be factual. His review was thorough and done only on those reports that were specific to the classification criteria.

Detective Constable O'Brien testified that it is an anomaly that Mr. Ayalogu has no criminal record, as most gang members indeed have criminal convictions. He confirmed he would consider "declassifying" Mr. Ayalogu as a gang member after several years of no contact with the police, and clear evidence that he has severed all former ties.

In this regard, he noted that since the immigration hearing in February 2007, there are indeed fewer gang related activity reports on Mr. Ayalogu. However, a street check report of July 2008, casts sufficient doubt on his ability to completely disassociate himself from the pattern of behaviour.

The second witness for the Registrar was Richard Newburn, Deputy Registrar for the Private Security and Investigative Services Branch of the Ministry of Community Safety and Correctional Services. He has been the Deputy Registrar for private investigators and security guards since August 22, 2007. He was a police officer for 29 years.

He testified that as the Deputy Registrar, he is responsible for the review of applications for both private investigators and security guards, which have been identified by the Canadian Police Information Center ("CPIC"), as having a criminal record or a warrant. In reviewing applications, the Deputy Registrar is authorized under the Act to access any information and data held by police services in both Canada and the United States.

The mandatory requirements for a person to hold a licence under the Act are:¹²

1. The person possesses a clean criminal record;
2. The person is 18 years old or older;
3. The person is entitled to work in Canada;
4. The person has successfully completed all prescribed training and testing.

The Act also provides for the Registrar to review any information that is relevant to an applicant's fitness to hold a licence.¹³

The Deputy Registrar stated that the current legislation, the *Private Security and Investigative Services Act, 2005*, which came into force on August 23, 2007, places emphasis on public safety and professionalism when issuing licences. The previous legislation was silent on these factors. The Ministry of Community Safety and Correctional Services has been vigilant in reviewing applications and focuses on public safety. A security guard wearing a uniform is perceived as a symbol of authority and a person who can be trusted and relied upon. Under the new legislation, they are perceived as an integral part of the law enforcement community.

Mr. Ayalogu was granted a licence as a security guard on June 1, 2007. The licence was issued under the former legislation. Pursuant to section 52 of the new Act, Mr. Ayalogu's licence remained valid.

¹² *Private Security and Investigative Services Act, 2005*, section 10

¹³ *Private Security and Investigative Services Act, 2005*, section 13(2)

In August 2007, the Guns and Gangs Unit of the Ottawa Police Services advised the Deputy Registrar that Mr. Ayalogu was a known member of the Crips street gang, a criminal organization in the City of Ottawa.

The Deputy Registrar reviewed police documentation and the decision by the Immigration and Refugee Board of Canada, previously noted in Detective Constable O'Brien's testimony. On September 18, 2007, he issued an order to revoke Mr. Ayalogu's licence under section 15(1) of the Act because he determined that it was not in the public interest for Mr. Ayalogu to have a licence. The first attempt to serve Mr. Ayalogu with this order was unsuccessful, as he had changed address and failed to advise the Registrar of his new residence. Finally on October 12, 2007, Mr. Ayalogu was served with the order.

Mr. Ayalogu exercised his right for a hearing before the Registrar to show cause why the Registrar should not revoke his licence. At his hearing on March 10, 2008, he was unsuccessful in regaining his licence.

Counsel for Mr. Ayalogu, on cross-examination, suggested that the Deputy Registrar gave too much weight to the Immigration and Review Board decision. He noted that the majority of the police contacts are prior to Mr. Ayalogu's immigration hearing, and since that time, Mr. Ayalogu has made significant changes to his lifestyle.

The Deputy Registrar concluded his testimony by stating that a police contact as recent as August 2008, confirms his belief that Mr. Ayalogu's lifestyle changes are not sufficient to allow him to work in the capacity as a security guard.

The only witness for the Applicant was Mr. Ayalogu himself.

Mr. Ayalogu testified that he came to Canada with his family in 1998 or 1999. He is presently a refugee claimant. At the age of 18, he had a serious operation, which he claims has left him with poor memory, problems with logical thinking and learning, and some motor skill impairment on his right side. At the age of 19, he left home and went on welfare. He lived mainly in areas of social housing. At various times between 2001 and 2007, he has attempted to further his education. In July 2005, he married and has two children.

As part of his lifestyle changes, he stated that he relocated two years ago to a new area of the city. He has a valid work permit issued by Citizenship and Immigration.¹⁴ He worked as a mover and as a bouncer in bars. As a mover, he worked year round but was only able to work full time during the summer and earned \$12.00 an hour. When he obtained his licence as a security guard, he worked on a casual basis at special events for sports and entertainment, as a patient watcher in hospitals, and continued as a bouncer in a bar.

¹⁴ Exhibit 8

His duties included checking identifications at the door, monitoring parking lots, beer tents, etc. and ensuring order among patrons and patients. He earns from \$9.75 to \$10.00 an hour. Up until a few months ago, he was the sole provider for his family. His wife now works at a coffee shop.

The witness testified that he wants to continue working as a security guard, not because of the money but because he likes the job. He is unaware of any complaints about his conduct while working as a security guard.

Mr. Ayalogu testified that he was arrested on an immigration warrant in May 2004. The reasons for his arrest, that he was a member of a street gang, came as a total surprise. He was unaware that the Ottawa police identified him as a member of a street gang. However, in further testimony, he recalls an incident in 2003 when stopped by the Ottawa Police and asked for his identification, the police officer told him he was listed on the "G" unit on the police computer. He said that "G" stood for gang. He denies knowing that street gangs and associated criminal activity existed in his former neighbourhoods and that he was ever a member of any gang. To him, there were a bunch of guys who hung around together at the park and played basketball. He denies involvement in the selling of drugs, the possession of a gun or the use of a firearm.

On the other hand, he stated that even if he was a member at one time, it is in the past. He admits that he may have had contact with members of a street gang, simply because of where he lived. He may have hung around with the wrong crowd of people, but he did not know them as members of a street gang. He believes that the police have targeted him because of those neighbourhood contacts. He stated that he has always tried to be honest in answering police queries, but feels that the police find a way of using his information against him. He stated that some police officers have exaggerated and fabricated information about him. He feels that some police officers do not like him, and some officers are nice and others are mean.

On cross-examination, Mr. Ayalogu was asked if he understood the concerns of the Registrar in reinstating his licence as a security guard. He replied with his understanding that the Ottawa Police and the Immigration and Refugee Board identify him as a member of a street gang; however, he does not agree with their conclusions. He feels that he is guilty only by associating and hanging around with the wrong people. He sees no relation with gang related activity, to events that have occurred in the past, such as the 2007 assault on him.

Should his licence as a security guard be reinstated, Mr. Ayalogu proposes to be employed as a bouncer on weekends at a club in Ottawa. In the offer of employment, the owner states:¹⁵

Please be also informed that when the club was opened we wasn't aware of who gang members, now that we have knowledge of who they are, they are not allowed on the premises. (*sic*)

¹⁵ Exhibit 4

Mr. Ayalogu now knows that the Ottawa Police identify this bar as a Crips hangout. He disagrees with this assessment, but if members are there, he can work elsewhere. He is confident that he can handle the duties of the job, as the owner will tell him what to do.

Mr. Ayalogu concluded by stating that he has no criminal record. He may have made mistakes in the past, but since his immigration hearing, he has tried to turn his life around and he deserves a second chance. He repeated that he has moved to a new location in the city and wants to continue to work as a security guard or perhaps return to school. He wants to get on with his life and care for his wife and children.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

1. Between 2001 and 2004, Mr. Ayalogu was identified as a member of the Crips street gang by two qualified experts with the Guns and Gangs Unit of the Ottawa Police Service.
2. On February 28, 2007, the Immigration and Refugee Board concluded that Mr. Ayalogu is a member of an organization that is engaged in activity that is part of a pattern of criminal activity.
3. On May 30, 2007, Mr. Ayalogu was unsuccessful in his application for leave and judicial review of the above noted decision. He remains subject to a conditional deportation order while awaiting a decision on his refugee claimant application.
4. On October 12, 2007, Mr. Ayalogu's licence as a security guard was revoked. On March 19, 2008, his application to the Registrar for a reinstatement was denied.
5. Mr. Ayalogu was a licenced security guard from June 1, 2007 to October 12, 2007. No complaints were received on his performance of duties during this five month period.
6. The Ottawa Police designation of Mr. Ayalogu as a member of a street gang is based on the application of clearly identified criteria and standards by experts in the field.
7. The evidence before the Tribunal, by an expert on street gangs, continues to identify Mr. Ayalogu to gang related activity from May 2001 to October 2006 and with one further street check in July 2008.
8. Mr. Ayalogu denies ever being a member of a street gang, and even if he was a member at one time, it is in the past.
9. Mr. Ayalogu has no criminal record.

ISSUES

The only issue in these proceedings is whether or not Mr. Ayalogu should be granted a licence as a security guard.

LAW

The relevant sections of the Act, which are applicable to these proceedings, are:

2. (4) A security guard is a person who performs work, for remuneration, that consists primarily of guarding or patrolling for the purpose of protecting persons or property.
- (5) Examples of the types of work referred to in subsection (4) include,
 - (a) acting as a bouncer;
 - (b) acting as a body guard; and
 - (c) performing services to prevent the loss of property through theft or sabotage in an industrial, commercial, residential or retail environment.
13. (2) The Registrar may decline to issue or renew a licence if the Registrar is of the opinion that one of the following applies, and if the Registrar is of the opinion that the matter is relevant to the applicant's fitness to hold a licence:

...

 7. It is in the public interest to refuse to issue or renew the licence.
15. (1) The Registrar may revoke a licence,
 - (a) for any reason for which the Registrar could refuse or renew a licence under subsection 13 (2); or
 - (b) if the licensee is in breach of a condition of the licence.
- (2) If the Registrar proposes to revoke a licence and he or she considers it to be in the interest of public safety to do so, the Registrar may by order suspend the licence and any such order takes effect immediately.
17. (5) On hearing an appeal, the Tribunal may uphold the Registrar's decision, vary or set aside the Registrar's decision, grant or restore a licence or impose conditions on a licence.

APPLICATION OF LAW TO FACTS

Counsel for the Registrar outlined the intent of the new legislation and the aim of reforming the security guard industry. The 2007 legislation made licensing mandatory for all security personnel. In-house security personnel were previously exempt.

The changes were to ensure a high level of professional service to the community at large, and to increase professionalism in the industry. The new Act better protects citizens of Ontario, establishes standards for security guards and promotes the growing role the industry plays in Ontario.¹⁶

The Act places security guards in the continuum of law enforcement, working in cooperation with the police in providing security to the general public. The intention and objective of the *Private Security and Investigative Services Act, 2005* is to increase public trust and confidence in the security guard industry. It also aims at ensuring that suitable people work in these positions of trust. It remains crucial that a security guard who is on the front line of the industry helps provide a safe environment and will cooperate with the police when required to do so.

The Act clearly places the onus on the Registrar of establishing that it is not in the public interest for Mr. Ayalogu to hold a licence as a security guard. 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 concept of public interest should be given a broad interpretation. The Tribunal interprets it as acting in a manner that a law enforcement officer, such as a police officer, would behave in a similar role and circumstance. Security guards, by law, must wear a uniform and members of the public have an expectation that a security guard will protect them and their property, and act in a law abiding manner.

The evidence before the Tribunal is clear. For the past seven years, Mr. Ayalogu has been identified as a member of a street gang by the Ottawa Police. In 2007, the Immigration and Refugee Board made a similar finding. The Tribunal is persuaded by this evidence and accepts the criteria presented by the experts and the application of that criteria in this case.

Mr. Ayalogu was not completely forthright in his testimony and was often evasive. Although he accepts that he may have associated with wrong persons, he persists in denying knowledge that his associates are gang members, and that he has knowingly participated in criminal related activity.

Mr. Ayalogu's Counsel alleged that the evidence presented by the police is bold, untested and unproven allegations. He alludes to fabrication and exaggeration by the police to boost the reputation of the Guns and Gangs Unit. Mr. Ayalogu has no criminal record and that, in itself, is proof that allegations against him cannot be substantiated.

The Tribunal is not persuaded by that argument. The absence of a criminal record does not point to Mr. Ayalogu not being a member of a street gang. The Ottawa Police Service is not jumping on the bandwagon to target Mr. Ayalogu for no reason. The Tribunal does not accept that Mr. Ayalogu was at the wrong place, at the wrong time on so many occasions.

¹⁶ Exhibit 7, Tab1

It is unreasonable to expect the public would have confidence in the security guard industry if it were known that a licenced security guard was a member of a street gang.

The past and present lifestyle of Mr. Ayalogu was reviewed by the Tribunal in reaching its decision. Having looked at his past conduct and his history of ties to criminal elements, considered as a whole, the Tribunal has no hesitation in determining that there are reasonable grounds for the belief that it is not in the public interest for Mr. Ayalogu to be licenced as a security guard.

The Tribunal understands the difficulty faced by Mr. Ayalogu in severing former ties and considered his request for a licence with conditions while he continues to improve his lifestyle.

The Tribunal commends Mr. Ayalogu on his efforts at changing his lifestyle, returning to school and maintaining employment but is not convinced that a reasonable period of time has elapsed for him to achieve complete and credible disassociation. The Tribunal concludes that a licence with conditions is not in the public interest at this time.

DECISION

Pursuant to the authority vested in it by section 17(5) of the Act, the Tribunal upholds the Registrar's decision.

LICENCE APPEAL TRIBUNAL

Geneviève Blais, Member

RELEASED: December 18, 2008

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

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PRE-HEARING

IKEMEFUNA AYALOGU

APPEAL FROM THE DECISION OF THE REGISTRAR,
PRIVATE SECURITY AND INVESTIGATIVE SERVICES ACT,
2005

TO REVOKE A LICENCE TO ACT AS A SECURITY GUARD

TRIBUNAL: CHANTAL PROULX, Vice-Chair

APPEARANCES: PAUL LEWANDOWSKI, Counsel, representing the Applicant

DUDLEY CORDELL, Counsel, Ministry of the Attorney General,
representing the Respondent

DATE OF
PRE-HEARING: July 28, 2008

Ottawa

ORDER

A pre-hearing was held in this matter on July 28, 2008 in Ottawa before this Tribunal in the presence of Paul Lewandowski, Counsel, representing the Applicant and Dudley Cordell, Counsel representing the Respondent, the Registrar, *Private Security and Investigative Services Act, 2005* (the "Act").

The Tribunal makes the following Order respecting the hearing of this matter:

1. It was noted that the documentation refers to the Applicant's first name as both Ikemefuna and Ikemefuma. The Applicant indicated that the proper spelling was Ikemefuna. For the purpose of the proceedings before the Licence Appeal Tribunal, it is understood that the documentation in the material refers to the same individual, notwithstanding the different spelling of the first name.

2. A hearing was scheduled for September 8 and 9, 2008. Mr. Lewandowski requested a postponement because he is not available to represent the Applicant on that day. The request was granted. The hearing is scheduled for November 17 and 18, 2008, commencing at 9:30 a.m. at the Gillespie Reporting Services, 130 Slater Street, Suite 200, in Ottawa.
3. Mr. Lewandowski will represent the Applicant at the hearing and he expects to have five witnesses, whose identities were provided to the Respondent.
4. Mr. Lewandowski will serve his Book of Documents to the Respondent and the Tribunal by August 1, 2008.
5. Mr. Cordell expects to have two witnesses, whose identities were provided to the Applicant.
6. For the purposes of this hearing, it was agreed as a statement of fact that the Ledbury-Banff Crips (also known as the "Crips") organization operates in the city of Ottawa and that it engages in violent and illegal activities.
7. It was agreed that the issue before the Tribunal is whether or not it is in the public interest to refuse to issue or renew a security guard licence to the Applicant pursuant to paragraph 13(2)(7) of the *Private Security and Investigative Services Act, 2005*.
8. The parties are reminded of their obligation to comply with Rule 6 of the Tribunal's Rules of Practice regarding disclosure.

LICENCE APPEAL TRIBUNAL

Chantal Proulx, Vice-Chair

Released: August 12, 2008

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



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HAMID AZIZI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O.
2002, c.30, Sch. C

TO REVOKE A REGISTRATION

TRIBUNAL: ELIZABETH L. SPROULE, Vice-Chair

APPEARANCES: LAWRENCE N. SHAPIRO, Counsel, representing the Applicant

ROBERT MAXWELL, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: March 10, 2009

Toronto

ORDER

This matter is an appeal from a Notice of Proposal of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar" and the "Act" respectively) dated February 6, 2009, to revoke the registration of Homelife Arianna Realty Inc. ("Homelife") as a Brokerage, and to revoke the registration of Hamid Azizi ("Azizi") as a Broker under the Act. Homelife did not file an appeal of the Registrar's Notice of Proposal.

On February 6, 2009, the Registrar issued an Order of Immediate Suspension pursuant to s. 15 of the Act. The Act provides that an applicant has 15 days to appeal an order for immediate suspension following which it may be extended by the Tribunal, under s. 15(3)(b), until the hearing is concluded provided the hearing commences within 15 days of the request for a hearing. The hearing commenced on March 10, 2009, within the time prescribed by s. 15(3)(b).

The following documents were entered, with the consent of the parties, as exhibits in this matter:

Exhibit #1 - Notice of Proposal dated February 6, 2009

Exhibit #2 - Immediate Suspension Order dated February 6, 2009

Exhibit #3 - Notice of Appeal received February 23, 2009

Exhibit #4 - Volume 1 of the Registrar's Book of Documents

Exhibit #5 - Volume 2 of the Registrar's Book of Documents

Exhibit #6 - Volume 3 of the Registrar's Book of Documents

Counsel for the Registrar called one witness, Yvonne Nandalall, a Registration Officer with the Real Estate Council of Ontario ("RECO"). She provided a brief portion of her evidence relating to the registration history of Homelife and Azizi under the Act.

The hearing did not proceed further as Counsel for the Applicant requested an adjournment to allow for the adequate review and response to the three volumes of documents submitted by the Registrar. There was no objection stated to the continuance of the suspension order in the interim. The request to adjourn was not opposed by Counsel for the Registrar.

Accordingly, this Tribunal orders that:

- 1) The hearing of the matter is adjourned on the consent of the parties to continue at 9:30 a.m. on Thursday, June 4, 2009, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and continue on June 5 and 11, 2009, if required.
- 2) The time of expiration of the Registrar's Order of Immediate Suspension is extended until the hearing of this matter is concluded.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule, Vice-Chair

RELEASED: March 31, 2009

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

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PRE-HEARING

BRIDGE RAJ BAHADOOR-Pre-hearing

APPEAL FROM A DECISION OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c. 30, SCHEDULE C

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice Chair

APPEARANCES: P. CAPONE, Counsel, representing the Applicant
B. SCHUBERT, Student-at-Law, for the Applicant

TIM SNELL and MAYA SABHARWAL, Counsels, representing the Registrar, *Real Estate and Business Brokers Act, 2002*
J. HURTER, para-legal, for the Registrar

DATE OF
PRE-HEARING: March 2, 2009

Toronto

ORDER

A pre-hearing was conducted on March 2, 2009, with the Applicant in attendance.

The Parties agreed to adjourn the hearing on the understanding that a second pre-hearing would be conducted in an attempt to narrow the issues. The up-to-date estimate for the hearing is 15 days.

Conditions for the adjournment were agreed to, whereby the Applicant would cease trading through Acquisition Realty Ltd., pending the full hearing. It is known to the

Parties that the Applicant will be seeking to transfer his registration as a broker to another brokerage where he will not be the broker of record.

Accordingly, the Tribunal Orders as follows:

1. This pre-hearing is adjourned to April 14, 2009 at 9:30 a.m. at the Licence Appeal Tribunal, 1 St. Clair Avenue West, Toronto, Ontario;
2. As a condition for the adjournment, the Applicant, pending the hearing and adjudication of the herein appeal, will not trade in real estate through Acquisition Realty Ltd.;
3. The Registrar shall serve and file a supplemental and/or amended notice of proposal ("amended notice") on or before March 6, 2009;
4. The Applicant shall provide a responding notice of appeal, if advised, within 15 days of the amended notice;
5. The hearing dates of March 23, 2009 to April 13, 2009 inclusive are cancelled. New hearing dates will be set, peremptory on the Applicant, following the pre-hearing of April 14, 2009;
6. The Parties shall complete their disclosure obligations prior to the pre-hearing of April 14, 2009; and
7. In the event the matter is resolved, the parties shall notify the Tribunal in writing.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

RELEASED: March 4, 2009

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



JOHN CHIN LEE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT, 2002*, S.O. 2002, c. 30

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: JOHN CHIN LEE, the Applicant did not attend the hearing
nor was he represented

MAYA SABHARWAL, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: December 22, 2008 Toronto

ORDER

The hearing in this appeal was scheduled for today, December 22, 2008. The hearing was scheduled by the Tribunal on an expedited basis on account of the Applicant having been the subject of an immediate suspension under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30 ("the Act").

The Registrar appeared through counsel, Maya Sabharwal. Also in attendance for the Registrar were Angela Volpe, the Manager of Registration and Inspector Linda Kim.

The Applicant has been served with all relevant documents as evidenced by exhibits 4-6. Nonetheless, the Applicant did not attend the hearing.

The Registrar has requested that I extend the suspension order. I find that I have grounds for extending the suspension order on the basis of s. 15(4) (a) of the Act (delay by the Applicant) and his failure to co-operate with the Registrar. The affidavit of Linda Kim, Tab 13 of Exhibit 3, provides the evidentiary basis for the Applicant's failure to co-operate. I am advised by counsel for the Registrar

that there have been subsequent attempts to meet with the Applicant and obtain books and records from him and that those attempts have not met with success, through no fault of the Registrar.

The Registrar has requested costs of the day. I find that the Applicant is aware that he was the subject of an immediate suspension and would be presumed to know that a hearing would be scheduled on an expedited basis. The Applicant has not attended today's hearing, despite notice, and has tendered no explanation for his absence. In the circumstances, I find that the Registrar has met the test for a cost order under 14.4(2)(a) of the Tribunal's Rules.

Therefore I order as follows:

- i) Service on the Applicant of the Notice of Proposal dated August 27, 2008 and the Notice of Immediate Suspension Order, dated September 5, 2008 has been made in accordance with s. 45(1)(c) of the Act, as set out in exhibit 4;
- ii) The hearing of the Applicant's appeal will commence on April 23, 2009 and continue to April 24, 2009 at the Licence Appeal Tribunal, 1 St. Clair Avenue west, 12th Floor, Toronto at 9:30 a.m.;
- iii) The time for expiration of the Suspension Order is extended until the conclusion of the hearing.
- iv) The Registrar shall have costs ordered, payable by the Applicant, in the amount of \$400.00.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

Released: January 6, 2009

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

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MORRISSA AMSEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002,
c. 30, Sch. C

TRIBUNAL: DAVID GREGORY FLUDE,
Vice-Chair

APPEARANCES: MORRISSA AMSEL,
the Applicant, unrepresented

NICOLE KOTEFF,
Counsel, appearing on behalf of the Registrar, *Real Estate and
Business Brokers Act, 2002*

DATE OF
HEARING: January 19, 2009 Toronto

ADJOURNMENT ORDER

The hearing into this matter commenced today, January 19, 2009, at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto. At the outset the Registrar tendered and the Tribunal accepted his book of documents which was marked as Exhibit 3. The Applicant then moved for an adjournment of the appeal to permit her to retain and instruct counsel. The adjournment request was opposed by counsel for the Registrar.

At the pre-hearing of this matter in November, 2008, the Applicant was represented by a paralegal, Harry Kopyto. Mr. Kopyto had applied for registration as a paralegal but as of the date of the pre-hearing had not yet been registered. Following the pre-hearing, Mr. Kopyto ceased acting for the Applicant and she retained the services of a friend to represent her. According to the Applicant, the friend had no formal legal training but had successfully defended himself against charges under the *Real Estate and Business Brokers Act, 2002* (the "Act"). Shortly before the hearing was to commence the friend withdrew his representation of the Applicant. She has applied for Legal Aid and currently holds a certificate dated January 12, 2009 confirming funding for a lawyer to prepare an opinion on the viability of an appeal from two 2007 decisions of the Discipline Committee appointed under the Act wherein she was fined a total of \$45,000.00. She feels she can get Legal Aid to fund a lawyer for the appeal to this Tribunal.

It was the Registrar's position that the Applicant knew that she did not have the ability to represent herself from the date of the receipt of the Notice of Proposal in September 2008. Further, Mr. Kopyto's representation was terminated in November 2008 and she has had sufficient time to retain and instruct counsel. It was unreasonable, in the Registrar's view, for the Applicant to proceed with a friend as her representative and, in pith and substance, the Applicant's request for an adjournment is unreasonable in all of the circumstances and is a delaying tactic. If the Tribunal was disposed to grant an adjournment, the Registrar sought a number of terms.

The Registrar requested that the adjournment be as short as possible. To this the Applicant countered that she would need at least six weeks to retain and instruct counsel. The Registrar sought an affirmation of December 19, 2008 as the latest date for the Applicant to submit documents she intends to rely on at the hearing. The December 19 date is set out in the pre-hearing order for disclosure of the Applicant's documents. The Tribunal notes that that date was thirty-one days prior to the scheduled start of today's hearing. The Registrar sought to make the adjournment preemptory on the Applicant. The Registrar sought costs. The Registrar sought to issue a Supplementary Notice of Proposal adding new allegations. Finally, the Registrar sought restrictions on the Applicant's right to practice real estate pending the outcome of the hearing. The matter then stood down for several hours to permit the Registrar's counsel to consult her client.

When the matter resumed in the afternoon, the Registrar had prepared and served a Supplementary Notice of Proposal adding the new allegations referred to in the morning. The Registrar had also prepared and served an Immediate Suspension Order, pursuant to section 15 of the Act. Discussions then proceeded with regard to the interaction between the provisions of sections 14 and 15 of the Act and the most efficacious process for bringing the Immediate Suspension Order before the Tribunal as required by s. 15. The relevant portions of sections 14 and 15 of the Act state:

14. (1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(b) suspend or revoke a registration;

Hearing

(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.

Continuation pending renewal

(8) If, within the time prescribed or, if no time is prescribed, before the expiry of the registrant's registration, the registrant has applied for renewal of a registration and paid the required fee, the registration shall be deemed to continue,

(c) if the registrant is served notice that the registrar proposes to refuse under subsection 13 (1) to grant the renewal, until the time for requesting a hearing has expired or, if a hearing is requested, until the Tribunal makes its order.

Immediate suspension

15. (1) If the registrar proposes to suspend or revoke a registration under section 14 and if the registrar considers it in the public interest to do so, the registrar may by order temporarily suspend the registration.

Immediate effect

(2) An order under subsection (1) takes effect immediately.

Expiry of order

(3) If a hearing is requested under section 14,

(a) the order expires 15 days after the written request for a hearing is received by the Tribunal; or

(b) the Tribunal may extend the time of expiration until the hearing is concluded, if a hearing is commenced within the 15-day period referred to in clause (a).

Same

(4) Despite subsection (3), if it is satisfied that the conduct of the registrant has delayed the commencement of the hearing, the Tribunal may extend the time of the expiration for the order,

(a) until the hearing commences; and

(b) once the hearing commences, until the hearing is concluded.

Except where the public interest is better served by immediate action, the overall policy of the Act is to permit registrants to continue to exercise the privileges of their registration pending the outcome of an appeal to this Tribunal. Where the Registrar is of the opinion it is in the public interest to do so, the Registrar may issue an Immediate Suspension Order and the Act sets out time limits for the continued validity of such an order. The Applicant has 15 days to appeal to this Tribunal and the hearing must commence within 15 days of receipt of that Notice of Appeal. At issue in the present appeal is the manner in which the Registrar deals with allegations of concern after the commencement of the hearing. Is the effect of the wording of the statute to restrict the Registrar's right to act on allegations of behaviour seriously prejudicial to the public interest simply because the behaviour did not come to Registrar's attention in a timely manner? To put the problem another way, do the time limits set out in s. 15 start running when the original proposal is appealed or does the fact of new allegations reset the clock for the purposes of an Immediate Suspension Order?

S. 64 of the *Legislation Act, 2006* S. O. 2006 c. 21 Sch. F states:

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

It has been previously held that the Act is public protection legislation. Its purpose is to ensure that the Ontario public can have confidence in members of the real estate profession when purchasing property. In dealing with the regulation of real estate professionals, the Act strikes a balance between the interests of the public and the protection of a registrant's livelihood pending an independent adjudication by this

Tribunal of the allegations made against that registrant. Section 15 of the Act deals with the balancing of competing interests by permitting the Registrar to move quickly to protect the public interest, but it also requires the Registrar to bring the allegations before this Tribunal expeditiously to ensure that a registrant's livelihood is not irreparably damaged in the event of a delay of a hearing in the normal course.

In applying the policy of the Act in a fair, large and liberal manner, it is clear that it was not the intention of the Legislature to limit the Registrar's powers to protect the public interest because an accident of timing results in the discovery of serious infractions after a Notice of Proposal has been issued and an appeal launched to this Tribunal. Rather, the time limits referred to in s. 15 of the Act commence on the date upon which the new allegations sufficient to prompt the Registrar to issue an Immediate Suspension Order are served on a registrant. Where, as in the present case, an appeal has already been commenced with respect to an earlier Notice of Proposal, it is unnecessary for a registrant to file a new Notice of Appeal. Supplementary allegations may still be addressed in the context of the ongoing appeal. It is necessary for the registrant to notify the Tribunal and the Registrar in writing, within 15 days, of an intention to appeal the order of immediate suspension. In compliance with the Act, the Tribunal must then schedule a hearing within 15 days of receipt of the notice in writing in accordance with the provisions of s. 15. Where, as on the present facts, the hearing has already commenced, the Tribunal shall hold a hearing on the Immediate Suspension Order within 15 days.

The Registrar has made new allegations against the Applicant. In light of this fact, the December 19, 2008 disclosure date cannot be sustained. The Applicant must be given time to review the allegations and decide what documents, if any, she intends to rely on. With respect to the adjournment request, the Tribunal orders:

1. The hearing of this matter shall be adjourned for six weeks and shall now commence at 9:30 a.m. on March 4, 2009 at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario and continue as necessary on March 5 and 6, 2009.
2. The new hearing date is peremptory on the Applicant. The Applicant shall ensure that any counsel she retains is available on the dates set out in paragraph 1 above and is retained with sufficient time to prepare for the hearing.
3. The Applicant shall have until Monday, February 2, 2009 to provide copies to the Registrar of any documents she intends to rely on at the hearing. Where she intends to rely on expert testimony she shall provide an opinion of the expert and a resume of the expert.
4. If she intends to appeal the Immediate Suspension Order, the Applicant shall have 15 days from January 19, 2009 to notify the Registrar and the Tribunal,

in writing, of her appeal. The Tribunal shall then set a hearing date within 15 days of receipt of the Applicant's written notice.

5. There shall be no costs of the adjournment motion.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

Released: January 23, 2009

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

JACK GRANT

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
REAL ESTATE AND BUSINESS BROKERS ACT, 2002,
S.O. 2002, c. 30 Sch. C

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: CLINT GRANT, Agent Representing the Applicant,

NICOLE A. KOTEFF, Counsel, representing the Registrar,
Real Estate and Business Brokers Act, 2002

DATES OF
HEARING: November 7, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") pursuant to section 14 of the *Real Estate and Business Brokers Act, 2002* (the "Act"). The Applicant appeals a Notice of Proposal dated June 24, 2008, issued by the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar") to refuse to renew the registration of Jack Grant (the "Applicant") under the Act.

Registrar's position

It is the position of the Registrar that the Applicant is not entitled to registration under the Act for the following reasons:

1. The Applicant's past conduct affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty, (section 10 (1)(a)(ii) of the Act).

2. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

Applicant's position

In his notice of appeal and in correspondence to the Registrar, the Applicant has raised numerous issues with respect to the position taken by the Registrar which can be summarized as follows:

1. The information regarding debts of the Applicant requested by the Registrar is irrelevant as it relates to personal matters.
2. The parties involved with respect to the writs of execution filed against the Applicant are not "interested parties" within the meaning of the Act.
3. The provision of such information will not help the Registrar fulfill his mandate under the Act.
4. The Registrar failed to specify what details or circumstances the Applicant was to provide to the Registrar regarding the writs of execution filed against the Applicant.
5. The Registrar failed to identify the authority which gave the Registrar permission to inquire into the personal affairs of the Applicant.
6. The Registrar failed to provide information regarding the complaint received by the Registrar with respect to which the Registrar claimed to be acting when requesting information from the Applicant.

THE EVIDENCE:

At the commencement of the hearing the Registrar's Book of Documents was admitted as Exhibit 3 and the Applicant's Book of Documents was entered as Exhibit 4 in these proceedings.

The opening statement made by the Applicant's representative suggested that the Applicant would be putting forth Charter arguments with respect to the actions of the Registrar. The requirements that must be fulfilled in order to pursue a constitutional challenge were reviewed with the Applicant who elected not to raise any Charter issues in these proceedings.

Testimony of Angela Volpe

The only witness called by the Registrar was Angela Volpe who is the manager of registrations for the Real Estate Council of Ontario (the "Council"). Over the two years that she has been with the Council, her responsibilities have included supervising staff, providing support to the Registrar and Deputy Registrar and reviewing difficult applications.

Ms. Volpe testified that the purpose of the Act was to regulate the real estate industry in the public interest. She testified that there were three categories of registrants under the Act, being sales persons, brokers and brokerages. Ms. Volpe testified that if an applicant had met the prescribed requirements, the Registrar would then review the application with respect to the financial position and past conduct of the applicant and where appropriate, verify that the information in the application was correct. Ms. Volpe testified that past conduct was not limited to the real estate industry, but was viewed on a global basis. The witness stated the registration under the Act carried with it the "stamp" of fiduciary responsibility.

Ms. Volpe referred to the undated letter from Advance Commission Company of Canada ("ACCC") received by the Council on March 20, 2007, which claims to be a formal complaint against the Applicant for money advanced to the Applicant in June 2006, which was not repaid. The letter enclosed copies of a "Commission Sales Agreement" and a transaction record which shows the amount of \$5,088.87 being deposited into a TD Canada Trust account.

The witness testified that upon receipt of a complaint, the next step is to conduct relevant searches, request information from an applicant, review past applications and review the Council's file. In the Applicant's case, an execution certificate dated March 30, 2007, was obtained by the Council which indicated that the Applicant had three writs of execution filed against him as of the date of the search (Exhibit 3, Tab 6). According to the certificate, there were the following filings:

Capital One Bank	issued November 11, 2005	\$15,837.75
E. M.	issued December 14, 2005	\$ 3,045.00
President's Choice		
Financial MasterCard	issued November 11, 2006	\$ 4,441.14

The witness noted that the writ of execution in favour of E. M. had originally been issued in 1993 and remained unpaid as it had been renewed in 2005.

Ms. Volpe referred to the Applicant's application dated November 22, 2005 (Exhibit 3, Tab 4) which was filed after two of the three writs of execution were filed against the Applicant. In his application, the Applicant answered "no" in response to Question 5 in

Section B, asking if there were any outstanding judgements against him. The witness stated that this question should have been answered “yes”.

The witness testified that after receiving the results of the writ search, the Council wrote to the Applicant by letter dated May 2, 2007, a copy of which is at Tab 7A of Exhibit 3, enclosing a copy of the complaint of ACCC and requesting that the Applicant provide “a written response regarding this complaint.”.

The letter of May 2, 2007, also asks for confirmation that the writs of execution referred to above were in fact against the Applicant and if so to “provide a written explanation as to why they were not disclosed to our office.”. This letter stated that the information was being requested in accordance with section 10(1.1) of the Act.

Ms. Volpe referred to the letter from the Applicant in response (Exhibit 3, Tab 7B) which states that the Applicant acknowledged the judgement of ACCC and would disclose it in future. The letter also stated that the Applicant did not recall receiving any documents indicating that there were judgements against him with respect to those writs of execution but that he would declare them on his application for renewal.

The witness testified that there then followed an exchange of correspondence between the Council and the Applicant. The Council continued to press the Applicant for information about the status of the writs of execution by asking if there were repayment schedules or if any of the judgements had been satisfied, and if so that the Applicant provide proof of payment. The Applicant responded to each inquiry, but provided little useful information.

Ms. Volpe referred to the Applicant’s letter dated September 6, 2007 (Exhibit 3, Tab 7K) in response to a further request for information from the Council wherein the Applicant challenged the constitutionality of the Council’s actions toward him, requested a written explanation as to why the Council wanted details of private debts and questioned the authority of the Council to conduct such investigation.

The witness referred to the continuing exchanges between the Applicant and the Council which culminated in the Applicant writing to the Registrar and Tom Wright, the President and CEO of the Council, and a letter from the Registrar to the Applicant dated April 7, 2008 (Exhibit 3, Tab 7U). Tab 7V of Exhibit 3 contains the Applicant’s response to the Registrar’s letter and repeats many of the allegations previously advanced.

Ms. Volpe testified that the correspondence from the Council to the Applicant repeatedly referred to the sections of the Act that were being relied upon by the Registrar when requesting information from the Applicant. A three page schedule which sets forth the date of each letter sent to the Applicant by the Council and the section number of the Act referred to in the specific letter with an extract of the Act was entered as Exhibit 5 in these proceedings. This schedule contains entries for eight letters which in turn contain 16 references to sections of the Act and more particularly sections 10(1), 10(1)(a),

10(1.1), 10(1)(g), 19, 19(1), 19(4) and section 3 of Ontario Regulation 567/05 made pursuant to the Act.

The witness testified that after the exchange of correspondence between the Registrar and the Applicant in April 2008, it was apparent that there was no point in continuing to request information from the Applicant and therefore the Notice of Proposal at Tab 1 of Exhibit 3 was sent to the Applicant.

The witness stated that the opinion of the Registrar as set forth in the Notice of Proposal had not changed. The refusal of the Applicant to provide the information requested frustrated the Registrar's ability to effectively evaluate the Applicant's level of financial responsibility. Without having anything other than the facts that there were long outstanding debts owing by the Applicant, it was Ms. Volpe's testimony that the Registrar had no alternative but to propose that the Applicant's registration not be renewed.

On cross-examination, the witness stated that the purpose of the Act is to provide consumer protection in the real estate industry and it is the mandate of the Registrar to administer the Act. Ms. Volpe stated that the Registrar, in forming an opinion regarding the entitlement of the Applicant to have his registration renewed, takes into consideration non-business matters as it is part of the overall view of how the Applicant conducts himself.

In an exchange between the Applicant's representative and the witness, Ms. Volpe pointed out that section 10 of the Act referred to "past conduct" not "past business conduct".

Testimony of John Grant

Mr. Grant testified that he had been in the real estate industry for 31 years during which time he had never misappropriated any money nor done anything which would indicate a lack of integrity.

The witness stated that he questioned the process followed by the Registrar of requesting information which did not relate to the Applicant's real estate business activities.

The witness testified that he repeatedly requested in his correspondence with the Council that they clarify the information the Council wanted the Applicant to provide so he could "streamline" his response. The Council failed to provide any such clarification.

Mr. Grant testified that the writ of execution in favour of E. M. was filed after the Applicant had filed his application in November 2005. The witness stated that in his opinion the Council could not force him to pay the judgements against him.

On cross examination, the witness acknowledged that he understood the words used in the various letters from the Council, but that he did not understand what the details were that the Council wished him to provide.

The witness acknowledged that the writ of execution in favour of E. M. may have been outstanding since 1993. Mr. Grant admitted that he had attended the trial that lead to the judgement against him in favour of Capital One, but could not recall attending Court with respect to the other matters.

The witness stated that he was never told the nature of the complaint made to the Registrar as required by section 19(2) of the Act.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant filed an application for renewal of his registration dated November 22, 2005 (the "2005 Application") in which he stated that there were no unpaid judgements outstanding against him.
2. The 2005 Application was approved November 28, 2005.
3. The Council received a letter from ACCC on March 21, 2007, claiming that the Applicant had failed to repay money which was owed.
4. As of March 30, 2007, there were three writs of execution filed against the Applicant, one of which had been outstanding since September 15, 1993.
5. The Council wrote to the Applicant on nine occasions requesting information with respect to the writs of execution filed against the Applicant and all but two of those letters contained references to the sections of the Act being relied upon for the requests for information.
6. The Applicant responded to each letter from the Council, but with a minor exception, refused to provide any information with respect to the writs of execution filed against him.
7. The Applicant filed an application for renewal dated November 29, 2007, wherein the Applicant acknowledged that there were unpaid judgements outstanding against him.
8. The 2007 Application has not been approved.

LAW:

The authority granted to the Registrar is provided in subsections 10 (1) and 13 (1) of the Act which states:

Registration

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;

Refusal to register, etc.

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.

Notice re: refusal, suspension, etc.

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; or
 - (c) apply conditions to a registration or renewal to which the applicant or registrant has not consented.

Hearing

14. (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.

Complaints

19. (1) If the registrar receives a complaint about a registrant, the registrar may request information in relation to the complaint from any registrant.

Request for information

- (2) A request for information under subsection (1) shall indicate the nature of the complaint.

Duty to comply with request

- (3) A registrant who receives a written request for information shall provide the information as soon as practicable.

Procedures

- (4) In handling complaints, the registrar may do any of the following, as appropriate:
1. Attempt to mediate or resolve the complaint.
 2. Give the registrant a written warning that if the registrant continues with the activity that led to the complaint, action may be taken against the registrant.
 3. Require the broker or salesperson to take further educational courses.
 4. Refer the matter, in whole or in part, to the discipline committee.
 5. Take an action under section 13, subject to section 14.
 6. Take further action as is appropriate in accordance with the Act.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case is *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No. 1017 a decision of the Divisional Court which overruled a decision of this Tribunal. In that case 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* ("MVDA"). In referring to the powers of the Tribunal under Section 7.4 of the MVDA, Southey J. stated that:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, he added in the third last paragraph of the decision:

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

In its decision in the case of *Ontario (Motor Vehicle Dealers Act, Registrar) v Shine Care Sales et al* [2003] Can LII 11437, Mr. Justice Lane on behalf of the Divisional Court, after referring to the above paragraph from the *Brenner* decision, said:

“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 is entitled to deference,”

APPLICATION OF LAW TO FACTS:

In the Notice of Proposal dated June 24, 2008, the Registrar stated that one of the reasons for the Registrar to be of the opinion that the Applicant’s past conduct affords reasonable grounds for the belief he will not carry on business in accordance with the law and with integrity and honesty is that the Applicant failed to notify the Council within five days of a change to information included in the 2005 Application. It is unclear what information was not included; however a review of the 2005 Application suggests it was the change of an address of the Applicant. Curiously, the new address provided by the Applicant in the 2005 Application is the same address as that of the property referred to in the agreement of purchase and sale that was provided as additional information from ACCC. For whatever reason, all of the correspondence to the Applicant from the Council after the initial letter in May 2007, is addressed to the Applicant at a different address on the same street. In any event, this matter was not pursued at the hearing and no finding is made by the Tribunal on this issue.

The Registrar also takes the position that the refusal of the Applicant to provide information to the Council with respect to the complaint from ACCC provides reasonable grounds for the Registrar’s opinion regarding the renewal of the Applicant’s registration.

The Tribunal does not accept that the “complaint” of ACCC is the type of complaint to which section 19 of the Act applies. A section 19 complaint must be industry specific. The letter sent by ACCC can only be characterized as notification to the Council that the Applicant borrowed money and has not repaid the money to ACCC. The fact that the

debt arose as a result of the Applicant's entitlement to receive a commission from a real estate transaction is not a sufficient connection for the matter to be considered a complaint under Section 19 of the Act.

The letter from ACCC does, however, together with the existence of writs of execution, raise questions as to the financial responsibility of the Applicant which leads to the dispute which is the subject matter of this hearing.

The fundamental issue in these proceedings is the Registrar's belief that he is entitled to information about the debts of the Applicant, however incurred, in order to properly evaluate the Applicant's worthiness to have his registration renewed as part of the Registrar's mandate under the Act and the Applicant's belief that personal matters are not subject to the scrutiny of the Registrar when considering the application of the Applicant for renewal of his registration.

No cases were cited by either side with respect to this or any other issue before this Tribunal, perhaps because the Applicant's position with respect to the provision of information is a novel response to a request from the Registrar.

The Tribunal does not accept the position taken by the Applicant. The Registrar must be allowed to pursue inquiries that are beyond activities directly related to the real estate industry. As convictions, no matter their nature, are an important part of the information to be gathered so that the Registrar can form an opinion as to the manner that an applicant will carry on business, so to is the existence of outstanding debts relevant to an inquiry as to financial responsibility.

Clearly, if the Applicant refuses to acknowledge that he is indebted to another person or, having acknowledged the debt, refuses to pay the amount, it demonstrates a questionable attitude about the financial responsibility of the Applicant. There may be explanations as to why outstanding debts are not being paid which would reduce or alleviate the Registrar's concerns about the willingness of the Applicant to be responsible with respect to financial matters. However, if the Applicant refuses to provide such explanations, the Registrar must draw his own conclusions when forming his opinion of the Applicant's sense of responsibility.

The Tribunal does not accept the Applicant's contention that the Registrar failed to specify the information that the Registrar wanted the Applicant to provide to his office.

It is clear from the numerous letters sent by the Council to the Applicant that the Council was seeking information as to why the writs of execution remained unpaid. The requests for copies of any repayment schedules were not, as perceived by the Applicant, an exercise in forcing the Applicant to pay the judgements, but an attempt to identify information which would be of assistance in understanding the Applicant's financial position.

It is also clear from the letters sent to the Applicant by the Council, that every effort was made to advise the Applicant of those sections of the Act that were being relied upon when requesting information from the Applicant.

A review of the correspondence which passed between the Council and the Applicant leads to the inescapable conclusion that, although the Applicant may have developed a

philosophical position opposing the intervention of the Registrar in his affairs, the Applicant simply did not want to divulge the information being requested.

The Applicant must understand that he chose to work within a regulated industry and therefore there are requirements that are different and more stringent than what would be experienced by persons working in other areas. Real estate agents and brokers are entrusted with significant sums of money and it is the Registrar's responsibility to ensure that persons working in the real estate industry appreciate the responsibilities they have and will act accordingly.

If the Applicant finds the demands placed upon him by the Registrar under the Act in order to carry on business within this regulated industry too onerous, he is at liberty to work elsewhere.

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 the Notice of Proposal dated June 24, 2008, to refuse to renew the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

Released: December 30, 2008

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

FRANK WILLIAM MAGYAR

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
REAL ESTATE AND BUSINESS BROKERS ACT, 2002,
S.O. 2002, c. 30 Sch. C

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: FRANK WILLIAM MAGYAR, the Applicant,

GEORGE DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act, 2002

DATES OF
HEARING: October 29, 2008

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal before the Licence Appeal Tribunal (the "Tribunal") pursuant to section 14 of the *Real Estate and Business Brokers Act, 2002* (the "Act"). The Applicant appeals a Notice of Proposal dated November 21, 2007, issued by the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar") to refuse the registration of Frank William Magyar (the "Applicant") under the Act.

Registrar's position

It is the position of the Registrar that the Applicant is not entitled to registration under the Act for the following reasons:

1. The Applicant's past conduct affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty, (section 10 (1)(a)(ii) of the Act).
2. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible.

3. The Applicant failed to disclose criminal convictions handed down in September 2005 on his subsequent application for renewal.

Applicant's position

It is the Applicant's position that:

1. The past conduct referred to by the Registrar in his proposal relate to old matters which were known to the Registrar and the recent conviction was not reported as the Applicant believed that because it happened in the United States of America he did not have to report the conviction.
2. The issues that gave rise to concerns about his financial position were either resolved or unknown to him at the time of filing his application.
3. The Applicant was advised that he was not required to report the convictions in September 2008 as they took place outside of Canada.

THE EVIDENCE:

At the commencement of the hearing the Registrar's book of documents was admitted as Exhibit 3.

Testimony of Angela Volpe

The only witness called by the Registrar was Angela Volpe who is the manager of registrations for the Real Estate Council of Ontario (the "Council"). Over the two years that she has been with the Council her responsibilities have included supervising staff, providing support to the Registrar and Deputy Registrar and reviewing difficult applications.

Ms. Volpe testified that the purpose of the Act was to regulate the real estate industry in the public interest. She testified that there were three categories of registrants under the Act being sales persons, brokers and brokerages. Ms. Volpe testified that if an applicant had met the prescribed requirements, the Registrar would then review the application with respect to the financial position and past conduct of the applicant and where appropriate, verify that the information in the application was correct. As part of this process previous applications would be reviewed as well as the current application. Ms. Volpe testified that past conduct was not limited to the real estate industry, but was viewed on a global basis as criminal convictions speak to the integrity of an applicant. The fact that there may be no complaints against an applicant is not decisive as to whether or not an applicant would be registered.

Ms. Volpe confirmed that the reasons for the proposal to revoke the registration of the Applicant was due to his past conduct, his financial position and his non-disclosure of the conviction in the United States of America.

Ms. Volpe referred to the Director's Certificate appearing at Tab 2 of Exhibit 3, which indicates that the Applicant has been registered since June 6, 1997 to the present. Ms. Volpe testified that at the time of the Applicant's initial application for registration as a salesperson in April of 1997 (the "1997 Application"), the Applicant marked the "yes" box in answer to the question "had he been charged or convicted of an offence".

As a result of that answer a criminal records search was conducted which disclosed that there were three convictions against the Applicant in 1985, 1989 and 1991.

The witness stated that, as a result of the disclosures made in the 1997 Application and the subsequent investigations conducted by the Registrar, the Registrar approved the Applicant's registration upon terms and conditions, which were agreed to by the Applicant. A copy of those terms and conditions is at Tab 8 of Exhibit 3. Two of the terms included the Applicant's agreement that he would immediately notify the Registrar if he was charged under any law including the *Highway Traffic Act*, and that he immediately surrender his registration to the Registrar if he was found guilty of a "pending charge". The Applicant also agreed that he would provide the Registrar with a copy of the Judge's reasons for sentencing in such case.

The witness referred to the application of the Applicant dated December 10, 1999 appearing at Tab 10 of Exhibit 3 (the "1999 Application").

Tab 11 of Exhibit 3 includes a copy of correspondence sent by the Council to the Applicant dated January 7, 2000, requesting an explanation of a judgement against the Applicant in favour of one M.W.U. Tab 12 of Exhibit 3 contains a copy of a facsimile cover sheet from the Applicant dated May 2, 2000, transmitting a document, which the Applicant states was the full disclosure of the matter involving the Family Support Plan. The cover sheet contains reference to the Applicant's correspondence of January 31, 2000, however a copy of that document was not included in Exhibit 3.

The attachment at Tab 12A of Exhibit 3 is a copy of a judgement from the Ontario Superior Court of Justice dated April 5, 2000, which orders that the support arrears owed by the Applicant to the Minister of Community and Social Services are rescinded.

Ms. Volpe stated that upon receipt of the Applicant's further application for renewal dated March 22, 2002 appearing at Tab 13 of Exhibit 3 (the "2002 Application"), the Registrar conducted a search of the Sheriff's office, Tab 14 of Exhibit 3, which revealed that there were three writs of execution filed against the Applicant as follows:

- Execution - Director, Family Responsibilities Office for the benefit of one M.R.
- Execution - Kamin, Fisher, Burnet, Ziriada and Robertson
- Execution - M.W.U.

Tab 15 of Exhibit 3 contains a copy of correspondence sent by the Council to the Applicant dated March 8, 2002, stating that his licence was renewed on February 1, 2000 with an acknowledgement signed by the Applicant that he would provide the

Council with a report on the status of the repayment of his outstanding judgement in favour of M.W.U. The March 8, 2002, letter continues by listing the additional two executions and requesting the Applicant to advise why the second execution was not disclosed on his 2002 Application and requesting a current repayment schedule.

The Applicant's response is at Tab 16 of Exhibit 3, which contains a facsimile cover sheet dated March 21, 2002 and a letter dated March 18, 2002 to the Council from the Applicant wherein the Applicant refers to his telephone conversation with Margaret Marshall, a registration officer with the Council and proceeds to explain that the execution in favour of M.W.U. is expected to be paid in full in two weeks. Further, that according to the Applicant's records there are no outstanding amounts owed to the Family Responsibilities Office. The Applicant states in his letter that the judgement in favour of Kamin, Fisher, Burnet, Ziriada and Robertson was paid in full.

The witness testified that the Applicant applied for a further renewal by application dated January 28, 2004 (the "2004 Application").

Ms. Volpe testified that some time in 2005, the Registrar became aware of the possibility that the Applicant had been convicted of an offence in the United States of America. A search was conducted by the Registrar that revealed that the Applicant had been convicted on or about September 30, 2005, of two counts of bringing aliens into the United States of America and copies of the indictments appear at Tab 23 of Exhibit 3. The judgement of The United States District Court appears at Tab 24 of Exhibit 3 and the sentence imposed on the Applicant was for time served being 13 months and 25 days.

The witness testified that at approximately the same time, the Registrar conducted an insolvency search, a further police records inquiry and a search of the Sheriff's office. The insolvency search and the police records search did not disclose anything not known to the Registrar, however the certificate from the Sheriff, dated October 7, 2005, indicated that there were two additional writs of execution filed by third parties against the Applicant.

Ms. Volpe testified that there is concern that the additional writs of execution and the American convictions had not been disclosed by the Applicant on his application for renewal dated January 24, 2006. Further, the witness stated that the outstanding judgements raised concerns with regards to the Applicant's financial responsibility.

The witness testified that the past criminal activity of the Applicant together with the unpaid writs of execution constituted past conduct, which was of significant concern to the Registrar. Further, the failure to disclose certain information suggested a lack of truthfulness on the part of the Applicant, which raised concerns as to whether or not the Applicant could be regulated under the Act.

The witness testified that it was expected that an Applicant would answer the questions on an application honestly in order to obtain accurate information about the Applicant. Such information is necessary to get an overall impression of the Applicant to determine how he will conduct himself when unsupervised.

Ms. Volpe testified that although the criminal convictions against the Applicant do not relate to the real estate industry, they are of concern because the issue of honesty is not just in relationship to the real estate industry. The Registrar must take into consideration the number of previous convictions and the pattern of those convictions. Ms. Volpe noted that it was a condition of the Applicant's initial registration that he would advise the Registrar if he was convicted of a criminal offence and that those conditions continued in effect with each renewal.

Ms. Volpe referred to the Applicant's letter of January 21, 2007 at Tab 36 of Exhibit 3, which acknowledges that as of the date of the letter there were still outstanding judgements against the Applicant. The witness also noted that one of the counts in the indictment specifically referred to the accused having brought or attempted to bring aliens into the United States of America for "commercial advantage and private financial gain" and that the Applicant pleaded guilty to that charge.

Testimony of Frank William Magyar

Mr. Magyar testified that during the period that he was in detention in the United States his attorney negotiated a plea bargain with the United States authorities for time served and it was for that reason that he pleaded guilty to the charges in the indictment.

The witness testified that the judgements giving rise to the two writs of execution disclosed in the Sheriff's certificate of October 7, 2005, occurred while the Applicant was in detention in the United States of America.

The witness testified that the one of these writs of execution arose as a result of a dispute between the buyer and the seller of an automobile and that he had only been involved in so far as he introduced one to the other, but believed the judgement had been settled and that the information had been provided to the Registrar.

Under cross examination, Mr. Magyar acknowledged that, according to the Sheriff's certificate dated October 7, 2005, there were five writs of execution filed against him and that one of the writs of execution had remained outstanding since 1997.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant initially applied for registration in April 1997.
2. In the 1997 Application, the Applicant indicated that he had been involved in a personal bankruptcy and that he had been convicted of an offence.
3. At the time of making the 1997 Application, the Applicant had been convicted of three offences.

4. The Applicant signed the terms and conditions required by the Registrar in order to obtain his licence pursuant to the 1997 Application.
5. By application dated December 10, 1999, the Applicant applied to renew his licence.
6. In addition to the positive answers given in the 1997 Application, the Applicant acknowledged that he had unpaid judgements and that he had a registration or licence suspended.
7. The Applicant applied for renewal of his licence by application dated January 30, 2002.
8. In the 2002 Application, the Applicant answered “no” to the question “are there any unpaid judgments outstanding against you?”.
9. As at March 8, 2002, the Applicant had three writs of execution registered against him.
10. The 2002 Application was approved on March 22, 2002.
11. By application dated January 26, 2004, the Applicant applied to renew his registration.
12. The Applicant responded in the negative to question #5 in the 2004 Application, which asks if there are any unpaid judgements outstanding against the Applicant.
13. The 2004 Application was approved on March 5, 2004.
14. By judgement dated September 30, 2005, the Applicant was convicted in the United States District Court, Eastern District of Michigan, Southern Division, of two counts of bringing aliens into the United States of America.
15. As at October 10, 2005, the Applicant had five writs of execution filed against him.
16. The Applicant applied for renewal of his licence by application dated January 24, 2006.
17. In the 2006 Application, the Applicant answered no to the question “are there any unpaid judgments outstanding against you?”.
18. The 2006 Application was approved on February 14, 2006.
19. As at September 1, 2006, the Applicant had four writs of execution filed against him, one earlier execution having been removed.

LAW:

The authority granted to the Registrar is provided in subsections 10 (1) and 13 (1) of the Act, which state:

Registration

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;

Refusal to register, etc.

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.

Notice re: refusal, suspension, etc.

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; or
 - (c) apply conditions to a registration or renewal to which the applicant or registrant has not consented.

Hearing

14. (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.

.....

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page

59, is a decision issued on April 7, 1983 of the Divisional Court, which overruled a decision of this Tribunal. In that case 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* (“MVDA”). In referring to the powers of the Tribunal under Section 7.4 of the MVDA, Southey J. stated that:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, he added in the third last paragraph of the decision:

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

In its decision in the case of *Ontario (Motor Vehicle Dealers Act, Registrar) v Shine Car Sales et al*, Mr. Justice Lane on behalf of the Divisional Court after referring to the above paragraph from the *Brenner* decision said:

“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 is entitled to deference,”

APPLICATION OF LAW TO FACTS:

A troubling aspect of this case is the interaction between the Applicant and the Registrar over the course of time from the initial application in 1997 through the four subsequent applications for renewal to the present.

When the Applicant made his initial application in 1997, the Council made inquiries, which resulted in the Applicant agreeing to terms and conditions in order to receive approval of his registration.

At the time the Applicant applied to renew his registration in December 1999 (the “1999 Application”), the Council wrote to the Applicant to request an explanation of a writ of execution filed against him. The Applicant responded in May 2000 and apparently no further steps were taken with respect to the 1999 Application, which was approved.

The Applicant applied to renew his registration by application dated January 30, 2002 (the "2002 Application"). Upon receipt of the 2002 Application, the Council conducted a Sheriff's search, which revealed that there were three writs of execution filed against the Applicant as at March 8, 2002. By letter dated March 8, 2002, the Council wrote to the Applicant requesting an explanation with respect to the second writ of execution filed against the Applicant. The Applicant subsequently responded and apparently no further steps were taken with respect to the 2002 Application, which was approved.

The Applicant's 2004 Application was received and approved without further inquiry.

When the Council received the Applicant's application for renewal in January 2006 (the "2006 Application"), the Council apparently did not write to the Applicant or take any action even though the Council had, in October 2005, received information regarding the possibility that the Applicant had been convicted of criminal activity in the United States and had conducted Sheriff's searches in October 2005, which revealed that there were five writs of execution filed against the Applicant. The 2006 Application was approved.

It was not until the Council conducted further investigations in August and September 2006 that a letter, dated September 22, 2006, was sent to the Applicant requesting an explanation of the United States convictions and an update on the outstanding writs of execution previously disclosed and an explanation as to why additional writs of execution filed against the Applicant were not disclosed.

The September 22, 2006, letter resulted in various pieces of information being sent to the Council by the Applicant in October and November 2006 and culminate in a request from the Council for a meeting with the Applicant in January 2007.

The January 2007 meeting resulted in letter from the Council to the Applicant dated January 12, 2007, following the meeting with the Applicant, requesting an update as to the status of three of the writs of execution filed against the Applicant.

The Applicant responded with a lengthy letter dated January 21, 2007, which provided an explanation with respect to each of the writs, with copies of correspondence to one of the creditors. The Applicant also provided information with respect to the American convictions stating that he was advised by a lawyer and his broker that he did not need to report the United States convictions to the Council, as they were not Canadian.

Apparently these explanations were not satisfactory to the Registrar as the Applicant was notified by letter dated March 19, 2007 that a proposal revoking his registration would be forthcoming. The proposal under appeal was issued on November 21, 2007.

Throughout the ten years that the Applicant dealt with the Registrar, it was reasonable for him to believe that he was completing the applications satisfactorily or, when the Council took issue with an answer in an application, that the Applicant had provided acceptable explanations, since his applications were repeatedly approved.

It is clear that the Applicant has been involved with the justice systems in both the Canada and the United States. Of the five writs of execution filed against the Applicant over the years, three were with respect to disputed accounts from lawyers for which the Applicant provided reasons for the disputes.

One of the writs of execution was with respect to the Applicant's tangential involvement with an automobile transaction that went wrong.

The remaining writ of execution was with respect to a claim by the Family Responsibility Office for which the Applicant provided a Court order, which rescinded the support arrears, which were the subject matter of the writ.

None of the explanations provided by the Applicant to the Registrar were challenged during the hearing.

Although there may have been reasonable grounds to revoke the Applicant's registration because of his past conduct, the repeated renewal of the Applicant's registration when the conduct of the Applicant was known to the Registrar deprives the Registrar, on the grounds of fairness, from now going back and taking the position that, notwithstanding the previous approvals, his registration is being revoked.

With respect to the writs of execution filed against the Applicant as they relate to the Applicant's financial position and the Applicant's ability to conduct business in a financial responsible manner, the Applicant, when asked, provided explanations, which apparently satisfied the Registrar at the time. The explanations provided by the Applicant were not challenged or otherwise shown to be inaccurate.

As to the matter of non-disclosure, the Applicant provided an explanation as to why he did not disclose the convictions in the United States. Although this explanation is questionable given the scope of the question on the applications, the Registrar approved the Applicant's 2006 application even though the Registrar knew of the convictions.

No evidence was provided that showed the Applicant knew of the additional writs of execution filed against him at the time he submitted his applications for renewal. When inquiries were made with respect to those writs of execution, the Applicant provided explanations which must have been accepted by the Registrar, as each of the 2002, 2004 and 2006 Applications were approved notwithstanding that inquiries had been made and responses provided.

The existence of writs of execution being filed against the Applicant does give rise to concerns, especially when certain of those writs have been outstanding for a considerable period of time. In addition, the Applicant had, at various times, in his response to the Registrar's inquiries, stated that there were arrangements being made repay those judgements.

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 not to carry out the notice of proposal dated March 11, 2004, to refuse the registration of the Applicant on the condition that within three (3) months of the date of release of this order, the Applicant provides to the Registrar, a then current sheriff's certificate which shows that those executions for which the Applicant stated arrangements had been made for payment were discharged where there remain executions filed against the Applicant, and the Applicant will provide a signed agreement with each of those creditors for payment which agreement shall include a timetable for payment and an agreement that upon payment the writ of execution will be lifted.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: December 10, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



REALTY SELLERS (ONTARIO) LIMITED AND
STEPHEN MICHAEL MORANIS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, 2002,
R.S.O. 1990, c. R.4

TO REVOKE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: ANNA K. MARKIEWICZ and LAWRENCE DALE, Counsels,
representing the Applicant Stephen Michael Moranis

No one appearing on behalf of Realtysellers (Ontario) Ltd.

CHRISTOPHER BREDT and DENISE BAMBROUGH, Counsel,
representing the Registrar, *Real Estate and Business Brokers Act*

TIM SNELL, Counsel, representing the Real Estate Council of
Ontario

DATE OF
HEARING: December 5, 2008

Toronto

ORDER

The hearing in this matter was scheduled to continue for a period of five days, commencing on Monday, December 1, 2008, at the Chambers of the Tribunal in Toronto, Ontario.

Counsel for the Applicant, Stephen Michael Moranis, brought a Motion before the Tribunal on December 1, 2008, requesting that this Tribunal order that the Registrar and this Tribunal have lost jurisdiction in this appeal because the Applicant, Stephen Michael Moranis, terminated his employment at a real estate brokerage. The Tribunal heard arguments on the Motion throughout the day on December 1, 2008 and reserved its decision on the Motion. Reasons for decision to the Parties were given orally together with written reasons, on Friday, December 5, 2008.

The decision of the Tribunal was to dismiss the Motion;

The Tribunal, having dismissed the Motion brought on behalf of the Applicant Stephen Michael Moranis, orders:

1. The hearing of this matter is adjourned to **Monday, May 11, 2009**, commencing at 9:30 a.m., at the Tribunal's hearing room, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and thereafter to continue, as may be necessary, on May **12, 13, 14 and 15** and, if necessary to complete the hearing, to continue on **May 19, 20, 21 and 22**, peremptory on both Applicants, Stephen Michael Moranis and Realtysellers (Ontario) Limited.
2. The Applicants, Stephen Michael Moranis and Realtysellers (Ontario) Limited, shall ensure that any Counsel that they retain to represent them at this hearing, either jointly or separately, is prepared to proceed with the continuation of the hearing of this matter on May 11, 2009. The Tribunal will allow no further adjournments to allow the Applicants, or either one of them, to retain counsel or to allow counsel time to prepare for this hearing.
3. The Applicants, Stephen Michael Moranis and Realtysellers (Ontario) Limited are not to trade in real estate or take part in any activity relating to the purchase and sale of real estate until this hearing is completed and the Tribunal's final decision released.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski, Vice Chair

Released: December 12, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



REALTY SELLERS (ONTARIO) LIMITED AND
STEPHEN MICHAEL MORANIS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: KENNETH W. KOPROWSKI, Vice-Chair

APPEARANCES: ROBERT J. BRUSH, Counsel, representing the Applicant

CHRISTOPHER BREDT and DENISE BAMBROUGH, representing
the Registrar, *Real Estate and Business Brokers Act*

TIM SNELL and NICOLE KOTEFF, Counsel, representing the Real
Estate Council of Ontario.

DATE OF
HEARING: December 1, 2008

Toronto

DECISION AND REASONS FOR DECISION

BACKGROUND

In this matter, the Registrar, *Real Estate and Business Brokers Act, 2002*, S.O. c. 30, schedule C ("Registrar" and the "Act", respectively) issued a Notice of Proposal ("Proposal") against Stephen Michael Moranis ("Moranis") and Realtysellers (Ontario) Limited ("Realtysellers").

The Proposal relating to Moranis was to revoke his registration as a broker under the Act. The reason stated in the Proposal is that the past conduct of Moranis affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Proposal relating to Realtysellers was to revoke its registration as a brokerage under the Act. The reasons that are stated in the Proposal are, first, that, having regard to its financial position, Realtysellers cannot reasonably be expected to be financially

responsible in the conduct of its business. Second, the past conduct of Moranis, the sole officer and director of Realtysellers, affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty.

A copy of the Proposal is found at Tab 2A of the Motion Record.

The Proposal was issued on March 13, 2007. The Notice of Appeal of both Moranis and Realtysellers was dated April 20, 2007.

The hearing of this appeal commenced only on February 4, 2008. The hearing was adjourned on the fourth day of proceedings, after this Tribunal had heard the evidence of thirteen witnesses called by the Registrar. The matter was adjourned to June 2008.

After a further adjournment was granted in June, the hearing was scheduled to continue on December 1, 2008. Five days were scheduled for the continuation of the hearing.

On December 1, the Applicant, Moranis, brought a Motion challenging the jurisdiction of the Registrar and of this Tribunal to proceed with the hearing to revoke his registration. The Motion was brought on behalf of only Moranis and not on behalf of Realtysellers. No counsel or agent appeared on behalf of Realtysellers on this Motion. Moranis did not attend, either. Mr. Brush and Mr. Dale both appeared on his behalf.

The first two Orders sought by Moranis on this Motion are as follows:

1. An Order declaring that the Registrar of *Real Estate and Business Brokers Act* (the "Registrar") and the Tribunal do not have jurisdiction to proceed with a hearing to revoke Mr. Moranis' registration because he already lost his registration when he ceased employment with a brokerage on November 6, 2008.
2. An Order dismissing this proceeding because of the Registrar's and the Tribunal's lack of jurisdiction.

Moranis also sought an Order from this Tribunal directing the Real Estate Council of Ontario ("RECO") to remove the representation on its website that Mr. Moranis is a broker with Sadie Moranis Realty Corporation. However, at the conclusion of arguments on the Motion, counsel for Moranis agreed that this Tribunal has no jurisdiction to grant that relief.

In addition, Moranis also sought an Order adjourning this proceeding pending the final resolution of his challenge to the Registrar's and Tribunal's jurisdiction upon appeal. Presumably, this prayer for relief would be advanced if the Tribunal were to deny this Motion. No submissions were made to this Tribunal on that matter during argument on this Motion.

The grounds for this Motion are stated in the Notice of Motion found at Tab 1 of the Motion Record. They are as follows:

1. The Registrar obtains his jurisdiction to revoke a registrant's registration from section 13 of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, schedule C, as amended (the "Act");
2. That section only empowers the Registrar to revoke the registration of a "registrant";
3. Mr. Moranis is no longer employed by a brokerage, no longer meets the definition of a "registrant" under the Act and no longer has a registration that can be revoked.
4. Rule 11.2 of the LAT's Rules of Practice;
5. Parts I and IV of the Act;
6. Section 10 of Regulation 567/05 made under the Act; and
7. Such further and other grounds as counsel may advise and this Honorable Tribunal may permit.

Rule 11.2 of the Rules of this Tribunal, effective January 1, 2008, sets out the procedure that a party before this Tribunal is to follow in bringing a Motion before it. Part I of the Act is the Interpretation section. Part IV of the Act is that part of the Act that outlines the provisions for registration under the Act and for the Registrar's proposals to grant or refuse an application for registration. It also sets out the process to be followed if the Registrar proposes to suspend or revoke an existing registration of a registrant under the Act.

ISSUE

The issue to be decided is whether the Registrar and the Licence Appeal Tribunal have jurisdiction to hold a hearing to revoke a registration that the Applicant claims no longer exists by reason of the voluntary termination of employment by the Applicant, Stephen Moranis, from Prudential Sadie Moranis Realty?

HISTORY

Considering the length of time that this appeal has taken since the Applicants in this appeal, Moranis and Realtysellers, signed the Notice of Appeal on April 20, 2007, it would be useful to outline the history of this appeal since that date.

The first hearing was scheduled to commence on September 17, 2007. However, a pre-hearing before this Tribunal was held on July 30, 2007. At the request of counsel for Moranis who was representing him at that time, it was adjourned to August 28, 2007. On August 28, Moranis and his counsel both attended. An Order was made, requiring, among other things that counsel for the Registrar provide further disclosure to counsel

for Moranis by September 17, 2007. The Order also required counsel for Moranis to provide a written response to the Registrar's Proposal no later than December 5, 2007. The hearing scheduled to commence on September 17, 2007, was adjourned to February 4, 2008. Five days were scheduled for the hearing.

Subsequently, at the request of counsel who had been acting for Moranis at the time of the previous pre-hearing, the pre-hearing scheduled for December 5, 2007, was adjourned to December 17, 2007. The adjournment was to allow Moranis to retain and instruct new counsel. Counsel for the Registrar opposed the request to adjourn the pre-hearing on December 5th. Although the adjournment was granted, the hearing date was still confirmed to be February 4, 2008.

At the pre-hearing on December 17, 2007, Moranis was represented by new counsel, who requested an adjournment of the pre-hearing. The new counsel also informed this Tribunal that he was prepared to proceed with the hearing scheduled for February 4, 2008, and that he consented to the hearing date being made peremptory on Moranis. This Tribunal made an Order that the hearing was to proceed, peremptory on the Applicants. A further pre-hearing was scheduled for January 7, 2008.

On January 31, 2008, Realtysellers brought an Application (the "Application") under the *Company Creditors' Arrangement Act* R.S.C. 1985 c. C-36 ("CCAA"). In the Application, Realtysellers requested an Order staying the hearing before the Licence Appeal Tribunal.

The Application was heard by Justice Wilton-Siegel on January 31, 2008. In Reasons dated February 1, 2008, Justice Wilton-Siegel dismissed the Application of Realtysellers. In dismissing the Application, Justice Wilton-Siegel characterized the Application before him as an attempt to prevent this Tribunal from proceeding with the Applicants' appeal that the Applicants had requested in their Notice of Appeal. At paragraph 8 of the decision, found at [2008] O.J. No. 340, Justice Wilton-Siegel states:

- 8 First, I think it is clear that the sole purpose of the Applicant in seeking protection under the CCAA is to obtain a stay of proceedings that is directed at preventing the Tribunal licensing hearing from proceeding.

Further, at paragraph 16, Justice Wilton-Siegel states:

- 16 Lastly, the application is ultimately of little effect unless the Court also orders a stay of the Tribunal proceedings in respect of Moranis. Indeed, because Moranis is the controlling mind and will of the Applicant, the substantive effect, if not the purpose, of the application is to obtain a stay in respect of the scheduled Tribunal hearing regarding Moranis' registration which, as mentioned, is based on a single, broader allegation of honesty, integrity and compliance with law in the conduct of business in the past that does not refer specifically to the financial responsibility issue asserted in respect of the Applicant.

Finally, at paragraph 8, he states:

- 18 As the Applicant has indicated that it does not seek an order under the CCAA in the event the Court is not prepared to grant a stay there under that extends to the Tribunal hearing, the application of Realtysellers is hereby dismissed. The applicant is, however, at liberty to bring on a similar application in the future if a change in its circumstances so warrants.

On the first day of the hearing before this Tribunal scheduled for February 4, 2008, Moranis himself did not appear but was represented by two counsel. As a preliminary matter, counsel for Moranis requested an adjournment because of the medical condition of Moranis. Counsel for the Registrar opposed the request for adjournment. The medical report tendered by counsel for Moranis did not comply with the requirements of the Rules of this Tribunal, effective January 1, 2008. Therefore, that adjournment request was denied.

However, before the Registrar could present any witness to give evidence, counsel for Moranis again sought an adjournment on five separate grounds, all of which counsel for the Registrar opposed. On February 5, this Tribunal gave its decision refusing the further adjournment request.

The hearing finally started on February 5. After the third day of the hearing, thirteen witnesses had testified on behalf of the Registrar, twelve of whom were consumers who the Registrar alleged were adversely affected by the conduct of the Applicants.

At the start of the fourth day of the hearing, counsel for Moranis again requested an adjournment because of the medical condition of Moranis. This time, the medical report, written by a different doctor than the one who had written the report that had been submitted three days earlier, complied with the requirements of the Rules of this Tribunal. Over the objections of counsel for the Registrar, an adjournment was granted. The hearing was re-scheduled to commence on June 9, 2008. Five days were set aside for the continuation of the hearing.

As part of the adjournment Order, this Tribunal made an interim Order, on the consent of counsel for all parties, that the Applicants, Moranis and Realtysellers, were not to trade in real estate or take part in any activity relating to the purchase and sale of real estate until the completion of this hearing.

Moranis then arranged for a different representative, Lawrence Dale, to represent him. On June 2, 2008, Mr. Dale had written to the Real Estate Council of Ontario ("RECO") to advise that Realtysellers had voluntarily surrendered its registration so that, in his opinion, the hearing before this Tribunal had become moot. However, to date, the Registrar has not accepted Realtysellers' surrender of its registration. RECO is the designated sole administrative authority that administers the *Real Estate and Business Brokers Act, 2002*, and its Regulations.

On June 4, 2008, five days before the hearing before this Tribunal was to resume, RECO received a Notice of Employee Change from Moranis, transferring his employment from Realtysellers to Prudential Sadie Moranis Realty. The correspondence between RECO, Moranis and Prudential Sadie Moranis Realty relating to this transfer is found at Tabs 2E, 2F and 2G in the Motion Record.

Counsel for the Registrar then told the Moranis' representative that he would consent to an adjournment of the hearing scheduled to commence June 9, 2008, subject to terms. However, there was no agreement on terms, so that the parties appeared before this Tribunal on June 9th.

On June 9th, neither Moranis himself nor anyone on behalf of Realtysellers appeared. Only Mr. Dale appeared. He stated that he was appearing as agent for Moranis, but not for Realtysellers. Mr. Dale presented a medical report from still another doctor concerning the medical condition of Moranis. After hearing submissions from Mr. Dale and from counsel for the Registrar, this Tribunal adjourned the hearing to December 1, 2008, and made that date peremptory on both Moranis and Realtysellers. Again, five days were set aside for the hearing. The Tribunal also confirmed, in its Order for adjournment, the continuation of the term that neither Moranis nor Realtysellers were to trade in real estate or take part in any activity relating to the purchase and sale of real estate until the completion of this hearing.

On November 6, 2008, Moranis resigned from his employment as a broker with Prudential Sadie Moranis Realty. His letter of resignation is dated November 6, 2008, and is addressed to Prudential Sadie Moranis Realty and states, "This letter is to confirm that I am terminating with your Company as of today's date." It is signed by Moranis. The letter is found at Tab 2H of the Motion Record.

In response to that letter, Prudential Sadie Moranis Realty wrote to Moranis, in a letter dated November 7, 2008, the following: "This will confirm that you are no longer employed with Prudential Sadie Moranis Realty effective November 6, 2008." The letter is found at Tab 2I of the Motion Record. It is signed by Sadie Moranis, who is designated in the letter as "Chairman." Sadie Moranis is the mother of Stephen Moranis.

Moranis also sent to RECO a Notice of Employee Change.

Mr. Dale then informed the Registrar that he would inform this Tribunal that there was no longer any necessity for the hearing because Moranis had terminated his employment with Prudential Sadie Moranis Realty. The Registrar disagreed. Consequently, the Motion now before this Tribunal was served and filed.

In support of this Motion, Moranis signed and swore an affidavit on November 19, 2008. It is found at Tab 2 of the Motion Record. In it, he states, among other things, in paragraph 11, "I do not intend to become employed as a broker with any brokerage." On behalf of RECO, counsel wrote to Mr. Dale a letter dated November 7, 2008, stating that RECO would not accept what counsel referred to in the letter as "the notice of termination." The letter is found at Tab 2L of the Motion Record.

SUBMISSIONS AND ANALYSIS

This Tribunal is indebted to both Mr. Brush, on behalf of Moranis, and to Mr. Brett, on behalf of the Registrar, for their extremely capable submissions to this Tribunal and for

their very thorough arguments on a novel matter that does not seem to have come before this Tribunal in the past.

Basis of Jurisdiction of the Registrar and the Tribunal

In his submissions, Mr. Brush argued that the Tribunal and the Registrar lost their jurisdiction over Moranis when Moranis resigned his employment with Prudential Sadie Moranis Realty. There were several reasons for this argument. First, the Registrar only has jurisdiction to revoke the existing registration of current registrants. Second, Moranis is no longer a registrant. Third, Moranis' registration had already terminated and, therefore, cannot be revoked. Mr. Brush also argued that his position was consistent with the position previously taken by the Registrar in another case, the *Reid* case that this Tribunal will deal with more fully later in these Reasons.

Mr. Brush referred this Tribunal to section 13(1) of the Act. It provides that the Registrar is empowered to refuse an application for registration, and to suspend or revoke an existing registrant's registration. That section reads as follows:

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.

Section 13 makes reference to section 10 of the Act. Section 10 outlines the circumstances in which an applicant for registration or for renewal of registration is not entitled to registration or renewal thereof. The provisions relevant to the matter now before this Tribunal are 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

...

(d) the applicant is a corporation and,

(i) 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) 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

The above provisions of section 10 were those on which the Registrar relied in issuing its Proposal.

Then, section 14 of the Act sets out the process to follow if the Registrar proposes to refuse an application for registration or renewal thereof, or to suspend or revoke an existing registration. The Registrar is to give written reasons and is to advise the applicant or registrant of his or her right to appeal the proposal to this Tribunal. The relevant provisions are as follows:

- 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; or
 - (c) apply conditions to a registration or renewal to which the applicant or registrant has not consented.
- (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
- (4) If an applicant or registrant does not request a hearing in accordance with subsection (2), the registrar may carry out the proposal.
- (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.
- (7) The registrar may cancel a registration upon the request in writing of the registrant and this section does not apply to the cancellation.

Therefore, Mr. Brush argues that the jurisdiction to revoke the registration of Moranis is found in section 13. In turn, the Tribunal has jurisdiction to hold a hearing under section 14, but only if the Registrar has the jurisdiction to revoke under section 13. If the Registrar has no jurisdiction under section 13, then this Tribunal has no jurisdiction to conduct a hearing under section 14.

Expiration of registration based on the definitions of “registrant”, “broker” and “salesperson” and “brokerage”

Following his review of sections 13 and 14 of the Act, Mr. Brush argues that, at this stage of the proceedings, the Registrar no longer has jurisdiction under section 13 because Moranis is no longer a “registrant” under the Act, as that term is defined. Section 1 of the Act contains the definitions of terms used in the Act. The definition of “registrant” is:

“registrant” means a brokerage that is registered under this Act or a broker or salesperson who is registered under this Act

The terms, “broker” and “salesperson” are defined as follows:

“broker” means an individual who has the prescribed qualifications to be registered as a broker under this Act and who is employed by a brokerage to trade in real estate

“salesperson” means an individual who has the prescribed qualifications to be registered as a salesperson under this Act and who is employed by a brokerage to trade in real estate

“Brokerage is defined as follows:

“brokerage” means a corporation, partnership, sole proprietor, association or other organization or entity that, on behalf of others and for compensation or reward or the expectation of such, trades in real estate or holds himself, herself or itself out as such

Therefore, Mr. Brush submits that a registrant must satisfy two criteria. First, he or she must have the prescribed qualifications and, second, must be employed by a brokerage to trade in real estate.

Therefore, if, as he alleges in the case of Moranis, Moranis ceases to be employed by a brokerage, he ceases to be a “broker”, because one of the above criteria no longer applies to him; that is, he is no longer employed by a brokerage. In the Motion Record, at Tab 2H, referred to earlier, is a copy of the letter that Mr. Brush relies on in making this argument. In that letter, dated November 6, 2008, already referred to, Moranis states, “This letter is to confirm that I am terminating with your Company as of today’s date.”

If, then, Moranis ceases to be a “broker” because he is no longer employed by a brokerage to trade in real estate, then he also ceases to be a “registrant” because a “registrant” is defined as “...a broker or salesperson who is registered under this Act.”

Therefore, by voluntarily terminating his employment at a brokerage, Moranis ceases to be registered.

However, Mr. Bredt strongly disagreed,

Employment at a brokerage is not a “prescribed qualification”

Mr. Bredt submitted that employment by a brokerage is not among the “prescribed qualifications” to be registered as a broker. He referred to section 4 of Regulation 567/05 under the Act. That section states:

4(1) For the purposes of subsection 9.1 (1) of the Act, the following requirements are prescribed for an applicant for registration or renewal of registration as a broker or salesperson:

1. The applicant must be at least 18 years of age.
2. The applicant must be a resident of Canada.
3. If the application is for registration as a broker and the applicant has never been registered as a broker, the applicant must,

- i. have been registered and employed as a salesperson for at least 24 of the 36 months immediately preceding the date of the application, or
- ii. have experience that, in the opinion of the registrar, is equivalent to the requirement in subparagraph i.

4. The applicant must have paid any group insurance premiums and applicable taxes, and any expenses associated with a group insurance policy, including contributions to reserve funds, that he or she is required to pay by any regulation made under clause 50 (1) (c) of the Act.

5. The applicant must have paid the fee referred to in section 3. O. Reg. 567/05, s. 4 (1).

(2) For the purposes of subsection 10 (1) of the Act, the following requirement is prescribed for an applicant for registration or renewal of registration as a broker or salesperson:

- 1. The registrar must not have refused to grant or renew the registration under subsection 9.1 (1) of the Act.

Nowhere does that section state that employment by a brokerage is a prescribed requirement. The only reference in the section to any kind of employment is to employment as a salesperson or some equivalent experience before one can be registered as a broker. But, employment by a brokerage is not a “prescribed requirement” to be a broker.

This Tribunal would accept the submissions of Mr. Bredt on this matter. The “prescribed requirements” are clearly set out in section 4 of Regulation 567/05. It would be an unwarranted extension of and addition to those provisions to say that employment at a brokerage is a prescribed qualification.

Expiration of registration based on section 10(1) of Regulation 567/05

Mr. Brush also relies on section 10(1) of regulation 567/05 made pursuant to the Act. Section 10 provides that if a broker ceases to be employed by a brokerage, but is employed within a specified time at that brokerage or at another brokerage, the broker may, during that specified time, make application for registration in an approved form. He referred this Tribunal to section 10(1) and (2) of the Regulation, which provide as follows:

10 (1) If a broker or salesperson ceases to be employed by a brokerage and, within the period described in subsection (2), is employed by that brokerage or another brokerage, the broker or salesperson may, during that period, make an application for registration in a form that the registrar has approved for use in those circumstances. O. Reg. 567/05, s. 10 (1).

(2) The period referred to in subsection (1) is the period that begins on the day the broker or salesperson ceased to be employed and ends on the earlier of the following dates:

- 1. The date that is 60 days after the day the broker or salesperson ceased to be employed.

2. The date that the previous registration of the broker or salesperson would have expired if he or she had not ceased to be employed. O. Reg. 567/05, s. 10 (2).

Therefore, so Mr. Brush argues, there would be no need to apply for registration unless the previous registration expired upon leaving the employ of a brokerage.

However, on reading that section, there is nothing in it that actually states that the registrant's registration expires. In fact, subsection (3) of section 10 of the Regulation implies that the existing registration still continues, for, upon applying for registration on being employed by the previous or a new brokerage, that subsection states that the registration expires at the time that the existing registration would have expired. Subsection (3) states:

(3) Despite any regulation made under clause 50 (1) (c) of the Act that relates to the expiration of registration, if an application under subsection (1) is approved, the registration expires on the date that the previous registration of the broker or salesperson would have expired if he or she had not ceased to be employed.

The fact that registration of a broker or salesperson, when employed by a new or former brokerage, has the same expiration date as the existing registration presumes a kind of continuum, when the time remaining in the existing registration will continue once the broker confirms employment in the name of the new brokerage firm. The previous registration, therefore, does not automatically end with the finality suggested by Mr. Brush. If it did, then one would expect that the registration under section 10 of the Regulation would be for the same period of time for which an entirely new registration is granted.

Therefore, this Tribunal does not accept Mr. Brush's submissions on that matter.

Expiration based on information on RECO website

Mr. Brush also relies on the contents of the first paragraph contained in information on the RECO website. The print-out of that portion of the RECO website on which Mr. Brush relies is found at Tab 2M of the Motion Record. The first paragraph of that print-out states:

TRANSFERRING TO A NEW BROKERAGE

If you are transferring from one brokerage to another, there will be a period of time that your registration is terminated and you are not entitled to trade in real estate. This is because your employment with the former brokerage has been terminated and your transfer to a new brokerage is being processed.

To ensure you're back in business quickly, and to prevent unnecessary delays, it's important to make sure all required documents and the transfer fee are submitted to the office.

The website does not state the provision or provisions of any Act or Regulation on which that statement is based. This Tribunal should not be bound by an opinion stated on a website by an unknown person or persons, made on unspecified authority.

Expiration based on the *Reid* case

In arguing that the registration expires when a registrant ceases to be employed at a brokerage, Mr. Brush also relies on a decision of the Ontario Divisional Court in *Ontario (Registrar of Real Estate and Business Brokers) v. Ontario (Licence Appeal Tribunal)* [2001] O.J. No. 83, between the Registrar of Real estate and Business Brokers and Licence Appeal Tribunal and Lori Anne Reid ("*Reid*"). The head note summarizes the case as follows:

Application by the Registrar of Real Estate and Business Brokers for judicial review of a decision of the Licence Appeal Tribunal dismissing its motion for an order finding that the Tribunal did not have jurisdiction to proceed with a hearing. The Registrar served Reid with a notice of proposal under the Real Estate and Business Brokers Act to revoke her registration. Reid requested a hearing before the Licence Appeal Tribunal. Prior to the hearing, her membership expired as a result of her failure to pay insurance premiums. The Registrar moved for an order that the Tribunal had no jurisdiction to proceed with the hearing in light of the expiry of Reid's membership.

The reason that the salesperson's registration expired in that case was that she failed to pay a mandatory insurance premium. The Court states as much in paragraph 2 of the report:

2. On September 1, 2000, her registration expired as a result of her ceasing to be a member of the Real Estate Council of Ontario (RECO) consequent on her failure to pay the insurance premiums required as part of the Consumer Protection Program that is mandatory for all registrants under REBBA and its Regulations (s. 46.1 of the Act; s. 17.1 of the Regulations). The Consumer Protection Program came into effect on September 1, 2000. Under the Safety and Consumer Statutes Administration Act, 1996 (SCSAA) and the Administration of Various Acts Regulation, RECO has been designated as the sole administrative authority for the purpose of administering REBBA and its Regulations.

In discussing the Registrar's Motion, the Court states, at paragraph 9:

9. However, in our view, the jurisdiction of the Tribunal to proceed with a hearing would not be ousted by the circumstance that the registration of Ms. Reid as a salesperson under REBBA expired after service of the notice of proposal by the Registrar and her notice requiring a hearing before the Tribunal but before the hearing itself. If the Registrar wishes to proceed against her with the serious allegations set out in the notice, then Ms. Reid is entitled to the hearing she has requested to respond to them.

Therefore, Mr. Brush argues that Moranis' registration expired also, because, as in the *Reid* case, a condition of registration (that is, in the case of Moranis, not being employed by a brokerage) was not met.

But, in *Reid*, the condition of registration that was not met was a mandatory obligation to pay an insurance premium required as part of the Consumer Protection Program that was mandatory for all registrants under the Act and its Regulations. This Tribunal notes that consumer protection was a significant aspect of that decision.

On the other hand, in the case of Moranis, he underwent a cessation of employment with a brokerage that was voluntary, not mandatory, as in the *Reid* case. Although the

definition of “broker” refers to one who is “employed by a brokerage,” that is not a mandatory prescribed requirement (as this Tribunal concluded earlier in these Reasons) as was the requirement to pay insurance premiums in the *Reid* case.

Also, in *Reid*, the Court held that this Tribunal still had jurisdiction to hear the matter even though the Applicant’s registration in that case expired because of her failure to fulfil a mandatory requirement.

Mr. Brush made much of the fact that, in *Reid*, the Registrar argued that the jurisdiction of the Tribunal ended because Ms. Reid’s registration expired. But, in the instant case, the Registrar is now arguing that the Tribunal does have jurisdiction, even though it is Mr. Brush’s submission that the registration of Moranis expired.

However, to accede to Mr. Brush’s argument that this Tribunal has lost jurisdiction because Moranis’ registration supposedly expired flies in the face of the *Reid* decision, which held that the Tribunal does, in fact, have jurisdiction even though Ms. Reid’s registration had expired.

Since this Tribunal still has jurisdiction in the face of an expired registration, to say that the Registrar, in the case now before this Tribunal, no longer has jurisdiction because of an alleged expired registration would create an absurdity. That is, the Tribunal would have jurisdiction, but the Registrar would have no case to present. The interpretation of any statutory and regulatory provisions presented to this Tribunal on this Motion should be done in a manner that avoids absurdities.

This argument would also seem to contradict Mr. Brush’s previous argument that the Tribunal has jurisdiction under section 14 of the Act only if the Registrar has jurisdiction under section 13.

In any event, for the Reasons given herein, this Tribunal does not accept the argument that Moranis’ registration expired.

Expense and “reputational damage”

Mr. Brush argued that, if there is a conflict between, on the one hand, the expense to Moranis to carry on with this hearing, in the face of his withdrawal from employment, and, on the other hand, the continuation of a hearing that Mr. Brush argues is moot, then the conflict should be resolved in Moranis’ favour.

In view of this Tribunal’s findings, this Tribunal does not agree that the hearing is now moot.

Mr. Brush also referred to the possible “reputational damage” that Moranis would suffer if he simply withdrew his appeal. Withdrawing his appeal would be an admission of wrong-doing, but he does not admit that. However, the procedures under the Act, summarized earlier in these Reasons, and his own Notice of Appeal provide the very avenue that Moranis needs to contest the allegations of wrong-doing. It is an avenue that he himself had originally chosen, but which, now, he seeks to avoid. This Tribunal

does not agree that such “reputational damage” is a matter that it has been given statutory authority to consider in an Appeal such as this.

In summary, Mr. Brush submitted that the Registrar cannot revoke something that is already lost; that is, the Registrar cannot revoke Moranis’ registration because it is already lost, based on his resignation from the Realty company. The expiration of his registration is also based on the interpretation of the definitions of “registrant,” “broker,” “salesperson” and “brokerage” under the Act. He also relies on the wording of section 10 of Regulation 567/05 made under the Act. He also relies on the *Reid* decision and on the information contained on the RECO website.

However, for the reasons stated herein, this Tribunal does not agree with those submissions.

Consumer Protection

Mr. Brush also challenged the consumer protection aspect of the Registrar’s submissions. Mr. Brush agreed, as did Mr. Bredt on behalf of the Registrar, that the Act is consumer protection legislation. But, Mr. Brush argued that the consumer protection aspect of this case has already been met because, if one were to accept the argument that Moranis’ resignation from employment ends his registration, then the public is protected. As well, Moranis stated in his affidavit, referred to earlier, that he does not intend to become employed as a broker with any brokerage.

However, this Tribunal is persuaded by Mr. Bredt’s submissions that the statement in the affidavit is only a statement of current intention. Moranis could change his mind at some time in the future. As well, Moranis states only that he does not intend to be employed as a broker. He makes no reference, however, to not becoming employed as a salesperson, since those are two different categories of registrants under the Act.

As well, Mr. Bredt argued that the Registrar has a further concern. If these proceedings end because of a finding that the Registrar and the Tribunal have lost jurisdiction, and if, at a later time, Moranis should apply for registration under the Act, and if the Registrar should propose to refuse to register him, the Registrar would have evidentiary problems resulting from the passage of time. If Moranis were to apply again, and if the Registrar were to propose to refuse registration on the same grounds as in the Registrar’s current Proposal, the Registrar would have the onus of proving the very same things that he must prove in the current case. But, that gives rise to the possibility that witnesses might no longer be found, or may have died, and that memories will weaken over a period of time and that witnesses might not be able to find relevant documents. This would create an unfairness to the Registrar.

On the other hand, if this proceeding continues to its conclusion and if this Tribunal (without deciding the matter at this stage of the proceeding) should direct the Registrar to carry out its Proposal, then, if Moranis should apply, again, it will be his onus to provide new or other evidence that material circumstances have changed. But, in that case, Mr. Bredt argues, the Tribunal would at least have the benefit of hearing more recent evidence from Moranis so that the Registrar would not have to rely, at that time,

on evidence of events that happened in time past. Section 17 of the Act deals with this possible situation where it states:

17 A person whose registration is refused, revoked or refused renewal may reapply for registration only if,

(a) the time prescribed to reapply has passed since the refusal, revocation or refusal to renew; and

(b) new or other evidence is available or it is clear that material circumstances have changed.

This Tribunal agrees that one of the primary goals of the Act is the protection of the home-buying public. To make the findings that Mr. Brush urges upon this Tribunal would frustrate the purposes of the Act. Allowing a registrant, after he, himself, invoked the appeal procedure of this Tribunal, to resign, and, therefore, escape sanction for alleged improper acts committed while a registrant, can hardly be said to protect the public and to maintain confidence in the real estate business. This Tribunal considers that the Registrar should foster and maintain such public confidence.

The misconduct of a registrant, if it is proved to this Tribunal, should not escape sanction by a voluntary withdrawal from employment. It is not futile, as Mr. Brush argued, to hear this case even if Moranis may no longer be a registrant because, surely, a finding of misconduct on the part of a registrant would result in condemnation of such conduct for the person and a warning to others who may be tempted to do likewise. The public could very well lose confidence in the real estate business where penalties for alleged improper conduct, if proved, could be avoided by a simple letter of withdrawal from employment.

Expiration based on a request in writing

Mr. Brush submitted that the registration of Moranis should be cancelled because of Moranis' letter of November 6, 2008, in which he terminated his employment with Prudential Sadie Moranis Realty. He relies on section 14(7), quoted earlier in these Reasons.

However, Mr. Bredt pointed out to this Tribunal that Moranis did not, in his letter, request cancellation of his registration, as section 14(7) requires. All that Moranis did was to say that he was "[...] terminating with your Company as of today's date."

But, even if, without deciding the matter, that letter could be considered to be a request for cancellation of his registration, Mr. Bredt submitted that the Registrar has the option to accept it or not. Section 14(7) states that the Registrar "may" cancel a registration upon the request in writing of the registrant. Mr. Bredt argued that, from a public policy perspective, the Registrar should have the discretion to not accept attempts to surrender a registration, and that the Registrar should, therefore, in the circumstances of this case, maintain jurisdiction to protect the public.

This Tribunal accepts Mr. Bredt's submission that the letter is not a request for cancellation. This Tribunal also accepts his submission on the permissive nature of section 14(7) as being consistent with the public protection character of the Act.

CONCLUSION

For all the reasons stated herein, this Tribunal would conclude that the registration of Moranis has not expired by reason of his voluntary termination of employment with Prudential Sadie Moranis Realty and that the Registrar and the Tribunal have not, therefore, lost jurisdiction in this matter.

This Tribunal, therefore, dismisses the Motion brought on behalf of the Applicant, Moranis.

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski, Vice Chair

Released: December 5, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MOTION

GURJEET SINGH CHEEMA

APPEAL FROM A PROPOSAL OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c.30, SCH. C

TO REVOKE A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JEROME H. STANLEIGH, Counsel, representing the Applicant

IAN DALEY, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF
HEARING: October 31, 2008

Toronto

ORDER

The Applicant appeals to the Licence Appeal Tribunal (the "Tribunal") from a notice of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Act") proposing to revoke the Applicant's registration as a real estate salesperson. At the commencement of the hearing, the Applicant brought a motion requesting an adjournment. The Registrar consented to the adjournment and moved for a continuation of the Immediate Suspension Order issued by the Registrar under section 15 of the Act. The Applicant consented to the Immediate Suspension Order being continued.

Accordingly, the Tribunal orders that:

1. The hearing in this matter is adjourned until **Monday, February 2, 2009**, when it will commence at **9:30 a.m.** at the offices of the Tribunal and will continue on February 3rd, 5th and 6th, if necessary.

2. A pre-hearing in this matter will commence on **Friday, December 5, 2008 at 1:30 p.m.** at the offices of the Tribunal.
3. On consent of the Parties and by authority of subsection 15(3)(b) of the Act, the Tribunal extends the expiration of the Order for Immediate Suspension until the hearing is concluded.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: November 19, 2008

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



AMBROZINE A. GRANT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE REAL ESTATE AND BUSINESS
BROKERS ACT, S.O. 2002, c. 30, Schedule C

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair,

APPEARANCES: AMBROZINE A. GRANT, the Applicant, in person

GEORGE DRAMETU, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF
HEARING: October 6, 7 & 8, 2008

Toronto

REASONS FOR DECISION AND ORDER

By Notice of Proposal to Revoke Registration dated November 28, 2007, the Registrar seeks to revoke the registration of the Applicant, Ambrozine A. Grant. The Registrar alleges that the Applicant cannot reasonably be expected to carry on business in a financially responsible manner and, further, that the past conduct of the Applicant shows there are reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty. The impugned behaviour is then divided into two broad categories. It is alleged that the Applicant borrowed funds from her clients and, despite repeated demands, failed to repay the funds. It is also alleged that the Applicant has had judgments against her name for 5 or 6 years and has not paid or made any arrangements to satisfy such judgments.¹ The authority for the issuance of the Notice of Proposal is found in section 13 of the *Real Estate and Business Brokers Act*, S.O. 2002, c. 30, Schedule C (the "Act") and is based on criteria set out in section 10.

¹ Ex 1

FACTS

The Registrar called two witnesses and the Applicant called three, including herself.

Much of the Applicant's financial history was not in dispute. That part of the financial history that is of concern to the Registrar began with a loan in and around November 7, 1988. It appears that on March 26, 1990 the Applicant executed a demand promissory note evidencing her liability to a individual, OW, for a loan advanced in 1988. The document identifies the amount advanced to be \$3,400.00 with compound interest at 12% for the first year increasing to 13% in years following.² In September 1998 the Applicant informed the Registrar that the loan debt had been reduced to a judgment, which was then in the amount of \$18,000.00 and an execution had been registered.

On November 9, 2000, the Applicant borrowed \$10,000.00 from one, EP. The loan was arranged through the agency of NH, who complained to the Registrar of the Applicant's failure to repay the loan in June of 2001. The Complaints and Compliance Department of the Registrar's office, the Real Estate Council of Ontario, reviewed the complaint and determined that the Applicant was not in breach of any of the Council's rules of ethics and advised the complainant that the matter would have to be pursued through the courts. At a settlement conference in the Small Claims Court, the Applicant undertook to make monthly payments of \$300.00. She substantially complied with the payment schedule until March 4, 2005 when she received a threat from a paralegal acting for the lender demanding payment in full.³ She stopped making payments altogether until the lender acknowledged that she had paid almost the whole amount owing.⁴ There has been no acknowledgement and the Applicant has not made any further payments.

On July 11, 2005, LB was granted judgment against the Applicant in the amount of \$13,000.00 plus \$1,660.00 in costs with interest set at 10% p.a. LB filed a Notice of Garnishment with the Applicant's employing brokerage in September 2005. Following default on the loan, no other arrangements were made between the lender and the Applicant to repay this outstanding amount. A percentage of the Applicant's earnings is applied in reduction of that loan.

On April 21, 2005, the Applicant borrowed the amount of \$10,000.00 from IA. She signed a promissory note to repay that loan plus \$400.00 in interest on or before June 30, 2005.⁵ The advance was made by cheque which, the Applicant states, she then certified.⁶ By letter dated December 29, 2005, IA demanded repayment of the loan. The matter proceeded to court where a settlement was agreed. There is no evidence that the Applicant has not abided by the terms of the settlement. While the fact of the IA loan was not in dispute, there was a great deal of dispute concerning the manner in

2 Ex 6

3 Ex 4 Letter from Paragon Legal Services dated March 4, 2005

4 Ex 4 Debtor's Ledger This is the easiest document to find in exhibit 4 as it is on legal size paper.

5 Ex 3 Tab 8 page 14

6 Ex 3 Tab 8 page 10

which the loan was arranged and whether IA was a client of the Applicant at the time the loan was entered into. A further \$7,500 was borrowed from IA in June of 2005 to be repaid on or before July 31, 2005. IA stated that the Applicant simply raised the circumstances of this loan with her but did not pressure her in any way. She decided to advance the loan and it was subsequently repaid substantially in accordance with its terms.

The final financial concern put forward by the Registrar was a Requirement to Pay issued by the Canada Customs and Revenue Agency. It seeks payment but states: "but do not pay hereunder more than \$38,446.19." Payment is to be made at a rate of 40% of wages and salaries over a period of one year from the date of the document. The date of the document is January 20, 2006. The one year period expired on January 30, 2007 and there was no evidence that a new Requirement to Pay had been issued.

IA testified. She is not currently employed. She has three grown children who, at all material times were living with her. She stated that, in April 2005, she and her family were living in subsidized housing, a co-op townhouse. She was scheduled to have an operation, following which she would have difficulty coping with the stairs. She conceived of a scheme to move her bedroom to the first level and install an ensuite bathroom. She approached the co-op manager and asked if it were possible to make the suggested alterations. The manager subsequently advised her that the co-op board would permit the alterations but would not finance them. When she left the co-op for whatever reason, IA would have to leave the renovations and she would receive no reimbursement. The projected cost of the work was \$10,000.00 to \$15,000.00. She had a family discussion. Her children were against her spending the money and urged her to buy her own house where she would enjoy the benefits of any improvements she installed.

According to IA, she called another co-op owner, SG who recommended that she use her real estate agent, the Applicant. IA called the Applicant from her sickbed and told her she wanted to buy a home urgently. IA stated that the urgency arose out of the imminence of her surgery. According to IA, the Applicant responded that she was not interested unless IA was serious about buying a home. The Applicant stated that she did not want to waste her time and money driving IA around only to have IA decide not to purchase. Once she was re-assured that IA was serious about purchasing, the Applicant discussed with her the area within which she wanted to purchase. These discussions led to the Applicant visiting IA's home on April 21, 2005 when IA met the Applicant for the first time. The Applicant asked IA how much money she had to fund the deposit. IA answered that she had \$15,000.00. The Applicant informed her that she needed only \$5,000.00 for a deposit. The Applicant went on to ask if she could borrow the balance of \$10,000.00 because she had a house to close and there was a woman she dealt with to whom she owed a percentage. If IA would lend the \$10,000.00 then the Applicant would pay her back \$10,400.00 prior to closing. IA initially refused but became concerned that the Applicant would not look after her urgent need for a new home if the loan were not granted. She gave the Applicant a cheque for \$10,000.00 and the Applicant signed a promissory note to repay \$10,000.00 plus \$400.00 in interest

on June 30, 2005. Payment was made out of a line of credit. IA had two lines of credit available to her, one in the amount of \$14,000.00 and one in the amount of \$23,000.00.

After April 21 the Applicant worked with IA and her family to find a suitable house. IA had informed the Applicant that her price range was \$250,000.00 to \$300,000.00. They looked at homes in Scarborough as well as a home the Applicant owned in Ajax. IA told the Applicant she did not want to live in Ajax because of the difficulty the children would experience getting to work or school. They went back to Scarborough and IA finally saw a house she liked. She put in an offer on May 27, 2005, which was accepted on May 30, 2005 with the closing scheduled for August 26, 2005.⁷ Thereafter dealings turned to financing.

IA stated that she needed her older son on title to qualify for a mortgage. According to her testimony her only income was CPP. She would not qualify for a mortgage unless she could include her son's income. At this point the Applicant referred IA to a mortgage broker. IA preferred to go to her own bank. Her bank turned her down, citing lack of equity and a low down payment. According to IA, she then asked the Applicant for the return of the \$10,000.00 loan but was refused. IA then went to someone she described as a private lender but who the Tribunal concludes was a mortgage broker. The Applicant warned her about mortgage brokers telling her that they were not reputable. At this point in their dealings, with the closing looming, the Applicant was refusing to help IA. The Applicant finally relented. The Applicant, IA and a mortgage broker had a three-way telephone conversation where the lender undertook to advance the closing money. Notwithstanding the fact that mortgaging was not secured until August, IA signed a waiver of the mortgage financing term on June 6. She testified that she did not know the purpose of the waiver but recalls the Applicant telling her that if she did not sign the waiver she would lose her down payment.

IA stated that she and the Applicant fell out over repayment of the \$10,000.00 loan. The Applicant did not want to discuss repayment with her. At one point the Applicant took IA to her office to sign a document. IA later identified this document as the Buyer Agency Agreement signed on May 18, 2005.⁸ The Applicant told her that she was working on repaying the money and she would get it back on time for closing. In fact, every day she would promise repayment but she never did repay. At one point, after the repayment of the \$7,500.00, the Applicant dropped a note through IA's door promising timely repayment but failed to pay.⁹ After closing, IA attempted to contact the Applicant. She called the Applicant's house but was told not call. She finally found the phone line was busy each time she called. She attended at the Applicant's home and put a letter under her mat. She then called from a neighbour of the Applicant and the phone was answered. She believes that the Applicant had blocked her number. The Applicant was abusive. The Applicant finally advised IA that she had been sick in hospital and had then left the country. The Applicant stated that she would pay later. In despair, IA contacted City TV's consumer advocate, Mr. Silverman. Mr. Silverman tried

7 Ex 4 Agreement of Purchase and Sale

8 Ex 4

9 Ex 3 Tab 8 Page 7

to contact the Applicant but had no success. He aired IA's story. After airing the story, the Applicant wrote a long letter setting out her side of the story. In the opinion of IA, the content of the letter is nonsense. IA states that she does not have the \$200,000 in assets alleged by the Applicant, she did not know the Applicant before April 2005 and she does not have bank accounts at Sheppard and Warden as alleged.

Finally, IA is of the view that if she had not retained counsel she would not have been repaid. She still stands to lose a significant amount of money in legal fees and disbursements. Legal fees are 33% of the amount recovered. She started receiving funds in May 2008 and confirmed that the Applicant is repaying at the rate of \$200.00 per month increasing to \$300.00 per month in September. So far she has received about \$1,000.00 through her legal advisors although she feels the Applicant has actually repaid \$3,000.00. The worry that she might lose her house was causing her to wake up at night.

In cross-examination, IA confirmed that she was given the Applicant's phone number by SG but insisted that it was on April 21, 2005 and not before. She denied that the Buyer Agency Agreement was signed before looking for a house, stating instead that it was signed after she saw the house she liked. She did state and then corrected that she had put an offer on the house on the day that she had first seen it. She corrected herself by saying it was several days later that the offer was put in. When it was put to her that she had never been to the Applicant's office, she insisted that she had attended the office on the day she first saw the house to sign the Buyer Agency Agreement. Her evidence was that the Applicant had explained that she wanted to be paid and needed the listing agreement to guarantee that she was paid.

IA's attention was drawn to the cheque she issued for \$10,000.00. While it is very difficult to read, the cheque appears to have the words "loan repay" written on the memo line. IA confirmed that she wrote the word "loan" on the memo line but denied that she wrote the word "repay." She had no explanation of how the word "repay" was written on the cheque. With respect to the \$15,000.00 for the house purchase, she asserted that she had told the Applicant that she had only \$15,000.00 in assets. She stated that the \$7,500.00 that she loaned later came from a line of credit through a credit card. It was her evidence that the Applicant had informed her that a young woman needed \$7,500.00 to close a deal. While the Applicant didn't pressure her for this loan, IA could not sleep knowing that this young woman was in trouble. She finally decided to advance the loan. While IA confirmed that she had received \$150,000.00 in settlement proceeds in 2000, she denied that she told the Applicant this fact. It was her evidence that she had very little of the \$150,000.00 left after she had paid her lawyer and accrued expenses. In September 2003 when she moved into the subsidized housing co-op, she testified that she had no money left, no assets and \$198.00 per month in total income.

The subpoena served by the Applicant on IA asked her to bring her banking records with her. She failed to do so. She stated that the bank would charge \$26.00 to prepare the records for 2005 and she didn't want to pay that amount. She made no attempt to contact the Applicant and ask her to pay the money.

With respect to her search for a mortgage, IA's testimony in cross-examination was somewhat haphazard. Initially, she said that she did not recall telling the Applicant that she had 25% down payment. She denied that the Applicant told her that a mortgage broker confirmed that if she had 25% down there would be no need for a job history. She stated that it was not until July that she first talked with the Applicant about using a mortgage broker. Finally, she did recall the Applicant advising her that she had a pre-approval from a mortgage broker on the basis of 25% down payment before she went to the bank; yet she still insisted that the this conversation took place after she had signed the mortgage waiver.

In her testimony in chief, IA had stated in an accusatory fashion that the Applicant had called IA's lawyer on the day of closing to confirm that the deal had closed, the inference being that IA could afford to close without the need to repay the \$10,000.00. In cross-examination it was revealed that IA was a number of hours late attending at her lawyer's office to complete the closing documentation and the closing had to be postponed to the next business day. She testified that she was unaware that the lawyer had called the Applicant trying to track her down and denied that the Applicant had called her on her cell phone to try and find out where she was.

In response to the Applicant's position that IA was trying to hide money because the co-op housing organization was pressuring her to disclose her assets with a resultant significant increase in rent, IA denied that she was ever pressured in this manner or that the disclosure required for her 2005 renewal was any more detailed than her obligation to disclose assets in her 2003 application or her 2004 renewal. She did confirm that she had lent money in the past to SG, the witness who testified, to help SG save her home.

Brain Scholzhauer is the Deputy-Registrar. He testified about the Applicant's registration history and about a meeting held with the Applicant in October 2006 to discuss her background.

Mr. Scholzhauer reviewed the role of the Registrar's office. He stated that the test for registration is set out in s. 10 of the Act. Applicants who have met the educational requirements are entitled to registration unless they fall afoul of the provisions regarding financial responsibility or integrity and honesty and operating in accordance with law. In Mr. Scholzhauer's opinion, the Applicant had run afoul of all of these provisions.

In reviewing the Applicant's loans history, Mr. Scholzhauer was of the opinion that it demonstrated a pattern. Lenders became involved with the Applicant through real estate. Each lender was forced to sue before the Applicant took her loan obligations seriously and began repayment. With respect to the requirement to carry on business

in accordance with law and with integrity and honesty, the Registrar had two concerns. The first concern was the manner in which money was borrowed from IA, according to IA's version of events. According to IA, the Applicant, in her role as an agent and in full knowledge of IA's financial circumstances, advised her in such a manner to secure a loan for herself. In the Registrar's view, giving self-serving advice is not in accordance with integrity and honesty in the conduct of business.

The Registrar's second concern arose out of the version of events given by the Applicant at the interview and again before this Tribunal. At the interview the Applicant explained that she had not asked IA for a loan. IA was in a panic because the co-op corporation was requiring greater disclosure of assets for the year 2005. IA had substantial assets that she was looking to hide. If she fully disclosed her true financial position her rental subsidy would be removed and her rent would increase substantially. She asked the Applicant if she knew anyone who needed money. The Applicant did and IA loaned \$10,000.00 but made it look like it was a repayment by IA of a loan to the Applicant so the Co-op would not ask questions about the source of funds. IA wrote "loan repayment" on the cheque to advance this deception. During the meeting, the following exchange occurred (A is the Applicant and B is Mr. Scholzhauser):

- A) *She [IA] got scared and I said I would take the money, interest was too much, we decided on how much. Do you have a copy.*
- B) *I have promissory note.*
- A) *Yes, that is it.*
- B) *So you were aware that the purpose of the loan was to hide money.*
- A) *Yes sir, I have to admit I did.*
- B) *So, you knew she was defrauding the co-op.*
- A) *After, I realised that it was.*
- B) *But at the time you agreed, knowing and assisting her to hide money.*
- A) *She wrote a cheque to show loan repay – (shows cheque).*
- B) *Its on our copy, so you were well aware that she wanted to hide money, fraudulent.*
- A) *I did not know it was fraud.*
- B) *Then why did you set up the cheque to read as it was?*
- A) *I?*
- B) *So you were assisting her. You were setting it up.¹⁰*

In the Registrar's view the Applicant's answer indicates a willingness to become involved in illegal activity. Mr. Scholzhauser then reviewed a 1982 criminal conviction where the Applicant has been convicted in a scheme to purchase false immigration documents for her relatives. Mr. Scholzhauser was concerned that the poor judgment that resulted in that conviction was making itself manifest again in the dealings with IA. The Applicant was again demonstrating poor judgment and could not be trusted to carry on business in accordance with law and honesty and integrity.

Mr Scholzauer also reviewed the Applicant's November 9, 2006 Application for Re-Instatement. At issue in this application is the fact that the Applicant had answered "no" to the question concerning outstanding judgments. Mr. Scholzauer stated that an untrue answer such as this one is serious because the Registrar relies on full and truthful disclosure in applications in arriving at the decision to register or not. The Registrar's office does not have sufficient staff or resources to independently check answers on all applications.

SG is a friend of both the Applicant and IA. The Applicant called her as a witness in this proceeding. It was SG who introduced them. SG testified that IA was a friend. As SG was unemployed, she would drive IA to therapy sessions. On one such trip in the summer of 2004, SG took IA to show her new home. IA stated that she wished she had a nice home such as SG's. A couple of weeks later IA asked to talk to a real estate agent. SG recommended the Applicant. There was an exchange of phone numbers. Shortly after the exchange of phone numbers, the Applicant called SG to inform her that IA was not seriously interested in buying a house. Thereafter, SG is unaware of any further telephone conversations between the Applicant and IA.

In early 2005, SG was having trouble paying her mortgage. She discussed this with IA during one of their drives to therapy and IA offered to pay the mortgage while SG got back on her feet. All told, IA paid about \$7000.00 on behalf of SG. At the end of April 2005, IA called SG suddenly and asked her to sign a promissory note in the amount \$9,000.00. SG stated that the face amount included interest. Some time later IA asked SG to sign a letter for an insurance company stating that SG took IA to therapy sessions. In April 2005, IA was pushing for repayment of funds. The Applicant called SG and told her that IA was considering suing for the return of funds. According to the Applicant, IA had been advised by a lawyer not to sue because of collection difficulties. The Applicant advised SG to call IA to sort out repayment. SG has no recollection of a call in April 2005 from IA seeking a real estate agent.

Geraldine Pennie is the manager of the co-op housing unit where IA lived. She gave evidence about the increased training received by co-op managers to assist them in tracing undeclared assets and income. She stated that the co-op receives a list of previously qualified applicants for each vacancy from Housing Connections. The co-op then interviews the whole family before offering them a place. With respect to IA, Ms Pennie could not find the actual documents from the archives but she brought documents generated from the computer database together with samples of the disclosure documents IA would have had to complete setting out all of her assets and income.

Ms Pennie reviewed the records for IA. She stated that IA declared total income of \$198.00 in August 2003 when she moved in. Based on that income, she was assessed a housing charge of \$131.00. IA was then under an obligation to declare any changes in her income or assets within 30 days. She did not declare any changes until her renewal for 2004 when she declared her income as \$200.00/mth, one child's income at

\$503.47/mth and another child at \$977.39/mth. Based on the new figures the rent was increased to \$330.00/mth.

Ms Pennie stated that in 2003 the *Social Housing Reform Act* came into force. Responsibility for subsidized housing was transferred from the Province to the City of Toronto. Following the implementation of the new legislation, Ms Pennie and her colleagues received further training on tracing undeclared income. The new training and system were fully implemented for the 2005 renewal year. Starting in mid-February 2005, renewal packages were sent out to unit holders requiring more extensive documentation of income and assets, including their Notice of Assessment from the Canada Revenue Agency. In 2005, Ms Pennie had 13 people move out of the co-op. She believes the move outs were because of the new disclosure requirements.

In the spring of 2005, IA approached Ms Pennie. She believes the conversation occurred in the month of April or May. IA asked about making alterations to her unit to permit her to sleep downstairs and not have to manage stairs. Ms Pennie was aware that IA was expecting an operation in the near future and would have problems managing the stairs. Ms Pennie stated that she advised IA to put her plans in writing and she would take it up with the co-op board. She did not get any details plans from IA.

When asked why she did not follow up with IA for full disclosure of documents after February 2005, Ms Pennie stated that she usually gave people 30 days to respond before asking questions. When she finally approached IA she was advised that IA was moving out. Ms Pennie was concerned about IA's options for new housing because of her low income. She thought that IA was moving in with friends.

In dealing with IA, Ms Pennie said that she did not have reason to deal with her extensively. While IA did not appear to be affluent, Ms Pennie had no idea of her lifestyle. She did state that, given IA's declared assets and income, there was no way for IA to save \$15,000.00 for the deposit on a house, pay a mortgage for someone else or make an \$80,000.00 down payment on a new house. In her first year IA had \$67.00/mth of income left after her housing charge payment. Average hydro bills on the units were \$75.00/mth. She noted that the income of the children would not be considered while they were in school.

Ms Pennie confirmed that she did receive letters in the name of IM from the TD Bank after IA moved but, as she had no record of an IM living in the co-op, she returned them to the bank. No unit number was shown on the letters. She was then shown the cheque given by IA to the Applicant in April 2005. She noted that it was a TD cheque in the name of IM.¹¹

The Applicant testified on her own behalf. She commenced her testimony with the 1982 criminal charges and conviction and proceeded chronologically through the various loans and dealings.

11 Ex 3 Tab 8 Page 10

In 1982 the Applicant was married for the second time and had a home and two children. Her nephew and two cousins came to Canada on visitors' permits and overstayed. The Applicant stated that, if they returned home, she would have to make payments for their upkeep and the upkeep of her parents. It would be best if the young relatives stayed with her, so she decided to wait for an immigration amnesty. Her ex-husband informed her that he knew an immigration officer who, for a payment of \$3,000.00, would help to get the young people documents. She gave the money and received one set of documents. The documents looked genuine. The other 2 sets never appeared. She then called her ex-husband asking for the other two sets of documents or her money back. That conversation was caught on tape as part of an RCMP operation. The Applicant was out of the country at the time when the RCMP moved to arrest the young people and charge her ex-husband, friends and family. She called the police and was informed she would likely be charged and to contact them on her return. She did so contact them and was charged with forgery and uttering a forged document. She was found guilty on both counts and sentenced to 9 months in prison. An appeal was started but abandoned on the grounds of cost. The Applicant turned herself in to the Vanier Women's Centre. A few days after her incarceration began she went through an assessment. The unit leader wanted to know why she was in jail and the Applicant told her. The Applicant was then asked if she had a job to go back to. This was confirmed. The unit leader had her apply to the parole board, which happened to be in the prison at the time. She was interviewed and released after serving three weeks. She spent 1 month in a halfway house and was then permitted to return home with no conditions. She has always regretted her actions. She has never sought a pardon. Someone advised her that, with a criminal record, she may encounter difficulty in the profession of nursing. She was told that, any time something went missing, the finger would point at her. She decided to change her profession and become a real estate agent. She met with the registrar and asked him if her criminal conviction would be a bar to her registration. She was informed that as long as she passed the educational requirements she would be registered.

OW was a friend of the Applicant's housekeeper. She would eat Sunday dinner with the family each week. The Applicant introduced a friend to OW to whom OW subsequently lent \$3,400.00. The Applicant guaranteed the loan. Interest on the loan was 13% compounded. The friend refused to pay back the amount needed to settle the loan as she thought it was excessive. OW sought repayment from the Applicant in 1994 or 1995 when the amount outstanding sat at around \$7,000.00. The Applicant felt the amount was excessive and balked at repayment. She dug her heels in and OW finally took the matter to court and proceeded to judgment. With costs and legal fees, the judgment was in the amount of \$13,000.00. In the interim OW had left the country. In 1998, the Applicant became aware of the judgment and included it in her application for renewal. The Registrar made it a condition of renewal that the Applicant make her best efforts to satisfy the judgment and produce a clear execution certificate. In late 1999 or early 2000 the Applicant met with OW and they agreed to settle for \$5,000.00. The Applicant paid the \$5,000.00 and the execution was lifted.

With respect to the loan in November 2000 from EP, arranged through NH, the Applicant testified that she was driving through Pickering one day when she saw a lady coming out of her house. The lady was of a similar build to the Applicant and she was immaculately dressed. The Applicant stopped her car and struck up a conversation with the lady, NH, about her clothing. The chance meeting developed into a friendship. According to the Applicant, she listed NH's home for sale in December 2, 2000 and it sold on December 6, 2000. NH stated in her complaint letter that her house closed in November 2001.¹² This apparent long closing may be explained by the fact that the Applicant had gone with NH to a new home development where, at some point, NH had purchased a new home. The Applicant had joined what she referred to as a partnership where EP was the treasurer. She explained that what she meant by a partnership was a kind of savings club where members contribute a weekly sum and each member takes turns at taking the whole amount. As described, it is a type of forced saving scheme where members get a lump sum for special needs every so often when they would have been unlikely to save it by other means. The Applicant joined the partnership and gave EP \$100.00 each week.

At the time, the Applicant was getting occasional loans from LB, who figures later in the evidence. She was in the process of getting a 2nd mortgage from LB and discussed this with NH. NH said she should get her loan within their community and not let the interest money go outside the community. NH arranged for a loan of \$10,000.00 with EP on a revolving two-month renewal period. The loan was repayable in February 2001. At one point, the Applicant advised NH that she had half of the money. NH told her not to pay back immediately but wait until she could pay back the full amount of the loan. The Applicant asked to deal directly with EP but NH asked why she wanted to do so. It was agreed to extend the loan until June 2001. Almost immediately after this agreement to extend, NH called the Applicant and asked her to borrow \$1,000.00. The Applicant deposited \$1,000.00 into NH's account on February 9, 2001. The reason for the need to borrow money was the fact that NH had been given money by EP to pay to one of the club members. NH had misapplied the money and was being pressed for payment. She needed the funds immediately, late on a Friday evening, because the member was attending her home the next morning. The Applicant stated that she made it to the bank just before closing to deposit the funds into NH's account. Several months after this exchange, NH called the Applicant and told her that EP had said the Applicant should give the outstanding partial payment funds to NH. Further, NH said that EP wanted a further \$1,000.00 interest to cover the extension period. The Applicant was aware that NH was having difficulty paying progress payments on her new home and began to suspect NH was not telling the truth. She contacted EP directly. EP told her that she did not need the funds until June 2001 but would like some more interest. An amount of \$200.00 was agreed. EP then advised the Applicant to deal with NH. When next the Applicant spoke with NH, NH was angry and accusatory. The Applicant fell out with NH. Matters then proceeded to a court action. At the settlement conference, the Applicant was given credit for the \$1,000.00 she had given to NH and \$500.00 in payments made to EP as part of the partnership. She entered into an agreement to repay the outstanding \$8,500.00 in the amount of \$300.00/mth. The Applicant paid the

money into court each month as required until, in 2005, she received a letter from Paragon Legal Services, the plaintiff's paralegal firm, denying that she had paid anything and demanding payment of approximately \$9,000.00. The Applicant attended at the court office and received a printout of the register showing she had paid \$7,600.00. She then paid a further \$150.00 but refused to make further payments until the paralegal firm confirmed the amount outstanding to be in the region of \$750.00, not the amount demanded. She has not received a reply and has made no further payments in the intervening three years.

NH complained to the Real Estate Council of Ontario (RECO) about the Applicant's failure to repay the loan. The matter was reviewed by the Complaints and Compliance Department and it was determined that the Applicant was not in breach of any code of conduct applicable to real estate agents. On December 10, 2005, RECO responded that it had no jurisdiction in the matter and advised NH to proceed through the courts. The results of the court proceeding are set out above.

In 2005 the Applicant was in default of a loan received from LB. LB had been the Applicant's broker but had retired. Over the years she had made a number of loans to the Applicant, all of which had been repaid. A loan went into default in 2005 and LB proceeded to judgment and served a Notice of Garnishment on the Applicant's employing broker. So far over \$4,000 has been repaid as a result of the garnishment. The Applicant did not attempt to negotiate any other payment schedule with LB. The Applicant acknowledges the loan to LB and intends to pay it in full.

In addressing the Requirement to Pay delivered by Canada Customs and Revenue Agency, the Applicant admitted that she has been a poor bookkeeper with respect to her GST returns. Prior to her divorce several years ago, her husband handled this aspect of her financial management. Since the divorce, the Applicant has been less than diligent at making her filings. Notwithstanding the fact she has not filed, she stated that it was impossible for her to owe \$38,000.00 in GST. After becoming aware of the Requirement to Pay, the Applicant contacted the person who had charge of her account to discuss these matters. The Applicant was informed that the amount was chosen simply to get the Applicant's attention, something at which it succeeded admirably. She has now put the preparation of these returns in the hands of an accountant and has been informed that she may owe \$1,200.00 in unpaid GST. That amount is still subject to review after figuring in deductions for car expenses. She was informed by the account representative that the Requirement to Pay would be allowed to lapse, and it has done so.

With respect to her dealings with IA, the Applicant asserted that same version of the story before this Tribunal as she did in her interview with the Mr. Scholzhauser but in slightly more detail. She stated that she had met IA in 2004, through an introduction by SG. Their early discussions in 2004 resulted in the Applicant concluding that IA was not interested in buying a house. Thereafter, the Applicant and IA would talk from time to time about their families and other matters. In April 2005, IA called the Applicant and asked her to come to her house urgently. When the Applicant arrived, IA informed her

that the co-op where she lived were seeking greater asset disclosure for the year, 2005. IA said that if she disclosed her assets she would be charged market rent for the town house she occupied, an increase of 300% or so over her current rent. She needed to keep her rent low so she could fund her children's post-secondary education. IA asked the Applicant if she knew anyone who was in need of a loan. The Applicant made a phone call and advised IA that she did have a candidate for a \$10,000.00 loan. IA prepared a cheque for \$10,000.00 and gave it to the Applicant. IA informed the Applicant that she did not know the borrower so she would only lend the money if the Applicant took responsibility. There was discussion about interest. The Applicant advised IA that the way to maximize interest was to charge a fixed fee every two months and to make the loan a revolving loan repayable every two months. As a result of this discussion, the Applicant signed a promissory note for \$10,000.00 plus \$400.00 in interest repayable in June 2005. The Applicant testified that IA was always aware that the funds were being borrowed on someone else's behalf and that the loan period would be extended at each expiry date.

The Applicant stated quite categorically that IA was not a client at that time but a friend. As far as the Applicant was aware, IA was not interested in buying a house. On May 17, 2005, IA called the Applicant and asked her to come to her home. The Applicant came the next day, May 18. IA's eldest son was present at the time and there was a dispute over the disclosure of the son's income. He had now graduated from college and was earning a substantial sum. The son complained that if the co-op saw his pay stub the housing charge would be increased to market rent. The son was adamant that he did not want to live where he was if he was paying fair market rent. He had decided to move in with his grandmother. The eldest son was the only one helping IA financially as her daughter was sleeping all day and her other son was still in school.

The Applicant told IA that her son was right. At that time, she suggested that IA consider buying a house. IA's son agreed to help and IA agreed to look for a house. The Applicant asked IA to sign the Buyer Agency Agreement and IA reluctantly agreed to do so. The early part of the conversation was held in the parking lot but once IA agreed to sign the documentation, it moved inside where the Applicant prepared the documents and IA signed. After a discussion of the type of house IA wanted, the Applicant informed her that the likely cost would be in the range of \$300,000.00. IA wanted a basement apartment with an en suite bathroom. IA acknowledged that she could afford a house in this price range. The Applicant immediately called a mortgage broker to discuss financing. She was informed that as long as IA had 25% down payment that a mortgage could be arranged notwithstanding that IA was not working. The Applicant then informed IA of the financing terms and told her she would need 25% down payment, \$5,000.00 as a deposit with the offer and the mortgage broker fee. IA confirmed that she could afford to buy a house on those terms. The Applicant then took IA and her son out to show them houses. It was necessary to work around the son's work schedule. On the first day they went out for a showing, Ms Pennie approached IA and asked her for the disclosure documentation. The Applicant advised IA to tell Ms Pennie that she would be moving out.

IA found a house she liked within the first week and put in an offer. The Applicant called her office and asked the secretary to prepare an offer. She then called into the office, picked up the offer and went to IA's home to have it signed. There was some competition for the house, so IA was impatient to get her offer in a timely manner. She questioned the Applicant about the conditions in the offer regarding a home inspection and satisfactory financing. The Applicant explained the necessity for these terms and IA reluctantly signed the offer. The offer was ultimately accepted. The day following acceptance of the offer, the Applicant called the mortgage broker and advised him of the details of the house and arranged an appointment for IA to meet with him. She explained in cross-examination that, despite the fact that the mortgage broker had pre-approved IA, it was not possible to confirm the actual mortgage until the offer was accepted. Financial companies may not finance certain areas or may find problems with the house. IA phoned the mortgage broker who advised her that she would qualify for a mortgage. On this basis, IA waived the financing clause. Thereafter IA would not return calls from the mortgage broker or the Applicant. The mortgage broker closed his file.

The Applicant finally got in touch with IA and told her she thought she was shopping for a mortgage. IA advised the Applicant that she intended to seek financing with TD Bank, where she had always banked. She later advised the Applicant that TD would not give her a mortgage because of a lack of equity and employment. Some time later, IA called the Applicant from another mortgage broker's office. She stated that she had found a mortgage with 5% down and a lower interest rate than that available from the broker recommended by the Applicant. The Applicant told IA to go home and the Applicant would call her there. Instead, the Applicant actually visited IA at her home and walked her through the mortgage broker trap: i.e. promises of funding on favourable terms that evaporate just prior to closing, at which point the purchaser has no option but to agree to much less advantageous terms. IA ignored this advice and continued with the broker she had found. Some time later, IA's broker called the Applicant and told her he needed a job letter and a T4 showing that IA had an income of \$70,000.00 p.a. The Applicant stated that she would not do such a thing. She went on to say that a credit bureau check would put the lie to the false documents. The broker advised her that he had already changed IA's credit report to show she was employed as a production manager. The Applicant refused to have anything to do with the false documents scheme. IA was furious and accused the Applicant of trying to force her to the Applicant's broker of choice. She accused the Applicant of doing this type of favour for SG so she could complete her purchase. IA then refused to answer the Applicant's calls for a number of days. In response to this silence, the Applicant wrote IA a letter about the type of criminal activity that was being proposed and the fact that agents and brokers had been jailed for such schemes.

During this time, early to mid August 2005, because of the bad feelings over the job letter and T4 and a demand for repayment by IA, the Applicant took steps to arrange for the repayment of the \$10,000.00.¹³ The Applicant went to a commission factoring company and arranged to factor her commissions in return for an advance to cover the

loan. Once this was arranged she contacted IA and offered repayment in full, notwithstanding her position that IA had agreed to a revolving loan to be repaid over time. IA advised the Applicant that she did not want to be repaid in full. The transaction with the factoring company had proceeded to such an extent that the Applicant was required to take the advance of funds.¹⁴

Also in August, IA called the Applicant and informed her that she had been unable to get a job letter and funding was not available. There then followed a three way telephone conversation between IA, the Applicant and the broker recommended by the Applicant. Any misapprehension that IA had about the Applicant gaining a financial advantage from using this particular broker was cleared up and IA worked with him thereafter to finance her closing. The broker advised the Applicant that, on doing his credit check, he found that IA was noted as being employed as a production manager.

The Applicant continued to assist IA after the closing. She helped to negotiate the contribution to be made by each of the children. She advised her on how to set up the dining room and lay out the basement. She even called an agency that looked for living quarters for foreign students to see if she could get two students to rent IA's two spare bedrooms. IA thanked the Applicant for putting her in the house. She was happy that she had good neighbours.

Shortly after closing, both the Applicant and IA were hospitalized. The effects of the Applicant's illness were to last for approximately two years during which time she was unable to work or could only work sporadically. During this time IA began to demand repayment of the loan. The Applicant advised IA that she was willing to repay the loan with monthly instalments. IA refused and said she wanted the whole amount. When the Applicant failed to pay, IA went to court. A settlement was reached whereby the Applicant would make monthly payments generally in accordance with her earlier offer.

In addressing the failure to disclose outstanding judgments in her November 10, 2006 renewal, the Applicant could only state that she had made an error. She drew the Tribunal's attention to the fact that less than two weeks prior to filling out the form, she had had an extensive interview with Mr. Scholzhauer where the main topic was executions and her credit history. She stated that she had no intent to mislead but cannot explain why she gave the answer she did.

ISSUES

As stated above, there are two issues in this appeal. The Tribunal must decide whether, on all the evidence before it, having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of her business. The Tribunal must also decide if 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. Should the Tribunal

¹⁴ Ex 9

conclude that the evidence discloses that the Applicant falls within either of the grounds for revocation set out above, then the Registrar would have satisfied the onus of proving that the Applicant is deserving of revocation. It is not necessary for the Registrar to establish the application of both grounds.

ANALYSIS AND FINDINGS OF FACT

The Tribunal finds the evidence of IA to be totally untrustworthy. Her testimony fails any test of credibility, whether with regard to specific facts, agreement with the evidence of other witnesses or just plain common sense. One example of a specific attempt to mislead the Tribunal was her blanket denial that she had bank accounts at Sheppard and Warden Avenues in Toronto. IA had previously identified as hers the cheque given to the Applicant for the advance of the loan of \$10,000.00. The Tribunal notes that the name on the cheque is not IA but IM, indicative of the fact that IA kept accounts in at least two names. The bank address on the cheque is 3477 Sheppard Ave. East, Toronto. The Tribunal takes judicial notice of the fact that 3477 Sheppard Ave. East is in the first block east of Warden on the south side of Sheppard Ave. East, described as Sheppard and Warden when locating it in Toronto.

IA's insistence that she first had dealings with the Applicant in April 2005 runs directly counter to evidence of both the Applicant and SG who had no interest in the outcome of this proceeding. SG gave her testimony in a forthright manner and, to the frustration of the Applicant, would not testify to facts of which she had no recollection. The Tribunal found her to be a thoroughly reliable witness and prefers her evidence to that of IA. Similarly, the evidence of Geraldine Pennie was thoroughly reliable. Ms Pennie confirmed the Applicant's evidence that in the spring of 2005 the co-op was putting pressure on IA to make greater disclosure of assets and income, including the disclosure of tax Notices of Assessment. While IA may have hidden assets by using different names, her tax filings would include all income under her social security number regardless of the name used.

Finally, IA's evidence does not make sense on a number of levels. She would have the Tribunal believe that in August 2003 she had no assets and total income of \$198.00/mth. Out of this income she paid \$131.00 in housing cost and approximately \$75.00 monthly for hydro. She then fed, clothed, schooled and raised a family of four on the negative balance. Granted that Ms Pennie advised the Tribunal that part-time income from her children while they were in school was not included, even allowing for such income, it would require the highest degree of financial management skills to make ends meet. IA's evidence goes much further. Not only was she living in limited financial circumstances without assets through 2005, but also she had \$37,000.00 in two lines of credit available to her at the bank and at least another \$7,500.00 available in credit card lines of credit. In 2004 she was able to pay SG's mortgage to the tune of about \$7,000.00 and in 2005 lent \$17,500.00. Further, by fall 2005 she was able to purchase a house with approximately \$80,000.00 down and carry a mortgage of \$240,000.00. Clearly IA was a woman of substantial means throughout the period of her residence in

subsidized housing. She was practised at lying to the co-op about her real financial situation and her sources of income. SG confirmed that, in 2005, IA was still actively involved in advancing some level of insurance claim. It was IA's evidence that she had received \$150,000.00 in 2000 all of which had been dissipated by 2003 and that she had no other insurance claims.

It follows from the rejection of IA's evidence that IA was not a real estate client of the Applicant in April 2005. While the Applicant and IA had initially been introduced to each other in the context of a possible real estate purchase in 2004, the Applicant had quickly concluded that IA was not interested in purchasing a house and the relationship changed to an acquaintanceship. In April 2005, the Applicant was not dealing with IA in the context of a home purchase when the \$10,000.00 loan occurred. It further strains credulity to believe that IA handed over 2/3rds of her home down payment to an agent she met for the first time on April 21, 2005. The Tribunal is satisfied that the Applicant did not abuse her position as a real estate advisor to IA to engineer a financial advantage for herself.

Similarly, the Tribunal is satisfied that the Applicant did not abuse her real estate agent relationship with NH to gain a financial advantage for herself. It must be borne in mind that, not only did the Applicant not borrow funds from NH, but that she actually lent funds to NH. The lender to the Applicant was EP. NH acted as a go between and attempted to exploit her position for her own benefit. It was the Applicant's refusal to allow NH to exploit her that led to a breakdown of the relationship that ultimately resulted in a refusal to accept the Applicant's offer of a substantial partial payment and terms. The refusal was followed by a court action.

Overall, the Tribunal found the Applicant to be a reliable witness. She had a good recollection of details and was generally consistent throughout with earlier statements. She insisted on telling the truth even though the truth may have been more harmful to her. This position was summed up in her closing argument when she stated that she would rather lose her registration because she told the truth than because IA lied. Key aspects of the Applicant's evidence were also confirmed by the testimony of other witnesses.

The world in which the Applicant lives and carries on her business, as described by the Applicant, is, in the Tribunal's experience, not in accordance with normal business practices. The Applicant described the practice of pooling resources in "partnerships," or forced savings schemes where nothing is documented and everything takes place on trust. She outlined relationships where loans are advanced on the basis of personal dealings notwithstanding that it is in the mutual contemplation of the parties that the funds are being borrowed by a third party. These transactions fall outside the normal course of mainstream financial dealings. Only when matters proceed to court do these transactions take on a familiar appearance. Otherwise these transactions are poorly documented, interest rates are expressed as lump sums not as annual rates, and advances are made on a handshake not on detailed documentation.

Of the four loans advanced by the Registrar in support of the position that it is reasonable to conclude that the Applicant will not be financially responsible in the conduct of her business, the Applicant acknowledged one as being for her benefit, the EP loan. All of the others seemed to be for the benefit of others. It is clear that LB is not part of the same community as the Applicant and loans made by LB followed the more familiar business model. The fifth loan, the \$7,500.00 advanced by IA, and acknowledge by her, as being for another woman, seems to sum up the dealings. Knowing that the loan was for someone else, IA still insisted that the Applicant sign a promissory note and she looked to the Applicant for repayment. In this transaction, the Tribunal finds confirmation that the original \$10,000.00 loan was for the benefit of a third party and, more importantly, the full circumstances were known to IA.

Looking at all of the loans together in light of the statutory test that, from her financial position it is reasonable to conclude she will not be financially responsible in the conduct of business, the Tribunal notes that two loans date back many years. The OW loan has been settled completely and the EP loan has been paid down and the plaintiff appears to have abandoned her claim to the small remaining balance. Clearly neither of these loans can have any impact on the Applicant's financial position. With respect to the two remaining loans, the LB loan and the IA loan, arrangements have been made to repay these loans and there was no evidence before the Tribunal that the Applicant is incapable of abiding by those arrangements. The Tribunal would have preferred to see the Applicant take active steps to pay off the LB loan and not let it proceed to garnishment proceedings, but the evidence is that over \$4,000.00 has been paid and a portion of each commission cheque is going to pay the balance down. The Tribunal also notes the Applicant's ill health during late 2005 through 2006 and recognizes the impact the medical condition would have had on her ability to repay. The Tribunal accepts the Applicant's explanation concerning the Requirement to Pay. The estimated amount outstanding is \$1,200.00. There was no evidence about the Applicant's current financial position or whether managing these debt obligations has, or is likely to have, any impact on her ability to carry on business in a financially responsible manner. It is not reasonable to draw such an inference on the facts as disclosed.

The second ground advanced by the Registrar is directed at an examination of the Applicant's past behaviour to determine whether there are reasonable grounds to conclude that she will not carry on business in accordance with the law and with integrity and honesty. There is no doubt that in examining the Applicant's past behaviour, the fact that she was prepared to assist IA in hiding IA's true financial position from the co-op is indicative of poor judgment. It matters not that, in doing so, she thought she was acting for the greater good of her community by ensuring that its young men completed post-secondary education. To this, the Registrar adds the very similar circumstances surrounding the Applicant's 1982 criminal conviction and urges the Tribunal to conclude that there are reasonable grounds to conclude the Applicant will break the law in future. The Tribunal notes that, in both cases, the Applicant was seeking no personal benefit. It was her misguided altruism that led her into making poor decisions. Against these two events the Applicant has carried on a real estate career without blemish. She has disclosed her past and, when she was aware of them, she

has disclosed outstanding judgments. She abided by terms set by the Registrar with respect to the OW debt and discharged it. She has substantially abided by court settlements she has entered into. Finally she reacted vehemently when asked to provide false documentation regarding IA's mortgage.

The Registrar also asks the Tribunal to take into account two other factors. It is the position of the Registrar that repeatedly borrowing funds and then forcing the lenders to court to seek redress indicates a pattern of wrongful behaviour. It is also the Registrar's position that the Applicant's failure to disclose her outstanding judgments in the November 10, 2006 renewal shows that the Applicant is not trustworthy. The last ground was not set out in the Notice of Proposal, but the Applicant did address it when she provided particulars of her grounds for appeal. On that basis, the Tribunal permitted questions concerning it with some reservation that it was adding a new ground in the middle of the hearing. False declarations are specifically addressed in s. 10 of the Act. The Registrar has not pleaded that ground and the Tribunal is not prepared to entertain it as a ground for revocation at this late stage. To do so would be grossly unfair to the Applicant.

The Tribunal has described above the unorthodox manner in which loans are made and documented in the Applicant's community. It is not surprising that sometimes, these transactions lead to disputes over periodic payment or partial payment or even the amount of payment. Of the loans in question, the quantum was in dispute in the OW loan and it settled for substantially less than the judgment, partial payment was in issue in the EP loan plus accounting for funds received, and full payment was tendered and refused in the IA loan. Only the LB loan was not seriously disputed.

The Registrar invokes the parole evidence rule. The Applicant executed promissory notes indicating that the principal was to be repaid on a specific date. The Tribunal accepts that the execution of the promissory notes evidences the Applicant's liability to repay. The Applicant did not attempt to deny her liability. The behaviour of the parties indicates that the terms of the promissory notes were modified, either by collateral agreement between the parties or by subsequent behaviour. The Applicant is not legally sophisticated so she did not argue concepts such as estoppels before the Tribunal. There is evidence that all of the lenders except LB may well be stopped from insisting on the strict application of the terms of the promissory notes. It was the Applicant's evidence that she offered repayment in full to IA prior to the closing of IA's purchase. The documentary evidence supported this evidence. By advising the Applicant not to repay, IA cannot now raise the failure to repay in a timely manner to the detriment of the Applicant. With respect to the OW loan, the Tribunal has serious doubts whether there was consideration for the promissory note. The note itself was signed two years after the advance. The advance, according to the Applicant's evidence, was to a third party. The third party had balked at repayment in full. When OW approached the Applicant to hold her liable for the third party's action, the Applicant accepted responsibility to repay a loan despite the lack of any legal obligation to repay. In such circumstances, the Tribunal cannot find the Applicant was not acting lawfully or with honesty and integrity in forcing these actions to court.

The Tribunal agrees with the Applicant that the inclusion of the 1982 criminal conviction was more prejudicial than probative. Its only purpose was to taint the Applicant as someone prone to slipping into criminal behaviour. The Tribunal concludes that it has no role in determining whether, 26 years later, the Applicant will carry on business in accordance with law and with integrity and honesty. The Tribunal does not accept the interpretation urged on it by the Registrar that it is indicative of overall poor moral character. If it does indicate poor moral character, then 22 years of unblemished record more than offsets that indication.

The Tribunal is concerned by the willingness of the Applicant to assist IA in her money-hiding scheme without considering the implications. The Applicant has a well-developed sense of community responsibility. Her justification in assisting IA was to ensure that IA's sons secured post secondary education. She was of the opinion that her community needs more young men to take post-secondary education. The goal may have been good, but, in undertaking to assist IA, the Applicant has decided that her narrow view of her community's best interests is superior to the needs of the community as a whole. By failing to disclose her income and assets, IA has received an undeserved rent subsidy, possibly in excess of \$36,000.00. The Applicant's role had no monetary effect, as, according to Ms Pennie, the new rental rate would not take effect until after the actual termination of the lease in August 2005. That fact was unknown to the Applicant at the time she made her decision. Funds were denied to the City of Toronto where they would have been applied for the benefit of all Torontonians, including more deserving members of the Applicant's community. Decisions regarding which residents of Toronto should benefit from these funds are made by democratically elected officials and should not be usurped by the private actions of the Applicant. The Tribunal cannot condone this action, no matter the motivation behind it. It is clear that the Applicant needs further ethical training to understand that ethical behaviour cannot be compartmentalized into one code for carrying on the real estate business and one for dealing with her community.

The Tribunal concludes that, in the light of the whole of the Applicant's past behaviour, including her many years of unblemished practice, her abhorrence at the fraud scheme engineered to win IA mortgage financing, her determination to ensure that the truth, however damaging to her own position, came out before this Tribunal and her single recent act of poor judgment in assisting IA, termination of the Applicant's registration is unnecessary for the protection of the public of Ontario. The Tribunal concludes that the following compliance with certain conditions set out below, it is not reasonable to conclude that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Tribunal sets the following terms. After the date of the release of these reasons, the Applicant must undertake not to enter into further loans on behalf of third party borrowers who are not immediate family members. She has been acting as an informal broker in borrowing from lenders and giving to borrowers. There was no evidence that she is compensated in any manner for this activity. Relationships between borrowers and lenders are generally regulated in Canada; Parliament and provincial legislatures

having found it necessary to regulate the practice for the protection of consumers. The Registrar did not draw the Tribunal's attention to any illegality in acting as a go between or borrowing on behalf of third parties, however, operating in such a manner has resulted in breaches of the disclosure requirements for the total cost of loans. The Applicant described the practice of charging a lump sum interest payment as a means of increasing the yield on the advances. The IA promissory note has no statement of the effective annual interest rate. The Applicant's future involvement must be restricted. While it might be a counsel of perfection to suggest that private parties will not enter into loan transactions not documented properly, the Applicant shall not be involved as a guarantor or borrower. Her role in such transactions, if any, shall be limited to providing introductions between the lender and the borrower. She shall not act as a guarantor of these loans or assume liability for their repayment.

The Applicant shall honour the settlements that she has entered into with respect to loan repayment. This undertaking includes the repayment schedule she entered into with respect to the EP loan, the IA loan and the LB loan. With respect to the LB loan, while the Tribunal would prefer that the Applicant formalize a repayment schedule with LB, if such an arrangement does not occur, continued deduction of a percentage of commission payments pursuant to the Notice of Garnishment should be sufficient. The EP loan has been in default for a number of years, the Applicant having unilaterally decided to terminate court ordered payments. The Applicant shall, within 30 days of the release of this order, take all reasonable steps to determine the amount currently outstanding and recommence payments at the rate previously agreed and ordered, that is \$300.00 per month, until it is paid off. At the request of the Registrar, the Applicant shall provide reasonable proof that she is taking the steps required by this order. Finally, the Applicant shall take the "Code of Ethics under REBBA" course offered by RECO. If such a course is not offered within 180 days of the release of this order, then the Applicant shall take a course determined by the Registrar to be an equivalent or replacement course.

ORDER

Subject to the terms set out above, the Tribunal orders the Registrar not to carry out the Proposal to Revoke the Applicant's Registration dated November 28, 2007.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

Released: November 3, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



RISHIRAM SHIWSANKAR

IN THE MATTER OF A PROPOSAL BY THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, 2002 S.O.
2002, c.30, SCH.C

TO REFUSE REGISTRATION

TRIBUNAL; ELIZABETH SPROULE, Vice-Chair

APPEARANCES; DOUGLAS STRELSHIK, Counsel, representing the Applicant

MAYA SABHARWAL and TIM SNELL, Counsel, representing the
Registrar.

DATE OF
MOTION; October 21, 2008 *by teleconference*

ORDER

Mr. Rishiram Shiwsankar (the "Applicant") has brought a Motion for an Order granting an extension of time to file an appeal from the May 28, 2008 Proposal of the Registrar, *Real Estate and Business Brokers Act*, 2002 (the "Act") to refuse his registration as a salesperson under the Act.

BACKGROUND

This is the Applicant's second motion for the extension of time to file the above appeal. The first motion was heard September 12, 2008, and the Tribunal's decision and order was released September 25, 2008. In the last paragraph of her Reasons, Vice-Chair Weary states:

"Given the findings that there was an immediate intention to appeal the Proposal, that there was no excessive delay in filing the Appeal, that there is no prejudice suffered by the Respondent and that there is, at least on some allegations, a reasonable chance the Applicant could succeed in his appeal, the Tribunal finds that the justice of the case requires the Registrar's final Notice be withdrawn and the Applicant be provided a period of seven (7) days from the date of this Order to properly serve and file his Appeal in order that it may be heard as expeditiously as possible".

A copy of Vice-Chair Weary's Order was sent by facsimile to the Applicant's Counsel on the afternoon of September 25, 2008. Counsel then confirmed by telephone with staff at the Tribunal that the Applicant's Notice of Appeal could be filed up to October 6, 2008. The Applicant's Notice of Appeal was sent by facsimile, by his Counsel, to the Tribunal at 5:13 p.m. on October 6, 2008. Pursuant to Rule 4.2(2) of the Tribunal's Rules of Practice relating to service and filing, any documents delivered after 4:00 pm. shall be deemed to have been served on the next day that is not a holiday.

By letter dated October 7, 2008, sent by facsimile to the Applicant's Counsel, and Counsel for the Registrar, *Real Estate and Business Brokers Act*, the Chief Administrative Officer and Registrar of the Licence Appeal Tribunal ("LAT") advised that the Applicant's Notice of Appeal was not filed within the seven-day deadline required by the Tribunal's Order, and asked whether the Registrar would consent to an extension of time. The Registrar's Counsel replied that the Registrar would not consent.

One affidavit was provided by the Applicant in support of this motion.

LAW

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

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time.

Rule 5 of the Licence Appeal Tribunal Rules of Practice reads as follows:

TIME

- 5.1 In the computation of time under these rules or in an order of the Tribunal, except where a contrary intention appears,
 - (1) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens, and including the day on which the second event happens even if they are described as clear days or the words "at least" are used;
 - (2) where a period of less than 10 days is prescribed, holidays shall not be counted;
 - (3) where the time for doing an act under these Rules expires on a holiday, the act may be done on the next day that is not a holiday; and

(4) where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally.

5.2 The Tribunal may extend or reduce any time period required under these rules.

DECISION

During his submission, Counsel for the Applicant further explained the events of October 6, as set out in the affidavit evidence, and unequivocally conceded that the late filing of the Applicant's appeal was a result of his mistake. He explained that after receiving the Tribunal's decision of September 25, 2008, he verified the last day on which the Applicant's Notice of Appeal could be filed as he was about to leave town for five days to celebrate religious holidays. He did not, however, check the LAT Rules to determine the time of day that it would have to be filed by and therefore erred in faxing the Notice of Appeal after 4 p.m. This is a reasonable explanation and the Tribunal accepts it. Counsel argued that this defect can and should be corrected under the Tribunal's Rule 5, set out above. In particular, Rule 5.2 provides that "the Tribunal may extend or reduce any time period required under these rules". He further argued that to deny the Applicant's the right to appeal in these circumstances would be contrary to the principles of natural justice.

Counsel for the Registrar strongly opposed the further extension of time on a number of grounds, including that it was an abuse of process, a breach of natural justice and would have a prejudicial effect on the Respondent. Further, it was argued that the correspondence of the Tribunal's Chief Administrative Officer and Registrar on October 7, 2008, amounted to a decision in the matter, to the effect that the Appeal was not filed in accordance with the Tribunal's prior order and, as a result, the Tribunal was *functus officio*.

With respect to the arguments made by Counsel for the Registrar, it is not clear to the Tribunal how this motion for the further extension of time could be considered an abuse of process. It is not frivolous or vexatious. This motion is appropriate and necessary to correct the error of Counsel, and restore the Applicant's rights.

Neither is it clear to the Tribunal how extending the time to correct this defect in filing would be contrary to the principles of natural justice. In fact, the opposite would appear to be the case. It is an accepted principle that an error of counsel should not be borne by his or her client.

When asked how the extension of time would have a prejudicial effect on the Respondent the submission was that "there has been a lot of time spent". The Tribunal does not doubt this, given the tenacity with which the Registrar has opposed this motion. It was found by Vice-Chair Weary that there was no prejudice suffered by the Respondent at the time she granted relief to the Applicant in September, and there was

no evidence before the Tribunal to suggest that there had been any change in circumstances. Counsel put forth the argument that granting relief in this instance would be sending a message to registrants that the rules set out in the Act can simply be disregarded. The Tribunal does not find this argument persuasive. This is a unique situation involving an error that resulted in a minor defect.

With respect to the argument that the Tribunal is *functus officio*, the letter of the Registrar of LAT dated October 7, 2008, does not purport to determine the legal rights and privileges of the party. It simply points out the defect in the filing of the appeal and asks whether the Respondent will consent to the defect being corrected. The jurisdiction of the Tribunal is affected when a final decision or order is issued in a matter by a member of the Tribunal. Members of the Tribunal are appointed by the Lieutenant Governor in Council, (see s.2 (3) of the LAT Act), and have statutory powers of decision. The letter of the Registrar is not a decision or order of the Tribunal that would end the Tribunal's jurisdiction. The only decision which has been issued involving the Applicant and his right of appeal was that of Vice-Chair Weary, wherein the Applicant was granted relief from the Registrar's final Notice and given additional time to serve and file his Appeal.

The Tribunal notes that neither party made a request for costs during the proceedings.

ORDER

Having regard to the facts and the discretion given the Tribunal under Section 7 of the LAT Act, and the LAT Rules of Practice, the Tribunal orders that the appeal of the Applicant be deemed perfected as of the date of this decision.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule
Vice-Chair

Released: October 27, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DESMOND ALLEN

APPEAL FROM A NOTICE OF PROPOSAL ISSUED BY THE
REGISTRAR OF THE *REAL ESTATE AND BUSINESS BROKERS
ACT*, 2002, c. 30, Sch. C.

TO REFUSE REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: OSBORNE BARNWELL, Counsel, representing the Applicant
NICOLE KITOFF, Counsel, representing the Registrar

DATE OF
HEARING: AUGUST 20, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

Mr. Desmond Allen (the “Applicant”) has applied for registration as a salesperson under the *Real Estate and Business Brokers Act, 2002* (the “Act”). Originally licensed as salesperson under the Act in 1987, his registration was revoked by the Registrar in June of 2006. Mr. Allen did not appeal the revocation. The Proposal of the Registrar now in issue alleges that the Applicant is not entitled to registration in 2008 based on continuing significant financial debt as well as recent past conduct consisting of 2007 convictions under the *Income Tax Act*, the *Excise Act* and the *Real Estate and Business Brokers Act, 2002*.

In his application of December, 2007 the Applicant disclosed three judgments registered against him in favor of Revenue Canada dated 2003, 2005 and 2006 totaling close to half a million dollars in unpaid taxes.

Under an Agreed Statement of Facts filed by the Parties, the Applicant acknowledged these convictions. He also conceded that he had failed to comply with the Court’s

restitution Order under which he had agreed to commence monthly payments in August of 2007. This date had been extended to commence in December 2007 at the Applicant's request; however he has only made one payment to date.

Nor does the Applicant contest the existence in 2007 of two convictions against him for operating as a salesperson whilst unregistered.

It is his position that the convictions, and the outstanding financial obligations he faces, can be explained to illustrate a series of unfortunate events which fail to provide reasonable grounds for the revocation of his license.

Motion to Exclude:

At the commencement of the hearing the Registrar moved that documents filed by the Applicant five days prior to the hearing date be excluded. The documents consisted of a series of character reference letters. The Registrar relied upon the Pre-hearing Order of this Tribunal dated January 22, 2008, wherein the Tribunal Rules that disclosure be made within ten days of the Hearing date were clearly stipulated to the parties.

Mr. Barnwell argued that the Applicant had not been represented by Counsel at the time of the Pre-hearing and, in fact, had only retained legal services ten days prior to the scheduled hearing date. Once retained, these documents were provided to Counsel for the Registrar as promptly as possible with phone numbers for each referee in the event the Registrar wished to follow up.

The letters were admitted. Fairness is the primary issue to be considered in allowing material to be filed which fails to meet the disclosure timelines provided in the Tribunal Rules of Practice. In the circumstances of this case, the letters in question, while late, were in fact provided to the Registrar within sufficient time that rebuttal witnesses or contradicting evidence could have been - if not made available - at least, determined. However, the Registrar requested no additional time or evidence be allowed. Given their hearsay nature, their weight may be of dubious value. This is a matter for Counsel to argue in submissions; they are however, relevant and, given that they do not unfairly disadvantage the Registrar, properly admitted.

Evidence:

The Registrar's witness was Mr. Brian Schlotzhauer, Deputy Registrar of the Real Estate Council of Ontario (RECO), the organization mandated to administer the Act. The witness described the Act as consumer protection legislation enacted to provide consumers with a standard of real estate conduct. The basic standards imposed on those conducting the real estate professions are set out in section 10 of the Act.

In order for the Registrar to determine whether an applicant for registration meets these standards, detailed information is sought to be provided by an applicant on the application form provided to the Registrar for license. The Registrar considers this disclosure as well as any other information on the applicant's past conduct before deciding whether or not to approve an application. Mr. Schlotzhauer noted that, since

the role of an applicant's past conduct is specifically highlighted in the legislation as an indicator of future conduct, the whole of an applicant's past conduct is considered to the extent practical, and not just past conduct in the profession.

The witness also stressed the importance of honesty and integrity in registrants under the Act. Often a home purchase is the most significant purchase for a consumer, and their agent is their sole conduit in the complex economic and legal process. Trust is fundamental to the relationship.

Given these considerations, Mr. Schlotzhauer reviewed the Applicant's application for registration when it was received by his office in December 2007. He reviewed the information disclosed, past registration history, execution, bankruptcy and criminal record searches. This information revealed the large outstanding financial debt owed by the Applicant on which he had failed to make payments he had agreed to, as well as the most recent convictions for trading whilst not registered. When these were considered against the Applicant's past registration history, the Registrar concluded the Applicant displayed an on-going disregard for the law, as well as an on-going lack of financial responsibility, and was therefore not suitable for registration.

In cross-examination, the Deputy Registrar noted that the lack of consumer complaints against the Applicant while he was registered did not necessarily imply good conduct, as consumer concerns and issues with registrants can and do exist without the Registrar's office ever being informed. Mr. Schlotzhauer also stated that the fact that the Applicant had pled guilty to his previous convictions did not weigh in the Registrar's consideration, as such decisions are predicated on numerous factors and the Registrar's concern is with the prohibited activity and not the plea.

The Applicant testified he had demonstrated an aptitude for the practice of real estate early on in his career when he found that 98% of his business originated in referrals. Between 1987 and 2003 he served in excess of 2000 clients to whom he was devoted. To his knowledge, not one of these clients ever had a complaint against him. Indeed, he claimed the opposite was true – as is evidenced in the referrals he received, no less than in the letters of reference filed.

The Applicant further denied ever having borrowed funds from clients or in any way compromising their financial relationship with him. In fact, he stated the opposite was true – he had on more than one occasion lent money to clients in need of extra cash to conclude a trade.

Prior to his earlier revocation in 2006, the Applicant stated he had been fined \$2500.00 by a professional discipline committee. He understood that this fine was imposed because he was found to be vicariously liable for negligent misconduct of one of his employees. He testified he learnt from this experience to ensure anyone who assists him is properly registered and he remains mindful of any documentation such an individual produces on his behalf.

The taxation convictions also were the result of improper activity by others. According to the Applicant, his tax returns for 1998 and 1999 were completed by a tax preparer who

failed to submit the proper information provided by the Applicant to the Canadian Revenue Agency. An audit was consequently triggered for the taxation year 2000. This led to convictions against the Applicant under the Income tax Act for:

1. understating 1998 income by the amount of \$161,906.78;
2. reporting 1999 false rental losses in the amount of \$8,892.24;
3. reporting 1999 unsupported commission expenses in the amount of \$109,248.89;
4. understating 1999 taxable income by \$118,141.83;
5. failing to report 2000 real estate commissions of \$100,050.26;
6. reporting unsupported expenses for 2000 of \$59,906.11;
7. understating 2000 taxable income by \$159,956.37

Related convictions were also rendered under the Excise Act (Exhibit 3(b) Tab 9).

The Applicant testified that it was his criminal lawyer who advised that he plead guilty to the charges. He had only agreed to do so based on the extreme stress and concern the process caused him and his family. It was his evidence that he advised his lawyer that he was not guilty. However, in a document dated January 23, 2007 signed by both the Applicant and his lawyer (Exhibit 4, Tab 2), the Applicant consented to having been fully informed of the consequences of pleading to the charges and explicitly acknowledged he had been advised of all his possible defences as well as all ramifications stemming from his guilty plea.

The Applicant claimed he had never signed an authorization for e-filing his tax return of 2000. Had he done so, he would have caught the obvious error made by the tax preparer in that instance. This return was completed by the son of his earlier accountant and the Applicant surmised the son had made a clerical error with transposing the figures provided to him. Despite his requests, the Canadian Revenue Agency failed to provide him with copies of his seized records showing the specific information he had provided to the accountant.

The Applicant did not provide information as to whether or not he had signed off for the returns of 1998 and 1999.

The Applicant has only made one monthly payment under his restitution Order of \$98,000.00. He explained his failure to meet this debt as directly flowing from his license revocation, which has resulted in his inability to earn income. He testified he took courses in 2007 for employment with a tax shelter company but was unable to register under the Ministry of Financial Institutions due to his conviction record. In answer to questions posed by the Tribunal, the Applicant advised he has relied on borrowing from friends and family, including his wife who has had to refinance various investments, in order to keep the family finances afloat.

The Applicant blamed the 2006 license revocation on a misunderstanding between himself and his then-lawyer. At the time of the Proposal, in May 2006, and within the 15 days granted to appeal the matter, the Applicant had, he alleged, instructed his lawyer to meet with the Registrar with a view to reconsidering the termination. The lawyer

failed to do so. A Motion to extend the time for appeal was filed with this Tribunal. Vice-Chair Sandford heard the submissions and rejected the request by Order dated September 25, 2006 (Exhibit 3(b) Tab 12). The Order concludes that the Applicant's appeal has no substantial merit.

The Applicant acknowledged receipt of the Registrar's Final Notice revoking his registration dated June 6, 2007. He also conceded he was aware the Registrar had sent a letter dated June 7th, 2007 to his then-lawyer specifying the revocation (Exhibit 3(b) Tab 3) and a further letter dated June 14th, 2007 to the Applicant's Broker of Record stipulating the license revocation and the need to ensure all trading activity by the Applicant cease immediately. This latter letter was acknowledged by fax on June 15th whereby the Broker advised the Registrar's office that the Applicant was being removed from all listings (Tab 6). Notwithstanding all this information, the Applicant claimed he continued to trade in real estate because he believed he could do so, given that his lawyer was bringing a Motion before the Tribunal for leave to appeal. This decision to continue trading resulted in his convictions of trading whilst unregistered dated June 22 and August 6 (Tab 10). He testified he pled guilty as he wished to put the problem behind him and because he had no funds to pay a lawyer.

THE LAW:

The Act provides in part:

- 9.1(1) If an applicant for registration or renewal of registration does not meet the prescribed requirements, the registrar shall refuse to grant or renew the registration.
- 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,

DECISION AND ORDER:

Counsel for the Applicant argued that the Registrar has failed to establish grounds to conclude that the Applicant cannot be financially responsible in the conduct of business as required under s. 10 (1) (a) (i). He noted that the execution orders stemming from the tax returns of 1998-2000 emanated from the Applicant's personal tax returns. Relying on the 2005 decision of this Tribunal *Bistany (re)* [2005] OLATD No. 61, Counsel argued that this evidence did not establish the requisite nexus between the financial irresponsibility and the regulated business. In *Bistany* an applicant appealed a

Proposal denying registration based in part on the Registrar's finding of outstanding judgments against the applicant. The Tribunal found that the judgments arose from bankruptcy proceedings which occurred due to failed unrelated business investments and concluded the "debt was incurred for what appears to be legitimate personal, professional and business expenses." The Tribunal also found the applicant had made numerous efforts to pay down large amounts of these debts. In doing so he had inappropriately disbursed real estate client trust funds for his own use hence the Tribunal upheld the Registrar's proposal.

The fact is uncontested that it was the Applicant's business income which was improperly declared, leading to the convictions. I do not accept Counsel's submission that simply because the false disclosure was in the form of a personal return, it is removed from the ambit of s. 10 (1) (a) (i) of the Act. The amounts declared as earned from his business activity were false and the Applicant was found responsible. Further, he remains in serious debt and has made little, if any, effort to meet the undertakings he provided to the Court to pay the penalties imposed upon him. If the Applicant is willing to act irresponsibly in his business of paying taxes to the extent which this state of affairs implies, this provides reason to conclude he cannot reasonably be expected to be financially responsible in the conduct of his business in selling real estate in the absence of mitigating factors.

Even if these facts do not adequately support a finding of financial irresponsibility in the conduct of business, they do support the conclusion that the Applicant is not a suitable candidate for registration under s. 10 (1) (a) (ii). Unlike *Bistany*, the evidence in this case demonstrates, that the debts incurred do not find their source in any legitimate act.

Mr. Barnwell argued in submissions that a conviction resulting from a plea bargain is not prima facie proof of guilt in a subsequent civil proceeding. He relied on the federal tax Court decision of *Hagon v. Canada* [1999] T. C. J. No. 42 where the Court dismissed the taxpayer's appeal from penalties imposed upon him based on tax assessments on findings of credibility. In doing so, the court heard evidence and did not accept the Crown's initial plea of issue estoppel based on a guilty plea to convictions at the Provincial Offences Court. The Tribunal in *Bistany* came to a different decision. It considered the extent to which previous convictions can be re-litigated at the Tribunal. Relying on the Divisional Court ruling in the case of *Ontario (Motor Vehicle Dealers Act) v. Jacobs* [2004] O.J. No. 189, the Tribunal concluded that it might look at all the circumstances, which give rise to such convictions for the purpose of mitigation and not for the purpose of re-litigation. The Tribunal also considered the Supreme Court of Canada decision in *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77 and *Ontario v. CUPE (OPSEU)*, [2003] 3 S.C.R. 149 where the Court refused those persons who had been convicted of offences to re-litigate those convictions before an administrative Tribunal.

These cases can be read together for the proposition that, while re-litigation of a plea bargain conviction might be allowable within the jurisdiction of the Federal Court, such is not the case where administrative tribunals are concerned.

In the circumstances of this case, the Tribunal is unable to conclude that the Applicant's evidence as to the convictions against him mitigates the convictions. The Tribunal finds, rather, that the Applicant's testimony was self-serving and unreliable. In each and every instance he said that the fault lay with others who, he claimed, were responsible for his predicaments. These others were not limited to the two tax preparers, but included the criminal lawyer who urged him to plead to the convictions and the Canadian Revenue Agency, which failed to provide him with seized documents which would demonstrate his innocence. It strains credibility that the tax preparers and the Applicant would have made the same kind of errors on a number of disclosures comprising three different years of returns and two different tax professionals. Further, none of these excuses is corroborated by independent or third party evidence. Finally, despite the allegations of being repeatedly wronged, there was no evidence of any effort made by the Applicant to call any of the alleged wrongdoers to account.

The same excuses also occur in the Applicant's explanation of the 2006 revocation of his licence - which was not apparently properly delivered to him, given that he found it at a later date "badly weathered" in his back yard. He makes no mention of the fact that both it and the Final Notice were also served by registered mail and returned to the Registrar's Office as not claimed. The consequent revocation, he said was the fault of his lawyer for not properly ensuring his appeal was filed. Again, there is no indication of a complaint to the Law Society or letter of reprimand for the lawyer's alleged negligence.

The reasons provided for his convictions for operating as a salesperson while unregistered – his speculation this was not prohibited given the Motion before the Tribunal to extend the time for appeal - are also not supported by any independent evidence. There is no letter from the lawyer supporting the Applicant's version. There are, however, three letters clearly stating otherwise from the office of the regulator to him, his lawyer and his broker. If the Applicant was indeed willing to assume that his continued trading was allowed in the face of these, he is either willfully blind or a great risk taker. Neither demonstrates the required integrity or honesty of regulated individuals with access to significant amounts of consumer funds and with significant impact on consumer legal liabilities.

Further, all of the above indicate the Applicant remains unwilling to accept responsibility for his actions and situation.

I am aware of a line of Tribunal decisions, which hold that one act of dishonesty or illegality alone is sufficient to support revocation. In this case there are a number of convictions for illegal activity. The behavior of the Applicant leading to these convictions as well as his attitude in rationalizing them before this Tribunal outweigh whatever positive conclusion one might draw from his many years as a registrant.

Based on all of this, the Tribunal concludes there are reasonable grounds for belief that: (a) the Applicant will not carry on business in accordance with the law and with honesty and integrity, and (b) his indebted financial position reasonably leads to the conclusion he can not be expected to conduct his business responsibly.

Counsel for the Applicant urged the Tribunal to recognize the severe hardship which upholding the Registrar's Proposal will cause his client in the removal of his livelihood. He argued that clear and convincing evidence was required before I could interfere with the Applicant's right to earn his living. With respect, Counsel is mistaken. The Applicant has not had the benefit of registration for over two years. The upholding of the Proposal will not therefore take away any right to earn an income, which he currently possesses. Further, the Applicant has also given evidence of his having taken courses to be qualified in another discipline. He has further provided character references demonstrating he has the respect and admiration of many in his community where he is involved in charitable and Christian activities. It is therefore open to him to find some employment in one of these arenas or through one of these references, which does not impact directly on regulated consumer activities. A record of honesty and integrity in such endeavors can be created over time, such that the Applicant may re-apply to the Registrar and demonstrate a more recent past conduct, which meets the requirements for registration contained in the Act.

For all these reasons, the Applicant's application for registration as a Real Estate salesperson is denied and the Registrar is directed to carry out the Proposal dated April 9, 2008.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

RELEASED: October 14, 2008

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



RISHIRAM SHIWSANKAR

IN THE MATTER OF A PROPOSAL BY THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002* S.O.
2002, c. 30, SCH. C

TO REFUSE REGISTRATION

TRIBUNAL; JANE WEARY, Vice-Chair

APPEARANCES; DOUGLAS STRELSHIK, Counsel, representing the Applicant
NICOLE KOTEFF, Counsel, representing the Registrar

DATE OF MOTION; September 12, 2008 Toronto

ORDER

Mr. Rishiram Shiwsankar has brought a Motion for an Order granting an extension of time to file an appeal from the May 28, 2008 Proposal of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Act") to refuse his registration as a salesperson under the Act.

THE LAW

The relevant sections of the Act are as follows:

14.(1) The registrar shall notify an applicant or registrant in writing if he or she proposes to,

(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.

(3) The notice of proposal shall be served on the applicant or registrant in accordance with section 45.

(4) If an applicant or registrant does not request a hearing in accordance with subsection (2), the registrar may carry out the proposal.

...

45. (1) Any notice, order or request is sufficiently given or served if it is,
 (a) delivered personally;
 (b) sent by registered mail; or
 (c) sent by another manner if the sender can prove receipt of the notice, order or request.

(2) If service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice or order until a later date.

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

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

This Tribunal has had recent occasion to consider the meaning of "reasonable grounds" for extending the time in which to file an appeal under section 7. Vice-Chair Sanford, in *Allen (Re)* [2006] O.L.A.T.D. No. 443 reviewed the Ontario Court of Appeal decision in *Miller Manufacturing and Development Co. v. Alden*, [1979] O.J. No. 3109, where Mr. Justice Blair concluded:

[The decisions] reveal that a number of considerations are viewed as important, the emphasis given to them in each case varying with the circumstances. They include the existence of a bona fide intention to appeal, the length of the delay, prejudice to the other party, whether it can be compensated by costs and the merits of the appeal.

The learned judge noted that the merits of the appeal in such a case can be established on a lower standard of proof than is required on an application for leave to appeal.

Ten years later, Justice Blair again had occasion to consider the requirements for an extension to appeal in *Frey v. MacDonald* [1989] O.J. No. 236 where he added:

Usually time for an appeal or taking any steps within an appeal is not extended unless the appellant has maintained a firm intention from the beginning to appeal and the failure to observe the time limits is reasonably explained. This, however, is subject to the broader rule that extensions should be granted if the 'justice of the case' requires.....

In the Tribunal decision of *Saini* [unreported, released April 12, 2005] Vice-Chair Israel determined the applicant had failed to establish he had a reasonable chance of success on the merits given that he failed to present any evidence which might raise a defence on any of the six separate allegations against him as outlined in the Registrar's Proposal from which he appealed. Noting that the "bar is not set high" the Vice-Chair found that the fourth requirement had simply not been met.

FACTS

Evidence was provided by documents, affidavit and oral testimony. The following is a summary of the relevant findings.

The Registrar's Proposal against the Applicant is lengthy. It alleges the Applicant's past conduct disentitles him to registration under the Act as it affords reasonable grounds for the belief he will not carry on business in accordance with the law and with honesty and integrity. It relies on particulars that include improper requests for payment from consumers who believed the funds were for deposits on real estate transactions and which the Applicant later admitted were for payment to himself for immigration services. It also alleges the Applicant failed on a number of occasions to provide required information to the Registrar on past criminal convictions, pending criminal charges and outstanding unpaid judgments.

The Registrar also finds the Applicant is not a suitable candidate for registration with regard to his financial position. The Proposal alleges that the Applicant has a number of unpaid judgments against him, totaling over \$114,000 in Canadian funds and other judgments totaling \$3,766,723.02 in Guyanese funds.

There was no dispute that the Proposal was duly served upon the Applicant.

Some six weeks later, on July 14, 2008, the Registrar served the Applicant with a Final Notice advising his registration request was refused, given that no appeal to the Proposal had been filed. This was served upon the Applicant on July 16, 2008.

On July 25, 2008 the Applicant filed a Notice of Appeal with the Tribunal and with the office of the Registrar at the Real Estate Council of Ontario (RECO).

EVIDENCE

Mr. Shiwsankar testified that, on receipt of the Proposal in late May, he had taken it to the lawyer representing him at that time with regard to provincial offence charges laid against him by the Registrar for furnishing false information in his application for registration. The Applicant testified he had been present in his lawyer's office when a phone call was made to the Registrar at the RECO office. An earlier problem with the

telephones was identified by RECO staff and his lawyer was told the Registrar would return the call.

In an affidavit supporting this Motion, Mr. Worsoff, the lawyer, states that the Applicant had attended his office “in or about June, 2008” where he reviewed various documents pertaining to the Applicant’s real estate licensing efforts, including the Proposal of May 28. Although the lawyer advised the Applicant that he did not practice administrative law, he did agree, “to look into” the matter for him. The affidavit then advises that Mr. Worsoff attempted to contact the Registrar on two occasions but was unable to reach him, and that his calls were not returned. A third effort resulted in his talking with an assistant who noted the Registrar’s telephone lines were proving problematic, but that the message would be relayed to the Registrar. No responsive call was forthcoming. When the Applicant received the Final Notice he returned to Mr. Worsoff, who reminded him this was not his area of expertise and referred him to Mr. Strelshik. Mr. Strelshik in turn advised the Registrar of the inadvertent oversight and filed the Appeal Notice on July 21, 2008.

Melissa Serodio, Administrative Assistant to the Registrar, provided affidavit evidence wherein she notes that she received a call from Mr. Worsoff on July 4, 2008. Mr. Worsoff advised he had earlier attempted to reach the Registrar and disclosed his client, the Applicant, was not able to afford to appeal the Proposal given the simultaneous charges he was facing in Provincial Offences court. Ms. Serodio states she told Mr. Worsoff that the Registrar’s voicemail was not working, but when she asked if she could take a message to the Registrar, Mr. Worsoff responded he had nothing further to add. Her notes taken at the time of the telephone call were appended to her affidavit and read:

Shiw sankar

-hearing req – was never responded to couldn’t afford to have a hring

-battling chrg in crt in Prov court w/ same issue

Mitchell Warsof (phone no) Ref 2 Nicole (Exhibit 2, Tab 3A)

The Applicant responded to the Registrar’s allegations of his supplying false disclosure on registration applications in 2002, 2004 and 2007. He stated that at the time of his completing his application to RECO the two charges had been withdrawn, and his sponsoring broker advised that he not disclose the two convictions. In cross-examination the Applicant conceded that he had falsely responded “no” to the question on the form pertaining to convictions, and that his broker had changed his honest response to a false one on the question concerning unpaid judgments.

The Applicant also stated that he had responded “no” to questions on the registration application form concerning prior judgments as the Registrar’s office knew as far back as 2004 about the executions registered against him and yet had continued to register him in 2004 and 2006, notwithstanding his failure to disclose these executions on the form. He testified that he had been unaware of the Guyanese judgment against him until such had come to the attention of RECO. He stated this was a consequence of

family business problems and he was currently in the process of having the judgments dealt with.

Testimony from the Applicant was provided in response to the two consumer complaints of concern to the Registrar, as particularized in the Proposal. The Applicant testified he had been unfairly accused of wrongdoing by the two consumers whose complaints to the Registrar were referenced in the Proposal. In neither case has a claim been issued by the consumers, nor was any affidavit evidence from either consumer before the Tribunal.

APPLICATION OF THE LAW

The test to determine whether leave should be granted to extend the time for filing an appeal before an administrative tribunal has been described in the above referenced decisions by Blair J. to include a consideration of four factors:

1. whether the applicant had a firm intention from the beginning to appeal
2. the length of the delay before the appeal was brought
3. whether any prejudice suffered can be compensated and
4. whether the appeal has any merit.

All four considerations are to be canvassed within the broad spectrum of understanding that extensions should be granted if the "justice of the case" requires it.

After reviewing the testimony of the Applicant and the arguments of Counsel, the Tribunal concludes that the Applicant in this case did indeed have an intention to appeal the Proposal from its issuance. He so instructed his Counsel at the time and that Counsel undertook to deal with the matter, but failed to do so adequately by not filing the required Notice of Appeal within the time frame given.

The affidavit of Ms. Serodio discloses that the lawyer called the Registrar's office the first week of July to advise his client did not have the necessary funds to mount an appeal, given that he was forced to defend the provincial offence charges brought against him by the Registrar simultaneously. Her office memo documenting the call was not dated, however, and it seems uncertain given the conflicting, but uncertain testimony of the Applicant on this point as well as the equivocal dates recorded in the lawyer's affidavit, that the time is correct. Moreover, her evidence would, if accepted, place the information received by the Registrar outside the time frame for an appeal – that being mid-June of 2008. More importantly however, it is not relevant to the issue as to whether the Applicant wished to appeal the administrative action as soon as he was made aware of it. It merely speaks to the lawyer's communication, and thus the Registrar's understanding. Neither is conclusive on the question of the Applicant's intention.

There is no conflict in the evidence that the Applicant complained to his lawyer once the Registrar's Final Notice was received and that the lawyer then re-iterated his earlier position that he was not experienced in such law, but would refer the Applicant to a lawyer who was. Within the week, Mr. Strelshik had contacted the Registrar to advise an extension was requested. This evidence is supported by Mr. Worsoff's affidavit as well as the Applicant's testimony. It is accepted by the Tribunal and provides a "reasonable" explanation for the failure to file the Appeal – see *Desmond Allen, supra*. These facts also lead to the reasonable conclusion there was a bona fide intention of the Applicant to appeal within the time frame given within the notice.

The delay was of no great significance being less than 5 weeks (mid-June through to July 21).

The Registrar readily conceded that there was no prejudice suffered as a consequence of the delay in the Applicant's appeal.

The "bar is not set high" in determining whether the Applicant's appeal is meritorious – see *Saini, supra*. Nonetheless, some substantive grounds must be demonstrated.

To this end the Applicant has conceded he supplied false information to the Registrar in his various applications for registration. He explains these as being due, in part, to his belief that the Registrar's office was already aware of past judgments and did not require repeated disclosure of same. Given his having responded "No" to similar questions in earlier applications, knowing the Registrar's office was aware of past execution certificates against him, this would not appear to be an unreasonable conclusion and would, if relied upon at an appeal, have some merit.

Evidence provided by the Applicant concerning his current financial debts and efforts to repay same, if found credible by an appeal Tribunal, would raise reasonable questions on the validity of the Registrar's conclusions as to the Applicant's financial business integrity. He asserted that the execution certificates of 2000 for \$98,000.00 and \$2,500.00 were to have been discharged and that lawyers had been instructed in both cases to do so. Also, he said the remaining judgments, including that of the Guyanese courts, were personal matters and were filed against him in error.

The Applicant's position regarding the convictions, which he admittedly failed to disclose in 2007, appears to be analogous to "guilty with an explanation" which is insufficient to establish meritorious grounds of appeal, even where such grounds are subject to a much lower standard of proof. Neither did he present any evidence as to his reasons for similar false disclosure on earlier applications, although such were also clearly enunciated in the Registrar's reasons for his refusal to grant the registration.

The testimony of the Applicant raises issues as to the credibility of the consumer K, relied upon by the Registrar as a complaint, which evidences dishonest conduct by the Applicant. Were the Registrar unable to prove K's allegations against the Applicant,

then this ground for refusing registration would be severely questioned. This is also the case with regard to the second consumer complaint alleged. In both cases the Tribunal concludes there is the possibility of a meritorious defence to these alleged grounds, which may be established by the Applicant should his appeal be heard.

It thus is the Tribunal's conclusion that the Applicant has an arguable case on a number of the Registrar's reasons for refusing him a license to trade in real estate.

Counsel for the Registrar argued that the Notice of Appeal eventually filed by the Applicant on July 21, 2008 failed to specify any grounds for appeal but rather relied entirely on a claim that he had been wrongly disallowed to appeal. She argued that this supported her position that the Applicant's appeal was without merit.

The Tribunal is not persuaded by this argument. It finds rather that the Applicant and his Counsel were, at the time the Notice was eventually filed, correctly concerned with the Registrar's position that his Proposal was final and thus directed their minds to this issue. Substantive arguments against the Registrar's initial Proposal were canvassed during the hearing of this motion and demonstrate some merit.

Given the findings that there was an immediate intention to appeal the Proposal, that there was no excessive delay in filing the Appeal, that there is no prejudice suffered by the Respondent and that there is, at least on some allegations, a reasonable chance the Applicant could succeed in his appeal, the Tribunal finds that the justice of the case requires the Registrar's final Notice be withdrawn and the Applicant be provided a period of seven (7) days from the date of this Order to properly serve and file his Appeal in order that it may be heard as expeditiously as possible.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

Released: September 25, 2008

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



PRE-HEARING

JACK GRANT

AN APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT, 2002* S.O 2002, c.30 Sch. C.

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: CLINT GRANT, Agent for Jack Grant (the "Applicant")

NICOLE KOTEFF, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act, 2002* (the
"Registrar")

DATE OF
PRE-HEARING: September 19, 2008 Toronto

ORDER

The Parties attended at a pre-hearing conference before this Tribunal on September 19, 2008. The Tribunal makes the following order with respect to the hearing:

1. The hearing shall commence at 9:30 a.m. on November 7, 2008, at the Tribunal's Chambers, 1 St. Clair Ave West, 12th Floor, Toronto, Ontario.
2. The parties to the hearing are the Applicant and the Registrar.
3. The Applicant admits that he is currently a judgment debtor with respect to four outstanding judgments. He also admits the factual allegations as set out in paragraphs 19 through 21 of the Particulars of the Notice of Proposal but denies having knowledge of the existence of the judgments or of breaching the requirements of the Act with respect to timely disclosure.

4. The Parties shall comply with the provisions of Rule 6 of the Tribunal's Rules of Practice with respect to disclosure of documents.

LICENCE APPEAL TRIBUNAL

David Gregory Flude,
Vice-Chair

Released: September 25, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BILLY WING-YU CHOW O/A BILL CHOW AND
ROYALAND REAL ESTATE LIMITED

APPEAL FROM A NOTICE OF PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*,
2002

TO REVOKE REGISTRATION

TRIBUNAL: HARINDER GAHIR, Vice-Chair

APPEARANCES: EUGENE J. BHATTACHARYA, Counsel, representing Billy Wing-
Yu Chow o/a Bill Chow and Royaland Real Estate Limited

IAN DALEY, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act, 2002*

DATES OF
HEARING:

August 14 and 15, 2008

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

This is an appeal by Billy Wing Yu Chow o/a Bill Chow (the “Applicant”) and Royaland Real Estate Limited (“Royaland”) to the Licence Appeal Tribunal (the “Tribunal”), arising out of a Notice of Proposal dated December 20, 2007, (the “Proposal”) issued by the Registrar under the *Real Estate and Business Brokers Act, 2002* (the “Act”), revoking the registration of the Applicant as a Broker, and of Royaland as Brokerage, pursuant to Subsections 14(1)(b) of the Act.

In February 2004, the Applicant was charged for serious offences. Thereafter, in September 2004, he applied for registration as Broker of Record for his Brokerage, Royaland. The Registrar registered him subject to terms and conditions. The Registrar issued the Proposal, as the Applicant, in June 2005, plead guilty of the charges, and the Registrar took the position that the Applicant had breached the terms and conditions of his registration.

PRELIMINARY MATTERS

Pursuant to Rule 7.2(2) of the Tribunal's Rules of Practice, the Tribunal made an order to restrict the access to the public of certain documents concerning the Applicant contained in Exhibit 4, Tabs 6 to 12 & 14.

ISSUE

The issue that this Tribunal has to decide is whether or not 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?

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 the past conduct of the Applicant does not afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

THE EVIDENCE

The facts of this Appeal are not significantly in dispute, although the parties urged the Tribunal to interpret the facts differently. The Registrar's evidence included testimony of Brian Schlotzhauer, and the Registrar's Book of Documents, which the Tribunal marked as Exhibit #3. The Applicant's evidence included his testimony and the testimony of four character witnesses. He also submitted an Applicant's Book of Documents, and an Applicant's Book of Documents II, which the Tribunal marked as Exhibit #4 and #5, respectively. The summary of the evidence is as follows.

Testimony of Brian Schlotzhauer

Mr. Brian Schlotzhauer has been the Deputy Registrar under the Act since April 2006. 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 complex process of property transactions. Mr. Schlotzhauer's duties include overseeing registrations, general administration and compliance. He makes sure that all registered agents and brokers meet the requirements set out in the legislation. He explained that there are different categories of registrants including salesperson, broker and brokerage.

When talking about the requirements for registration, Mr. Schlotzhauer insisted that the past conduct of an applicant is important to determine if he will conduct his business in accordance with the law and with honesty and integrity. He clarified that the concern is

not only industry related conduct as the registrants are dealing with consumers who sometimes are unsophisticated.

Mr. Schlottzauer reviewed the Notice of Proposal and the past conduct of the Applicant, and stated that the Registrar is concerned with respect to the Applicant's charges and subsequent convictions. The Applicant has been continuously registered to trade in real estate under the Act, and the Act's predecessor legislation, since September 1989 (Exhibit #3 Tab 1). The Applicant's troubles with the law enforcement started in February 2004, when the local police charged the Applicant for ten counts of criminal offences, related trafficking in cocaine, Cannabis Marijuana, Cannabis Resin, and LSD, and for possession of other prohibited substances, and one charge of possession of proceeds of crime in excess of \$5,000.00.

Although the Applicant was charged in February 2004, in September 2004, he applied to the Registrar to be registered as Broker of Record, for his Brokerage, Royaland. The Registrar registered the Applicant subject to the following terms and conditions, which he was required to sign:

- 1) Pursuant to subsection 6(2) of the Real Estate and Business Brokerage Act (the "Act"), I hereby undertake to abide by the following terms and conditions to my registration as a broker.
 - a) During the period of my registration, I will immediately advise the Registrar in writing of any charges laid against me under any statute (except municipal parking violations) and any convictions of finding of guilt by any Court, as well as any civil court judgments or orders against me. I will also keep the Registrar apprised of any changes of my residence address.
 - b) I shall immediately inform the Registrar's office of the Decision of the Court with respect to the charges now pending.
- 2) I understand if I am found guilty of my pending charges before the Court, I am to provide the Registrar with a copy of the Judge's Reason for Conviction and Judge's reason for Sentencing in my case.
- 3) I agree not to apply for a transfer of my registration to another broker without prior approval of the Registrar. I understand that such approval cannot be granted, and I cannot trade in real estate, until such time as the Registrar has received both a notice of transfer and a copy of these terms and conditions duly signed by my new broker.
- 4) I shall submit a copy of my Police Record (CPIC) upon the next renewal application.
- 5) I agree to voluntarily surrender my registration as a real estate broker if I, in the opinion of the Registrar, breach any of the terms and conditions consented to herein or any of the terms and conditions prescribed by Regulation 986/90, as amended under the Act.

(Exhibit 3, Tab 5)

As part of his terms and conditions, the Applicant, on June 8, 2006, informed the Registrar that he had plead guilty to trafficking in cocaine, and marijuana, and being in possession of the proceeds of crime grater than \$5,000.00, and that his sentencing

would be on August 18, 2006. He was later sentenced to 30 months incarceration, and \$109,000.00 were forfeited. However, after sentencing, he failed to immediately inform the Registrar as to the result of sentencing. The Registrar came to know about the outcome of sentencing, the next day, through a newspaper article. Thereby, Mr. Schlotzhauer testified that the Applicant breached the terms and conditions of his registration by failing to immediately advise the Registrar in writing of the outcome of the sentencing. Mr. Schlotzhauer agreed that the Applicant, on February 23, 2007, five days after his release, had sent to the Registrar a copy of the Court's Reasons for Sentence.

The Applicant served his sentence from August 18, 2006 till February 18, 2007, during which time, as Mr. Schlotzhauer states, the Applicant kept his brokerage locked. Mr. Schlotzhauer further testified that the Applicant, as a Broker of Record and sole officer of and director of Royaland, failed to inform the Registrar of the closing down and locking of the business premises. Under s. 19 (1) of O. Reg 579/05, the brokerage is required to keep all original records made in the course of trading in real estate at its business premises, where the Registrar or a person designated by the Registrar may conduct an inspection under s. 20 of the Act.

Mr. Schlotzhauer testified that the Applicant's convictions were of very serious charges, that reflect badly on his honesty and integrity. He further testified that one of the things the Registrar looks at in these circumstances is the possibility of imposing conditions, but felt that no terms and conditions would be appropriate in the given circumstances. He went on to testify that the brokers are quite independent when they are in field. Therefore, they are not under the direct control of the Registrar.

In answer to a question regarding the rehabilitation of the Applicant, Mr. Schlotzhauer testified that the Applicant was highly involved in illegal activity, and he did not agree that he has paid his debts to the society, as he is on parole till February 2009. Mr. Schlotzhauer further testified about the Applicant's future chances of registration by suggesting that the Applicant would have the opportunity to submit a new application after a 12-month period, at which time he will have to demonstrate that his circumstances have changed.

In cross-examination, Mr. Schlotzhauer testified that since the Applicant's registration in September 1989, as a salesperson and broker, he is not aware of any complaints relating to his professional work.

Testimony of the Applicant

The Applicant testified that, in his entire professional life, he had never been subject of any complaints about his professional work, which he started in September 1989 as a salesperson under the Act. In order to achieve excellence in his profession, he took certain extra courses, which are not required to keep his licence (Exhibit #4, Tab 4). The Applicant also testified to taking some optional courses in construction estimates (appraisals), which he took to increase his knowledge base.

Explaining his involvement with drugs, the Applicant testified that in late 1990, he started smoking marijuana and using cocaine for recreation. After about six months of use, he became addicted. Thereafter, he was in denial and submerged into that culture. The Applicant considered his arrest in 2004 as his rescue from this dangerous lifestyle. After the Applicant was on bail, he turned his negative into positive to bring his life in order, and he voluntarily started treatment with a rehabilitation facility. He has successfully completed the National Substance Abuse Program in September 2007, and testified that he was the only person in his group to complete this program (Exhibit #5, Tab B).

The Applicant, to prove his rehabilitation, submitted a letter from a supervisor at the Hamilton Parole Office, Correctional Services Canada (Exhibit #4 Tab 15), which states:

Since September 07.02.18 I have supervised the subject's release in the community first on the Day Parole, while living in a halfway house, and then on Full Parole where the subject lives independently. To date, the subject has complied with all aspects of his parole. He has completed the required substance abuse programming, and in fact did well enough that the facilitator did not believe that he needed any follow up programming in that area. He meets all his obligations with regard to reporting his whereabouts, and meeting with this writer. To this date, all of the subject's urinalyses have been "clean" or negative for any illicit substance.

Testifying about his rehabilitation, the Applicant stressed that his life has become more meaningful since he became drug free after his arrest in December 2004. As a result of his rehabilitation, he never breached his parole conditions.

Explaining his inability to inform the Registrar of his sentencing, the Applicant testified that, as he was in custody and then in detention, he had no access to a fax or a telephone after his sentencing on August 18, 2006. He testified that after his release to halfway facility in February 2007, he forwarded to the Registrar the reasons for the sentencing on February 23, 2007. (Exhibit #3 Tab 16)

The Applicant testified that, during the time of serving his sentence, he maintained his registration by paying his dues, the rent of his office, and all the telephone and fax bills. He testified that he had instructed his sister to call his clients and inform them that he was not able to work for them anymore.

The Applicant testified that since his release, he has been continuously working as a Broker and since that date did not have any client complaint against him. Explaining the nature of his business, he testified that his main business is commercial and retail leasing. Stressing his achievement in leasing, he testified that a dishonest person could not achieve so much with these types of clients, as they are sophisticated investors and landlords. He went on to testify that in the last few years, he has helped lease out about 1.2 million square feet of retail space, stressing that lots of these plazas were empty for a long period of time. As a result of his business, he generated millions of dollars for the city in terms of taxes. Testifying about his business acumen and his good interpersonal skills, he claimed to have good sense of what will do well in a particular property.

In cross-examination, when asked about his future business, the Applicant assured that he will continue to work hard as he has been doing for 19 years.

Testimony of Character witnesses

The Applicant adduced evidence of four character witnesses including a relative and two family friends, and a client. The Applicant used to play tennis with the family friends, and therefore they had knowledge about his personal circumstances. All witnesses attested to the integrity of the Applicant. The client also testified about the professional services the Applicant had provided to him over the period of time. The client was very successful in business due to the professional help he had received in leasing from the Applicant. All witnesses were aware of the circumstances of his criminal proceedings and convictions. They were all shocked to know his involvement.

THE LAW

The Act states:

Prohibition against trade in real estate unless registered

4. (1) No person shall,
 - (a) trade in real estate as a brokerage unless the person is registered as a brokerage;
 - (b) trade in real estate as a broker unless he or she is registered as a broker of a brokerage;
 - (c) trade in real estate as a salesperson unless he or she is registered as a salesperson of a brokerage; or
 - (d) trade in real estate unless registered under this Act.

Registration

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;
- (d) the applicant is a corporation and,
 - (i) 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,
 - (ii) having regard to the financial position of its officers or directors or 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,
 - (ii) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or
 - (iv) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration;
- (e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 50;
- (f) the applicant is in breach of a condition of the registration; or
- (g) the applicant fails to comply with a request made by the registrar under subsection (1.1).

(1.1) The registrar may request an applicant for registration or renewal of registration to provide to the registrar, in the form and within the time period specified by the registrar,

- (a) information specified by the registrar that is relevant to the decision to be made by the registrar as to whether or not to grant the registration or renewal;
- (b) verification, by affidavit or otherwise, of any information described in clause (a) that the applicant is providing or has provided to the registrar.

(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.

ANALYSIS

The Tribunal is required to make an independent determination as to whether the criteria for depriving the Applicant of his registration has been met, showing no

deference to the decision of the Registrar as contained in his Proposal. The Tribunal is to determine if the past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law, and with integrity and honesty.

The Registrar based his Proposal on the Applicant's criminal conviction and his violation of the terms of registration by failing to notify the Registrar of the sentencing on timely basis.

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 Registrar bears the onus of establishing the grounds for revocation, and the onus on the Registrar must be established by clear, cogent and convincing 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

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 of proof 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 further held that the concept that the standard of proof rises with the gravity of the allegation and the seriousness of the consequences, as was also held in the decision of the Supreme Court of Canada in *R. v. Oakes (1986)*, 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719n. There, Chief Justice Dickson said, at p. 226 D.L.R., p. 137 S.C.R.:

- Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto, 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 at p. 459 (C.A.):

"The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

The Applicant has established that he has been a licensed real estate professional for the last 19 years, first as an agent, from September 1989, and then as a Broker and broker of record, from September 2004. The evidence has also established that the Applicant did not have a single complaint or act of violation of his professional responsibilities in his entire professional life.

The record has established that the Applicant, on December 9, 2005, faxed to the Registrar updates of the charges against him (Exhibit #3, Tab 7). On June 8, 2006, the Applicant faxed to the Registrar information that he has plead guilty to three charges, and that his sentencing was put over to August 18, 2006 (Exhibit #3, Tab 8). On the day of the sentencing, the Applicant was sent to incarceration. On November 6, 2006, the Registrar sent a letter to his home address stating that the RECO was in receipt of information showing that he was convicted of charges before the Courts (Exhibit #3, Tab 14). On February 23, 2007, five days after his release on parole, the Applicant forwarded to the Registrar the Reasons for sentence. In view of the foregoing, the Tribunal finds that the Applicant had complied with the terms and conditions of his registration by providing the information to the Registrar regarding his charges and final disposition, as soon as it was practical to so.

The Tribunal, now, has to focus on the Applicant's past conduct keeping in view his professional and criminal background, in determining whether his past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. In the case of *Ontario (Real Estate and Business Brokers) v. Faccenda* [1994] O.J. No. 954 (Ont. Div. Court) Justice Adams laid down the test as, "It is the totality of the past conduct considered in the light of more current circumstances, which form the basis of relief."

The Counsel for the Applicant relied on the *Goulart* Decision of this Tribunal released on March 5, 2008. That case involved an appeal from a notice of proposal refusing to grant registration as a salesperson under the Act. Counsel submitted that the reasoning in that case should permit this Tribunal to give weight to the Applicant's rehabilitation efforts. *Goulart* plead not guilty, but was convicted in 2003, for importing a suitcase containing approximately 15 kilograms of cocaine into Canada. The Tribunal considering the past criminal record of the applicant held:

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 behavior 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 behavior to offset a lengthy career of wrongdoing.

The Registrar's Counsel submitted that the Registrar is interested in enforcing the legislation as he has the responsibility of protecting the public. He submitted that the Registrar has no control over the activities of the Applicant as a Broker and therefore, cannot ensure public protection. Differentiating the circumstances of *Goulart*, the Registrar's Counsel submitted that the Applicant's case is more serious as he was involved in series of acts as opposed to a single act of trafficking in *Goulart*.

The Registrar's Counsel submitted that, moreover, the Applicant is still serving his sentence as he is on parole until February 2009, and he has not demonstrated that he is rehabilitated. The Registrar's Counsel submitted that the Applicant might have been rehabilitated from the use, but he did not adduce evidence that he is rehabilitated from the use of proceeds of crime. The character witnesses do not have formal training or experience dealing with drug addicts. The Tribunal agrees with the Counsel and places little weight to the testimony of the character witnesses. However, the Registrar had the onus of proof, and he did not adduce evidence to show that the Applicant is likely to relapse in the future. In the absence of such evidence, the Tribunal is not going to speculate.

The Tribunal took note of the Applicant's successful rehabilitation efforts, which he started upon his arrest in 2004. He has acknowledged his substance abuse as inappropriate, taken all necessary steps to overcome his addiction, and received positive prognosis that recurrence is unlikely.

The Tribunal, after analyzing the evidence and jurisprudence, finds that there are number of mitigating factors in favor of the Applicant, which include:

- (a) The Applicant not only cooperated with the police at the time of arrest in 2004, but he immediately accepted responsibility and voluntarily informed the police of the extent of his involvement in the drugs. He plead guilty at the criminal trial, and therefore publicly acknowledged his guilt and expressed his remorse for what he had done. His conduct was an immediate contrition that weighed heavily in the sentence imposed.
- (b) It has been over four years since he was charged and two years since he plead guilty.
- (c) The probation officer, considering the Applicant's conduct after his release, has stated that there was no need to supervise him and that he has full support system in place.
- (d) In terms of the sentence, the Applicant's punishment in the criminal courts and the extraordinary publicity in the media represent sufficient deterrence.
- (e) The sentencing Judge made a positive finding of the rehabilitation of the Applicant. On page 4 of the Reasons for Sentence, Justice Lofchik stated, "*I am*

impressed, quite frankly, with the personal rehabilitation of Mr. Chow and that certainly it is a mitigating factor, as is the fact that there was a plea of guilt."

- (f) The Applicant has an unblemished professional record.
- (g) Most importantly, the Applicant testified in a manner that was so forthright and credible.

Considering all the aspects of this matter, the Tribunal finds that, on a balance of probabilities, there is no clear, cogent and convincing evidence to make a finding that 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.

ORDER

Pursuant to the authority vested in it under the provisions of the Act, the Tribunal directs the Registrar **not** to carry out his Proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Harinder S. Gahir
Vice-Chair

Released: September 24, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MOTION

SEPIDEH MOAZZANI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002,
c. 30, Sch. "C"

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: JONATHAN ROSENTHAL, Counsel, appearing on behalf of the
Applicant

CHRISTOPHER BREDT, Counsel, appearing on behalf of the
Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF

PRE-HEARING: September 19, 2008

Toronto

CONSENT ORDER

This motion was brought by the Applicant for an order extending the time for filing an appeal and for an order awarding it costs of an earlier proceeding brought by the Registrar, wherein the Registrar withdrew the Notice of Proposal after many days of evidence. The Parties have agreed to settle the motion on terms. Therefore, on the consent of the Parties, the motion is concluded on terms as follows:

1. The Applicant withdraws its allegations of misconduct against former counsel for the Registrar.
2. The Registrar acknowledges that any failure to file an appeal in a timely manner by the Applicant was an inadvertent mistake on the part of Symon Zucker, former counsel for the Applicant.

3. The Applicant shall file the Notice of Appeal with the Tribunal no later than 4:00 p.m. on September 29, 2008.
4. The Applicant abandons its claim for costs on the withdrawn proposal.
5. The pre-hearing conference on this matter shall be held on October 30, 2008, at 9:30 a.m., at the Tribunal's Chambers, 12th Floor, 1 St. Clair Avenue West, Toronto, Ontario and the hearing shall commence on January 22, 2009, and continue on each business day thereafter, as necessary, until February 4, 2009.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

Released: September 23, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MOTION

FARHAD GHODRAT

APPEAL FROM A DECISION OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REFUSE TO RENEW A REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: SYMON ZUCKER, Counsel, representing the Applicant

NICHOLE KOTEFF, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF
MOTION:

September 15, 2008

Toronto

ORDER

This motion is brought in the course of an appeal by the Applicant to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Registrar, *Real Estate and Business Brokers Act, 2002* refusing to renew the Applicant's registration as a real estate salesperson. The motion requests the production of certain documents.

The first request in the motion is for an order requiring a third party to these proceedings to produce an original signature. The third party was not present at the hearing of the motion nor did the Applicant provide an affidavit of service of the Notice of Motion on this person. In the absence of any evidence that the third party is aware of this motion, it must be denied. The Applicant is encouraged to approach the third party directly, or through the Real Estate Council of Ontario ("RECO") to obtain the required signature.

The second item was a request for the production of certain documents alleged to be in the possession of a third party brokerage. Again, there was no evidence that the third party had notice of the motion and the brokerage was not in attendance. The motion is denied on these grounds and because this matter may be dealt with by way of summons. The Applicant is encouraged to clarify his request for documentary evidence so that the third party can understand specifically what is being summoned.

The third request in the motion is for the exchange of witness statements. In a previous pre-hearing dealing with this motion, the parties agreed to exchange witness statements, although the specifics of the agreement are in dispute. It may be characterized as an agreement in principle. The parties are unable to agree on how to effect the exchange or on whether the applicant's statement of evidence ought to be included. In the absence of such an agreement, the Tribunal will not order the exchange of witness statements, which are not expressly provided for in the Tribunal's Rules of Practice. If the Applicant desires particulars of the case, he must request them from the Registrar and, if the request is unsuccessful, then the Tribunal may be addressed by motion.

The Applicant has withdrawn his motion as it relates to obtaining the Crown brief in a criminal matter involving the Applicant. The Applicant was aware that the Tribunal has no jurisdiction to order the disclosure of this brief.

The Registrar requested costs for this motion. Under Rule 14 of the Tribunal's Rules of Practice, July 2008, the Tribunal may grant costs where the Tribunal determines that a party has acted unreasonably, frivolously, vexatiously, or in bad faith. Where the Tribunal has not commenced a hearing, the amount of costs shall not exceed \$400. Rule 14.2 requires the Tribunal to consider all of the circumstances in deciding to award costs, and Rule 14.4 imposes the same obligation in determining the amount of the costs. The party making the request for costs must give notice to the other party, which the Registrar has done in his Notice of Proposal.

In this case, there have been two pre-hearings dealing primarily with this motion. In the second order, dated August 19, 2008, the Applicant is specifically directed to serve the Notice of Motion on the third parties whose rights were to be affected. Despite this order, this motion was brought without an affidavit of service on these third parties. Although counsel for the Applicant advised the Tribunal that the parties had been served and that he would provide evidence of service by fax, this has not been done at the date of release of this order. Failure to comply with orders of the Tribunal is grounds for awarding costs.

Despite two pre-hearings dealing with the motion and affording the Applicant full opportunity to raise any procedural or substantive questions regarding the matter, the resulting Motion was ill considered. As noted above, a summons is an appropriate method to deal with the production of documents by a third party witness and a motion for particulars could address any questions not answered in the Notice of Proposal regarding the case the Applicant must meet.

Counsel for the Applicant phoned the Tribunal on the morning the motion was heard to advise that he had an urgent matter that would require his attention. It was too late to advise counsel for the Registrar not to attend and therefore she was inconvenienced by having to attend and to wait for the Applicant's counsel, who did not appear until 90 minutes after the scheduled commencement. Further, the Applicant's counsel scheduled one and a half days for the hearing of a motion that required less than an hour to complete. Counsel is an experienced barrister and must be assumed to have understood that the motion would require, at most, a half-day to argue.

Based on the above, the Applicant's conduct regarding this motion has certainly been unreasonable and vexatious. The Tribunal will award costs on this motion in the amount of \$400.

Accordingly, the Tribunal orders that:

1. This motion is denied.
2. The parties shall have until October 31, 2008 to disclose any document or thing on which they intend to rely at the hearing.
3. Within 30 days of receipt of this Order, the Applicant shall pay costs to the Registrar in the amount of \$400.
4. The hearing in this matter will commence on **December 8, 2008 at 9:30 AM** at the offices of the Licence Appeal Tribunal, and will continue on December 9th, 10th, 11th and 12th if necessary.

LICENCE APPEAL TRIBUNAL

Laurie Sanford
Vice-Chair

RELEASED: September 17, 2008

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

PRE-HEARING

FARHAD GHODRAT

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF THE *REAL ESTATE AND
BUSINESS BROKERS ACT, 2002* (THE "ACT")

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD MACKLIN, Vice-Chair

APPEARANCES: SYMON ZUCKER, Counsel, representing the Applicant

NICOLE KOTEFF, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002* (the "Respondent")

DATE OF
PRE-HEARING: July 24, 2008

Toronto

ORDER

A pre-hearing was conducted July 24, 2008. The Applicant intends to bring several motions including a motion to stay these proceedings, obtain witness statements from RECO, obtain third party records, and obtain consent to utilize the Crown brief pertaining to the Applicant. The Applicant agrees that the abuse of process motion is to be heard at the time of the main hearing. The Applicant also anticipates filing an expert report. The Parties estimate that, combined, they will call 11 witnesses. The Registrar indicates that he intends to amend the notice of proposal.

Accordingly, I order as follows:

1. The Applicant must serve and file its notice of motion on or before July 31, 2008. Service must be made on the Sutton Brokerage, Neda Ansari, the Respondent and the Attorney General for Ontario;
2. The Registrar shall serve and file its amended notice of proposal on or before July 31, 2008;

3. The Applicant shall serve and file its document brief on or before August 12, 2008. The Registrar has already filed his document brief. The Parties shall serve and file documents subsequently obtained no later than ten days before the hearing;
4. The Parties have orally exchanged witness lists. On or before September 15, 2008, the Parties are to exchange, in writing, their anticipated witness lists. The identity of any additional witnesses that are going to be called by the parties are to be disclosed no later than 10 days before the hearing;
5. A further pre-hearing will be conducted at 9:30 a.m. on August 19, 2008, at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario. The purpose of the pre-hearing is to ensure that the Applicant's motions are "on the rails". The Applicant's counsel is to attend by conference call. The Respondent's counsel will attend in person.
6. The Applicant's pre-hearing motions, excluding the abuse of process motion, will be heard September 15 and 16, 2008, at 9:30 a.m., at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;
7. The hearing originally scheduled for September 15 to 18, 2008, is adjourned, on consent, and will now commence at 9:30 a.m., on December 8, 2008, and run until December 12, 2008. The hearing will take place at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario. **The hearing is peremptory** on the Applicant;

LICENCE APPEAL TRIBUNAL

Richard Macklin
Vice-Chair

Released: July 29, 2008

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



PRE-HEARING

DESMOND R. ALLEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c.30

TO REFUSE A REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: DESMOND R. ALLEN, the Applicant, unrepresented

NICOLE KOTEFF, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATE OF
PRE-HEARING: July 14, 2008

Toronto

ORDER

A pre-hearing was held in this matter on July 14, 2008, in the presence of Desmond Allen, the Applicant, and Nicole Koteff, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar").

The issue was discussed in detail but was not resolved.

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 the registration of the Applicant as a Real Estate Agent.
3. The Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal. In particular, the Parties will exchange any documents to be used at the hearing by no later than 12 noon on July 22, 2008, and any replies will be exchanged by July 31, 2008.

4. There was agreement on the facts contained in the Reasons section numbers 2.i and 2.ii and in the Particulars section numbers 1, 2, 3, 6, 7, 8, 9, 10, 11, and 13 of the Notice of Proposal dated April 9, 2008.
5. There were disputes over the facts contained in the Reasons section numbers 1, 3, 4, and 5, and in the Particulars section numbers 4,5(a), (b), (c) and (d) and 12 of the above noted Notice of Proposal.
6. The Applicant intends to call up to two witnesses and the Registrar intends to call up to five witnesses and although neither party intends to call any expert witnesses the Parties were reminded of the Rules of the Tribunal regarding expert witnesses.
7. Should the matter be resolved before the hearing date, the Parties shall advise each other with a copy to the Tribunal that the dispute has been settled and that a hearing is no longer required and the hearing date will be cancelled.
8. If this matter is not resolved, the hearing shall commence at 9:30 a.m. on August 20, 2008 and continue on August 21 and 22, 2008 at the Tribunal Chamber's, 1 St. Clair Ave. West, 12th Floor, Toronto.

LICENCE APPEAL TRIBUNAL

Donald Benninger,
Member

Released: July 18, 2008

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



DESMOND ALLEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, S.O. 2002,
c. 30, Sch. C

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair,

APPEARANCES: DESMOND ALLEN, the Applicant, attended by phone

NICOLE KOTEFF, Counsel, appeared on behalf of the Registrar,
Real Estate and Business Brokers Act, 2002

DATE OF
HEARING: June 30, 2008

Toronto

PRE-HEARING ORDER

The Applicant, having notified the Tribunal and the Registrar that he was out of town today, attended at this pre-hearing by telephone. Counsel for the Registrar attended in person. The Tribunal makes the following order with respect to a further pre-hearing:

1. A further pre-hearing will be held at the Tribunal's Chambers, 1 St. Clair Ave. West, 12th Floor, Toronto on July 14, 2008, commencing at 1:30 p.m.
2. By July 11, 2008, the Applicant shall provide detailed particulars, in writing, of the grounds of appeal outlining facts in the Notice of Proposal admitted by the Applicant, facts disputed by the Applicant and brief reasons therefore, and facts of which the Applicant has no knowledge.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Vice-Chair

Released: July 7, 2008

File name: 4808.rebba.allen.pre.1.doc

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



PRE-HEARING

IMAN SHAKERI

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

APPEARANCES: SIMON ZUCKER, Counsel, appearing on behalf of the Applicant

IAN DALEY, Counsel, appearing on behalf of the Registrar, *Real*
Estate and Business Brokers Act, 2002

DATE OF
PRE-HEARING: July 15, 2008

Toronto

ORDER

A pre-hearing was held in this matter on July 15, 2008, at the Tribunal's Chambers, 1 St. Clair Ave. W., 12th Floor, Toronto in the presence of Ian Daley, Counsel, on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002*, and Simon Zucker, counsel on behalf of the Applicant.

The Tribunal makes the following order with respect to the hearing of this matter:

1. The hearing of this appeal is adjourned until 9:30 a.m. on October 27, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, to continue, if necessary, on October 28, 2008, such adjournment to be preemptory on the Applicant.
2. The Applicant admits all of the documents in the Registrar's Brief of Documents without the need for strict proof thereof.
3. Counsel for the Parties undertake to make their best efforts to prepare an Agreed Statement of Facts prior to the commencement of the hearing.

4. The Parties may agree to commission a joint expert's report, in which case the provisions of Rule 6 of the Tribunal's Rules of Practice do not apply. In the event the Parties do not agree on a joint expert, then the Applicant shall provide a copy of any expert's report upon which he intends to rely, together with the *curriculum vitae* of the expert, at least 30 days before the hearing. Further, on or before delivery of an expert's report, the Applicant shall make himself available for examination by the Registrar's expert, if any, in a timely manner in order that the Registrar may provide a responding expert's report and *curriculum vitae* in accordance with Rule 6.4.
5. The parties shall comply with Rule 6 of Rules of Practice of the Tribunal with respect to the disclosure of documents.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

Released: July 29, 2008

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

Licence
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FRANK MAYGAR

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR, *REAL ESTATE AND BUSINESS
BROKERS ACT, 2002* (THE "ACT")

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: J. RANDALL BARRS, Counsel for Frank Maygar (the "Applicant")

GEORGE DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002* (the "Respondent")

DATE OF
HEARING: July 9, 2008

Toronto

ORDER

The Licence Appeal Tribunal (the "Tribunal") held a pre-hearing in this matter on July 9, 2008, in the presence of Counsel for the Applicant and Counsel for the Respondent;

Counsel for the Applicant advised that his client was not present at the hearing today as the Applicant had understood that the cancellation of the June 13, 2008, hearing date also cancelled the July 9, 2008 hearing date;

Counsel for the Applicant could not confirm that the Applicant had been advised by Counsel's office that this matter would proceed on July 9, 2008;

The Applicant who resides in Windsor, Ontario is unable to attend the hearing on short notice;

The Tribunal makes the following Order:

1. The hearing of this matter is adjourned to Wednesday, October 29, 2008 and Thursday, October 30, 2008 to commence at 9:30 a. m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, peremptory to the Applicant.
2. The issue of costs payable by the Applicant to the Respondent for the attendance on July 9, 2008, is reserved to the panel hearing the matter.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: July 21, 2008

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

Licence
Appeal
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HARINARAIN MATHUR

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*, 2002, S.O.
2002, c. 30

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: JACK R. FITCH, Counsel, representing the Applicant, Harinarain
Mathur

GEORGE DRAMETU, Counsel, representing the Registrar under
the *Real Estate and Business Brokers Act*, 2002, S.O. 2002, c. 30

DATE OF
HEARING: June 4, 2008

Toronto

ORDER

This is an appeal by Mr. Harinarain Mathur to the Licence Appeal Tribunal (the "Tribunal") from a proposal by the Registrar under the *Real Estate and Business Brokers Act*, 2002 S.O. 2002, c. 30 (the "Act") to revoke his registration.

At the outset of the hearing, the parties advised that they had reached a settlement of the issues between them and had entered into Minutes of Settlement. They requested that there should be no hearing in this matter and that these Minutes of Settlement should form part of an order of this Tribunal.

Accordingly, on consent of the parties and under the authority of Subsection 4.1 of the *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S.22, the Tribunal orders as follows:

1. The Registrar shall refrain from carrying out his proposal dated November 8, 2007 to revoke the registration of Mr. Harinarain Mathur as a salesperson under the Act.

2. Mr. Mathur shall comply with the terms and conditions of the Minutes of Settlement between the parties dated June 4, 2008 which have been reviewed by the Tribunal and which are attached to this Order and incorporated into this Order by reference. Mr. Mathur's broker has also agreed to comply with its obligations under these Minutes of Settlement.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: July 3, 2008

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

LAT File # 4531/REBBA/07/8

LICENCE APPEAL TRIBUNAL

BETWEEN:

HARINARIAN MATHUR

Appellant

- and -

REGISTRAR,
REAL ESTATE AND BUSINESS BROKERS ACT, 2002

Respondent

MINUTES OF SETTLEMENT

IN THE MATTER of the *Real Estate and Business Brokers Act, 2002*, (hereafter, the "REBBA, 2002"), and in the matter of the appeal by the Registrant Harinarian Mathur (hereafter, the "Appeal") of the Proposal of the Registrar, REBBA 2002 dated November 8th, 2007 (the "Proposal") to revoke the registration of Harinarian Mathur as a salesperson under REBBA 2002, the parties to this matter, Harinarian Mathur and the Registrar, REBBA 2002, HEREBY AGREE THAT THE MATTER IS SETTLED AS FOLLOWS:

1. Harinarian Mathur and the Registrar, REBBA 2002, hereby consent to seek by way of joint submission to the Tribunal that the document attached hereto and entitled "CONDITIONS TO THE REGISTRATION OF HARINARIAN MATHUR AS A SALESPERSON UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT" be attached as conditions to the Order of the Tribunal in this matter pursuant to subsection 14(5) of the REBBA, 2002;
2. The Applicant hereby acknowledges that he was advised by independent legal Counsel in this matter.

DATED AT TORONTO this 4 DAY of JUNE, 2008

Witness Name

Harinarian Mathur, Registrant

Witness Signature

DATED AT TORONTO this 20th DAY of JUNE, 2008

Witness Name

Brian Schlotzhafer, Deputy Registrar
For the Registrar, REBBA 2002, Respondent

Witness Signature

**CONDITIONS TO THE REGISTRATION OF HARINARIAN MATHUR AS A
SALESPERSON UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT 2002**

To: The Registrar
Real Estate and Business Brokers Act
3250 Bloor Street West
6th Floor, East Tower
Toronto, Ontario M6X 2X9

Pursuant to subsection 10 (2) of the *Real Estate and Business Brokers Act 2002* ("REBBA 2002"), I hereby consent and undertake to abide by the following Conditions to my registration as a salesperson under the REBBA 2002:

1. I hereby consent to the suspension of my registration as a salesperson under the REBBA 2002 for a period of ninety (90) days commencing fifteen (15) days from the imposition of these Conditions by the Licence Appeal Tribunal. (the "Suspension Period"). The Suspension Period shall commence to run on June 19th, 2008 and end on September 16th, 2008.
2. During the Suspension Period, I shall not trade in real estate contrary to the REBBA 2002 nor shall I accept any compensation or other remuneration for any trade in real estate, except that it shall not be deemed a breach of these Conditions if I accept compensation or remuneration for a trade in real estate in relation to an agreement of purchase and sale that has been accepted by the seller and purchaser prior to the commencement of the Suspension Period (regardless of whether such agreement of purchase and sale is firm or conditional) even if the closing of such trade occurs during the Suspension Period.
3. These Terms of Settlement and Conditions shall be acknowledged by my brokerage/employer, Century 21 People's Choice Realty Inc. ("Peoples Choice").
4. At the end of the Suspension Period, I will provide proof to the Office of the Registrar that I have attended and successfully completed the following courses;
 - a) Preventing Real Estate Fraud
 - b) RECO's Code of Ethics Under the REBBA 2002
 - c) Think in Legal Terms: Stay out of Trouble
 - d) Building Loyal Customers: Avoiding Legal/ Discipline Proceedings
5. For a period of one (1) year commencing at the end of the Suspension Period, my registration cannot be transferred from Commitment Realty, without prior written authorization from the Registrar. Should the Registrar authorize the transfer of my registration to a brokerage other than Peoples Choice, any new brokerage must acknowledge and agree in writing to abide by these Conditions.
6. For a period of one (1) year from the end of the Suspension Period, I and my brokerage agree to advise the Office of the Registrar immediately of any and all complaints made about me from any source, and without limiting the generality of the foregoing, including consumer complaints lodged with the brokerage and/or complaints lodged with any real estate boards by either consumers or registrants.

7. For a period of one (1) year from the end of the suspension period, I shall work closely with my broker of record and he/she shall monitor my activities in trading in real estate. My broker shall on a quarterly basis, submit to the Registrar detailed reports concerning my conduct and activities while in his or her employ. The first report shall be filed on December 16th, 2008 (three (3) months after the end of Suspension Period) and then every three months there after.
8. I hereby acknowledge that if new or additional information comes to the attention of the Registrar related to my honesty, integrity, compliance with the law or financial responsibility, or if I breach any of these Conditions, the Registrar may take further administrative action, including a proposal to revoke my registration, based on the totality of the evidence of my past conduct and/or financial position, including the particulars set out in the proposal to revoke registration dated November 8th, 2007.
9. I hereby agree to voluntarily surrender my registration under the REBBA 2002, if I, in the opinion of the Registrar, breach any of the Conditions consented to herein or any of the obligations and conditions prescribed by the Act and its regulations.
10. If any of these Conditions shall be deemed invalid, unenforceable, illegal or a mutual mistake, such Condition shall be severed and the remaining Conditions shall remain in full force and effect.
11. I hereby acknowledge that I have read and understood these Conditions and that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the Conditions set out herein.

DATED AT 4, THIS June DAY OF JUNE 2008.

WITNESS' SIGNATURE

HARINARIAN MATHUR
Registration No.: 4716437

WITNESS' NAME

ACKNOWLEDGED AND AGREED TO BY:

WITNESS' SIGNATURE

BROKER OF RECORD'S SIGNATURE

WITNESS' NAME

BROKER OF RECORD'S NAME

DUGAL-DAN McDONALD

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

CLARIFICATION OF ORDER

On June 19, 2008, the Licence Appeal Tribunal (the "Tribunal") issued a Decision and Order in the appeal by Mr. Dugal-Dan McDonald of a proposal by the Registrar under the *Real Estate and Business Brokers Act, 2002* in the above-noted matter.

The Registrar has requested a clarification of the Order. Specifically, the Registrar wants to know whether or not Mr. McDonald has been suspended under the Order. Effective June 19, 2008, Mr. McDonald's registration is subject to the terms and conditions of the Order. One of these terms is that Mr. McDonald shall not act as a real estate salesperson until he has met the requirements of paragraph 2 of the Order. The Tribunal, in seeking the appropriate balance between public protection and Mr. McDonald's ability to earn a living, concluded that a formal suspension would undermine Mr. McDonald's ability to secure employment with a new broker, as required by the Order. Therefore, Mr. McDonald's registration has not been suspended by the Decision and Order.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: July 11, 2008

This clarification of order, which is being released to the parties in this proceeding, will also be posted on the Licence Appeal Tribunal's website <http://www.lat.gov.on.ca/> within three weeks. Also, it will be available on Quicklaw at a later date.

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DUGAL-DAN McDONALD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: LAURIE SANFORD, Vice-Chair

APPEARANCES: PELLEGRINO CAPONE, Counsel, representing the Applicant,
Dugal-Dan McDonald

RONALD FOERSTER and
CATHERINE MOREAU, Counsels, representing the Registrar
under the *Real Estate and Business Brokers Act, 2002*

DATES OF
HEARING: December 3, 4, 6 and 7, 2007
April 14, 15, 17, 18, 2008
May 15, 2008

Toronto

DECISION AND ORDER

This is an appeal by Mr. Dugal-Dan McDonald to the Licence Appeal Tribunal (the “Tribunal”) from a proposal by the Registrar under the *Real Estate and Business Brokers Act, 2002* (the “Act”) to revoke his registration as a real estate salesperson.

FACTS

Mr. Dugal-Dan McDonald has been a realtor for approximately 20 years and in that time he has not had a customer complaint nor, until the events which led to the Registrar’s proposal, has he been the subject of an investigation or sanction by the Real Estate Council of Ontario (“RECO”), the body which administers the Act and which conducts investigations on behalf of the Registrar.

Approximately 9 years ago, Mr. McDonald met a man who shall be referred to as “KM”, whom Mr. McDonald characterises as “smart” and “charismatic”. Over the years, KM referred between 12 and 15 prospective transactions to Mr. McDonald, but the two men

remained business acquaintances and did not become personal friends. Mr. McDonald derives an increasing amount of his business from such referrals and it is now not uncommon for a vendor to refer a prospective purchaser to him. It is common now, he explained, but it has taken 20 years to get to this point.

In December 2003, KM approached Mr. McDonald and told him that he, KM, had obtained an agreement with an assignment clause that permitted him to sell a property in Toronto (the "Toronto Property"). KM had entered into an agreement to purchase the Toronto Property from the vendor and proposed to "flip" his agreement. Mr. McDonald was familiar with this type of transaction from dealing with new houses, time shares and life leases, but he had never heard of it being done with an existing house. To clarify matters, he spoke to his manager about the assignment. His manager told Mr. McDonald that he would look into the form of the transaction and, some days later, told him that he did not see a problem with listing the property. Mr. McDonald understood that his manager had consulted a lawyer, but his manager testified that he could not recollect the matter. Mr. McDonald went to see the Toronto Property, which he characterised as an "odd bird". It was a bungalow semi-detached from a two storey house, one of the few bungalows in the area. In Mr. McDonald's experience, bungalows are more desirable than two storey houses of similar floor space, because the market is broader for a bungalow. The location was in a part of the city that was undergoing re-development which was driving prices up faster than other parts of Toronto, which was a rising market generally. The house had been renovated on the inside, but the outside needed work and looked run-down with parts of the siding ripped off and at least one exterior hole. Offsetting this was the size of the lot and the fact that there was ample laneway parking in a part of town where off-street parking was rare. Mr. McDonald was having difficulty valuing the property when KM told him that he wished to list for \$439,900. Mr. McDonald told him that the price was "a little high" but when KM persisted, Mr. McDonald did not object. Mr. McDonald had done a search of contemporary sales in the neighbourhood but had not been able to find a directly comparable property. He was aware that detached bungalows and one and two storey semi-detached houses in the neighbourhood were selling in wide range, but most were selling at significantly below the price proposed for this house. He also knew that some houses were selling for prices materially above their listed price, suggesting that the prices were rising quickly in the neighbourhood. He knew that the last time the house had been listed, in June 2003, it had listed for \$249,900, but he did not know that the selling price had been \$249,500, because this was not in the Toronto Real Estate Board system.

KM told Mr. McDonald that he had found a prospective buyer for the property and in January 2004, Mr. McDonald listed it for \$439,900. Shortly after listing, Mr. McDonald met the prospective purchaser and became a dual agent, acting for both KM and the prospective purchaser. He took the prospective purchaser to see the property and showed him at least one other property in the neighbourhood. The purchaser was adamant that he wanted to make an offer on the Toronto Property. Mr. McDonald told the prospective purchaser of other prices in the neighbourhood and of the earlier listing of the house but, because his dual agent status made it unethical for him to act against

the interest of KM in advising the prospective purchaser about the purchase price, he did not attempt to talk the prospective purchaser into submitting a lower bid, nor did Mr. McDonald express his opinion about the listed price. In January 2004, KM and the prospective purchaser entered into an Agreement of Purchase and Sale (the "January APS"), prepared by Mr. McDonald, in which the prospective purchaser agreed to buy the property for \$429,900, subject to financing. The January APS does not mention that KM is assigning his interest in his purchase agreement; KM appears to be the owner of the Toronto Property. The prospective purchaser did not pay the required deposit so, as far as Mr. McDonald was concerned, the transaction was over by the end of January. He showed the property to other clients but it had not sold by February 2004, when the prospective purchaser again approached Mr. McDonald and asked him to prepare a new offer on the property reflecting revised dates. The "February APS" underwent several amendments as negotiations between the parties continued about the amount and payment of the deposit. During these negotiations, Mr. McDonald prepared amendments to the February APS that were faxed back and forth. Mr. McDonald signed as witness to some of the signatures, although he was not present when the documents were signed. At some point during the negotiations, it was expressly provided that KM was assigning his interest in a prior agreement of purchase and sale. Mr. McDonald was aware that both KM and the prospective purchaser had their own lawyers. During his testimony Mr. McDonald said that he expects the lawyers involved in his transactions to correct any errors or problems of law in the agreements he prepares. In this case, one of the lawyers advised that the deal could not proceed as an assignment. The original vendor would have to sell the property. Apparently on learning this, the original vendor and the prospective purchaser decided to do the transaction directly, cutting KM and Mr. McDonald out altogether and entering into a third agreement of purchase and sale. Mr. McDonald was unaware of this and, on at least one occasion showed the prospective purchaser the Toronto Property again, in anticipation of a new agency agreement.

The third agreement was scheduled to close at the end of February 2004. About a week before the closing, RECO was notified by a bank that the property appeared to be greatly over-priced and that the transaction looked fraudulent. A RECO representative spoke to Mr. McDonald who, after the conversation, called one of the lawyers involved in the transaction and told him of RECO's concerns and asked whether it would be possible to hold up the deal. The lawyer said that he had heard nothing from RECO and indicated that there was no reason to delay the closing. The original listing and the January APS were presented to a financial institution which, apparently without confirming whether KM was the owner of the property or whether the January APS had been superseded, advanced a mortgage. The purchaser soon went into the default and the property was sold under power of sale about a year later for \$180,000. The representative of the financial institution testified that subsequent investigation revealed that the employment records used by the purchaser to support the loan were fraudulent. Mr. McDonald was not paid a commission by the purchaser, but he did receive the vendor's commission from KM. Mr. McDonald assumed this was for the services he had performed for KM, although he knew that KM was not obliged to pay him anything.

Despite the on-going RECO investigation of the Toronto Property transactions, Mr. McDonald again worked with KM about a year later. In mid-2005, KM approached him with a property, this time in Tweed (the "Tweed Property"). KM said that he had a power of attorney from the owner of the property. Mr. McDonald had met the owner and assumed the power of attorney was necessary because she had returned to her native country. He reviewed the power of attorney but did not make a copy for his file. Mr. McDonald went to Tweed with KM, but the tenant refused to let them inspect the property. Mr. McDonald walked down the street and spoke to a local realtor who expressed an interest in a co-listing and opined that the property would sell "in the \$140's" although he wanted to see the inside before giving a final opinion. Mr. McDonald looked at comparable properties in the area. KM insisted that the property would fetch \$150,000 so Mr. McDonald listed it for \$149,900. The house was a large Victorian style house, with over 3,000 square feet. Many of the original details of the house had been preserved, although the exterior needed some work. The lot was large, 1.17 acres, and there was a 1,000 square foot garage on the property. The lot was in a good location and, with its access to roads, could be subdivided. With all this in mind, Mr. McDonald did not think the listing price was out of line. The first weekend after the listing, Mr. McDonald conducted an open house on the property and met again with the local realtor to discuss a co-listing.

Before a co-listing was finalized, KM introduced a prospective buyer. Mr. McDonald drove her out to Tweed to view the property. During the trip, she explained that she was a business woman who wanted to move out of Toronto and to raise her children in a smaller town. While they were in Tweed, Mr. McDonald drove her around to see some of the other properties for sale, but she was only interested in the Tweed Property. The large garage was a selling point as she would be able to store her inventory there. Mr. McDonald again agreed to act as a dual agent for both KM and the prospective buyer, but this time he took a copy of the buyer's driver's licence. The RECO investigator had suggested, as a precaution, that he should have photographic identification on file when he was dealing with buyers he did not know and Mr. McDonald followed this advice. The prospective purchaser put in an offer for \$142,000 and KM counter-offered at \$147,000, which was accepted.

KM attempted to make the deposit on this transaction, but Mr. McDonald's office rejected this as it is improper for vendors to pay the deposit. The prospective purchaser subsequently made the deposit. Mr. McDonald did not know that KM had attempted a deposit payment until two years later. There were a number of amendments to the agreement of purchase and sale. Some of these were sent to Mr. McDonald by fax and he signed as a witness on a number of occasions, although he had not in fact witnessed the signature. In at least one case where this occurred, the signature of the purchaser is visibly different from other examples of the purchaser's signature. Both the parties had their own lawyers and Mr. McDonald was not involved in the financing.

When the transaction closed, a mortgage was obtained but the purchaser very quickly went into default and appears to have abandoned the property. It was vacant over the winter and the pipes froze, causing visible water damage. There were missing fixtures

and broken windows. The bank, which seized the property, needed to do repairs and a general clean-up, but the representative of the bank testified that she did not know what work was done or what the state of the property was at the time of the subsequent sale. In addition to the internal damage, there was some exterior deterioration which was not recent. The property was transferred to CMHC under the provisions of the insurance agreement with the bank and was subsequently sold in 2006 for \$100,000.

The third property which is of concern to RECO is what will be referred to as the "Ajax Property". This property is on the same street where Mr. McDonald used to live. He knows the vendors, having acted for them in the past. He first listed the property in the fall of 2005. It was, in his words, "priced to move" at \$389,900. However, the vendors changed their minds and, while the listing remained open, the house was rarely shown. During this period, the male vendor was not in the workplace and he did some significant renovations to the house and property. These renovations were not finished in the winter of 2006 but the vendors listed the property again in the expectation that the work would be completed. This time, the property was listed for \$459,900. Mr. McDonald checked the values of comparable properties in the neighbourhood and he was quite confident that the house was worth \$450,000 because of his personal experience in the neighbourhood.

After the house was listed, KM introduced him to a woman who shall be referred to as "RK". RK was an apprentice with a mortgage brokerage. Again, Mr. McDonald became a dual agent acting for both the vendors and RK. However, RK could not qualify for a mortgage, so she brought a friend into the transaction. The two of them went with Mr. McDonald to a number of properties in the area. They were interested in the Ajax Property because it had two rental units in the basement, and they wanted an income producing property. They submitted an offer for \$450,000, which was accepted. However, there was a problem getting financing with RK on title so the agreement was amended to remove her and leave only the friend as purchaser. Despite not having a formal interest in the property, RK remained involved in the transaction. In the various amendments, Mr. McDonald again falsely signed documents as a witness to signatures. In one round of amendments, Mr. McDonald was shuttling back and forth from the listed house to his own house to draft the changes as the negotiations proceeded and in his testimony he was unable to re-construct the arithmetic that eventually resulted. However, there was an addendum signed that included an acknowledgement by the vendors that, on completion, they would receive \$370,000. Mr. McDonald understood that the vendors wished to know the incremental sum they would receive on closing and the purchaser wanted an allowance for some further renovations on the house. The addendum is confusing and does not expressly refer to the allowance for renovations. Mr. McDonald instructed his office to send copies of the addendum to all the lawyers and to the mortgage broker because, as he put it, "this was something everyone needed to know about". The mortgage broker in this case was the company where RK was employed. It was the testimony from a representative of the financial institution that advanced the mortgage that the addendum was not sent from the mortgage broker to the financial institution and, had they known of it, they either would not have advanced the mortgage, or would have advanced a smaller amount. The sale closed, there was a

default on payments and the financial institution was at the point of seizing the house and selling it for what they expected would be a loss when the owner redeemed the mortgage.

In all three cases, the mortgages were what are termed in the trade “high ratio” mortgages. These mortgages involve a loan of greater than 85% of the purchase price of the property. These mortgages are insured by a third party and the banks loaning the money do not do a property appraisal. They rely on the property listing and the agreement of purchase and sale, together with documentation about the purchaser’s income and employment to determine whether to advance the mortgage. Following an investigation of the transactions involving these three properties, the Registrar decided to propose the revocation of Mr. McDonald’s registration as a real estate salesperson.

LAW

The combined effect of Sections 10 and 14 of the Act is that the Tribunal must determine whether or not the past conduct of Mr. McDonald affords reasonable grounds for the belief that he will carry on business in accordance with law and with integrity and honesty. There is also a provision regarding financial responsibility, but that is not an issue in this hearing. It is important to note that although the Act changed between the sale of the Toronto Property and the dates of this hearing, the wording of the relevant sections of the Act remain the same.

The standard of proof required of the Registrar, as set out in *Coates v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* (1988), 65 O.R. (2d) 526 (Div. Ct.), is “clear and convincing proof based on cogent evidence”. The case of *Zahariev v. Ontario (Registrar, Motor Vehicle Dealers Act)* (2005), 205 O.A.C. 110 (Ont. Div. Ct.) is one of a line of cases which establishes that in making its decision, the Tribunal owes no deference to the earlier decision of the Registrar.

DECISION

RECO introduced circumstantial evidence of activities undertaken with the intent to deceive the financial institutions which advanced the mortgages of the Toronto Property and the Ajax Property. The evidence of deceit regarding the Ajax Property is not convincing. There was little evidence brought by RECO connecting Mr. McDonald to these activities. For example, the RECO investigator did not ask Mr. McDonald whether he had prepared all the documents at issue in these three transactions. Rather than direct evidence, RECO relied on its opinion that it is impossible for a fraud of the type that is alleged in this case to occur without everyone involved in the transaction being involved in the fraud. Thus, the case turned critically on the evidence of Mr. McDonald.

Mr. McDonald was a credible witness. He gave his evidence in a clear and straightforward manner and his hesitations were the result of caution, not of a desire to

mislead. As well, his testimony contained realistic details and had the ring of truth. The Tribunal accepts his account of his role in the sale and subsequent mortgage of the three properties.

Mr. McDonald engaged in conduct in these transactions that falls short of the standards expected of real estate salespeople. Specifically, on several occasions, he signed documents as a witness when he had not seen the parties sign. In one case, it was clear that his conduct enabled someone other than the signatory to sign as purchaser. Also, despite knowing that the price of the Toronto Property was high, he nevertheless accepted a dual agency. By doing so, he was unable to offer the kind of candid and informed advice he should have given the purchaser about the value of the property. If the purchaser had been acting in good faith, the purchaser would have been badly served by Mr. McDonald's conduct. Mr. McDonald has expressed sincere regret for signing as a witness for documents he had not witnessed and it was clear from his evidence that he and his family have paid a heavy price for his involvement in these three transactions.

Offsetting this misconduct, Mr. McDonald conducted himself with honesty and integrity in several important respects. First, when he received the unusual form of transaction for the Toronto Property, he sought the advice of his manager and did not proceed until, as he understood it, a legal opinion had been received. Secondly, when RECO began its investigation of the Toronto Property, he called one of the lawyers involved to warn of RECO's concerns to see if the sale could be halted. On the Ajax Property, Mr. McDonald instructed his office to send copies of the addendum which lowered the purchase price to all the lawyers and to the mortgage broker to ensure that all parties were aware of this important change.

It is not the role of the Tribunal to determine whether there has been fraudulent activity here or, if so, who the parties to the fraud are. The Tribunal's responsibility is to consider Mr. McDonald's conduct. Based on that conduct, the Tribunal concludes that Mr. McDonald did not knowingly or through wilful blindness participate in any scheme to deceive the mortgagees of these three properties. As the Deputy Registrar noted in his evidence, there are several hallmarks of a fraudulent mortgage scheme. One of the most striking of these is that the broker is paid for doing nothing more than listing the property and acting as a scribe for the agreement of purchase and sale and the subsequent amendments which usually set up the fraud. That was not the case in these three transactions. Mr. McDonald engaged in the normal activities of a salesperson. He showed the Toronto Property to other prospective purchasers when the January APS collapsed. He held an open house for the Tweed Property and consulted a local realtor about the possibility of co-listing. In all cases, he made a legitimate attempt to determine a selling price. This case is an exception to RECO's general view that, where there is a mortgage fraud of the type alleged here, then everyone involved in the transaction must be a party to the fraud.

Mr. McDonald did, however, make several errors of judgement. He was too quick to accept KM's valuation of the Toronto Property when he knew not only that it was "a little

high”, as he put it, but that it was substantially higher than the same property had been listed for less than a year earlier, after the internal renovations had been complete. He accepted a dual agency on this property, which, as noted above, prevented him from adequately advising the purchaser about the purchase price. He continued to do business with KM despite knowing that RECO was investigating the sale of the Toronto Property and apparently took no precautions to protect himself from the possibility of being used in a fraudulent scheme other than obtaining a photograph of one of the purchasers. As well, Mr. McDonald has been too reliant on others, including lawyers, to correct mistakes in the documents he prepares. Throughout Mr. McDonald’s testimony, he revealed himself as a fundamentally honest man who trusts implicitly in the honesty of others. He was unable to see, for example, that it made any difference whether a deposit for the purchase of a property was \$100 or \$5,000. Both, he felt, were equally binding; it was, he explained, a question of character to honour a contract that has been signed.

On considering the totality of Mr. McDonald’s past conduct, there are reasonable grounds for the belief that Mr. McDonald will conduct his business with honesty and integrity. However, whether he can conduct his business in accordance with law is less certain, given his trusting nature. He is perilously vulnerable to being used by the dishonest. Mr. McDonald acknowledges that he will need to become more aware of the signs of fraud or other deceptive behaviour. He understands that he will need to be less trusting and more questioning. Homebuyers are usually making the largest investment of their lives and they need to be able to rely on the advice and experience of a real estate salesperson to protect their interests and to steer them away from questionable transactions. Financial institutions rely on realtors and on the listings they prepare to assess the *bona fides* of the high ratio real estate transactions they finance. Whether the financial institutions should place such reliance on documents prepared by others is debatable but it is a well understood practice in the industry.

Mr. McDonald is capable of learning from his mistakes. He did begin keeping photographic identification of purchasers he did not know when advised to do so by RECO. He testified to the lessons he feels he learned during the hearing. However he will need help to become able to detect and prevent fraud. The Tribunal requested submissions from the parties as to the terms and conditions that would be useful in helping Mr. McDonald continue to function as a real estate salesperson while protecting the public from his current naivety. The Tribunal particularly appreciated the submission of RECO, which was not only helpful, but given the Registrar’s continued opinion that revocation is the best option here, very professional. Mr. McDonald will need to do a lot of work to achieve the goal of being able to conduct his business in accordance with the law. The way forward must contain several elements.

First, Mr. McDonald needs to leave his current brokerage. His manager, who testified, takes a very passive attitude towards the roles and responsibilities of a realtor. His manager claims not to have known that mortgage fraud was possible until the investigation of the Toronto Property sale. He expressed the opinion that it was not possible for a salesperson to detect fraud. Mr. McDonald’s manager also suggested

that realtors played a passive role, merely accepting the price set by the vendor. This is not the best environment for Mr. McDonald. He needs to be with a brokerage that encourages salespeople to play a much more active role in a real estate transaction.

Second, Mr. McDonald needs to pursue training and education in fraud detection and prevention. Third, Mr. McDonald will have to accept some additional activities as well as some restrictions on his conduct until he has had the time to put into practice the new approach he must take to his employment.

Accordingly, under the authority of section 14(5) of the Act, the Tribunal makes the following order:

1. The Registrar shall refrain from carrying out his proposal of March 23, 2007 to revoke the registration of Mr. McDonald as a salesperson under the Act.
2. Mr. McDonald shall refrain from trading or otherwise acting as a real estate salesperson under the Act until he has:
 - a. taken and successfully completed, with a score of at least 75%, the courses in Real Property Law, Mortgage Financing and Principles of Appraisal that are offered by The Ontario Real Estate Association as “articling” courses, and
 - b. left his current brokerage and found employment with a new brokerage (the “New Broker”). RECO shall confirm, upon application by Mr. McDonald, that it has no objection to the New Broker before Mr. McDonald begins working for the New Broker. The New Broker will confirm to the Registrar that it agrees to comply with its obligations under this Order.
3. In 2008, in addition to the articling courses specified above, Mr. McDonald shall successfully complete the following courses offered by educators approved by RECO:
 - a. “Fraud and Real Estate”, an online course offered by CE Network Incorporated, and
 - b. one other course dealing with real estate fraud, ethics in real estate trading, mortgage financing or drafting real estate documents.
4. In each of the calendar years 2009, 2010 and 2011, Mr. McDonald shall successfully complete three courses offered by educators approved by RECO which deal with real estate fraud, ethics in real estate, property appraisal, property listing, mortgage financing or drafting real estate documents. These courses shall be in addition to any education required by RECO to maintain registration. Mr. McDonald will pay the costs associated with any of the courses under paragraphs 3 and 4 of this Order.

5. As evidence of his successful completion of these 14 courses, Mr. McDonald will submit to his New Broker the transcripts or other completion certificates given by the course providers.
6. From the time Mr. McDonald resumes his activities as a real estate salesperson with his New Broker until December 31, 2011, Mr. McDonald shall not:
 - a. act as a dual agent in a real estate transaction, although nothing in this Order shall prevent the New Broker from accepting a dual agency for a transaction involving Mr. McDonald provided someone other than Mr. McDonald is acting for the other party to the transaction;
 - b. apply for registration as a broker under the Act;
 - c. be a shareholder, directing mind, officer, director or have any other ownership interest in a brokerage, or
 - d. apply for any transfer of his registration without the prior approval of the Registrar.
7. From the time Mr. McDonald resumes his activities as a real estate salesperson with his New Broker until December 31, 2011, Mr. McDonald shall prepare and maintain:
 - a. copies of all documents relating to the trades in which he is acting, which will be maintained in the trade record files of the New Broker;
 - b. a list of all referrals that have been made to Mr. McDonald by any other person, including the names and addresses of the person making the referral and the person referred;
 - c. evidence that Mr. McDonald has personally verified the identity of each of his clients, and
 - d. a financial summary of each transaction where Mr. McDonald is acting as a salesperson confirming that Mr. McDonald is aware of the details of deposits paid, trust monies held and amounts paid out by the New Broker.
8. From the date of this Order until December 31, 2011, Mr. McDonald shall promptly notify the New Broker and the Registrar in writing of any of the following:
 - a. any complaint with respect to Mr. McDonald's conduct as a real estate salesperson;

- b. any criminal charges or convictions or any regulatory charges or proceedings commenced or entered against him, or
 - c. any bankruptcy proceedings in which Mr. McDonald is personally involved.
9. From the time Mr. McDonald resumes his activities as a real estate salesperson with his New Broker until December 31, 2011, Mr. McDonald shall prepare and submit to the New Broker in December of each year a report, together with any supporting documentation requested by the New Broker, confirming that Mr. McDonald has complied with these conditions in the preceding year. Both the New Broker and the Registrar will be entitled to rely on this report as though it was given by Mr. McDonald under oath.
10. The New Broker shall promptly notify the Registrar if it becomes aware that Mr. McDonald is in violation of any of these terms and conditions. Annually in December of each year until and including December 2011, the New Broker will notify the Registrar in writing that it has received the report of Mr. McDonald under paragraph 9 of this Order and is not aware of any way in which Mr. McDonald is in violation of these terms and conditions.

LICENCE APPEAL TRIBUNAL

Laurie Sanford, Vice-Chair

RELEASED: June 19, 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

HARPREET SHOAN

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

TO REFUSE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Presiding Member

APPEARANCES: BRENDAN MORGAN, Counsel, representing the Applicant

NICOLE KOTEFF, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act, 2002*

DATE OF

PRE-HEARING: May 9, 2008

Toronto

ORDER

A pre-hearing was held in this matter on May 9, 2008, in Toronto before this Tribunal in the presence of Brendan Morgan, Counsel, appearing on behalf of Harpreet Shoan (the "Applicant") and Nicole Koteff, Counsel, appearing on behalf of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar").

At the commencement of the pre-hearing, Counsel for the Registrar provided to the Tribunal and to Counsel for the Applicant, the Registrar's Book of Documents.

The Registration Particulars numbered one through six (as contained in the Registrar's Notice of Proposal) were agreed upon. The Allegations numbered seven through 17, inclusive, were agreed upon. Allegations 18 and 19 are disputed by the Applicant.

Therefore, the Tribunal Orders as follows:

1. The Parties to the hearing are the Applicant and the Registrar.
2. There was no objection to the Book of Documents filed by the Registrar, from the Applicant's Counsel.
3. The Applicant intends to call up to five witnesses including one or two expert witnesses. The Registrar intends to call up to four witnesses. The Parties were advised of the Tribunal's Rules of Practice, effective January 1, 2008, and the requirements under Rule 6 regarding witnesses and expert witnesses.
4. The Parties shall comply with the disclosure requirements set out in Rule 6 of the above-noted Rules of Practice and, if they have not already done so, will exchange any documents to be used at the hearing by no later than May 23, 2008. Should there be any responses, they will be sent to the other party by no later than June 6, 2008. Copies of these documents shall be filed with the Tribunal at the hearing.
5. Should the issues set out in the Registrar's Notice of Proposal to Refuse Registration dated February 28, 2008, be resolved before the scheduled hearing date, the Parties will advise the Tribunal that the matter has been resolved and the scheduled hearing, no longer being required, will be cancelled.
6. Should the matter not be resolved, the hearing will commence at 9:30 a.m. on Monday, June 23, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and continue at 9:30 a.m. on June 24, 2008, if necessary.

LICENCE APPEAL TRIBUNAL

Donald Benninger
Presiding Member

RELEASED: May 22, 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

DAVE RAVINDRA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: DONALD BENNINGER, Member

APPEARANCES: JOHN F. JOHNSON, Counsel, representing the Applicant

NICOLE KOTEFF, Counsel, representing the Registrar under the
Real Estate and Business Brokers Act, 2002

DATE OF
PRE-HEARING: May 9, 2008

Toronto

ORDER

A pre-hearing was held in this matter on May 9, 2008, in Toronto before this Tribunal in the presence of John F. Johnson, Counsel, who appeared on behalf of Dave Ravindra (the "Applicant") and Nicole Koteff, Counsel, who appeared on behalf of the Registrar under the *Real Estate and Business Brokers Act, 2002* (the "Registrar").

THEREFORE the Tribunal orders as follows:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The issues to be addressed at the hearing are contained in Particulars 5 to 15, inclusive, as set out in the Registrar's Notice of Proposal to Revoke Registration dated February 26, 2008. Particulars 1 through 4 are not in dispute.

3. This matter will proceed in accordance with the Tribunal's Rules of Practice, effective January 1, 2008.
4. The Parties will comply with the disclosure requirements set out in Rule 6 of the above-mentioned Rules of Practice and, if they have not already done so, will exchange any documents to be used at the hearing by June 9, 2008. Should there be any responses, they will be sent to the other Party by June 23, 2008. Copies of these documents shall be filed with the Tribunal at the hearing.
5. The Applicant intends to call up to eight witnesses but no expert witnesses. The Registrar intends to call up to nine witnesses but no expert witnesses. The Parties agreed to exchange the names of the witnesses they intend to call no later than September 8, 2008.
6. Should the matter be resolved prior to the hearing date, the Parties will advise the Tribunal, in writing, with copies to each other, indicating the matter has been settled and a hearing is no longer required.
7. Should the matter not be resolved, the hearing dates of July 7, 8, and 9, 2008 are now, on consent of the Parties, rescheduled to September 29, 30 and October 1, 2 and 3, 2008, commencing at 9:30 a.m. at the Tribunal's Chambers, 1 St Clair Ave. West, 12th floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Donald Benninger, Member

Released: May 22, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



NICHOLAS LAPCEVICH AND METRO HAMILTON (REALTY) 2000 INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: RICKARD MACKLIN, Vice-Chair

APPEARANCES: SAM PARLATORE, Counsel, representing the Applicant

IAN DALEY, Counsel, representing the Registrar under the *Real
Estate and Business Brokers Act, 2002*

DATE OF
HEARING: May 13, 2008

Toronto

ORDER

The parties appeared before me today seeking to adjourn the proceeding. The stated basis for the adjournment is that as of late April 2008, the parties have been working towards narrowing the issues in dispute and expect to arrive at an agreed statement of facts.

It is further asserted that the adjournment will not prejudice either party or the Tribunal.

I note the pre-hearing Order of Vice-Chair Israel dated April 16, 2008. Paragraph four of the Order confirmed the time and date of the hearing and confirmed that those dates were peremptory.

I further note that the Tribunal's practice direction regarding adjournments has been virtually ignored.

I note that counsel for the Applicants was late for the hearing.

I note that the Applicants did not attend the hearing despite the fact that there would have been no assurance that this matter was not going ahead.

Counsel for the Applicants advised that “his client does not even know about today”. I am unsure as to how that assertion reconciles with counsel for the Applicants’ professional conduct obligations.

I do not accept that there is no prejudice to the Tribunal. Disregard for the Tribunal’s orders and failure to adhere to the Tribunal’s practice directions brings prejudice on the Tribunal.

Nonetheless, greater prejudice would result if the matter proceeded today. Accordingly, with considerable reluctance, I am prepared to accede to the consent adjournment request.

The parties advise that there are 76 points of agreement with respect to the allegations in the notice of proposal, and 15 points at disagreement.

The parties also advise that they are exploring resolution.

In view of the above, this Tribunal orders that:

1. The parties are to file with the Tribunal a Statement of Facts, indicating the agreed to facts and disputed facts, by June 4, 2008;
2. A pre-hearing will be conducted on June 6, 2008, at the Tribunal’s office, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m.;
3. The hearing of this matter is adjourned, peremptory against both parties, to July 3 and 4, 2008, commencing at 9:30 a.m., at the Tribunal’s office, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Richard Macklin
Vice-Chair

Released: May 22, 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

AMENDED 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 Minutes of Settlement, including terms and conditions for the Applicant's registration, was filed with the Tribunal. The settlement includes as a condition that the terms and conditions should form part of the Tribunal order.

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, c. S.22, and that on consent of the Parties the terms and conditions of the Minutes of Settlement are attached hereto and form part of the Tribunal order.

LICENCE APPEAL TRIBUNAL

Jane Weary, Vice-Chair

RELEASED: April 1, 2008

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

LICENCE APPEAL TRIBUNAL

BETWEEN:

MICHAEL ELMENHOFF

Applicant

- and -

REGISTRAR,
REAL ESTATE AND BUSINESS BROKERS ACT, 2002

Respondent

MINUTES OF SETTLEMENT

IN THE MATTER of the *Real Estate and Business Brokers Act, 2002*, (hereafter, the "REBBA, 2002"), and in the matter of the appeal by the Registrant Michael Elmenhoff (hereafter, the "Appeal") of the Proposal of the Registrar, REBBA 2002 dated February 21st, 2007 and the Supplementary Proposal dated September 25, 2007 (collectively hereafter, the "Proposal") to revoke the registration of Michael Elmenhoff as a broker under REBBA 2002, the parties to this matter, the Registrant and the Registrar, REBBA 2002, HEREBY AGREE THAT THE MATTER IS SETTLED AS FOLLOWS:

1. The Registrant and the Registrar, REBBA 2002, hereby consent to seek by way of joint submission to the Tribunal that the document attached hereto and entitled "TERMS AND CONDITIONS TO THE REGISTRATION OF MICHAEL ELMENHOFF AS A BROKER UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT" be attached as conditions to the Order of the Tribunal in this matter pursuant to subsection 14(5) of the REBBA, 2002;
2. The Applicant hereby acknowledges that he was advised by independent legal Counsel in this matter.

DATED AT TORONTO this 14th DAY of FEBRUARY, 2008

Michael Elmenhoff
Witness Name

[Signature]
Witness Signature

[Signature]
-Michael Elmenhoff, Applicant

DATED AT TORONTO this 13th DAY of FEBRUARY, 2008

Mary Ann Stephenson
Witness Name

[Signature]
Witness Signature

[Signature]
Allan Johnston, Registrar
REBBA 2002, Respondent

TERMS AND CONDITIONS TO THE REGISTRATION OF MICHAEL
ELMENHOFF AS A BROKER UNDER THE REAL ESTATE AND BUSINESS
BROKERS ACT.

To: The Registrar
Real Estate and Business Brokers Act
3250 Bloor Street West
6th Floor, East Tower
Toronto, Ontario
M6X 2X9

Pursuant to subsection 10 (2) of the *Real Estate and Business Brokers Act* 2002, S.O 2002, Chapter 30 Schedule C (the "Act"), I hereby consent and undertake to abide by the following Terms and Conditions to my registration as a broker under the Act:

1. Within 60 days of the Licence Appeal Tribunal Ordering these Terms and Conditions, I will cease to be the Broker of Record of Northumberland and I will hire a Broker of Record ("New Broker of Record") for Northumberland, acceptable to the Registrar.
2. For a period of one (1) year, commencing on the date when the New Broker of Record takes charge of Northumberland Realty, I will cease to be the Broker of Record of Northumberland Realty.
3. The New Broker of Record shall be advised of these Terms and Conditions and he/she shall acknowledge and agree in writing to these Terms and Conditions.
4. For a period of one year, commencing on the date when the new Broker of Record takes charge of Northumberland Realty, I shall trade as a broker under the Act and work closely with the New Broker of Record and he/she shall, monitor my activities in trading in real estate.
5. During the one year when I am not the Broker of Record of Northumberland Realty:
 - a) I will not be a signatory to the Real Estate Trust Account of Northumberland Realty;
 - b) I will not be designated as an alternate broker to exercise and perform the powers and duties of the Broker of Record in the absence of the New Broker of Record of Northumberland Realty;



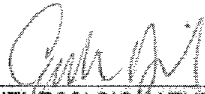
6. The New Broker of Record of Northumberland shall provide to the Registrar on a quarterly basis the monthly trust account statements and trust bank account reconciliations of Northumberland Realty. The first monthly and trust account reconciliation shall be provided by the New Broker of Record to the Registrar three months after the new Broker of Record is approved by the Registrar.
7. One year from the date I cease to be the Broker of Record of Northumberland Realty, I may apply to be reinstated as the Broker of Record of Northumberland Realty.
8. In the event I am reinstated as the Broker of Record of Northumberland Realty, for two (2) years from the date I am reinstated as a the Broker of Record of Northumberland Realty, I shall provide to the Registrar ;
 - a) On quarterly basis; the monthly trust account statements and trust bank account reconciliations of Northumberland Realty.
 - b) A copy of Northumberland Realty's fiscal year-end audited financial statement for a period of two (2) years, within sixty (60) days of the fiscal year end.
9. For a period of two (2) years from the date the Licence Appeal Tribunal Orders these Terms and Conditions, I and my broker shall immediately notify the Registrar in writing of any complaints (including, without limitation, any ethics or arbitration complaints) made against me by members of the public or other registrants under the Act, and I and my Broker of Record shall provide details of all such complaints and any documentation that the Registrar may require and hereby consent to the releasing of any information or documentation by any third party (including without limitation, any local real estate board or the Ontario Real Estate Association) to the Registrar.
10. At no time shall I have any agreements, oral or written, express or implied, including without limitation, any hidden or side agreements, with any person or corporation which would in any way violate the spirit and intent of these Terms and Conditions.
11. I hereby acknowledge that if new or additional information comes to the attention of the Registrar related to my honesty, integrity, compliance with the law or financial responsibility related to any issues in this proceeding, or if I breach any of these Terms and Conditions, the Registrar may take further administrative action, including a proposal to revoke my registration, based on the totality of the evidence of my past conduct and/or financial position, including the particulars set out in the proposal to refuse to renew registration dated February 21st, 2007 and the Supplementary Proposal dated September 25th, 2007.



12. If any of these Terms and Conditions shall be deemed invalid, unenforceable, illegal or a mutual mistake, such Term and Condition shall be severed and the remaining Terms and Conditions shall remain in full force and effect.

13. I hereby acknowledge that I have read and understood these Terms and Conditions and that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the Terms and Conditions set out herein.

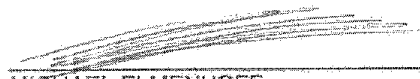
Dated at TORONTO, this 14th day of February 2008.



WITNESS' SIGNATURE



WITNESS' NAME



MICHAEL ELMENHOFF

REGISTRATION NO.: 2511742

ACKNOWLEDGED AND AGREED TO BY:

WITNESS' SIGNATURE

BROKER OF RECORD - SIGNATURE

WITNESS' NAME

BROKER OF RECORD - NAME



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5251 – TIA - CLAIM

APPEAL FROM A DECISION OF THE BOARD UNDER THE
TRAVEL INDUSTRY ACT 2002, R.S.O. 2002, c. T.30 Sch. D AS
AMENDED

TO REFUSE A CLAIM FOR COMPENSATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: NO-ONE appearing for the Applicant

SOUSSANNA S. KARAS, Counsel, appearing on behalf of the
Travel Industry Council of Ontario ("TICO"), the administrative
authority under the *Travel Industry Act 2002*

DATE OF
HEARING:

March 25, 2009

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the refusal of the Board of Directors of TICO to pay compensation out of the Travel Industry Compensation Fund (the "Fund"). Notwithstanding that the Applicant had been advised of the date and time of the hearing at the pre-hearing conference in this matter and attempts were made by the Tribunal on March 24, 2009 to advise him of the date and time the hearing, the Applicant failed to appear at 9:30 a.m. The Tribunal stood the matter down and reconvened at 10:10 a.m. The Applicant was still not present. The Tribunal proceeded to determine the matter based on admitted facts in the Decision Letter of the Board and the Notice of Appeal of the Applicant. The Applicant bearing the onus to establish his right to compensation, it was unnecessary for TICO to lead any evidence.

This matter arises out of the fact that a registrant, Aero Canadian Tour & Travel Inc. ("Aero") ceased operations on January 10, 2008. The Applicant had paid Aero for travel services which he did not receive. He made a claim to the Fund for reimbursement. Claims to the Fund are governed by the provisions of Ontario Regulation 26/05. With respect to the time limitation for making claims, Reg. 20/05 states at s. 60:

60. (1) A customer or a registrant may make a claim to be reimbursed in writing to the board of directors within six months after the relevant registrant or end supplier becomes bankrupt or insolvent or ceases to carry on business.

(2) A claim to be reimbursed that is made after the end of the six-month period is not valid.

The difficulty for the Applicant is the fact that he made his claim beyond the six month period. The Board of Directors turned down the Applicant's claim and the Applicant appealed to this Tribunal. In his Notice of Appeal that Applicant does not take issue with any of the factual allegations in the Board's decision letter. He appeals on the grounds that he did not know his claim rights and he does not understand English very well.

Having reviewed the *Travel Industry Act, 2002* and Regulation 26/05 and the *Licence Appeal Tribunal Act*, S.O. 1999, c. 12, Schedule G, the Tribunal can find no statutory authority for the proposition that either the Board or the Tribunal has discretion to extend the six month limitation period for making a claim to the Fund. The Tribunal is a creature of statute and has only the jurisdiction granted it by statute. It has no inherent or equitable jurisdiction. Accordingly, the Tribunal must dismiss the Applicant's appeal.

ORDER

Pursuant to the authority granted to it under the *Travel Industry Act, 2002* and the *Licence Appeal Tribunal Act*, the Tribunals orders the Board of Directors of the Fund not to pay compensation to the Applicant.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: March 26, 2009

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



5158-TIA-CLAIM

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO, UNDER
THE *TRAVEL INDUSTRY ACT*, 2002, S.O. 2002, c. 30, Sch. D

TO DISALLOW THE CLAIM

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair

APPEARANCES: APPLICANT, unrepresented

SOUSSANNA KARAS, Counsel representing the Travel Industry
Council of Ontario, *Travel Industry Act*, 2002

DATE OF
HEARING: February 23, 2009 Toronto

DECISION AND REASONS

BACKGROUND

This is an appeal to the Licence Appeal Tribunal, pursuant to s. 71 of O.Reg.26/05, from a decision of the Board of Directors of the Travel Industry Council of Ontario ('TICO'), disallowing a claim made under section 57 of the *Travel Industry Act*, 2002, (the 'Act').

By letter dated October 1, 2008, the TICO set out two reasons for the Board of Directors' decision to disallow the Applicant's claim, namely that the claim was not made within the prescribed time and that the claimant had not provided the required documentation.

EVIDENCE

The evidence for the Applicant consisted of some documentation and his own testimony. The evidence of TICO consisted of documentation and the testimony of Lori Furlan, a claims co-ordinator. The following is a summary of the relevant testimony.

The Applicant

The Applicant contacted Aero Canadian Tour and Travel Inc., ('Aero'), and bought two tickets to travel on December 30, 2007. He deposited \$800 dollars directly into the account of Aero on December 5, 2007. He was later called by Aero and was asked to deposit a further \$2,200 into Aero's account, which he did on December 20, 2007.

He went to the travel agent on the morning of December 24, 2007, and was given an itinerary but no tickets. He was told to come back later in the day. When he went in the afternoon the door was closed and there was a notice indicating that the agency was going bankrupt.

On December 29, 2007, the Applicant purchased two tickets to the same destination from Sky-route Travel Services Inc.

According to the Applicant, he was one of a number of people traveling in a group. Initially he gave his documents to an individual in the group as they were going to apply together to TICO. It was then decided that they should individually deal with TICO.

The Applicant delivered his claim form to TICO by hand on July 14, 2008. The Applicant testified that he had given the claim form to a lawyer, who he had no past relationship with, and paid \$20 to have the documents 'signed'. He picked them up on July 10, 2008, a few days later.

In cross-examination the Applicant indicated that he bought the alternative travel tickets from Sky-route Travel Services Inc. with money lent to him from a friend. He also testified that he picked up the claim form from the lawyer's office on July 14, 2008. He did not meet with the lawyer but merely showed his identification to a firm employee and signed the claim form. At the time he signed the form it had already been signed, (commissioned) by the lawyer. The lawyer's signature was dated July 10, 2008.

Lori Furlan

Ms. Furlan is a claims co-ordinator with TICO. She has been with TICO since its inception in 1997. Prior to that, from 1992, she was with the Travel Industry Compensation Fund. It is her job to process claims arising from the failure of travel agencies.

Ms. Furlan has been involved with the claims against Aero Canadian Tours and Travel Inc. which was officially closed on January 10, 2008. The final filing date for claims involving Aero was set for July 11, 2008, which was six months and one day from the date of closure.

Ms. Furlan testified that in the case of Aero a sign was posted on the agency's door directing individuals to call TICO as there were no books and records for TICO to use in this case to determine the names of potential claimants.

When claimants contacted TICO, they were forwarded a claim form with a covering letter explaining how and when the form was to be submitted. The Applicant's form was sent out February 13, 2008, as evidenced by the stamp on the claim form he submitted which read "released on February 13, 2008". The Applicant brought this form in to TICO on July 14, 2008. It was then stamped with the date of July 14, 2008 and the words "walk in" were written and initialed at the top of the claim form. Ms. Furlan testified that the Applicant was advised at that time that his claim was late. Nonetheless, she also advised him that if he wanted to go ahead he would need more documents including his receipt, itinerary and original proof of the money transfer.

Ms. Furlan referred to the covering letter sent with claim forms to claimants of Aero which sets out who must complete the claim and what original documentation is required. It also states in bold lettering that there is a six month filing deadline from the date that the supplier ceases to carry on business. It also states in bold and underlined in part:

"Please note the filing deadline date on the cover page of your claim form. Claims received at TICO beyond the filing deadline date will not be valid".

After providing the claim form to TICO on July 14, 2008, the Applicant on July 15, 2008, provided copies of itineraries and proof of deposit, but not a receipt. The Applicant advised TICO in writing on July 23, 2008, that he did not have a receipt. He also indicated that he paid for alternative travel for two people but provided proof for only one. On August 2008, the Applicant delivered copies of the receipt for the alternative travel for the second person. The Applicant claimed that he paid cash for the alternative travel arrangements. Ms. Furlan confirmed with the supplier for the alternative travel that payment had been made in cash.

The Applicant's claim was considered by the Board of the Travel Industry Council of Ontario at its meeting on September 23, 2008, at which time it was determined that the claim was not eligible for reimbursement as it was received beyond the six month filing deadline and that without a receipt the Board was unable to determine what travel services were purchased.

LAW

The following are the relevant sections of the O.Reg.26/05 under the *Travel Industry Act, 2002*.

- s. 56. The board of directors shall determine,
 - (a) whether a claim, or a part of one, is eligible for reimbursement; and
 - (b) the eligible amount of the claim.

s. 60 (1)A customer or a registrant may make a claim to be reimbursed in writing to the board of directors within six months after the relevant registrant or end supplier becomes bankrupt or insolvent or ceases to carry on business.

(2) A claim to be reimbursed that is made after the end of the six-month period is not valid.

s. 61(1) The claimant shall provide such documents and other information to the board of directors as the board requires to prove the claim.

(2) The board of directors may request that the claimant provide additional documents or other information.

(3) If the claimant does not provide the additional documents or other information within 12 months after receiving the request, the claim shall be treated as abandoned, unless the board of directors is satisfied that it would not be fair to do so.

DECISION AND ORDER

The evidence that the Applicant's claim for reimbursement was filed after the deadline of July 11, 2008 is not disputed. The Applicant requested and was provided with a claim form in February of 2008. The claim form itself clearly states the deadline by which it must be filed is July 11, 2008. The covering letter clearly sets out the importance of filing the claim before the deadline, whether complete or not.

The Applicant has provided no explanation of why he did not file his claim on time, other than to suggest that he left it at a lawyer's office and it took a few days to get it signed. His evidence in chief was that he picked the claim up from the lawyer's on July 10, 2008. In cross-examination he said he picked it up on July 14, 2008. In any event, there does not appear to be any evidence that the Applicant did not understand that there was a deadline. He simply did not meet it, notwithstanding that he had the better part of five months to do so.

Section 60(1) of Reg. 26/05 states that a customer may make a claim for reimbursement in writing to the board of directors within six months after the registrant ceases to carry on business. Section 60(2) state that a claim made after the six month period is not valid. Counsel for TICO argued that given the wording of the regulation the board of directors does not have discretion to extend the claim period and referred to previous decisions of this Tribunal, involving claims under the previous *Travel Industry Act* and regulation 806/93, s. 53, to that affect.

This Tribunal does not take issue with the previous decisions of the Tribunal, particularly given the wording of section 60(2) of regulation 26/05, which is not found in the previous regulation 806/93, which unequivocally states that claims outside of the prescribed time will not be paid.

Setting a limitation period for claims is reasonable, and arguably essential, in order that the fund set up to compensate consumers can be properly managed. In this particular case there is no evidence that the Applicant was not fully informed of what he needed to do; he simply did not do it. There was no issue of confusion or any other factor in this particular case which would render the enforcement of the deadline as unjust or unfair, although disappointing.

Had the Applicant filed his claim before the deadline, the Tribunal is of the opinion that the Applicant would have been entitled to reimbursement, as it is the Tribunal's opinion that the documentation provided by the Applicant was sufficient to support the

Applicant's position that he had paid for services from Aero in the amounts claimed and did not receive them. However, as previously stated, his failure to file his claim within the prescribed time disentitles him to reimbursement.

For these reasons, the appeal is denied and the TICO is ordered to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Vice-Chair

RELEASED: March 26, 2009

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

440629 ONTARIO INC. O/A ADRIATIC TRAVEL AGENCY & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT 2002*, S.O. 2002,
c.30, Sch. D

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair, presiding

APPEARANCES: GEORGE KUBES, Counsel, representing 440629 Ontario Inc.
o/a Adriatic Travel Agency & Tours

SOUSSANNA KARAS, Counsel, representing the Registrar,
Travel Industry Act, 2002

DATES OF
HEARING:

November 10 and
December 8, 2008

Toronto

DECISION AND REASONS

BACKGROUND

This is an appeal by 440629 Ontario Inc. o/a Adriatic Travel Agency & Tours (“Adriatic or Applicant”) to the Licence Appeal Tribunal (the “Tribunal”), from a Proposal of the Registrar, *Travel Industry Act, 2002* (the “Registrar”) dated July 10, 2008, to revoke the registration of Adriatic.

The reasons for the revocation, set out in the Proposal, are that the Registrant is and has been carrying on activities that are in contravention of the Act and regulations. In summary, those contraventions alleged include the following:

1. Failure to provide its financial statements within the time frame required,
2. Failure to maintain the minimum working capital required,
3. Failure to maintain its trust account in accordance with the regulation,
4. Failure to ensure the agency office was properly managed and supervised, and
5. Two consumer complaints.

EVIDENCE

The evidence of the Registrar consisted of documentation and testimony from four witnesses. They included Mary-Ann Harrison, Director of Operations and Acting Deputy Registrar, Travel Industry Council of Ontario ("TICO"), and Barbara Wesley, Rachel Palozzi, and Teddy Boyce.

The evidence of the Applicant consisted of documentation and the testimony of Christopher Philips, Director of the Applicant, Adriatic.

Below is a summary of the relevant testimony

Mary-Ann Harrison, C.A.

Ms. Harrison is the Director of Operations and Chief Financial Officer for the Travel Industry Council of Ontario ("TICO") and was at the time of the hearing the Acting Deputy Registrar. Her responsibilities include overseeing financial inspections, investigations and prosecutions of registrants to ensure they meet the financial requirements of the Act.

The Applicant was registered under the Act on December 8, 1982. The TICO contact at that time was Teddy Boyce, who was also a shareholder and director. A Notice of Business Change form was received by TICO on December 18, 2006, indicating that there was a new shareholder, Roshani Phillips, and terminating the previous shareholders and directors.

There were terms and conditions signed by the new shareholder when this change of ownership took place, which set out the requirements of the regulations that must be met. At this time, the manager of the Applicant was Mr. Boyce, the previous owner and manager of the Applicant, who was approved by TICO.

On November 30, 2006, form letters were sent as a courtesy to the Applicant stating when its financial statements were due on March 31, 2007. This requirement was in accordance with the regulations, which require statements to be filed 90 days from year-end. The letter also identified what needed to be included in the financial statements. The statements were not received on time and two further letters needed to be sent; one on April 10, 2007, indicating the statements needed to be received by April 9, 2007, and one dated April 25, 2007, setting out the due date of May 9, 2007.

The financial statements for 2006 were received by TICO on May 9, 2007, and showed that the Applicant had sales of \$618,415.00 but working capital of only \$5,022. Pursuant to Regulation 26/05 the Applicant, was required to maintain a minimum of \$10,000 in working capital and therefore an injection of \$4,978 working capital was required.

By letter dated June 25, 2007, TICO advised the Applicant that it was not in compliance and indicated what needed to be done and asked that it be done by July 9, 2007. On

August 9, 2007, TICO sent another letter, as it had not received a response. TICO received a letter August 14, 2007, from the Applicant dated July 30, 2007, indicating the required injection of capital had been made on July 19, 2007. A copy of a bank deposit slip was enclosed as evidence of the deposit. TICO accepted this with the intention of carrying out a later inspection to confirm that the funds were still in place.

An inspection was carried out October 2, 2007, for this purpose. It appeared to the inspector that the funds had not been removed; however, it was found that the trust accounting requirements were not being complied with. The principal of the Applicant, Mr. Phillips, who had identified himself as the vice-president at one point and the president at another, was using his personal credit card to pay for travel services on behalf of customers, then writing a trust cheque to himself for reimbursement. Payment should have gone directly from the trust account to the credit card company, not to Mr. Phillips. The Inspector met with Mr. Phillips and advised him of this. Mr. Phillips acknowledged the findings.

It was Ms. Harrison's evidence that at this time TICO had not been notified of the status of Mr. Phillips. The Notice of Business Change only showed Roshani Phillips as the shareholder, and she signed the form as an officer of the Applicant.

On November 22, 2007, TICO sent its courtesy letter reminding the Applicant that financial statements for 2007 were due by March 31, 2008. When they were not received by that date, a second letter dated April 21, 2008, was sent asking them to be filed by April 30, 2008. When they were not received, a final letter dated May 2, 2008, was sent requesting they be filed by May 16, 2008 or a proposal to revoke would be issued.

In July of 2007, Ms. Harrison received an internal email from a complaints officer indicating that TICO had received a consumer complaint about the Applicant. Given that, the 2007 financial statements had not been filed yet and that there had been a previous complaint, which took a long time to resolve, Ms. Harrison suggested a Proposal be issued.

Although the consumer complaint of July 2007 was resolved, the consumer indicated to TICO she wanted to file a complaint. TICO also became aware of an NSF cheque drawn on the Applicant's general account and made payable to an industry supplier. It was concluded that since this would be a payment for a purchase on behalf of a consumer the money should be coming from the trust account and if the consumer had paid money, it should be sitting in the trust account. This raised additional concerns.

Finally, there did not appear to be anyone managing the office that had authority to deal with the issues and that consumers were at risk. In response to the Proposal, a letter was received from Roshani Phillips stating that all communications should be directed to her or her husband and not Teddy Boyce. This caused concern as Teddy Boyce was the manager of record and he is the individual TICO was to contact to resolve issues. This left TICO with the question as to who was running the business and no confidence as to who was running the office. According to Ms. Harrison, there was nothing official that indicated TICO should be dealing with Christopher Phillips.

The Applicant's financial statements for 2007 were received September 15, 2008, five and a half months late. A bench review was done and it was determined that sales for 2007 totaled \$920,512.00. There was a loss of \$13,772 and negative working capital in the amount of -\$6,280. There was also no cash in bank accounts and bank indebtedness of \$5,080, which indicated, according to Ms. Harrison, that possibly trust accounts were not being maintained properly. The minimum working capital required was \$15,000 but because working capital was negative, an injection of \$21,280.00 was required. Ms. Harrison pointed out that these statements were eight and a half months after the year-end and therefore did not provide insight as to the current financial position of the Applicant.

The Registrar wrote to Roshani Phillips on September 15, 2008, advising of the need to correct the working capital. Apparently, this letter was not received. It was later faxed then to Mr. and Mrs. Phillips, and a trust deposit slip showing the required amount of working capital had been deposited, was provided to TICO. TICO was satisfied but, as is routine, planned to do a follow up visit to ensure the injected money stayed in the account. There were also a number of cash withdrawals from the trust account. Normally this would not be the case. As there was no information provided to explain these withdrawals, TICO again had concerns.

With respect to the status of Mr. Christopher Phillips, TICO was sent a fax October 18, 2008, which appears to be a form of "Particulars of New and Terminating, Officers, Directors, Partners, Sole Proprietor and Office Manager/Supervisor". This form indicated that Christopher Phillips was a Director of the Applicant. The form was signed only by him and no other officer, although the form indicated it was to be signed by all officers of the corporation.

TICO attempted to carry out an inspection to ensure the working capital injection was still in place and that trust accounting was being properly done. Despite all arrangements being made, three different days and times being set up and agreed to by Mr. Phillips, TICO was not able to do the inspection. Either Mr. Phillips did not make himself available or he claimed not to have the necessary documents. Rather, the manager Teddy Boyce had them.

Given the problems trying to carry out an inspection of the Applicant, and the fact there is no approved manager of the Applicant, the Registrar takes the position that registration should be revoked, however, the Applicant can reregister within 30 days once it is shown that a manager is in place and the books are in order.

In cross-examination, Ms. Harrison confirmed there had been a previous complaint, which began in December of 2007 and was resolved in June of 2008. She confirmed there were no outstanding complaints and no allegations of misappropriation although she stipulated that they have not been able to see the books and therefore cannot verify what has been happening.

Barbara Elizabeth Wesley

Ms. Wesley has been a Complaints Officer with TICO for approximately one and a half years. Prior to working for TICO, she had twenty years experience in the travel industry in the complaints or customer service area. Her job is to accept consumer complaints, then review the complaint in terms of travel legislation, then act as conduit for the flow of information between the parties, and help them resolve the issue.

Ms. Wesley was asked to call a consumer with respect to the Applicant in July of 2008. The consumer was worried because she had made a booking for a flight for her family and had not received tickets yet although she was going to travel within the next week. The consumer had dealt with 'Chris'. Ms. Wesley called Adriatic and spoke with the Manager Teddy Boyce who said he could not help her as he did not have access to the consumer's file and that she would have to call Chris. This was the afternoon of July 9. Ms. Wesley left a few messages for Mr. Phillips and he did return her call. He advised that at that time there was no booking. It was Ms. Wesley's evidence that she questioned this as Adriatic had had the money for a month. Mr. Phillips indicated that he would take care of this. The consumer did receive tickets and made her flight but she indicated that Mr. Phillips had not been pleasant to deal with.

Rachel Palozzi

Ms. Palozzi is also an employee of TICO and did the follow up on an earlier complaint involving the Applicant. A consumer had complained that she had been told the cost of her travel arrangements were \$2,000.00 and provided her credit card in payment of that amount. When she received her credit card bill, she noted she was charged \$2,306.00. She requested reimbursement of the \$306.00 from the Applicant. She was advised that the Applicant was not responsible, as a previous employee, who had since been fired, had acted improperly. Ms. Palozzi attended the Applicant's office, although she was unable to meet with Mr. Phillips. After a relatively lengthy period of time, it was agreed that the Applicant would reimburse the consumer.

Teddy Boyce

Mr. Boyce started in the travel industry in 1966. He purchased his own business, the Applicant, in 1982. He managed the Applicant for 25 years until January 2007 when he sold it to Christopher Phillips. Sales were about \$1.5 million and prior to selling, he had two employees – one full time, for 13 years, who was still an agent after Adriatic was sold. The other employee left when Adriatic was sold.

Mr. Boyce testified that he was asked to stay on as manager until a new manager was hired. Mr. Boyce was prepared to do that for about a year and then he hoped to retire. He testified that he had indicated to Mr. Phillips that he didn't mind working as an outside agent, that he had established a client base and wanted to remain as an outside agent as people continued to call him.

Mr. Boyce always dealt with Mr. Phillips. He never met Mrs. Phillips. His duties as manager were to run the business to the best of his ability and to look after the clients.

He testified that when Mr. Phillips first took over he was still writing cheques for suppliers and to employees for commission, but suddenly one day the deposit book and cheque books were gone from the office. Mr. Boyce testified he was at the agency all day, 10 to 5, and his contact with clients was not limited. Anything he did he had control over. Mr. Phillips came in after he left his other place of work. Mr. Boyce testified that if Mr. Phillips made bookings and Mr. Boyce got a call about it he could not help the client as the files were not in the office.

It was Mr. Boyce's evidence that he was basically stripped of managerial duties. He felt he was hardly treated as an employee. Although he was the only one in office, the new telephone system did not have a voice mail box for him although it had one for Mr. Phillips. He testified that for a brief time he had access to the voicemail but the access number was changed and the number he was given did not work. With respect to the mail, any mail that came in addressed to Mr. Phillips would be put on his desk. However, two months after he took over, Mr. Phillips directed that the mail go to a mailbox instead of the agency. This rerouting of the mail was eventually abandoned.

Mr. Boyce testified that books, records, and invoices were not kept in the office and this was a source of on going conflict. The 2007 invoices were not in the office so when TICO called and asked about past bookings, Mr. Boyce could not help because, he could not find the invoices. Any bookings he did he could deal with.

Mr. Boyce was aware of four NSF cheques to suppliers. He believed there were two complaints from tour operators that were resolved. He also indicated that there were tour operators who would only deal with Adriatic on a cash basis due to past problems with an employee hired by Mr. Phillips who committed credit card fraud against one of the suppliers. Mr. Boyce testified that he did not have a say in the hiring of this individual, notwithstanding he was supposed to be the manager. Mr. Boyce testified he resigned as a manager and the next day was fired. He testified he would stay as an outside agent but was not at the time of the hearing.

Mr. Boyce was shown a document from Airnets International which he signed authorizing a credit card charge. He confirmed he made the booking in July of 2008. The passenger had promised to come in and sign the credit card. He testified that this is not unusual for clients to call in – "we are supposed to get a signature but it is something done because of the urgency to get ticket". The client did not come in and sign, so there was a charge back to Adriatic, initiated October 16, 2008.

It was Mr. Boyce's evidence that he did not have problems with TICO when he owned the business. It was his opinion that Mr. Phillips did not take the time to learn the business and he has neglected the business.

In cross-examination, Mr. Boyce confirmed he does work from home. He has a home office set-up. He indicated he was a manager in name only. He was never paid a salary, only commission for work he did. He stated that all work he does at home goes

through Adriatic Travel. Mr. Phillips had a business card printed with his home telephone number on it. Mr. Boyce confirmed that the flyer that he produced indicating that Adriatic Travel was under new management but that he, Mr. Boyce, was still with the agency and provided his home contact information as well as a business number, was produced a week before he resigned. He confirmed that he did not sign cheques from the time Mr. Phillips took over. He indicated that sales for 2006 had been between .6 and .8 million. He stated he signed documents as the manager up until he resigned, as he had no choice.

Christopher Phillips

Mr. Phillips works full time as an accountant. He saw an advertisement for Adriatic Travel in the newspaper and after reviewing the books made an offer and purchased the business for \$50,000.00. Included in the agreement was a non-competitive clause, which stipulated that the Vendor would not compete with Adriatic Travel for a period of 10 years anywhere in the Greater Toronto area. According to Mr. Phillips, there were hardly any assets other than the goodwill of the company.

Mr. Phillips testified that the plan was that Mr. Boyce would stay with the business for about 4 months to train someone as manager. He did work with one agent for two or 3 months but Mr. Boyce was not getting along with him, and because the clients were Mr. Boyce's, Mr. Phillips sided with Mr. Boyce and the other employee left the agency. During that time, Mr. Boyce did not have the authority to sign cheques but he had all the other authorities and powers to act as a manager until the day he resigned.

Mr. Phillips attends to Adriatic's business after 5 p.m. If no one is in the office, the messages go into voice mail. He testified that when he took over the business it was in bad shape. The business was not viable at that time. Since then he has increased sales from .6 million to .9 million. He has since increased sales and hired more people for the office but Mr. Boyce did not get along with people. During the weekdays, Mr. Boyce usually gets the mail and, according to the witness, if he decides Mr. Phillips should read it, it is put on his desk. At one point Mr. Phillips arranged for a mailbox but it was too expensive.

Mr. Phillips testified that he purchased the business in January 2007 and that as part of the purchase arrangement Mr. Boyce was going to prepare the 2006 financial statements. Mr. Boyce did not do this by March 31, 2007, and it was Mr. Phillips' testimony that he would have thought it was up to Mr. Boyce to file them. TICO never got in touch with him about it. He found out the financial statements had not been filed when TICO sent him the letter of Proposal.

With respect to the trust accounts, Mr. Phillips testified that he used his personal credit card when he purchased tickets. Cash went into the Trust account but he needed to get paid. He showed the inspector the VISA statements and was told it would be better to write cheques directly to the credit card company.

With respect to the complaint from the consumer that Ms. Wesley testified about, Mr. Philips testified that the individual wanted to purchase tickets to Amsterdam but when she was told the cost she said it was too much and that if the price went below a certain amount to book it – it was booked a couple of weeks later. The consumer came in later and gave funds to Mr. Boyce who gave her a receipt. Mr. Philips pointed out that it was not against regulation to accept a deposit. Mr. Phillips testified he knew rates would be reduced closer to the departure date. When TICO called Mr. Philips he indicated that there had not been a booking, that the consumer had just been given a receipt. According to Mr. Phillips there was never a question of the consumer not traveling or not getting her money back.

With respect to the financial statements due March 31, 2008, Mr. Philips explained that they were late as his wife had twins and they were very busy. He had expected Mr. Boyce to put the numbers together but he was not co-operating and it took time for the accountant to do it.

Mr. Phillips testified that all files are on the premises and that he never removed any files. One copy of the invoice is left in the file and one in the binder. Mr. Boyce unfortunately had the documents. In September, Mr. Phillips advised TICO not to speak with Mr. Boyce with respect to the Applicant's affairs.

Mr. Philips terminated Mr. Boyce as a number of issues had come up in the last few months and he felt that Mr. Boyce was working against the interests of the company. He did not like the changes to mail, etc. Mr. Phillips also testified that he believes TICO was working against him and did not understand why TICO went over him and spoke with Mr. Boyce. He felt TICO was trying to tell him how to run his business. He does not see why TICO is concerned with changes to Adriatic's telephone system. The new way to forward calls was part of the strategy to make the business viable operation. He did not do it deliberately to affect Mr. Boyce.

With respect to the NSF cheques, Mr. Philips explained that he ran out of Trust Account cheques so he wrote cheques on the operating account and that money was going to be deposited in the operating account but the cheques were delivered before the money was transferred from the Trust to the operating account.

When TICO wanted to do the inspections, Mr. Boyce had all the documents. Mr. Philips testified he is willing to submit to inspection. He is a trained accountant and understands regulation.

Mr. Philips testified that an offer of employment for the manager's position has been made and accepted by an individual with experience in the travel industry. It has taken him a while to fill the position as he needed to find someone from the area as it is a specific clientele. The candidate previously worked for the Applicant in 2002.

Mr. Philips stated that he will undertake to file the financial statements on time. He reiterated that the Act says he can take funds to pay for tickets for consumers and that as far as he knows one can take cash out of the trust account for this. Right now the

situation is that suppliers want cash. They know he is going through a revocation and he is therefore required to paid cash.

He confirmed that Royal Scenic Holding Ltd. was still doing business with the Applicant, as was Galaxy Travel. He believes that he has taken steps to correct what was wrong and reiterated his willingness to comply with the Act by filing on time, ensuring the working capital is sufficient and submitting to regular and timely inspections.

Cross-examination

Mr. Philips confirmed his wife was the shareholder and that he was a director when they took over the business. The corporate registration reflected this and he thought he was registered with TICO. It was simply an oversight that he did not see his name on the form filed with TICO. When asked about his relationship with Royal Scenic, Mr. Philips confirmed that they require cash or a certified cheque from his business. He explained that he did not meet with the inspector as he did not have the records at the time. He denied that the money injected into, the business to bring the working capital into compliance had been removed.

THE LAW

Under Section 8 of the Act, in the case of a corporation, as here, the applicant is entitled to registration unless

- (d) (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
- iii) having regard to the financial position of its officers or directors or of an interested person in respect of its officers or directors, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
- (iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or
- (v) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration;
- (e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;
- (f) the applicant is in breach of a condition of the registration; or
- (g) the applicant fails to comply with a request made by the registrar under subsection (1.1). 2002, c. 30, Sched. D, s. 8 (1); 2004, c. 19, s. 23 (5-7).

Regulation 26/05 further provides:

- 22.(1) Every registrant shall file with the registrar the financial statements required by this section for each fiscal year. O. Reg. 26/05, s. 22 (1).
- (2) A registrant who had sales in Ontario of less than \$10 million during the previous fiscal year shall file, within three months after the end of the fiscal year,
 - (a) annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*; or
 - (b) annual financial statements with an auditor's report from a licensed public accountant, if the registrant is required to obtain annual financial statements with an auditor's report under the *Business Corporations Act*. O. Reg. 26/05, s. 22 (2).
- 27.(6) No registrant shall disburse or withdraw any money held in a trust account under subsection (1) except,
 - (a) to make payment to the supplier of the travel services for which the money was received;
 - (b) to make a refund to a customer; or
 - (c) after the supplier of the travel services has been paid in full, to pay the registrant's commission.

APPLICATION OF THE LAW TO THE FACTS

Section 8 of the Act sets out the conditions under which the Registrar may refuse to register an applicant. Section 10 provides that the Registrar may revoke a registration if, in his opinion, the applicant is not entitled to registration under Section 8.

The Registrar suggests that there are sufficient grounds for the revocation of the Applicant's licence under s.8 (1) (d) (ii): given its financial position, it cannot be expected to be financially responsible. Although it has not been suggested that the officers and directors lack honesty or integrity, it is suggested that their lack of experience provides reasonable grounds to believe that the Applicant will not carry on business in accordance with the law and therefore should have its registration revoked on the bases of 8(1) (d)(iv) of the Act. The onus is on the Registrar to prove these grounds on a balance of probabilities and the evidence must be clear and cogent.

The Applicant has been a registrant since 1982. It has only been since the change in ownership in December of 2006, that a concern has arisen. The facts are not really in dispute as to what has occurred to cause the Registrar's concern, however, the current director, Christopher Phillips, has argued throughout these proceedings that he has not been to blame for what has occurred and in any event, the contraventions of the Act and the concerns of the Registrar are not severe enough to warrant revocation.

Financial Position

The first and most significant concern of the Registrar relates to financial matters. The Applicant failed to file its financial statements within the prescribed time for both 2006 and 2007. This is not disputed. It was argued by Mr. Phillips that it had been part of the purchase agreement that the previous owner of the Applicant be responsible for

filing the 2006 financial statements. It was also argued by Mr. Phillips that he was not aware that the 2007 statements had not been filed in time until he received the Proposal. Mr. Phillips is the director and acting mind of the Applicant and it was his responsibility to know when the financial statements of the Applicant are due and it was his responsibility to ensure that they were submitted on time. He failed in this responsibility.

When the 2006 statements were reviewed, it was determined there was a working capital shortfall which was corrected. It also was discovered during an inspection of the banking records that there had been payments made from the trust account in a manner contrary to the Regulations. It would appear from the testimony that this arose due to lack of understanding of the Regulations by Mr. Phillips. This was acknowledged and assumed corrected. There was no suggestion of misappropriation.

The financial statements for 2007 were eight and a half months late. When reviewed it was determined that there was a working capital shortfall. This was corrected, although a follow-up inspection could not be done.

There was some evidence that at least two suppliers had been given cheques when there were insufficient funds for them to be cashed. Mr. Phillips attributed this to not transferring funds from one account to another prior to the cheques being presented to the bank. The Tribunal found this a feasible explanation. It was alleged that some suppliers are refusing to deal with the Applicant, or will deal on a cash basis only. It was not clear from the evidence that suppliers were in fact refusing to deal with the Applicant. However, it was acknowledged that some would only deal with the Applicant on a cash basis.

The Tribunal finds that the Applicant failed to file its financial statements on time for 2006 and 2007. It also failed to ensure the required working capital was maintained. Twice it was found to have less than the required working capital, although these shortfalls were corrected upon request. There were a few NSF cheques issued to suppliers. However, an explanation as to how it came about appeared to be plausible. Some of the industry suppliers will only deal on a cash or certified cheque basis with the Applicant.

It is clear that the transition from one owner of the Applicant to another was far from smooth. Due to Mr. Phillips' lack of understanding, or appreciation for, the requirements of the Act and the role of TICO, and his lack of industry's experience, the Applicant has run afoul of statutory requirements and financial difficulties. In its totality however, the evidence does not, in the Tribunal's opinion, support a conclusion at this time that there are reasonable grounds to believe that the Applicant will not be financially responsible.

Past Conduct

From the evidence of the Registrar, the past conduct that appears to have caused concern involve the apparent lack of understanding by the principal of the obligations of the Applicant under the Act and its Regulations, his failure to adequately manage the business office, and the fact that two consumer complaints arose which TICO had to become involved in to bring about a resolution.

It was clear from the evidence that Mr. Phillips did not have a sound understanding of the Act or its regulations when he began directing the Applicant. It was also abundantly clear that both he, and his counsel, fully appreciated the role and powers of the Registrar in regulating this industry and the Applicant's obligations to comply; at least this was the case at the onset of these proceedings. In submissions, however, assurances were made to the Tribunal that he understands this now and will ensure that the requirements of the Act will be met henceforth. Obviously, if this is not done, a subsequent proposal will be inevitable.

The concerns of the Registrar that the business office did not have proper management has some validity. It would appear for the period leading up to the Proposal Mr. Phillips' primary concern or preoccupation was with the protection of his business investment, which he perceived to be under the threat of competition from his own manager. The reality of this threat was not clear to the Tribunal. In any event, rather than take steps to find an alternative manager he trusted, which would have been the appropriate course of action, he continued to reduce the powers of his manager until he was a manager in name only. It is not clear how long this was the situation. The evidence would suggest from at least July until October of 2008. Mr. Phillips provided the Tribunal with a copy of an accepted offer of employment to an individual with a number of years of experience in the industry who, it is proposed, will act as the new manager. He testified that given these proceedings and the outstanding Proposal a contract of employment has not been finalized but will be.

Not dealing with the situation of the manager was a poor business decision. Mr. Phillips' testimony suggested that because the only business asset was the Applicant's clientele, and because that the manager was the previous owner and still connected with that clientele, his decisions were influenced by this. It is not clear, nor relevant, who did what as between the Director and manager, but the situation became dysfunctional. It is correctable and as indicated above Mr. Phillips has made steps to correct it.

With respect to the two consumer complaints, the first one, involving a \$306.00 refund, took longer than required to resolve this delay can be attributed to, at least initially, Mr. Phillips' lack of understanding as to the Applicant's responsibility for the actions of its employees. The evidence before the Tribunal relating to the second complaint was such that it was not clear as to what exactly had been agreed upon by the parties. In any event, both situations were rectified and the consumers received what they demanded.

There seemed to be some suggestion that TICO was not aware of Mr. Phillips being a director. It is not clear where the mix up occurred. From the documentation provided to the Tribunal it would appear that Mr. Phillips was identified as a director in January of 2007.

In its totality, the evidence of the past conduct of Mr. Phillips does not provide, in the Tribunal's opinion, reasonable grounds to conclude that the Applicant will not carry on business in accordance with the law and with honesty and integrity.

ORDER

Based on the evidence before the Tribunal it has reached the conclusion that there are insufficient grounds, at this point in time, to warrant the revocation of the Applicant's registration. However, the past non-compliance has obviously created uncertainty as to the current financial position of the Applicant and the sufficiency of the management of its agency at present. Clearly, these concerns should be addressed.

Mr. Phillips has made submissions that he wants to continue working with TICO to ensure the success of his business and has indicated a willingness to ensure any conditions imposed in order for the Applicant to continue as a registrant will be complied with. To date it has taken much time, effort and expense by the public authority to ensure that there has been basic compliance by the Applicant. Notwithstanding this, the Tribunal is willing to provide the Applicant with a further opportunity to demonstrate its ability to meet its obligations, subject to the following terms and conditions. These terms and conditions are in addition to those imposed under the Act and Regulations. Consequently, the Applicant is still required to meet the reporting requirements imposed upon it by the legislation including sections 22 and 53. A breach of any of the conditions, either those imposed by this Tribunal or those imposed under the legislation, will be sufficient to trigger section 8(1)(f) of the Act.

1. The Applicant will submit to an inspection of all its banking and other business records, within 10 days of the release of this decision or at a time specified by TICO.
2. The Applicant shall have a manager, approved by TICO, employed on a full time basis, at the Applicant's place of business with 14 days of the release of this decision.
3. The Applicant will deliver to the Registrar the following interim financial statements:
 - a) an interim financial statement for the period commencing September 1, 2008 and ending December 31, 2008. To be provided on or before, February 28, 2009;
 - b) an interim financial statement for the 3-month period commencing January 1, 2009 and ending March 31, 2009, to be provided within 30 days of the period end.
 - c) an interim financial statement for the 6-month period commencing January 1, 2009 and ending June 30, 2009, to be provided within 30 days of the period end.

- d) an interim financial statement for the 9-month period commencing January 1, 2009 and ending September 30, 2009: to per provided within 30 days of the period end.
4. Each of the interim financial statements referenced above shall include a balance sheet as well as an income statement. None requires review by a licensed public accountant.
5. If, after the review of the documents submitted as required pursuant to clause 3, the Registrar concludes that additional documentation is required to verify/determine the Applicant's financial position, the Applicant shall submit the additional documents required within 15 days from the date of the request.

The Tribunal therefore directs the Registrar not to carry out the Proposal dated July 10, 2008 to revoke the registration of the Applicant but to impose the above terms and conditions on the Applicant's licence.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Vice-Chair

RELEASED: January 23, 2009

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



4978-TIA- 1761752 ONTARIO INC.
O/A CANADIAN TRAVEL-Dismissal

TRAVEL INDUSTRY ACT, 2002
S.O. 2002, c. 30, Sch. D

IN THE MATTER OF an appeal by
1761752 ONTARIO INC. O/A CANADIAN TRAVEL

AND IN THE MATTER OF the PROPOSAL TO REVOKE REGISTRATION of the
Registrar, *TRAVEL INDUSTRY ACT, 2002*, made pursuant to section 10(1) of the Act

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

1761752 ONTARIO INC. O/A CANADIAN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of Section 11(5) of the *Travel Industry Act*, S.O. 2002, c. 30, Sch.D (the "Act"), 1761752 ONTARIO INC. O/A CANADIAN TRAVEL (the "Applicant") initiated an appeal from the Proposal of the Registrar, *Travel Industry Act, 2002* (the "Registrar") dated June 10, 2008.

The Pre-Hearing Order in this matter released to the Parties on September 17, 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 not be dismissed, including an explanation of the Applicant's failure to attend at the pre-hearing. 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 Applicant's appeal is dismissed, and the Tribunal's file is closed as of this date.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Presiding Vice-Chair

RELEASED: October 2, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



440629 ONTARIO INC. O/A ADRIATIC TRAVEL AGENCY & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT* 2002, R.S.O. 2002, c. T.30
SCHED. D

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-Chair, presiding

APPEARANCES: CHRIS PHILLIPS, Agent, appearing on behalf of 440629
Ontario Inc. o/a Adriatic Travel Agency & Tours (the Applicant)

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
HEARING: October 16, 2008 Toronto

ORDER

This is an appeal by 440629 Ontario Inc. o/a Adriatic Travel Agency & Tours ("Adriatic") to the Licence Appeal Tribunal (the "Tribunal"), from a proposal of the Registrar, *Travel Industry Act, 2002* (the "Registrar") dated July 10, 2008, to revoke the registration of Adriatic.

At the onset of the proceedings, the Applicant requested an adjournment. The primary reasons given for the request were that the Applicant had been served with documents on October 10, 2008, and had not had adequate time to prepare a proper response, and that its legal counsel had been unable to attend the hearing. Further, the Applicant had been served with an affidavit of a former employee/manager who would not be in attendance at the hearing, as he would be out of the country until October 28, 2008, thereby depriving the Applicant of the opportunity to challenge his evidence.

The Registrar was opposed to an adjournment, primarily because the Applicant attended a prehearing and has sufficient time to come prepared. Counsel for the Registrar explained that all documents were provided to the Applicant as soon as they were available, and that the affidavit evidence served on October 10, 2008, was

prepared when the Registrar was advised that the witness would be out of the country at the time of this hearing. It was the Tribunal's understanding that the Registrar had intended, and does intend, to call the employee/manager as a witness.

The Tribunal concluded that to deny to adjournment in this particular instance would be prejudicial and unfair to the Applicant. The adjournment was granted to allow the Applicant an opportunity to obtain counsel and fully prepare his response to the evidence and issues raised. It was clearly explained to the Applicant's representative that there would be no further adjournments of the matter and that it would proceed on the rescheduled date, whether or not the Applicant had retained counsel.

After conferring with the parties the hearing was scheduled to recommence at 9:30 on November 10, 2008, at the Tribunal's Chambers, 1 St. Clair Ave. West, Toronto.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Vice-Chair

RELEASED: October 24, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



NUGGET TRAVEL AND TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: ELIZABETH SPROULE, Vice-chair

APPEARANCES: ALI AKBAR, Counsel, representing the Applicant, Nugget
Travel and Tours Inc.

SOUSSANNA KARAS, Counsel, representing the Registrar,
TRAVEL INDUSTRY ACT, 2002

DATE OF
HEARING: September 9, 2008 Toronto

ORDER AND DECISION

This is an appeal by Nugget Travel and Tours Inc., ("Nugget"), to the Licence Appeal Tribunal, (the "Tribunal"), from a Proposal by the Registrar, *Travel Industry Act, 2002*, (the "Registrar"), dated April 17, 2008, to revoke the registration of Nugget.

EVIDENCE

The Registrar called three witnesses. The first was Ms. Mary-Ann Harrison, Director of Operations, Travel Industry Council of Ontario ("TICO"), and a Chartered Accountant, whose job it is to oversee the financial and non-financial investigations and prosecutions of registrants. The second and last were two consumers who had filed complaints against the Applicant.

The President and Director of the Applicant, Mr. Moazzam Khan, testified on behalf of the Applicant.

The Applicant Nugget was registered in July of 1999 as a travel retailer and wholesaler. It was purchased by Mr. Moazzam Khan, the current President and Director, in 2004. The year-end for the Applicant is December 31, 2007. Regulation 26/05 s. 22(2) requires that the financial statements for the Applicant be submitted within 90 days of its year-end. A letter was sent by TICO on November 22, 2007, to the Applicant requesting that the required financial statements be submitted by March 31, 2008. On March 31, 2008, Mr. Khan advised TICO that the statements would be submitted by April 20, 2008. As of April 21, 2008, the financial statements had not been received and a further letter was sent by TICO indicating the information must be received by April 30, 2008. Mr. Khan responded by letter that he would have the statements submitted to TICO by May 12, 2008. The financial statements were submitted on May 20, 2008.

In response to verbal complaints from customers regarding dishonored refund cheques TICO carried out an investigation at the Applicant's branch office on January 28, 2008. No banking records were available at that time. It was noted that the banking accounts had been changed without notice to TICO, despite the requirement to give notice.

A follow up inspection and meeting with Mr. Khan was set up for February 5, 2008. At this time it was determined by the TICO inspector that the trust accounts had not been maintained as required by O. Reg. 26/05 s. 27. In fact consumer deposits were being mixed with general funds in three different accounts. It was also noted that there had been a \$12,000 shareholder withdrawal from one of the accounts in December of 2007. Mr. Khan advised at this meeting that monies were owed by the Applicant in excess of \$50,000 to the International Air Transport Association ("IATA") and that its membership was effectively suspended. Given the above, the conclusion of the TICO investigator was that consumers were at risk.

On February 13, 2008, TICO received a written complaint from Consumer A that he and his brother were owed \$11,900 by the Applicant. Consumer A testified that they had purchased a Hajj tour from the Applicant, which they paid for in full in October of 2007, with a departure date of December 4, 2007. At the last minute they did not get to go on the tour, as Nugget did not secure the appropriate visa as it was obligated to do. Consumer A testified that they were never given any inclination that there was an issue involving the visas but discovered the problem themselves when they called the appropriate embassy one or two days before the departure date and were advised that they did not have the necessary visa. At the time of the hearing Consumer A had not been repaid any amount.

A second written complaint was received on February 14, 2008, involving Consumer B and the same Hajj tour. This consumer testified that the Applicant requested a money order for \$11,700 two weeks prior to the departure date. Both Consumer B and his mother were to make the trip. They were advised at the last minute that there was a problem and it was not made clear to them until one or twodays after the original scheduled departure date that they would not be making the trip. Consumer B was given 3 post-dated cheques as a refund, however, two did not clear. At the time of the hearing Consumer B was owed \$7,800.00.

A third written complaint was received April 3, 2008, from Consumer C. This complaint also involved the same tour as the previous two witnesses. Consumer C had paid the Applicant \$16,750.00 in June of 2007 and had been repaid \$12,000 to date. They were still owed \$4,750.00 at the time of the hearing. The facts relating to the consumers complaints and the amounts owed to them are not in dispute.

Based on the financial statements provided to TICO, the Applicant appears to have been maintaining sufficient working capital. The required amount for the Applicant is \$25,000 and the financial statements indicate that the Applicant has maintained working capital in excess of this amount. These financial statements also indicate that there was cash on hand in the amount of \$47,000 as of December 31, 2007, and approximately \$32,000.00 as of May 31, 2008. Mr. Khan was asked but could not verify what kind of funds the cash on hand were.

TICO's concern, as expressed by Ms. Harrison, is why, if the appropriate working capital is being maintained, and there appears to be cash on hand, has the Applicant not been able to refund the consumers over the past 9 months? By letter dated February 6, 2008, Mr. Khan advised TICO that the debts owed to the three consumers would be paid by the end of March 2008. This did not happen and the debts remain outstanding to date. TICO is concerned that the financial statements are not providing an accurate picture of the situation.

The Applicant's position is that the debts to consumers A, B, and C arose as a result of the Applicant losing a large amount of money at the time of the December 2007 Hajj trip. The Applicant has special authorization to arrange Hajj tours but it has a quota of only 100 visas. Prior to the December 2007 trip, Mr. Khan testified that he was given verbal assurances by the Hajj Ministry that the Applicant's quota of visas would be enhanced. Based on this the Applicant booked hotels and airline tickets for 50 additional individuals for the December tour. Five or six days before the departure days it became apparent that additional visas would not be forthcoming. At this point the Applicant had 108 clients booked on the trip. Attempts were then made to obtain visas for the surplus clients, (which according to Mr. Khan randomly came to be consumers A, B, and C), through U.S. operators without success. This attempt was apparently done by an employee of the Applicant and the documents for this were completed and signed in the name of consumers without their knowledge or consent. Mr. Khan denied knowing the employee did this. According to the testimony of Consumers A and B they were assured up until the absolute last moment that they would be going with the December 4 group thereby adding to their shock and disappointment when they were left behind.

According to the testimony of Mr. Khan, the Applicant has not had the money to repay the Consumers but will have. Steps have been taken in an effort to make the Applicant financially viable. The Applicant had been losing thousands of dollars a month. In response it has closed its Mississauga branch office and it is no longer offering Hajj tours. It has made arrangements to sell its quota for Hajj tours for \$30,000, payment for which is to be received in two installments, one at the end of September and one at the end of October. Mr. Khan testified that this was a 'firm deal' and when the Applicant receives these payments it will be in a position to repay the consumers.

Mr. Kahn was questioned as to the accounts receivables set out in the financial statements for the year ending December 31, 2007. Included are a number of receivables relating to the Hajj tour of December 2007. In particular, included is the amount of \$24,000 paid for hotels booked for the Hajj trip as well as \$14,285.71 paid the Hajj authorities. Mr. Kahn testified that these are collectible and are properly included in the financial statements. This evidence seems to contradict in part, the documentary evidence. In a letter to TICO dated February 28, 2008, Mr. Khan had written that the money paid for hotel rooms was non-refundable and that fact is what contributed to the loss suffered by the Applicant. Mr. Kahn testified that the monies paid to the hotel and Hajj Ministry were the Applicant's funds.

THE LAW

Under Section 8 of the Act, in the case of a corporation, as here, the applicant is entitled to registration unless

- (d)(ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
- (iii) having regard to the financial position of its officers or directors or of an interested person in respect of its officers or directors, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,
- (iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or
- (v) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration;
 - (e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;
 - (f) the applicant is in breach of a condition of the registration; or
 - (g) the applicant fails to comply with a request made by the registrar under subsection (1.1). 2002, c. 30, Sched. D, s. 8 (1); 2004, c. 19, s. 23 (5-7).

APPLICATION OF THE LAW TO THE FACTS

The Registrar argues that there are sufficient grounds for the revocation of the Applicant's licence under s.8(1)(d)(ii). Given its financial position it cannot be expected to be financially responsible. Further, under 8(1)(d)(iv) given the past conduct of its officers and directors, there is reasonable grounds to believe it will not carry on business with honesty and integrity and in accordance with the law. The onus is on the Registrar to prove these grounds on a balance of probabilities and the evidence must be clear and cogent.

Financial Position and the Ability to be Financially Responsible.

The *Travel Industry Act, 2002*, (the “Act”), like its predecessor, is provincial consumer protection legislation designed to ensure that registrants are financially responsible in the conduct of their business. It is in the interest of both the public and the industry that travel agents are financially responsible.

In the case before the Tribunal we have a registrant who has been unable to repay monies owed to consumers for at least nine months and has other outstanding industry debts, which as of the date of this proceeding remained unpaid. According to the evidence of Mr. Khan the consumers have remained unpaid as the Applicant does not have the money to repay them.

It is not clear from the financial statements provided to TICO why the Applicant has not been able to repay the consumers, this raises concern as to their accuracy with respect to the amount of working capital being maintained. The Applicant is required, under O.Reg. 26/05 s. 24, to maintain working capital in the amount of \$25,000. According to the financial statements provided, the amount of working capital being maintained surpasses that amount. However, in the preparation of these statements and the calculation of working capital certain receivables have been included, specifically, the amount paid for hotel accommodation and monies paid to the Hajj Ministry for the December 2007 Hajj tour. There is conflicting evidence before the Tribunal as to whether these amounts can be recovered. In particular, Mr. Khan testified before the Tribunal that steps can be taken to cover the amounts with respect to accommodation; however, he previously stated in writing to TICO that this amount was non-refundable and was one of the reasons for the substantial loss suffered by the Applicant. If the receivables are not collectable then that the working capital of the Applicant, as stated to TICO, would not be accurate and may in fact be deficient.

In any event, what is clear is that the Applicant has not been able to reimburse consumers, which it has the financial responsibility to do. Two out of three cheques provided by the Applicant to one consumer did not clear. In correspondence dated February 28, 2008, Mr. Khan advised TICO that the consumers would be repaid by the end of March 30, 2008. His current position is that they will be repaid in part by the end of September and the balance by the end of October, 2008.

The consumers involved here have been owed a significant amount of money, for a significant period of time. They are unable to make a claim to TICO for reimbursement so long as the Applicant is still in operation. Mr. Khan’s assertion that the Applicant will be in a position to repay the consumers soon does not satisfy the Applicant’s responsibility to the consumers. Previous commitments to repay have not been fulfilled and the current proposal requires the performance by a third party of a commitment to the Applicant, which may or may not happen. There is no doubt that Mr. Khan honestly believes this will happen, that the deal is “firm”; however, he also believed and relied upon his quota for visas being enhanced before that actually happened and the results were disastrous.

The facts before this Tribunal clearly show that the Applicant's current financial position prevents it from meeting its industry and consumer financial obligations and supports the conclusion that the Applicant cannot be reasonably expected to be financially responsible. The impact of a revocation of licence will be enormous to the Applicant and Mr. Khan, however, the interests of the consumers and the industry must be protected.

Past Conduct of the officers and directors

The evidence before the Tribunal is that the business of the Applicant had not been operating in compliance with the Act in a number of respects. They included the following:

- Late filing of financial statements,
- Failed to maintain trust accounts
- Failed to give notice of changing accounts
- Operated account in the name of a non-registered entity
- Made a shareholder withdrawal from an account containing consumer funds.

It was argued by Counsel for the Applicant that the basis for the proposal arises from one incident involving a poor business decision made by Mr. Khan to conduct business on the assumption that the Applicant would be able to get more visas than its existing quota, thereby leading to a large financial loss. Counsel further pointed out that there has been no suggestion of misappropriation on behalf of Mr. Khan, that he has been co-operative and deserves the indulgence of one or two months to make the refunds to the consumers.

The decision to book tours in excess of the Applicant's existing quota was a bad decision and has lead to financial problems for the Applicant. However, the list of contraventions above raises general concerns as to how the business of the Applicant was being operated. Failing to maintain a trust account, in particular, is a serious matter and certainly put the public at risk. It is disturbing that the business was being operated in this manner and that Mr. Khan did not know of the requirement to maintain trust accounts.

There was no clear evidence before the Tribunal, which would impugn Mr. Khan's honesty or integrity. However, he clearly lacks a thorough understanding of the requirements of the Act and its regulations and this brings into question his ability to ensure that the business of the Applicant is operated in accordance with the law.

The Tribunal notes that at the time of the hearing the Applicant had set up the required trust account and resolved the issues in that regard. Had the contraventions listed above been the only concerns regarding the Applicant's operation of business, there may have been room to argue that they could be appropriately addressed through the imposition of conditions of further training and increased scrutiny. However, these concerns are combined with the fact that consumers have been harmed and continue to

be so, and other consumers and industry members may be at risk as long as the Applicant continues to operate given its current financial position. The combined effect of both past conduct and the current financial position provides reasonable grounds for the revocation of the Applicant's licence.

ORDER

Having considered the evidence in its totality the Tribunal, pursuant to its powers under Section 11 of the Act, directs the Registrar to carry out the revocation of the Applicant's licence. However, the Order shall not be effective until 15 days after the issuance of the Order to allow the Applicant an opportunity to provide notice to any employees and to wind up the business. Given the current level of knowledge of Mr. Khan as to the regulatory requirements, the Tribunal directs that the Registrar's staff provide sufficient support to the Applicant to ensure that all supplier and customer obligations are discharged.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule, Vice-Chair

RELEASED: October 15, 2008

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

PRE-HEARING

440629 ONTARIO INC. O/A ADRIATIC TRAVEL AGENCY & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, R.S.O. 2002, c. T.30
SCHED. D

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, presiding
TERRANCE SWEENEY, Vice-Chair

APPEARANCES: CHRIS PHILLIPS, Agent, appearing on behalf of 440629
Ontario Inc. o/a Adriatic Travel Agency & Tours (the Applicant)

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
HEARING: September 15, 2008 Toronto

ORDER

A pre-hearing was held on September 15, 2008, before the Licence Appeal Tribunal. Chris Phillips attended as agent for the Applicant and Soussanna Karas attended as 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. In particular, the Parties shall have until 4:00 p.m. on October 6, 2008 to deliver to each other any and all documents they intend to rely on at the hearing.

3. The Parties shall ensure that, at the hearing of this matter, they shall have copies of all documents for the Tribunal, copies for any witnesses they intend to call and copies for their own use. Those documents for the use of the witnesses and the Tribunal shall be free from notations not on the original.
4. The Registrar shall have until 4:00 p.m. on October 3, 2008 to deliver a Notice of Further and Other Particulars to the Applicant and the Tribunal.
5. The hearing shall commence at 9:30 a. m. on October 16, 2008 at the Tribunal's Chambers at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude
Presiding Vice-Chair

Terrance Sweeney,
Vice-Chair

RELEASED: September 22, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



1761752 ONTARIO INC. O/A CANADIAN TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair, Presiding
TERRANCE SWEENEY, Vice Chair

APPEARANCES: NO-ONE appearing for the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: September 15, 2008

Toronto

ORDER and NOTICE OF INTENT TO DISMISS

The Parties to this matter are 1761752 Ontario Inc. ("the Applicant") and the Registrar, *Travel Industry Act, 2002* (the "Registrar").

The issues in this matter are set out in the Registrar's Notice of Proposal to Revoke Registration dated June 10, 2008, and relate to the failure of the Applicant to provide a correct address, and to respond to correspondence and misleading the Registrar concerning its location.

A pre-hearing was held in this matter on September 15, 2008, in the presence of Soussanna Karas, Counsel, appearing on behalf of the Registrar. No-one appeared on behalf of the Applicant.

The Applicant filed a Notice of Appeal, which was received by the Tribunal on July 22, 2008. On the Notice of Appeal form, the Applicant requested a pre-hearing by telephone conference. By letter dated July 30, 2008, the Tribunal advised the Applicant that the pre-hearing conference would be held at the Tribunal's Chambers at 1 St Clair Avenue West, and his personal attendance was required. The Tribunal's records indicate that the Notice of Pre-hearing and the Notice of Hearing were both successfully faxed to the Applicant on August 7, 2008. The Tribunal's records also indicate that correspondence from the Tribunal containing the Tribunal's Rules of Practice was returned as undeliverable to the Applicant's business address by Canada Post on or about August 7, 2008. This package was marked 'moved'. Tribunal staff reached the Applicant by telephone on September 12, 2008 and advised him that the pre-hearing of this matter was to proceed on Monday, September 15, 2008. The Applicant's President Kaifezahid S. Hussain confirmed that he would attend.

No representative of the Applicant attended the pre-hearing. Staff of the Tribunal again attempted to reach the Applicant and was able to leave a message. After a half hour delay, the pre-hearing commenced.

There is no indication that the Applicant has made any attempt to further its appeal. Counsel for the Registrar advised the Tribunal that the Registrar's office has had no contact from the Applicant and, indeed, that lack of contact is the basis for the Notice of Proposal.

Rule 2.10(d) of the Tribunal's Rules of Practice provides that the Tribunal may dismiss an appeal when it is abandoned. Rule 2.12 provides that when a party fails to attend before the Tribunal, the Tribunal may treat the party's hearing as abandoned and dismiss the matter. The Rules of Practice apply to all proceedings of the Tribunal, including the pre-hearing.

The Tribunal therefore finds this appeal should be treated as abandoned and intends to dismiss the appeal unless sufficient reason is provided by the Applicant as to why it should not be dismissed.

The Tribunal makes the following order respecting the hearing scheduled to commence at 1:30 p.m. on October 16, 2008 at the Tribunal's hearing rooms, 1 St. Clair Avenue West, Toronto, Ontario:

1. Pursuant to the *Statutory Powers Procedure 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.

2. 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 not be dismissed, including an explanation of the Applicant's failure to attend at the pre-hearing. 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

D. Gregory Flude, Presiding Vice-Chair

RELEASED: September 17, 2008

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

LIFEDREAM TRAVEL & TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, R.S.O. 2002, c. T.30
SCHED. D

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: NO-ONE appearing for the Applicant

SOUSSANNA S. KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act 2002*

DATE OF
HEARING: August 26, 2008 Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from a Notice of Proposal to Revoke its registration issued on February 20, 2008, by the Registrar under the *Travel Industry Act 2002*, R.S.O. 2002, c. T.30 Schedule D. (the "Act"). On August 15, 2008 the Registrar issued an Order of Immediate Suspension and a Notice of Further and Other Particulars providing for the immediate suspension of the Applicant's activities. The authority for an immediate suspension is found in s. 12 of the Act. The Act provides that the Applicant has 15 days to appeal an order for immediate suspension following which it may be extended by the Tribunal at the commencement of the hearing, provided the hearing commences within 15 days. The hearing was commenced within the 15-day appeal period, that is, before the time when the Applicant may choose to appeal the immediate suspension, and the Registrar moved for the extension of the suspension order until the conclusion of the hearing. The Tribunal deferred its ruling on the Registrar's motion until all of the evidence had been received, so the evidence could be used in support of the motion. Finally, on August 18, 2008 the Director issued a Director's Order pursuant to s. 23 of the Act to seize the Applicant's bank accounts.¹

¹ Ex 3 Tab 1 has the Immediate Suspension Order and the Director's Order to seize bank accounts.

At the commencement of the hearing, counsel for the Applicant, Vic Rampersad, advised the Tribunal that he had not received instructions from his client. He then withdrew. The Applicant not being in attendance, the Tribunal then adjourned for 30 minutes. When the hearing was restarted, the Applicant was still not in attendance.

The Tribunal proceeded to hear evidence. At the conclusion of the evidence counsel for the Registrar asked for an oral ruling with written reasons to follow. She explained that the Travel Industry Compensation Fund (the "Fund"), a fund set up to compensate consumers who do not receive the travel they have paid for, could not act to protect consumers until the Applicant's registration had been revoked. An oral ruling might result in the Fund being in a position to purchase tickets for consumers who had yet to travel, thereby ensuring they receive the travel they had purchased. Given the fact that the evidence against the Applicant was overwhelming and the public interest was best served by immediate revocation, the Tribunal acceded to this request and made an order, orally, requiring the Registrar to carry out the Proposal to Revoke the Applicant's registration with written reasons to follow. These are the written reasons. In light of the oral order, the Registrar's motion for continuation of the immediate suspension order was rendered moot.

EVIDENCE

Mary-Anne Harrison is Director of Operations and Chief Financial Officer at the Travel Industry Council of Ontario ("TICO"), the office of the Registrar under the Act. She identified the role of TICO as oversight of all inspection, compliance and registration functions under the Act to ensure compliance with the legislation. TICO also administers the Fund.

Ms Harrison reviewed the Applicant's regulatory problems, commencing in 2005. In August 2005, the Registrar issued a Notice of Proposal to Revoke the Applicant's registration.² The allegations in the 2005 Proposal ranged from improper trust accounting through the issuance of NSF cheques to suppliers through insufficient working capital. The Applicant appealed the 2005 Proposal. A settlement was entered into whereby the Applicant agreed to Terms and Conditions signed on March 30, 2006.³ Of particular note in the Terms and Conditions is the Applicant's undertaking to maintain working capital at the proper levels, and not to withdraw funds until the withdrawal may be done in such a manner that working capital is not compromised.⁴ Pursuant to the legislation and the Terms and Conditions, the Applicant filed its year-end financial statements for the year ended October 31, 2006, by January 31, 2007.⁵ TICO reviewed the financial statements and determined that the Applicant had had sales of \$2,208,224.00 in the previous fiscal year. This level of sales required the Applicant to

² Ex 4

³ Ex 5

⁴ Working capital requirements for various sales levels are set out in Ontario Regulation 26/05 passed under the Act.

⁵ Ex 3 Tab 23

maintain a working capital of \$25,000.00. The financial statements disclosed that the Applicant actually had a working capital of \$2,593.00. By letter dated February 26, 2007,⁶ the Applicant was advised that it needed a capital injection of \$22,407.00 to meet its working capital requirements. A response was requested by March 12, 2007. On March 13 the Applicant advised TICO that it had deposited \$22,407.00 into its accounts.

Ms Harrison advised the Tribunal that it is TICO's practice to conduct follow-up inspections to ensure that working capital is maintained. Accordingly a follow-up inspection was conducted on August 20, 2007. That inspection discovered that on the same day that the Applicant had advised TICO of the deposit of funds to maintain its working capital it withdrew \$7,600.00, thereby falling below the required working capital level. The Applicant was also found to be in breach of its trust accounting obligations. The Inspection Report ends with this conclusion:

The Registrant did not correct trust accounting issues found during the first inspection on February 17, 2006 and does not correct working capital shortage, therefore she may be a risk.⁷

The inspection findings were communicated to the Applicant by letter dated August 27, 2007. The Applicant was advised to respond by September 10, 2007, indicating that the working capital had been restored and that all trust bank accounts had been properly designated. It was also advised that trust accounts should never be in negative balance. The Applicant was advised that failure to comply with the Act might result in the issuance of a Notice of Proposal.⁸ The Applicant responded on September 14, 2007, showing a deposit of \$7,600.00. It also provided a letter from its bank, Royal Bank of Canada ("RBC"), setting out its accounts. It appears that a US account that had been a concern in the August 2007 inspection had been closed.

A further follow-up inspection on January 21, 2008, indicated that trust accounts were still being used improperly. It also raised a suspicion that the Applicant had paid out the capital injection made in September. A lack of documentation made it difficult to confirm whether this was, in fact, the case. The difficulty in obtaining documentation arose from the fact that the Applicant had changed bank accounts from RBC to National Bank without notifying the Registrar, as is required by the regulations.⁹

On January 29, 2008, the Applicant submitted its financial statements for the fiscal year ended October 31, 2007. They indicated that the Applicant had had sales of \$1,575,982.00 during the fiscal year. The working capital was \$10,878.00. Based on the annual sales, working capital of \$20,000.00 was required, so the Applicant was short once again, this time in the amount of \$9,122.00. The Registrar issued the Proposal to Revoke on February 29, 2008.

6 Ex 3 Tab 22

7 Ex 3 Tab 20

8 Ex 3 Tab 19

9 Ex 3 Tab 6

Also starting in January 2008, TICO began to receive an increasing number of complaints about the Applicant. Initially the complaints were from travel wholesalers. The complaints involved the issuance of NSF cheques. In a number of cases, replacement payment for these cheques was made using third party credit cards. Suppliers began to blacklist the Applicant, and refused to deal with it further. As time went by, TICO also began receiving complaints from consumers. The consumer complaints concerned travel paid in full by consumers, but tickets not forthcoming, notwithstanding the imminent departure dates. In every case, after TICO's intervention, the consumers received their tickets. Often the tickets the travellers actually received were not for the original itinerary. It appears that, despite confirming the itinerary at the time of booking, the Applicant had not actually made the booking. When pushed by TICO, it would then confirm and pay for a changed itinerary.¹⁰ A feature of many of these complaints was the fact that the Applicant had used the consumer's credit card information to book tickets for unrelated travel. The consumer complaint at Ex 3, Tab 25 involved the purchase of three Aeroflot tickets where the consumer sought to travel on LOT Polish Airlines. At Tab 29, the credit card charges were to four unrelated airlines, not MALEV, the airline booked by the consumer. At Tab 28, the consumer sought to change the booking. The Applicant charged \$450.00 to do so and then apparently lost the ticket. The lost ticket cost the consumer \$80.00. The Applicant promised to, but never did, refund the \$530.00.

On August 13, 2008, TICO received a complaint from a consumer who had sought the services of the Applicant to travel to Kazakhstan. When the consumer sought to use her credit card for the purchase of a laptop computer, she found that it was over the limit. On checking the statement she discovered that the Applicant had charged approximately \$8,000.00 to her credit card, none of which the consumer authorized. It was at this point that the Registrar issued the Notice of Immediate Suspension. It had become apparent to the Registrar by this time that the Applicant was in a financial bind and was using one person's money to pay for another's tickets. There was a real risk to the public. Since early August there have been further calls from suppliers. To the date of the hearing, 64 consumers had contacted TICO, and claims on the Fund are estimated to be in the region of \$92,000.00.

Recently the principal of the Applicant, Lidya Pashanov, has been charged with 29 fraud-related charges and one count of obstructing the police. The police are asking for other witnesses to come forward and have asked TICO to advise them of the names of persons who have complained.

Maria Franco is an accounts coordinator for Air Canada Vacations. Her duties include following up on collection issues. She detailed dealings with Lidya Pashanov of the Applicant, starting with the receipt of two NSF cheques in August 2007. When the Applicant was contacted, the cheques were replaced with a bank draft. Later, there were a number of incidents where payment was made by third party credit card. Tickets were issued and the passengers travelled. Subsequently the cardholders disputed the

10 Details of the various consumer complaints may be found at Ex 3 Tabs 25 through 29

credit card charges and Air Canada Vacations was charged back the outstanding amounts. It is currently owed \$10,593.00 for travel services.

The consumer who was to travel to Kazakhstan testified. She was referred to the Applicant. She had checked with several other agencies, but finally acted on the referral and started dealing with the Applicant in July 2008. She dealt with Lidya Pashanov. After discussions, she received two itineraries, both incorrect. She contacted Ms Pashanov, who blamed co-workers for the errors. Finally, she received the correct itinerary. The consumer was asked to make payment in cash. She advised Ms Pashanov that she could not pay cash but wanted to use American Express ("Amex"). She gave her Amex credit card number to the Applicant, but never received tickets. Some time later the consumer was purchasing a laptop computer and decided to use her Amex card. The transaction was refused because she was over her credit limit. She used another credit card to purchase the laptop and immediately called the Applicant to advise that her Amex card may be over the limit and to give another credit card number. On checking her statement at the end of the month, the consumer noticed that the reason her card was over the limit was because the Applicant had charged over \$7,700.00 for travel for other passengers on her card. She confirmed that the statement shown at the second last page of Exhibit 3 Tab 24 sets out the charges, but stated that her monthly statement actually gave the name of the passengers. The consumer immediately contacted Amex to advise them of the unauthorised transactions. Amex told her that another charge of \$1,500.00 was pending. She cancelled that transaction. Amex is still investigating the other charges and she has been unable to use her card pending the results of the investigation. She is furious with the Applicant and feels "ripped off." She wants to ensure that other consumers do not experience what happened to her.

Ceu Barriero works in accounting for SATA Express, the travel wholesaler for SATA Airlines, the airline of Portugal. As a wholesaler, SATA Express deals with travel agents.

The Applicant booked two passengers for travel to Portugal on July 6, 2008. One was to return on July 18 and the second to return on August 8. The Applicant paid by cheque for both passengers. The cheques were returned NSF after the passengers had travelled. She dealt with Lidya Pashanov. The Applicant promised payment on numerous occasions, including direct bank transfers and the provision of a courier number to confirm that the funds were on their way. The funds were never received. One passenger sought an upgrade on the return leg from economy to first class. The cost was \$200.00. The Applicant promised to send the funds outstanding for the ticket together with the \$200.00 for the upgrade. No funds were received. The passenger had to pay the upgrade fee at the airport in Lisbon, despite having already paid the Applicant. Another passenger sought to travel on August 24, 2008. No payment was received for this passenger so the booking was cancelled. The passenger finally travelled after paying himself. He had to pay another \$100.00 for his travel because of a fare increase between the time of his initial contact with the Applicant and the date of the actual ticket purchase. SATA Express is still owed over \$2,000.00 for unpaid travel.

The final witness was a consumer who was planning a vacation in Cuba with four friends. He contacted the Applicant on behalf of himself and his friends on August 1, 2008 for travel on August 18, and dealt with Lidya Pashanov. The Applicant advised him that it was necessary to book immediately as the resorts were filling up fast. He attended at the Applicant's offices with two friends and confirmed the resort they wanted. They paid \$4,000.00 in cash for five people. They were told that if they paid in cash they would get a better discount. Over the next week they called the Applicant every day about their tickets. Lidya Pashanov informed them that the tickets were there and there was nothing to worry about. On August 12, the consumers were advised that the resort was overbooked. This story was then changed to the fact that the resort was undergoing maintenance and was not available for travellers. Another "upgraded" resort was offered for the same price and the consumers agreed.

On August 15, three days before departure, two of the consumers received e-tickets for travel. The other three never received tickets. When the consumers called the Ms. Pashanov on Saturday, August 16, they were told that the company was in bankruptcy and a trustee would contact them in due course. During the week of August 17, the consumer was contacted by a person called Anna who identified herself as being from the trustee's office. Anna was calling from a cell phone. She asked for the consumer's home address. The consumer refused to give private information over the phone in this manner as there was no way of checking the identity of the caller. In hindsight, the consumer stated that Lidya Pashanov's procrastination when asked daily about the tickets was a sign of the Applicant's problems.

ANALYSIS

The registration of travel retailers and wholesalers is set out in section 8 of the Act. The applicable provisions are as follows:

8. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,...

(d) the applicant is a corporation and,

(i) is incorporated without share capital,

(ii) having regard to its financial position or the financial position of an interested person in respect of the corporation, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(iii) having regard to the financial position of its officers or directors or of an interested person in respect of its officers or directors, the applicant cannot reasonably be expected to be financially responsible in the conduct of its business,

(iv) the past conduct of its officers or directors or of an interested person in respect of its officers or directors or of an interested person in respect of the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or

- (v) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration.
- (e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42;
- (f) the applicant is in breach of a condition of the registration; or
- (g) the applicant fails to comply with a request made by the registrar under subsection (1.1).

By virtue of section 10 of the Act, the grounds for refusal to register or renew registrations are applicable to revocations.

Where the revocation of a licence is concerned the Registrar must lead clear, convincing and cogent evidence that revocation is necessary to achieve the purposes of the Act, i.e. protection of the public. At this juncture, the Tribunal must point out that the public includes more than consumers. It includes travel wholesalers and suppliers, who are entitled to assume that the Applicant is governing itself in accordance with the regulations and can pay for services it has ordered on behalf of clients.

The evidence against the Applicant is overwhelming. It matters not whether the grounds for revocation are the almost immediate and ongoing failure to live by the Terms and Conditions entered into in March 2006, the ongoing failure to maintain proper trust accounting, the cynical practice of depositing funds to meet working capital requirements followed by the almost immediate withdrawal of the funds, or the long history of fraudulent activity by the Applicant. It is clear that the Applicant and its principal, Lidya Pashanov, have a long history of financial irresponsibility, dishonesty, lack of integrity and failure to act in accordance with law. The Applicant has left a trail of deceived and defrauded consumers and wholesalers. It has forfeited any right to the public trust and must be immediately prohibited from carrying on business any further.

ORDER

Pursuant to the authority granted to it under the Act and the *Licence Appeal Tribunal Act*, the Tribunal orders the Registrar to carry out the proposal dated February 20, 2008.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: September 15, 2008

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

Licence
Appeal
Tribunal

Tribunal
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PRE-HEARING

4888 AND 4889 - TIA - CLAIM

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO DISALLOW THE CLAIM

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: BRIAN RUMANEK, Counsel, representing the Applicants

SOUSSANNA KARAS, Counsel, representing the Travel Industry
Compensation Fund under the *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: August 15, 2008

Toronto

ORDER

A pre-hearing was held in this matter on August 15, 2008, in the presence of Brian Rumanek, Counsel, representing the Applicants, and Soussanna Karas, Counsel, representing the Travel Industry Compensation Fund under the, *Travel Industry Act, 2002* (the "Respondent").

There are two Applicants and two claims in this matter. The first Applicant's claim is for \$1337.56 and the claim of the second Applicant, the son of the first Applicant, is for \$880.00. Both Applicants filed a claim for the total amount of \$2217.56 and the Respondent issued two decision letters. As a result, two appeals were filed and two hearings were scheduled. Both appeals were addressed at the pre-hearing and it was agreed by all Parties that the hearings would also be consolidated.

The matters were discussed in detail and Counsel for the Applicants indicated he would consider available options and notify the Tribunal and the Respondent should the Applicants decide to withdraw their appeals.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicants and the Respondent.
2. The issue to be addressed at the hearing is whether the claims were filed within the required time frame.
3. Counsel for the Applicants will notify the Tribunal and the Respondent in writing should the Applicants decide to withdraw their appeals.
4. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal. Specifically, disclosure shall be made by all Parties by no later than September 5, 2008.
5. The Parties agree that documents submitted to the Tribunal, specifically, the Registrar's documents dated August 15, 2008, are admissible at the hearing and may be reviewed by the hearing panel before the hearing commences.
6. The Parties agree that the Applicants' appeals will be consolidated and addressed at the hearing scheduled to take place on September 15, 2008, commencing at 9:30 a.m., at the Tribunal's hearing rooms, 1 St. Clair Ave. West, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Member

RELEASED: August 18, 2008

FILE NAME: 4888.4889.claim.doc

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

Licence
Appeal
Tribunal

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PRE-HEARING

MACSHA INTERNATIONAL LIMITED O/A MACSHA TRAVEL & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: August 7, 2008 Toronto

ORDER and NOTICE OF INTENT TO DISMISS

The Parties to this matter are Mascha International Limited ("the Applicant") and the Registrar, *Travel Industry Act, 2002* ("the Registrar").

The issues in this matter are set out in the Registrar's Notice of Proposal to Revoke Registration dated May 6, 2008, and relate to consumer refunds and supplier payments owing and the requirement to file financial statements prepared by a licenced public accountant.

A pre-hearing was held in this matter on August 5, 2008, in the presence of Soussanna Karas, Counsel, appearing on behalf of the Registrar.

The Applicant filed a Notice of Appeal which was received by the Tribunal on May 21, 2008. On the Notice of Appeal form, the Applicant requested a pre-hearing in person. The Tribunal's records indicate that the Notice of Pre-hearing and the Notice of Hearing were both successfully faxed to the Applicant on June 6, 2008. The Tribunal's records also indicate that correspondence from the Tribunal containing the Tribunal's Rules of Practice was returned as undeliverable to the Applicant's business address by Canada Post on June 16, 2008. This package was marked 'moved'. Tribunal staff attempted, unsuccessfully, to reach the Applicant by telephone and, on July 30, 2008, were informed that both the telephone and fax lines were disconnected. Tribunal staff also attempted to reach the Applicant's Agent at his personal number but were unsuccessful, and were unable to leave messages.

No representative of the Applicant attended the pre-hearing. Staff of the Tribunal again attempted to reach the Applicant's Agent at his personal number and were able to leave a message. However, after a half hour delay, the pre-hearing commenced.

There is no indication that the Applicant has made any attempt to contact the Tribunal since filing the appeal. Counsel for the Registrar advised the Tribunal that the Registrar's office has had no contact from the Applicant since April 30, 2008. Counsel further advised that the Notice of Proposal to Revoke Registration was sent to the Applicant's business address by both regular post and registered mail. The registered mail was returned to the Registrar marked "moved".

Rule 2.10(d) of the Tribunal's Rules of Practice provides that the Tribunal may dismiss an appeal when it is abandoned. Rule 2.12 provides that when a party fails to attend before the Tribunal, the Tribunal also may treat the party's hearing as abandoned and dismiss the matter. The Rules of Practice apply to all proceedings of the Tribunal, including the pre-hearing.

The Tribunal therefore finds this appeal should be treated as abandoned and intends to dismiss the appeal unless sufficient reason is provided by the Applicant as to why it should not be dismissed.

The Tribunal makes the following order respecting the hearing scheduled to commence at 1:30 p.m. on September 9, 2008 at the Tribunal's hearing rooms, 1 St. Clair Avenue West, Toronto, Ontario:

1. Pursuant to the *Statutory Powers Procedure 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.
2. 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 not be dismissed, including an explanation of the Applicant's failure to attend at the pre-hearing. 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

Mary Ann Spencer, Presiding Member

RELEASED: August 12, 2008

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

Licence
Appeal
Tribunal

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d'appel en
matière de permis



PRE-HEARING

IN CULTURE INC. O/A WINTON TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: LAWRENCE NGAI, Agent, representing the Applicant, In Culture
Inc. o/a Winton Tours

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: August 7, 2008

Toronto

ORDER

A pre-hearing was held in this matter on August 7, 2008, in the presence of Lawrence Ngai, Agent, representing In Culture Inc., (the "Applicant"), and Soussanna Karas, Counsel, representing the Registrar, *Travel Industry Act, 2002* (the "Registrar").

Counsel for the Registrar advised that the issues set out in the Registrar's Notice of Proposal to Revoke Registration have been resolved.

The Tribunal makes the following Order respecting the hearing:

1. The Parties to this matter are the Applicant and the Registrar.
2. The Registrar withdraws the Notice of Proposal to Revoke Registration dated April 28, 2008. Therefore, the hearing scheduled to take place on September 10, 2008 is no longer required and is cancelled.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer,
Presiding Member

RELEASED: August 11, 2008

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



PRE-HEARING

389631 ONTARIO LTD. O/A EDUCATIONAL TRAVEL SERVICES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, 2002, S.O. 2002, c. 30, SCH. D

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: MICHAEL ZUCCHERATO, Agent, and DEBRA SHELLY, Counsel,
representing 389631 Ontario Ltd. o/a Educational Travel Services

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel
Industry Act*, 2002

DATE OF
PRE-HEARING: August 5, 2008

Toronto

ORDER

A pre-hearing was held in this matter on August 5, 2008, in the presence of Michael Zuccherato, Agent, and Debra Shelly, Counsel, appearing on behalf of 389631 Ontario Ltd. o/a Educational Travel Services (the "Applicant"), and Soussanna Karas, 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. With the consent of the Parties, the hearing originally scheduled to take place on September 8, 2008, is adjourned to 9:30 a.m. on Wednesday, October 15, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
3. The issue to be addressed at the hearing is set out in the Registrar's Notice of Proposal to Revoke Registration (the "Proposal") dated April 18, 2008, and relates to the regulatory requirement to maintain sufficient working capital.

4. The Applicant's Agent will submit to the Registrar by no later than September 22, 2008, financial statements for the financial year ended July 31, 2008, in accordance with the requirements of section 22 of O. Reg. 26/05.
5. The Registrar will advise the Applicant by no later than September 26, 2008, if any further information or action is required.
6. The Registrar shall notify the Tribunal, in writing, if the matter is settled and the Proposal dated April 18, 2008 withdrawn. Should the Proposal be withdrawn, the hearing rescheduled to take place on October 15, 2008, will then be cancelled.
7. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal. Specifically, disclosure shall be made by all Parties by no later than October 3, 2008.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer, Presiding Member

RELEASED: August 7, 2008

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

Licence
Appeal
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PRE-HEARING

NUGGET TRAVEL & TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, R.S.O. 2002

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: SOUSSANA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: August 5, 2008

Toronto

ORDER

A pre-hearing was held in this matter on August 5, 2008, in the presence of Soussana Karas, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar").

No representative of the Applicant appeared at the pre-hearing. The pre-hearing was delayed and Tribunal staff attempted to reach the Applicant's Agent and his counsel without success. The Tribunal noted that on August 1, 2008, a letter had been received by the Tribunal from Counsel for the Registrar in response to a request received from the Applicant's counsel. That letter indicated the Registrar's agreement to an adjournment of the pre-hearing, dates to be determined, with the proviso that the hearing not be adjourned. However, the Tribunal had received no direct request for adjournment of the pre-hearing from the Applicant. The pre-hearing therefore proceeded with only the representative of the Registrar present.

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 April 19, 2008, and relate to the regulatory requirements to maintain trust accounting and to submit financial statements. In addition, there is an issue related to outstanding consumer refunds.
3. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 and the requirements for adjournment requests set out in Rule 12 of the Rule of Practice of the Tribunal.
4. Counsel for the Registrar indicated her intention to call up to four witnesses at the hearing, including the consumers owed refunds.
5. The hearing is scheduled to take place on September 9, 2008, commencing at 9:30 a.m., at the Tribunal's Chamber, 1 St. Clair Ave. W., 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: August 7, 2008

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

PRE-HEARING

ATTACHÉ CONCIERGE SERVICES INCORPORATED O/A ATTACHÉ

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT, 2002, S.O. 2002, c. 30, SCH. D

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: WILLIAM KERBY, Agent, appearing on behalf of Attaché Concierge
Services Incorporated o/a Attaché (the "Applicant")

SOUSSANNA KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act, 2002* (the "Registrar")

DATE OF
PRE-HEARING: July 28, 2008 *by teleconference*

ORDER

A pre-hearing was held by telephone on July 28, 2008, before the Licence Appeal Tribunal. William Kerby attended as Agent for the Applicant, and Soussanna Karas attended as Counsel for the Registrar.

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 Applicant shall have until 4:00 p.m. on August 29, 2008, to deliver to the Registrar any and all documents it intends to rely on at the hearing.

4. The hearing shall commence at 9:30 a.m. on Monday, September 8, 2008, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: August 8, 2008

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

Licence
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L J B TRAVEL LTD. O/A GOLIGER'S TRAVELPLUS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT 2002*, S.O. 2002, c. 30 SCHED. D

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: No-one appearing for the Applicant, Goliger's Travel

SOUSSANNA S. KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act 2002*

DATE OF
HEARING: July 31, 2008 Toronto

ORDER

At the commencement of the hearing counsel for the Registrar advised the Tribunal that all outstanding issues between the parties had been resolved and that the Registrar was withdrawing the Notice of Proposal to Revoke the Applicant's registration.

As a result, this proceeding is now concluded without a hearing.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: August 6, 2008

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



PRE-HEARING

LIFEDREAM TRAVEL & TOURS INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: LIDYA PASHANOV, Agent, and VIC RAMPERSAD, Counsel,
representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: August 11, 2008

Toronto

ORDER

A pre-hearing was held in this matter on August 11, 2008, in the presence of Lidya Pashanov, Agent, and Vic Rampersad, Counsel, both representing the Applicant, and Soussanna Karas, Counsel, appearing on behalf of the Registrar, *Travel Industry Act, 2002* (the "Registrar").

This was the second pre-hearing held in this matter. It was noted that the Applicant had not fully complied with the Order from the pre-hearing held on May 21, 2008, not having submitted trust reconciliations for the months of May and June 2008, and not having provided the Registrar with a list of outstanding supplier and/or customer accounts. The Applicant's Agent and Counsel advised that the business is currently listed for sale.

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 February 20, 2008, and relate to the regulatory requirements to maintain trust accounting and sufficient working capital.

3. Should the issues be resolved before the scheduled hearing, the Registrar will withdraw the Notice of Proposal to Revoke Registration and the hearing, no longer being required, will be cancelled.
4. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal. Specifically, disclosure shall be made by all parties by no later than August 20, 2008.
5. Counsel for the Registrar will call four witnesses at the hearing and Counsel for the Applicant will call only the Applicant's Agent.
6. The hearing will take place on August 26, 2008, commencing at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Ave. W., Toronto, Ontario. The hearing is now scheduled for one full day.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: August 13, 2008

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

Licence
Appeal
Tribunal

Tribunal
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JULIE BEVAN o/a COSMOPOLITAN TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT* 2002

TO REVOKE REGISTRATION

TRIBUNAL: D. GREGORY FLUDE, Vice-Chair

APPEARANCES: RICHARD STARTEK, Counsel, for the Applicant

SOUSSANNA S. KARAS, Counsel, appearing on behalf of the
Registrar, *Travel Industry Act* 2002

DATE OF
HEARING: July 30, 2008

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the February 8, 2008 Notice of Proposal to Revoke her registration issued by the Registrar under the *Travel Industry Act* 2002, S.O. 2002, c. T.30, Sch. D. (the "Act"). At the commencement of the hearing the Applicant admitted almost all of the factual allegations set out in section D of the Notice of Proposal.

The proprietorship operated by the Applicant was started by her father 34-years ago. Approximately 18 years ago, the Applicant joined her father in the business and they operated as partners. Her father withdrew from the business in 2002, and passed away shortly thereafter. The Applicant registered the business as a sole proprietorship in her name in 2002. The Registrar treated the change from joint to sole ownership as a new registration with the effect that certain grandfathered rights regarding preparation of trust reconciliations that may have been available to the jointly owned operation were not available to the Applicant. The Applicant operated a trust account but reconciled the trust account using her own "homegrown" method.

In the summer of 2007, the Registrar received a complaint from a travel wholesaler indicating that the Applicant had not paid for travel purchased on behalf of clients. An inspector was sent to review the Applicant's books and operations. The inspector found

that the Applicant was not properly operating her trust account with the result that cheques were written that were returned "insufficient funds." The Applicant's practice was to deposit all money received on account of travel into her general account and then transfer funds to her trust account for travel and payment. It was determined that a large part of the Applicant's business came from a single client. The Applicant extended payment terms to that client with the result that it often had insufficient cash on hand to cover its total obligations. The inspector advised the Applicant that she should deposit all funds received from customers on account of travel into her trust account. If she wished to extend payment terms to clients she was free to do so but she could not use money received from other clients to fund the credit she extended. It was suggested that the credit be funded by a personal line of credit. The Applicant testified that she immediately contacted credit card companies to deposit funds into the appropriate account and deposited prepaid cash and cheques for travel into her trust account and there was no evidence of cheques written that were denied for insufficient funds after August 2007.

There was evidence of the trust account being in an overdrawn condition after August 2007, particularly in April 2008. With the exception of one occasion, the Applicant testified, and the bank statements support, that the overdraft was the result of the bank improperly deducting charges from the trust account as opposed to the general account. This problem was only solved when the Applicant changed bank accounts in May 2008. On one occasion the trust account appeared to be overdrawn in the amount of approximately \$28,000.00 for one day. Naturally this state of affairs caused the Registrar serious concern and, taken in isolation, appears damning indeed. A closer look at the statements, however, seems to suggest that the entry arises out of the manner in which the bank posted deposits and withdrawals rather than an actual overdraft. The Applicant testified that her practice was to make deposits in the afternoon and write cheques from those deposits the next day. A review of the statement for April 2008 confirms this practice. On April 10 and 11 the statement shows the overdraft recorded on April 10 and the deposits recorded on April 11. The Applicant's testimony was that she had arranged a \$25,000 line of credit in her husband's name through a credit union. Other than minor overdrafts in the account, the Applicant did not have a line of credit with the bank for the trust account. The Tribunal finds it difficult to believe that the bank would extend \$28,000.00 of credit on April 11, if it were not comfortable with the fact that the deposited funds were already being processed. The Tribunal is satisfied that the \$28,000.00 overdraft is more apparent than real.

Following a further complaint of non-payment for travel services, the Registrar conducted a second inspection of the Applicant. That inspection found that the Applicant was not doing monthly trust reconciliations. The Registrar wrote to the Applicant requiring her to file trust reconciliations for the months of December 2007, January 2008 and February 2008 within thirty days of the respective month ends. The Applicant did not comply with these requirements. She stated in evidence that she made serious efforts to comply. She had no experience of doing trust reconciliations and wanted to ensure that she did them in the proper form. She called the Registrar's office and asked if there was a precedent. She called her accountant numerous times before she finally got through and set up a meeting. By the time of the meeting she had found a precedent format on the internet. After meeting with her accountant and going through lengthy and confusing explanations of what was required, she produced the internet precedent and the accountant advised her to use it. She then proceeded to carry out the trust reconciliations but by that time the deadline dates had passed. She also produced trust reconciliations for March, April and May 2008 shortly before the hearing. The Registrar's concerns with these months are discussed above.

As stated above, the Registrar inspected the Applicant's business after receiving complaints from travel wholesalers. Another complaint was received in June of this year. All of the complaints follow a common pattern. It appears from the correspondence and the testimony of one of the wholesalers that the Applicant has managed to develop a reputation for late payment. The incidents arose where the Applicant sought to book travel and the wholesaler's staff member had refused to take the booking because of concerns over the Applicant's credit worthiness. The Applicant would make promises that on this occasion she would ensure payment was made in a timely manner. The practice in the industry, according to the witness, is payment is made within 24 hours but he would allow 48 hours to permit cheques to arrive in the mail. On one occasion, the Applicant faxed copies of the cheques and promised to send them that day. She did not do so. When they were finally sent, they were not for the complete amount for the travel. In another, testified to by the wholesaler, he spoke to the Applicant personally and secured her promise to send the cheque that evening. She did not do so. Both complainants state that they made numerous calls to the Applicant. In some cases the phone just rang; in others, there was an answering machine, and on one occasion they talked directly to the Applicant. When contacted the Applicant would maintain that the cheque had been mailed and refuse to provide a replacement. Only after complaint to the Registrar did the Applicant finally address the situation.

Before the Tribunal the Applicant did not maintain the fallacy that the cheques had been in the mail. She did state that she had only received on phone call from the witness's company and had responded quickly. The witness provided a list of contact dates of calls made by him and his accountant. She did not deny making promises to pay promptly, defending herself by stating that she was used to getting payment terms from wholesalers and paying when paid by her corporate client. She also stated that in September 2007 her private life was thrown into complete turmoil and she was not attending to the business as closely as she might. Her husband had a seizure and, on falling as a result, struck his head hard causing brain damage. He was unable to walk. He is still unable to return to work. During this crisis, the Applicant's attention was somewhat diverted. The Applicant's husband was in the hearing room during the hearing and the Tribunal can only hope he is on the road to recovery. More recently, the Applicant now has available to her the services of a good bookkeeper and her trust account is reconciled monthly as required. She stated that she was unaware of the trust accounting needs as they were not required when she learned the business with her father. Now that she is aware of them, she is in compliance.

The Registrar led evidence of the Applicant's financial position as set out in the financial statements for the year ended December 31, 2007. The statements show that the Applicant is profitable. They also show it has assets well in excess of the bank overdraft in its general account of approximately \$17,000.00. The Tribunal is satisfied that the financial statements indicate that the Applicant is financially viable, albeit it is sometimes challenged by cash flow management. It should be pointed out that cash flow management is at the heart of the legislative requirement for financial responsibility. In addressing cash flow management, the Applicant testified that she has arranged the credit union line of credit referred to above. She has also been in discussions with her brother who is wealthy and an owner of a very successful travel business in the United States. Her brother has committed to financially support the business as necessary to make it successful. The Applicant told the Tribunal about discussions between her and her brother to extend the business base of the company.

ANALYSIS

The registration of travel retailers and wholesalers is set out in section 8 of the Act. The applicable provisions are as follows:

Registration

8. (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, [or]

(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,

By virtue of section 10 of the Act, the grounds for refusal to register or renew registrations are applicable to revocations.

Where the revocation of a licence is concerned the Registrar must lead clear convincing and cogent evidence that revocation is necessary to achieve the purposes of the Act, i.e. protection of the public. At this juncture, the Tribunal must point out that the public includes more than consumers. It includes travel wholesalers and suppliers who are entitled to assume that the Applicant is governing herself in accordance with the regulations and can pay for services she has ordered on behalf of her clients.

The Tribunal is satisfied that the financial position of the Applicant is such that she can carry on business in a financially responsible manner. In August 2007, she immediately responded to the Registrar's concerns over her trust accounting by cycling all travel prepayments through her trust account. There was no evidence that she had written cheques on her trust account where there were no funds to cover them since the incident in mid-2007 that led to the first inspection. The Tribunal also accepts the Applicant's evidence regarding the efforts she made to comply with trust reconciliation requests made by the Registrar. It appears, and the Tribunal accepts, that her accountants are unfamiliar with the trust accounting principles. The Applicant testified that the accountants were unable to provide her with a precedent for trust reconciliations, and the financial statements prepared for the year ended December 31, 2007, make no mention of trust assets and liabilities. That the Applicant persevered is indicative of a responsible attitude to her financial obligations. Her evidence regarding sources of new investment from her brother shows she is seeking to ensure that she meet her financial obligations going forward.

There is evidence that the Applicant has acted with a lack of honesty and integrity. The incidents involving failure to pay suppliers in a timely manner and then the exacerbation

of the problems by insisting that the cheques were in the mail are very troubling to the Tribunal. The statutory test looks backward at the past conduct of the Applicant as an indicator of future conduct. Considering the whole of the past conduct of the Applicant, the Tribunal is not convinced that her behaviour merits the “capital punishment” of regulatory law, revocation of her licence. The Applicant has been in the travel business for 18 years without complaints from consumers or suppliers. The amounts in issue were approximately \$4,000.00 out of annual sales of \$500,000.00. Payment was finally made or arrangements made for payment, albeit only after regulatory intervention. Since the events in question the Applicant has taken steps to tighten her accounting practices and refinance the operation. The Tribunal is of the opinion that the past dishonesty is somewhat of an aberration in an otherwise unblemished record and not indicative of the future behaviour of the Applicant.

Notwithstanding that the Tribunal does not believe that the Applicant’s record merits revocation, the Tribunal is sufficiently concerned about the evidence put forward by the Registrar to accept that some period of supervision is warranted to ensure that the Applicant is now on the right footing. Accordingly, commencing with the month of August 2008 and continuing for a period of twelve months the Applicant shall forward monthly trust reconciliations to the Registrar, such reconciliations to be forwarded by the 30th day of the following month starting on September 30th for August 2008. Further, for the period of twelve months, there shall be no complaints to the Registrar regarding non-payment of for travel services, whether such complaints are instigated by a supplier for failure to pay for travel services or by a customer for failure to receive travel services.

ORDER

Pursuant to the authority granted to it under the Act and the *Licence Appeal Tribunal Act*, the Tribunal orders the Registrar not to carry out the proposal dated February 8, 2008. Rather, as a condition of its continued registration, the Applicant shall comply with the terms regarding trust reconciliations and complaints set out above.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice-Chair

RELEASED: August 13, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



BARBARA SASIADEK AND CARLTON MONTAUT O/A TRAVEL AND TOURS HELP
DESK, CENTRE HOLIDAYS

IN THE MATTER OF AN APPEAL FROM A PROPOSAL OF THE
REGISTRAR, *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE A REGISTRATION

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: CARLTON MONTAUT, representing Barbara Sasiadek and Carlton
Montaut o/a Travel and Tours Help Desk, Centre Holidays (the “
Applicant”)

SOUSSANNA KARAS, Counsel, representing the Registrar, Travel
Industry Act, 2002

DATE OF
HEARING: May 16, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

The facts in this matter were not disputed. The Applicant has been registered as a travel agent under the *Travel Industry Act, 2002* (the “Act”) since 2003. As part of its responsibilities under the legislation, it must file annual financial statements with the office of the Registrar. Such filing is a term and condition of its registration under the Act. For a number of years, the Applicant was repeatedly late in the filing of such information and, when the financial statements were filed, the Applicant was found to have less than the working capital required. In each case, after being instructed by the Office of the Registrar to come into compliance, follow-up inspections undertaken by the regulator established that the Applicant had done so.

Such was not the case however, with the capital insufficiency determined by the Applicant's 2006 filed statements received by the Registrar two weeks late on April 13, 2007.

EVIDENCE OF THE REGISTRAR

Ms. Archana Gupta, a Financial Analyst and Inspections Co-ordinator for the Travel Industry Council of Ontario ("TICO") an independent body set up in 1997 to administer the Act and regulation of registrants, has over 20 years of accounting experience and is a certified management accountant.

Ms. Gupta testified that part of her responsibility includes a review of the financial statements filed by registrants in order to identify those who pose a risk to the compensation fund administered by TICO and, in turn, to consumers purchasing travel services in Ontario. Her review of the Applicant's 2006 financial statements revealed a working capital deficiency of minus \$122.00 (Exhibit 3, Tab 11). As the regulations require it maintain a working capital of \$5,000.00, she wrote to the Applicant on May 12, 2007, advising that \$5,122.00 needed to be injected into the business' assets in order to maintain its registration status. When no response was forthcoming, the Registrar's office wrote again to the Applicant advising that it had the option of providing the Registrar with a statement of the business partners' net worth to establish sufficient funds were available to the company, and requested a response of such by August 1, 2007.

On August 2, 2007, proof of a \$5,000.00 deposit was received from the Applicant. This consisted of personal funds endorsed over to the registered company. Although it was short by \$122.00, it was determined acceptable. A follow-up inspection by the regulator in November revealed, however, that \$10,000.00 had been withdrawn by the company's partners some few days after the deposit in August, resulting in a working capital deficiency of \$10,122.00. Ms. Gupta wrote to the Applicant advising that the situation must be rectified by December 11 or a Proposal might be issued. She testified to a number of telephone conversations with the Applicant wherein he claimed he was waiting for an injection of funds from overseas. The original December deadline for the injection was thus extended to January 25, 2008, but the required proof of such deposit was not received. The result was the Registrar's issuance of a Notice of Proposal to Revoke the Applicant's registration dated February 14, 2008.

Since the issuance of the Proposal, the Applicant has filed financial statements for year-end 2007 which reveal a negative capital of \$8,556.00 (Exhibit 3, Tab 4). This default results in a current requirement of \$13,556.00 in order for the company to come into compliance with registration requirements. Mr. Montaut was advised of this requirement in letters from the Registrar dated April 18 and 28, 2008 (Tabs 5 and 6) advising the Applicant that it had until May 9 to provide proof of an adequate deposit to the Applicant's account.

By telephone, the Applicant advised Ms. Gupta that it holds a line of credit for \$30,000.00 from which it can draw the necessary funds. Ms. Gupta informed the Applicant that this is not acceptable as such a draw merely results in increased loan liability to the business with the consequence that the balance sheet will still not adequately reflect the necessary capital fund requirement for continued registration. She testified that she has advised the Applicant of the need for the funds to come from a personal partner loan (if necessary) such that the Applicant itself is not itself indebted for the amount.

On May 9, 2008, the Applicant tendered photocopies of a credit card invoice and cheque which he alleged were to offset the deficiency (Exhibit 11, Tab 7). Ms. Gupta's evidence was that this was not sufficient as the amounts were inadequate (\$850.00 and \$4,307.00 respectively), nor did the photocopied documents establish the funds had in fact been credited to the account of the Registrant. A Notice of Further and Other Particulars was thus issued against the Applicant on May 12 setting out these additional facts in support of the Registrar's Proposal to Revoke.

The day before the hearing the Applicant faxed the Registrar a copy of a cheque issued on a MasterCard account in the name of a third party for \$15,000.00. He was advised that proof of deposit of the funds was necessary. Such proof was received on the morning of the hearing in the form of a bank receipt disclosing the cheque was on hold for clearing for some 10 days (Exhibit 4) Ms. Gupta testified the Registrar remained concerned as to the Applicant's financial stability given that the monies were provided by way of a loan on a high interest bearing asset. Without any information as to the terms of the loan, there remained a reasonably high level of risk that the Applicant would have difficulty meeting interest requirements given its current and past financial history. Ms. Gupta noted that the working capital requirements contained in the legislation merely indicate a registrant's ability to operate sufficiently safely to ensure consumers' funds are not at risk. Given the Applicant's tenuous financial position, this risk remains sufficiently high in this case to reasonably cause the Registrar to conclude it should not continue to be registered.

In cross-examination, Ms. Gupta acknowledged that Mr. Montaut and his partner in the Applicant business were free to take the \$10,000.00 because it was held in a Guaranteed Investment Certificate which was redeemable; however, since the funds represented a business asset on the financial statements, its withdrawal must be reflected as a depletion of the company's assets and thus reflect negatively on its balance sheet.

Ms. Gupta also allowed that in the five years the Applicant had been registered under the Act, there had been no consumer claims nor any complaints received against it.

EVIDENCE FOR THE APPLICANT

The Applicant testified that the line of credit from which he intended to draw capital for the business was actually a personal loan undertaken by his partner and secured by her home. She was not present at the hearing and did not testify.

The Applicant further stated that the MasterCard cheque of \$15,000.00 represented a personal loan to him, which he was providing to the Applicant. Proof of the cheque itself was all he could provide at such short notice; however, his new accountant was working on the documentation necessary to satisfy the Registrar as to the level of reduced risk such a loan represented.

In closing, the Applicant requested that the Applicant be given a reasonable time period to provide the Registrar with satisfactory documentation that the business is able to meet the working capital requirements of the legislation now that the Applicant clearly understands the Registrar's concerns with the evidence tendered to date by the Applicant that compliance has occurred.

THE LAW

The registration's requirements for travel retailers and wholesalers is set out in subsection 8(1) of the Act as follows:

8. (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,

ORDER

As a consequence of the testimony of witnesses and Parties' submissions the Tribunal is not persuaded that the Applicant fits within the intention of section 8(1)(d)(ii) of the Act. In turn, the Tribunal is not convinced that the Applicant has been shown to be sufficiently irresponsible in its financial conduct such that its license to operate under the legislation should be revoked. The law is clear that this determination is one for the Tribunal to make unfettered by the conclusions of the Registrar – see *First Place Fine Cars Sales Inc. and Cerullo v. Registrar, MVDA* (Court File 131/05), a decision of the Divisional Court, [2007] O.J. No. 3132.

The Tribunal finds that the Applicant was credible in his testimony that he honestly believed that the line of credit upon which the business operation had relied since first registered was based on a personal loan taken by his partner and was not therefore predicated on assets held in the name of the Applicant. It further finds his position to be supported by the note #5 contained in the financial statements appearing in Tab 4 which stipulate that the Registrant's bank indebtedness "has been secured by a **personal** guarantee of Barbara Sasiadek" (emphasis added). Neither the accountant who prepared the documentation, nor the partner, Barbara Sasiadek, were present to provide any testimony as to a separation of the potential liability attached to the line of credit. Despite being provided with the option of providing the regulator with Statements setting out his and his partner's financial net worth, Mr. Montaut has not done so.

Instead, Mr. Montaut appears to have conceded the point and has made efforts to comply with TICO's conclusion that the \$14,000 loan on the line of credit was a liability of the business and properly listed as such in the records. He therefore had in fact secured a personal loan as evidenced by the MasterCard cheque and only verified to TICO the morning of the hearing. This was very late in the game admittedly. The cheque does however demonstrate that the Applicant does intend to comply with the regulator's requirements. It is also in keeping with past behaviour accepted by TICO in allowing late filings and last minute compliances from the business.

We are here dealing with a business which has been registered for a number of years and an individual who relies on this registration for his established livelihood. Thus, removing the Registrant's license is an act which must be determined necessary on clear and convincing evidence.

Based on the submissions of Counsel for the Registrar, the co-operation of Mr. Montaut with TICO, his apparent lack of comprehension of the regulator's concerns and specific requirements only finally correctly understood at the hearing, and the fact that he appears to have almost achieved that compliance once again, the Tribunal is prepared to allow him his registration subject to the condition that the funds purportedly injected by means of the MasterCard cheque to him personally are properly deposited as required and proof of the same is provided to TICO within 45 days of this Order. This deposit is not to be predicated on a loan whereby the business is liable for repayment.

In the event the Applicant is unable to meet this condition within the 45 days provided the Tribunal finds that there is clear and convincing evidence that the Applicant is unable to meet the financial responsibility the legislation requires of it in the conduct of its business and the Registrar shall carry out the licence revocation as proposed.

ORDER

Pursuant to Section 11(5) of the Act, the Tribunal orders that:

- a) the Applicant shall, within 45 days, deposit \$15,000, as required by the Registrar and provide proof of same to the Registrar;
- b) in the event that the Applicant does not satisfy the above condition, the Registrar is directed to carry out the revocation of the licence as proposed in the Notice of Proposal dated February 14, 2008.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

RELEASED: June 26, 2008

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

PRE-HEARING

1294322 ONTARIO LTD. o/a SUNBREEZE TRAVEL & TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: ELIZABETH DELA CRUZ, Agent for the Applicant

SOUSSANNA KARAS, Counsel representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: May 7, 2008

Toronto

ORDER

A pre-hearing was held in this matter on May 7, 2008, in the presence of Elizabeth Dela Cruz, Agent for the Applicant, and Soussanna Karas, 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 February 14, 2008, and relate to the regulatory requirements to:
 - (a) provide financial statements prepared by a certified public accountant, and
 - (b) maintain sufficient working capital.
3. The Applicant's Agent will submit financial statements for the financial year that ended on September 30, 2007, prepared by a certified public accountant, and

current personal and corporate bank statements to the Registrar by no later than May 23, 2008.

4. The Registrar will review the above documents, and notify the Applicant's Agent of any further requirements, including any deficiency in working capital, by May 28, 2008.
5. The Applicant's Agent will rectify any identified deficiency in working capital and provide documentation to the Registrar by May 30, 2008.
6. Subject to the Registrar's review of all documentation submitted, the Registrar shall notify the Tribunal in writing if the matter is settled, and the Proposal dated February 14, 2008, is withdrawn. Should the Proposal be withdrawn, the hearing scheduled to take place on June 10, 2008, will then be cancelled.
7. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal.
8. The Parties agree that documents submitted to the Tribunal, specifically, the Registrar's documents dated May 6, 2008, are admissible at the hearing and may be reviewed by the hearing panel before the hearing commences.
9. The Registrar will call one witness at the hearing. The Applicant will call no witnesses.
10. The hearing is scheduled to commence at 9:30 a.m., on June 10, 2008, at the Tribunal's Offices, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: May 14, 2008

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



PRE-HEARING

JULIE BEVAN o/a COSMOPOLITAN TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: JULIE BEVAN, Agent, and KORY MIKALSKI, Counsel, representing
the Applicant

SOUSSANNA KARAS, Counsel representing the Registrar, *Travel
Industry Act, 2002*

DATE OF
PRE-HEARING: May 8, 2008

Toronto

ORDER

A pre-hearing was held in this matter on May 8, 2008, in the presence of Julie Bevan, Agent, and Kory Mikalski, Counsel, appearing on behalf of the Applicant, and Soussanna Karas, 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 February 8, 2008, and relate to the regulatory requirements to maintain trust accounting.
3. The Applicant's Agent will submit to the Registrar by no later than May 30, 2008: (a) a letter from the Applicant's bank addressed to TICO verifying the details of the Applicant's business accounts, and (b) a letter from the bank verifying the details of the Applicant's Agent's personal line of credit.

4. The Registrar will review the above documents and notify the Applicant of any further requirements by June 6, 2008.
5. Subject to the Registrar's review of all documentation submitted, the Registrar shall notify the Tribunal in writing if the matter is settled and the Proposal dated February 8, 2008 is withdrawn. Should the Proposal be withdrawn, the hearing scheduled to take place on June 18, 2008 will then be cancelled.
6. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal.
7. The Parties agree that documents submitted to the Tribunal, specifically, the Registrar's documents dated May 6, 2008 are admissible at the hearing and may be reviewed by the hearing panel before the hearing commences.
8. The hearing is scheduled to commence at 9:30 a.m. on June 18, 2008 at the Tribunal's hearing rooms, 1 St. Clair Avenue West, Toronto.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: May 27, 2008

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



PRE-HEARING

TRAVEL AGENT NETWORK INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: MARY ANN SPENCER, Presiding Member

APPEARANCES: VILMA MACIOCE, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Registrar, *Travel Industry Act, 2002*

DATE OF
PRE-HEARING: May 8, 2008 by teleconference

ORDER

A teleconference pre-hearing was held in this matter on May 8, 2008, in the presence of Vilma Macioce, Agent, representing the Applicant, and Soussanna Karas, 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 February 8, 2008, and relate to the regulatory requirements to submit financial statements prepared by a licenced public accountant.
3. The Applicant's Agent will submit to the Registrar by no later than June 20, 2008, financial statements prepared by a licenced public accountant for the year ended August 31, 2007.

4. The Registrar will review the above documents and notify the Applicant of any further requirements, including any working capital deficiency, by June 25, 2008.
5. The Applicant will rectify any identified working capital deficiency by June 27, 2008.
6. Subject to the Registrar's review of all documentation submitted, the Registrar shall notify the Tribunal in writing if the matter is settled and the Proposal dated February 8, 2008 is withdrawn. Should the Proposal be withdrawn, the hearing rescheduled to take place on July 10, 2008 will then be cancelled.
7. All Parties to the hearing shall comply with the disclosure requirements set out in Rule 6 of the Rules of Practice of the Tribunal.
8. The Parties agree that documents submitted to the Tribunal, specifically, the Registrar's documents dated May 2, 2008, are admissible at the hearing and may be reviewed by the hearing panel before the hearing commences.
9. With the consent of all parties, the hearing originally scheduled to take place on June 23, 2008, is adjourned to 9:30 a.m. on July 10, 2008 at Holiday Inn Select, 1855 Huron Church Rd., Windsor, Ontario.

LICENCE APPEAL TRIBUNAL

Mary Ann Spencer
Presiding Member

Released: May 13, 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

BARBARA SASIADEK AND CARLTON MONTAUT O/A TRAVEL AND TOURS HELP
DESK, CENTRE HOLIDAYS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*, 2002, C. 30, SCHEDULE D.

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BARBARA SASIADEK AND CARLTON MONTAUT, represented
themselves

SOUSSANNA KARAS, Counsel, represented the Registrar under
the *Travel Industry Act*, 2002

DATE OF
PRE-HEARING: April 10, 2008 Toronto

ORDER

A pre-hearing was held in this matter in Toronto before this Tribunal in the presence of Barbara Sasiadek and Carlton Montaut (the "Applicants") who appeared without representation, and Soussanna Karas, counsel, who appeared for the Registrar under the *Travel Industry Act*, 2002 (the "Registrar").

Negotiations took place with the object of arriving at a resolution of all the issues in this matter and, pursuant to such negotiations, the Tribunal makes the following order:

1. The Parties to the hearing are the Applicants and the Registrar;
2. By no later than April 18, 2008, the Applicants shall provide the Registrar's counsel with a letter from the Applicants' bank. This letter shall contain and provide information regarding the Applicants' bank's release of certain security relative to the letter of credit issued by that bank;

3. In the event of the aforementioned letter satisfying the requirements of the Registrar, the Applicants will be so advised, in writing, by the Registrar;
4. Irrespective of the Applicants satisfying the Registrar's requirements as stated in paragraph 3 above, they shall, by no later than April 18, 2008, deliver to the Registrar the Applicants' financial statements, which were due by March 31, 2008.
5. Should the Applicants not comply with this order, then in such event, the matter will proceed to hearing on May 16, 2008, which date is peremptory against the Parties.
6. The Applicants shall fully and in a timely manner comply with the disclosure requirements under Rule 6.3 of the Tribunal's Rules of Practice, effective January 1, 2008.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: April 17, 2008

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



PRE-HEARING

LIGAYA DIAZ & VIVIAN GODOYO O/A SEA-LAND-AIR TRAVEL SERVICES

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: DEREK ISRAEL, Vice-Chair

APPEARANCES: VIVIAN GODOYO, appeared on her own behalf and on behalf
of Ligaya Diaz

SOUSANNA KARAS, Counsel, appeared on behalf of the
Registrar, *Travel Industry Act, 2002*

DATE OF
HEARING: April 10, 2008 Toronto

ORDER

A pre-hearing was held in this matter on April 10, 2008 in Toronto before the Tribunal in the presence of Vivian Godoyo, representing herself and as agent for Ligaya Diaz (jointly referred to as the "Applicants") and Soussanna Karas, Counsel, representing the Registrar under the *Travel Industry Act, 2002* (the "Registrar" and the "Act" respectively.)

At the commencement of the pre-hearing the Registrar's Counsel informed the Tribunal that the Applicants had now furnished the Registrar with the financial statements of the Applicants due for the year ended July 31, 2007 and that the Registrar had reviewed such financial statements.

However, upon review of such financial statements, the Registrar noted that there was still a deficiency of \$3,304.00 in the Applicants' business working capital required under the Act.

Upon discussion of this deficiency in the working capital of the Applicants' business, the Applicants conceded that the amount of \$3,304.00 was in fact required to be paid into the Applicants' business so as to meet the requirements of the Act insofar as minimum working capital is concerned.

Accordingly the Tribunal orders as follows:

1. By no later than May 2, 2008, the Applicants shall pay into their travel firm's general banking account, the sum of \$3,304.00.
2. By no later than May 2, 2008, the Applicants shall transmit electronically to the Registrar, a true copy of the deposit slip relating to the deposit above, together with a true copy of the cheque in respect of the deposit of \$3,304.00.
3. Upon being satisfied that the above deposit has been effected, the Registrar shall notify, in writing, both the Tribunal and the Applicants that its Notice of Proposal is withdrawn.
4. In the event of the anticipated deposit of \$3,304.00 having been made, as above, the Registrar shall cause an inspector to attend at the Applicants' business in order to satisfy himself that the amount of \$3,304.00 has not been withdrawn from the firm's general account.
5. In the event of the sum of \$3,304.00 having been withdrawn by the Applicants without the written consent of the Registrar, the latter shall be entitled to issue a fresh Notice of Proposal to Revoke the Applicants' registration.
6. In the event of the Applicants not having made the required deposit of \$3,304.00 on May 2, 2008, the matter shall proceed to hearing on May 16, 2008, at the Tribunal's Chambers, such date being peremptory against the Applicants.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: April 18, 2008

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

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



MILESTONE TRAVEL LTD.

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: RICHARD MACKLIN, Vice-Chair

APPEARANCES: No one appeared on behalf of Milestone Travel Ltd.

SOUSANNA KARAS, Counsel, appeared on behalf of the
Registrar, *Travel Industry Act*

DATE OF
HEARING: April 14, 2008

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

Pursuant to a Notice of Proposal to revoke registration dated December 7, 2007, the Registrar of the *Travel Industry Act, 2002*, (the "*Act*") notified the Applicant, Milestone Travel Ltd., of his intention to revoke its registration.

Pursuant to a Notice of Appeal dated December 24, 2007, the Applicant indicated it wished to appeal the decision of the Registrar.

Pursuant to a Notice of Further and Other Particulars dated April 4, 2008, the Deputy Registrar under the *Travel Industry Act, 2002* notified the Applicant of further grounds for revocation of the Applicant's registration.

On the basis of these proceedings, a hearing before the Licence Appeal Tribunal was scheduled for April 14, 2008. At the time that the date was agreed to, the Applicant was represented by an agent, Linda Rumberg. Ms Rumberg is also a director of the Applicant

The hearing did proceed on April 14, 2008. The Registrar was represented by Ms. Soussanna Karas, Counsel. No one appeared for the Applicant.

EVIDENCE

The Registrar's witness was Ms Archna Gupta. Ms Gupta is a Certified Management Accountant. She has worked as a financial analyst and inspector co-ordinator with the Travel Industry Council of Ontario for the last two years. The Travel Industry Council of Ontario ("TICO") is the entity, with delegated authority under the *Travel Industry Act, 2002*, S.O. 2002 c. 30, Sched. D., that administers the *Act* and pertinent regulations. TICO is enjoined to take necessary steps to ensure that registrants are financially viable in order that consumer protection goals can be realized. The relevant legislation mandates certain financial disclosure and reporting obligations on the part of its registrants.

The Applicant has been in business since 1984. In 2004 it started to experience losses. In 2005, the Applicant's financial statements were being delivered late and reported a negative working capital position. Working capital is an important measure of a registrant's financial ability and, indeed, positive working capital levels are an express requirement for registrants under Ontario Regulation 26/05. An absence of working capital is a sign that the registrant may be "borrowing from Peter to pay Paul", with those borrowings coming from consumer trust monies being used to pay the registrant's general business obligations.

The Applicant's financial losses and working capital deficiencies have continued since 2005.

In addition, throughout this period of time, the Applicant has either been late or failed to make its required financial disclosure.

On the basis of the 2005 deficiencies, the Registrar commenced proceedings pursuant to a Notice of Proposal to revoke registration dated January 24, 2006. The Notice of Proposal was resolved by consent terms between the Applicant and the Registrar. Those terms and conditions were executed on May 23, 2006. In addition to re-affirming the Applicant's obligations under the *Act*, additional reporting requirements were instituted.

The following chart sets out the Applicant's standing in respect of the reporting requirements contained in the legislation and/or the terms and conditions dated May 23, 2006:

Item Required from Registrant	When Required	Basis for Requirement	When Delivered	Outstanding Non-compliance
Financial statements for June 30, 2006	September 30, 2006	Section 22 (2) of the <i>Travel Industry Act, 2002</i>	December 1, 2006 (late)	
Financial statements for June 30, 2007	September 30, 2007	Section 22 (2) of the <i>Travel Industry Act, 2002</i> Term and conditions of registration dated May 23, 2006, Clause 7	Not submitted	Yes
Form 1 as at June 30, 2007	September 30, 2007	Section 52 of Ontario Regulation 26/05 made under the <i>Travel Industry Act, 2002</i>	Not submitted	Yes
Working capital injection of \$22,269.00	March 1, 2007 (as per correspondence from TICO to Registrant dated February 14, 2007 – see Tab 11 of exhibit 5)	Section 24 of Ontario Regulation 26/05 and clause 5 of the terms and conditions of registration dated May 23, 2006	September 17, 2007 (late)	
Monthly trust reconciliation statements for June 30, 2006 to May 31, 2007	30 days from the end of each month	Terms and conditions of registration dated May 23, 2006, clause 4	Trust reconciliations for June 30, 2006 to January 31, 2007 were submitted on March 14, 2007 (late)	Trust reconciliations for February 28, 2007 to May 31, 2007

Item Required from Registrant	When Required	Basis for Requirement	When Delivered	Outstanding Non-compliance
Interim quarterly financial statements for the period of June, 2006 to May, 2007	30 days from the end of the quarter	Terms and conditions of registration dated May 23, 2006, clause 3	Quarterly financial statements for the period of July 1, 2006 to December 31, 2006 were delivered on March 14, 2007 (late)	Quarterly financial statements for January, 2007 to May, 2007 have not been delivered

The essence of the Registrar's case is that the Applicant has gone "under the radar" since December 31, 2006. Other than one trust reconciliation, the Registrar has received no financial information of any kind pertaining to the year 2007 or the first three months of 2008. The information that the Registrar has that predates this period indicates losses and regular deficiencies in working capital. In addition, the Applicant has failed to file its Form 1. This form provides for financial reporting in respect of sales earned by a registrant and a contribution to a fund for the benefit of claimants as established in the *Safety and Consumer Statutes Administration Act, 1996*.

In addition, the reporting that has been received by the Registrar from the Applicant has been consistently late, requiring an extraordinary amount of follow-up. The record is also replete with correspondence from the Registrar to the Applicant indicating that failure to comply with the legislation and/or the terms and conditions of registration dated May 23, 2007, would result in proceedings being taken by the Registrar for the purpose of revoking the Applicant's registration.

By email dated April 8, 2008, Linda Rumberg wrote to Counsel for the Registrar and stated as follows:

Hi Soussanna.

Sorry I missed your call. I was on a call with a client.

I will not be attending the hearing on April 14.

Milestone Travel Ltd. is handing in its licence before the end of this month.

What are the next steps? What does TICO still require of us. Your response by email, please. Thank you.

Linda Rumberg.

Thus, it would appear that there is no intention on the part of the Applicant to continue to operate in the travel agency field as Milestone Travel Ltd.

DECISION

On the basis of the evidence before me, I am satisfied that having regard to the Applicant's financial position, it cannot reasonably be expected to be financially responsible for the conduct of its business and that the applicant is in breach of conditions of its registration (see ss 8 (1)(d)(ii) and (f)) of the *Travel Industry Act, 2002*).

Accordingly, this Tribunal orders that the Registrar is directed to carry out his proposal as set out in the Notice of Proposal to revoke registration date December 7, 2007 and the Notice of Further and Other Particulars dated April 4, 2008.

LICENCE APPEAL TRIBUNAL

Richard Macklin, Vice-Chair

RELEASED: April 29, 2008

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



4511-TIA-CLAIM

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO, UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO DISALLOW THE CLAIM

TRIBUNAL: JANE WEARY, Vice-Chair

APPEARANCES: PAULO RIBEIRO, Agent, representing the Applicant

SOUSSANNA KARAS, Counsel, representing the Respondent,
Travel Industry Compensation Fund under the *Travel Industry Act,*
2002

DATE OF
HEARING: March 18 and 19, 2008 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND

On August 9, 2007, the registered travel agency, Alves Travel Inc. ("Alves Travel") advised the Registrar under the *Travel Industry Act* (the "Act") that it was terminating its registration as a travel agent under the legislation and that it had insufficient funds in its trust account to cover outstanding consumer obligations.

The Applicant submitted a Customer Claim Form to the Travel Industry Council of Ontario ("TICO") on August 21, 2007 wherein he claimed reimbursement from the Travel Industry Compensation Fund administered by TICO for services he claimed to have purchased from Alves Travel in the form of an air flight to Portugal, as well as a car rental, neither of which he had ever received.

On October 29, 2007, TICO informed the Applicant, by registered mail, that his claim had been considered and denied as: "Without proper receipts, the Board was unable to determine what was purchased, when the purchase was made and who made the payment."

The Applicant appeals this decision.

EVIDENCE

Ms. Mariana Alves is the Director and President of Alves Travel, a corporation registered as a Retail Travel Agent under the Act since 2005. She has known the Applicant for over ten years. There was a business relationship in which she had supplied him with travel services and had purchased from his bakery for a number of years. Both were members of Toronto's Portuguese community. They had never met socially.

Sometime during July 2007, Ms. Alves received a telephone request from the Applicant to arrange a flight for him to Portugal for late August and also arrange booking of a car rental. Ms. Alves testified that the Applicant was always very particular about the make and model car he reserved – a Mercedes, class “s” – which she reserved for the period he requested. It was her evidence that she told the Applicant that she needed payment due to a cash shortfall and that he had paid her the sum of a little over \$1,000.00 for the airfare and a further \$4690.00 for the car rental. She advised she had supplied the consumer with her signed business cards reflecting the amount paid “in case she died before returning to her office” as evidence of the payment.

Ms. Alves identified the VISTASOL invoice for \$4,669.00 dated August 3, 2007 and fax-timed 11:27a.m. requiring payment by August 3rd and the subsequent voucher from the same agency, also dated August 3rd, but fax-timed 4:14pm, as evidence that she had paid the sum required upon receipt of the \$4690 from the Applicant during the late afternoon of August 3, 2007.

The Applicant called her the following day to complain that the vehicle she had reserved was neither the make nor model he had requested. She, in turn, verified such to be the case and cancelled the booking. She stated that the rental company had credited her account with reimbursement, but she had never returned the funds to the Applicant.

In attempting to satisfy TICO as to these facts, Ms. Alves testified that she had called to explain the situation to the Registrar under the Act and was told that the Applicant's claim had been denied due to insufficient documentation. She also had advised the TICO representative, Ms. Furlan, that the discrepancy between the \$4690.00 and \$4669.00 was due to an error on the part of her office as well as reflecting her commission.

In cross-examination, Ms. Alves' explanation of the difference between the Applicant's legal name and “name” she had written on her business card was merely a matter of common usage. At the time of providing her cards as receipts, she had not foreseen that they would become proof of legalities and thereby require the customer's complete and formal legal name.

Ms. Alves clarified that she had provided the Applicant with her business card indicating payment of \$1090.00 on August 2, 2007, when the Applicant and his daughter had come into her office to pay for the air purchase. At the time, her receipt book was being

utilized by another staff and the Applicant was in a hurry to get to work. She would, in the ordinary course of business, have provided a proper receipt later in the week; however, her business was by then in chaos culminating with her decision to terminate her registration.

The following day, August 3, 2007, she had gone to the Applicant's bakery to pick up the required funds for the car rental as the money was required by the end of that day for the car reservation to be confirmed. She stated that she had left the bakery to go to her CIBC branch, where she deposited that Applicant's cash into her personal account, transferred the sum to her VISA and then was able to charge her VISA for the rental. She had supplied TICO with her VISA statement showing the credit of \$4690.00 and a debit to VISTASOL of \$4669.00, both occurring on August 3, 2007. (Exhibit 4, Tab 8).

An alleged copy of a bank statement pertaining to Ms. Alves' personal account with the CIBC was introduced by the Respondent. Although it had not been disclosed to the Applicant, in accordance with the Tribunal Rules of Procedure, it was allowed as it was found to be relevant to the issue. It consists of a significant number of blacked out items but does disclose the August 3rd debit to her VISA. Ms. Alves could not explain why there was no corresponding item disclosed for the credit, but maintained she could not have charged the funds had she not received them.

Ms. Alves acknowledged that she had breached the Act's requirements in not having placed the Applicant's cash into her trust fund, but explained that she did so due to the need for immediate payment (prior to 5pm on the 3rd of August, 2007) of the monies to VISTASOL for the car rental.

The Applicant's daughter testified that she attended at Alves Travel with her father on August 2, 2007, where they met with Ms. Alves. She also stated that she saw her father pass the \$1090.00 over to Ms. Alves and watched as she counted out the bills. In return, she witnessed Ms. Alves provide her father with a business card signed by Ms. Alves as a receipt for the funds given.

The Applicant gave his evidence with the assistance of an interpreter. A hardworking member of Toronto area's Portuguese community, his day commences at 2:00 a.m. when he arrives at the bakery he owns where he remains until 11:00 a.m. when his wife takes over so as to allow him time to sleep. After school his daughter generally works alongside her father, who remains at the bakery until 8pm. It is a long day, but over the years the business has done well.

In late July he called Ms. Alves to arrange his annual trip to Portugal for that summer. He requested a flight for himself on SATA, a Portuguese carrier, with whom he was familiar and usually traveled (the crew, he noted, all spoke Portuguese), as well as his usual make/model of rental car. His dates for the holiday were August 28 to September 14. His wife and daughter had already arranged their flight for August 7 through to the 27, but they would use the same rental car he booked. They, of course, were required to take their holidays on different dates due to the need to have someone manage the bakery business in Toronto during the holiday period.

The Applicant corroborated the evidence provided by both Ms. Alves and his daughter that he had paid Ms. Alves cash in the amount of \$1090.00 for his flight when attending her offices with his daughter on their way to work on the afternoon of August 2nd. He identified the business card as the receipt provided to him. He did not find such a receipt “strange” and stated he would have proceeded with his travel arrangements with no receipt at all as he had used Alves Travel for a number of years and had no reason to feel any concern with their services. The following day Ms. Alves had called to advise that the car rental was indeed arranged but that she required cash that day to confirm. He had the cash in his business location and paid her the \$4690.00 when she came to the bakery at around 3:30- 4:00pm. Again, the business card receipt did not cause him to worry.

Just prior to his wife and daughter’s flight, the Applicant called the car rental agency at the Portuguese airport at the phone number provided in the voucher Ms. Alves had given to him (Exhibit 3, Tab 3 – phone bill and Exhibit 4, Tab14-rental voucher) as he had some misgivings with respect to insurance coverage. He was upset to discover that the make and model of vehicle he had specified was not being held for him as he had been led to believe. He called the Applicant to complain. Ms. Alves undertook to have his money refunded and he arranged with family in Portugal to have alternate rental vehicles for both himself and his wife. Receipts of such were provided. While Ms. Alves undertook to repay the Applicant the refunded \$4690.00, she has never done so.

Just three days later, on August 10, a frequent bakery customer informed the Applicant that he had heard that Alves Travel had closed its doors. The Applicant panicked. Phone calls to SATA revealed that his flight, although reserved by Alves Travel, had not been paid for and he would be required to arrange payment via an alternate agency as the airline was not licensed to sell directly to the public. He did so through Sears travel, paying by credit card on August 13, 2007. He supplied evidence of this to TICO along with a copy of his boarding and baggage cards as well as invoices for the alternate car rentals.

Any apparent contradictions between his testimony at the Hearing and his written claim submitted to TICO on August 20, 2007(Exhibit 4, Tab 1) were explained by the Applicant as resulting from his describing the scenario in a simplified manner to his Agent, Mr. Ribeiro. Mr. Ribeiro had actually completed the TICO form while the Applicant himself was working at the bakery readying himself for his upcoming departure. He testified that, had he realized the claim form would become the basis for the ongoing dispute, which resulted, he would have been more detailed and precise.

The Applicant advised that he could not supply any further or other documentation to support his claim when such was requested by Ms. Furlan at TICO, simply because he did not have any further documentation to supply. He denied ever having extended store credit to Ms. Alves or having had any business relationship with either her or her agency, other than as a customer.

The case for TICO included the testimony of Mr. Douglas Fritz, an Investigator and Provincial Offences Officer with TICO since 2000. Mr. Fritz’s past employment includes

over 30 years as an Officer with the Peel Regional Police Force. His main duty with TICO involves the investigation of alleged infractions by registrants under the Act. In September 2007, he was instructed to commence an investigation into Alves Travel.

The result of his investigation was the laying of 66 counts of alleged contraventions of the Act against Ms. Alves and Alves Travel. A synopsis that he prepared was submitted (Exhibit 4, Tab 21), and includes the allegation that certain money had not been kept in trust as required under the Regulations under the Act. Mr. Fritz advised that, by the end of December 2007, TICO had received consumer claims against Alves Travel totaling \$84,168.97 for services purchased but not received between December 2006 and August 7, 2007 – the date on which Ms. Alves had voluntarily surrendered her company's registration. Of this amount, some \$48,471.50 should have been retained in the Travel Agency's trust account; whereas only \$24.00 was in fact on deposit in the said trust account.

Of these consumer transactions, the claim made by the Applicant was not included. Of these consumer transactions, a number involved alleged credit card fraud by Alves Travel. No charges of fraud had been laid by the Investigator, however, as he had been advised that it was the Bank that would need to do so.

Mr. Fritz stated he had obtained a warrant to search bank records in furtherance of his investigation. As a result, he obtained the bank statement for the CIBC account earlier referenced (Exhibit 5), which demonstrated a VISA payment made by Ms. Alves from that account for \$4669.00 on August 3, 2007. In preparation for giving his evidence, he had come upon another bank document he had earlier missed and which he now submitted as Exhibit 6.

Although Mr. Ribeiro contested the Exhibit on the basis of insufficient disclosure by the Ministry, the Tribunal allowed it as relevant and, in the end, finds it to be of no prejudice to the Applicant, but rather very much to his benefit. The document supports Ms. Alves' contention that she had indeed deposited the \$4690.00 given to her in cash by the Applicant in order to pay for the car rental she had arranged. It discloses a payment credited to her in this amount, which was not in fact posted on the bank's site until August 7, 2007. This would explain why it did not appear on the bank document submitted as Exhibit 5, which is limited to transactions posted for August 3. A reference to last year's calendar reveals that August 3 was a Friday before the long weekend in August with August 7 being the following business day – a Tuesday. Both Ms. Alves and the Applicant had testified that Ms. Alves only attended at the bakery to pickup the cash for the car rental late on the Friday afternoon.

Ms. Lori Furlan is a Claims Coordinator with TICO. She was responsible for the Applicant's Claim against the failed registrant in August, 2007.

She was concerned with the Applicant's claim as it was the only consumer claim against Alves Travel which did not contain proper receipts. She was further cautious when she noted that the business cards, which were submitted did not reference the consumer's correct name. As a consequence she had advised the Applicant by letter dated August 27, 2007, that TICO required proof of alternate travel having been paid for by the

Applicant and proof that the registrant had not already refunded the amount paid to the Applicant. In response, the Applicant wrote that he had never received any refund for the services he paid for from Alves Travel and attached invoices documenting his purchase of alternate travel and car rentals.

Ms. Furlan then emailed Alves Travel to inquire as to whether the Applicant's money had been refunded and was advised by return email from Ms. Alves that he had not.

Bank records provided by Ms. Alves did not establish that she had been paid the \$4690.00 from the Applicant. Ms. Furlan testified that it was not possible to "follow the money" since there was no record of the alleged deposit. It was her conclusion that the bank cards were not proper receipts as required. Further, the Applicant had failed to provide any documents to support his contention he had paid the money. Bank records showing a withdrawal would have been sufficient to do so. TICO can only approve claims which establish that services have "been paid for" but not provided. Mr. Furlan provided the bank records to TICO's Board of Directors who concluded:

"Without proper receipts from Alves Travel, TICO staff is unable to confirm who made payment, what was purchased and when the purchase was made."

The consequence was that the TICO Board of Directors denied the Applicant's claim at its October 2007 meeting.

Ms. Furlan allowed that, had she been provided with Exhibit 6, she would have acted differently as this Exhibit did demonstrate the fact that the funds had indeed been deposited to the registrant's account, albeit not on the same date.

No similar documentation has ever been provided by the Applicant with reference to the alleged payment to Ms. Alves of the \$1090.00 for the flight.

Following a Pre-Hearing before this Tribunal on January 2, 2008, the Applicant was told to submit further documentation substantiating his claim for the Board of Directors' Claim Review Meeting scheduled for late January. While the Applicant had been told to provide such documentation well in advance of the Board Meeting in order that it could properly be made a part of the Agenda for the Board, the information which he did provide, in the form of an Affidavit from Ms. Alves affirming that she had received the \$5180.00 from the Applicant in cash and never refunded his money or provided him the services paid for (Exhibit 3, Tab 13), was not provided by him until the first day of the two day Board Meeting. Ms. Furlan had consulted with legal counsel for TICO who had advised the documentation was submitted too late for review by the Board and it was, therefore, returned to the Applicant.

In cross examination, Ms. Furlan acknowledged that receipts required for processing claims from consumer claimants were not always properly prepared by failed registrants. She further acknowledged that she was aware based on all the claims against the Alves Travel agency, that documentation and record keeping was not one of the strengths of the company. Finally, she conceded that the Applicant would have no control over documentation prepared by the registrant and/or provided by her to TICO.

Ms. Dorian Werda is Manager of Administration and Claims for TICO. It is her responsibility to ensure all claims are complete prior to consideration by the Board of Directors. She stated that, as the Applicant's claim was not even on the Agenda for the Board's meeting of January 28/29, 2008, documentation received in furtherance of the Claim on the 28th of January, would not go before the Board, although she is present during Board meetings and has authority to provide additional information on Claims to the Board at her discretion.

It was Ms. Werda's conclusion that the affidavit provided by the Applicant in Exhibit 3, Tab 13 did not provide any new information as Ms. Alves had already advised TICO she had received the funds from the consumer and neither provided the service nor refunded the money to him.

THE LAW

The Travel Industry Compensation Fund, created pursuant to section 41 of the Act, has authority to manage and administer the affairs of the Fund (Ontario Regulation 26/05, s. 51). Part of this mandate includes its determination of eligible consumer claims (s.56). Such claims can include monies paid for services which were not supplied and for which no reimbursement has been made (s.57). The claimant is required to prove its claim and, to do so, may be required to furnish certain information to the Board, additional to that contained in its claim (s. 61). There is a \$5,000.00 maximum cap to any reimbursement found to be eligible (s. 66(1) and s.67).

The Regulations under the Act provide the Tribunal with the jurisdiction to hear a claimant's appeal from a decision of the Board of Director's to reject a claim. The Tribunal has authority to accept or reject the claim in whole or in part. In making its determination, the Tribunal is subject to the pertinent sections of the Regulation, including those sections noted here.

DECISION AND ORDER

The evidence establishes to the Tribunal's satisfaction that the Applicant paid Ms. Alves of Alves Travel for both his flight to Portugal on SATA for August 27, 2007, and his car rental in Portugal for the period of August 7 through to September 13. This money was paid to her in cash on August 2 and 3, 2007. Due to the collapse of Alves Travel, he did not receive the flight and had to arrange alternate travel. He was never refunded the \$1090.00 he had paid for the flight. Due to the same collapse of the business, he never received a refund of the additional \$4690.00 he had paid for the car rental despite Ms. Alves' undertaking to reimburse him the funds when she cancelled the rental booking on August 7, 2007, following his phone call to her.

Unlike the Board, the Tribunal has had the opportunity to hear the witnesses give testimony under oath and observe their demeanor. There was no conflicting story or scenario presented. All sworn testimony corroborated all documentation establishing the cash was indeed paid in good faith for the travel arrangements, which were not provided as a consequence of the failure of Alves Travel. The Tribunal found all witnesses credible. Ms. Alves herself was consistent and appeared sincere. It is the Tribunal's

conclusion that she and the Applicant were content to rely on good faith in documenting their arrangement. Indeed, whatever shortcomings Ms. Alves may have exhibited in keeping her trust funds and other business records as required, she has from the beginning of this claim before TICO, acted honourably to assist the Applicant. She has always acknowledged that the monies were paid her, as claimed by the Applicant, for which she admitted having failed to provide neither the service nor reimbursement. Moreover, there is no suggestion she attempted to subvert or obfuscate the TICO staff investigation into consumer claims against her agency, but rather that she responded to all inquiries made by such staff promptly and provided any and all records in her possession as requested. All such documentation supported her acknowledgment of the veracity of the Applicant's claim.

The Applicant was entirely believable. He said he had pursued this matter as a matter of honour. There was no reason to doubt him on any level. The only evidence upon which TICO witnesses relied to the contrary was suspicion and speculation, neither of which carry weight before the Tribunal.

Ms. Karas, in argument, provided the Tribunal with a decision of the Commercial Registration Appeal Tribunal, a predecessor of this Tribunal, in 1994 decision *Kumar* [1994] O.C.R.A.T. No. 199. She advised this was the most recent authority she could find articulating the test required for approval of a claim. On page 6 of the decision, the Tribunal notes the burden of establishing the claim rests with the Applicant and on page 7 it concludes the evidence must be the best available. It is the Tribunal's conclusion that this is exactly what was provided by the Applicant in this case.

There is no requirement that a claimant must provide certain specified records to prove his/her claim. Where cash is the chosen method of payment, such proof can only be predicated on a finding of credibility. There was nothing before TICO staff nor the Board to doubt the credibility of the Applicant. He submitted all the written receipts with which he was provided. There was no evidence that these were fraudulent. Indeed, even the registrant acknowledged them to be what they purported to be. While TICO staff placed weight on the fact that the name appearing on the cards was not the Applicant's legal name, the Tribunal accepts the witness' testimony that these receipts were for the same (name of the applicant deleted) as made the claim and in whose name the voucher for the car rental and SATA booking information appeared. He did supply additional documentation when requested. When further requested and with no more documents available to him, he arranged to have Ms. Alves swear a Solemn Declaration to present the Board. This was "other information" in the sense that it was under oath and should have been open to receipt by the Board as additional basis for "proof", given that its basis for denying the Claim appeared to be predicated on the question of the Claimant's credibility – whose story had been supported by Ms. Alves. The Tribunal is not persuaded that the Board could not have received it, given that the Board was meeting two days that month and the Board must have recognized the difficulty inherent in a claimant attempting to produce such a document. However, the fact is that not only the Declaration, but Ms. Alves as well appeared before this Tribunal, such that the Tribunal concludes that their evidence is credible and persuasive.

The Tribunal was also assisted by the existence of Exhibit 6, which verified the claim of Ms. Alves that the car rental cash funds were indeed paid into her account. Again, the Tribunal is not convinced such was ever necessary, as I agree that she could not have paid this amount to the rental company had she not had the amount available. The fact that the money can be “followed” as credited to her account does not, furthermore, establish from where it came. Be that as it may, it does furnish further corroboration of her testimony on the issue.

Ms. Karas also directed the Tribunal to a more recent decision of LAT, *Taher Shaath* (August 14, 2003), where the Tribunal did not accept evidence of a purported cash payment and the Fund’s decision to deny the claimant’s request for reimbursement was upheld in part. Unlike that decision, this Tribunal finds absolutely nothing contradictory in either the testimony or documentary evidence presented by the Applicant as to having paid the cash he purports to have paid to Ms. Alves. In fact, this Tribunal concludes there are no grounds to question his position in that regard and accepts, on a balance of probabilities that such payment was indeed made.

Thus, the Tribunal accepts the Applicant’s Claim and would allow him the maximum allowed under the legislation, although this falls somewhat short of the funds owing to him.

By virtue of the authority invested in this Tribunal, the Tribunal allows the claim and directs the Travel Industry Compensation Fund to pay to the Applicant the sum of \$5,000 forthwith.

LICENCE APPEAL TRIBUNAL

Jane Weary
Vice-Chair

RELEASED: April 23, 2008

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



2041061 ONTARIO LIMITED O/A PLANET EARTH TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT, 2002*

TO REVOKE REGISTRATION

TRIBUNAL: RAJ PANNU, Vice-Chair

APPEARANCES: JAMES E. ROGERS, Agent, representing the Applicant, 2041061
Ontario Limited o/a Planet Earth Travel

MAYA SABHARWAL, Counsel, representing the Registrar under
the *Travel Industry Act, 2002*

DATE OF
HEARING: FEBRUARY 11, 2008

Toronto

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 *Travel Industry Act, 2002* (the “Registrar” and the “Act” respectively). The Notice of Proposal dated August 17, 2007, proposed to revoke the registration of the Applicant.

FACTS

The Applicant was incorporated under the Ontario *Business Corporations Act*, on February 13, 2004. The Applicant operates as a retailer, whose principal activities are to provide travel tours and scuba diving supplies. The Applicant’s main activity was a retailer of travel packages. On September 2, 2005, Planet Earth Travel was purchased by the current owner, James Rogers. At that time, Mr. Rogers also owned and operated the company 667512 Ontario Limited, “The Dive Shop”. On May 31, 2006, Mr. Rogers

transferred all the assets to 2041061 Ontario Limited operating as Planet Earth Travel and the Dive Shop, and began operating the two entities as one. The Registrar alleges that:

1. The Applicant was registered as a travel agent (Registration # 50014915) on May 12, 2006;
2. On December 29, 2006, the Applicant was requested to file the financial statement for the year ended January 31, 2007. This financial statement was to be filed by April 30, 2007;
3. Another letter was sent to the Applicant on May 7, 2007, as a reminder to him to file the financial statement for the year ended January 31, 2007, no later than May 21, 2007;
4. On May 24, 2007, the Registrar wrote to the Applicant requesting that he file the financial statement for the year ended January 31, 2007, no later than June 7, 2007;
5. On June 15, 2007, TICO's legal counsel wrote to the Applicant requesting that he file the financial statement for the year ended January 31, 2007, no later than June 29, 2007. The letter also indicated that should the Applicant fail to file the required financial statement by this date, a proposal to Revoke the Registration may be issued;
6. The Applicant contacted TICO on June 18, 2007, and indicated that the financial statement would be submitted shortly. The Applicant submitted a financial statement for the year ended January 31, 2007. However, the financial statement was not acceptable, as it had *not* been prepared by a licensed public accountant under a Review Engagement;
7. On July 23, 2007, TICO contacted the Applicant to discuss the financial statement submitted on July 20, 2007. TICO was not able to contact the Applicant;
8. By a letter dated July 23, 2007, TICO wrote to the Applicant indicating that the financial statement submitted on July 20, 2007, was not acceptable, as it was not prepared by a licensed public accountant under a Review Engagement. The Applicant was again requested to submit an appropriate financial statement no later than August 7, 2007;
9. TICO did not receive the Applicant's financial statement for the year ended January 31, 2007. Therefore, it is the opinion of the Registrar that the registration should be revoked.

PARTICULARS

It is also alleged that:

1. On or about September 24, 2007, TICO staff received e-mail correspondence from two of the former managers of the Registrant's travel agency. These individuals advised that they were no longer employed with the Applicant and were not certain whether or not anyone has taken over the position;
2. Around October of 2007, TICO called the Registrant to ask about the details of new manager/supervisor and to provide proper documentation to TICO about these employees;
3. On November 8, 2007, TICO received the documentation regarding the new supervisor/manager;
4. On January 11, 2008, the Applicant submitted its financial statement for the year ended January 31, 2007. This statement was due April 30, 2007. The reason the Applicant gave for failing to provide the statement earlier was due to hospitalization of his accountant. The financial statement revealed a working capital deficiency of \$70,478. Based on sales of \$386,973, the Applicant is required to maintain a minimum working capital of \$5,000. As a result, a working capital injection of \$75,478 is required;
5. TICO wrote a letter to the Applicant dated January 14, 2008, indicating that he was required to provide evidence of the working capital correction of \$75,478. The Applicant was requested to respond to TICO no later than January 28, 2008;
6. TICO staff contacted the Applicant on January 30, 2008, to inquire as to what was being done to correct the working capital deficiency. The Applicant confirmed receipt of TICO's correspondence dated January 14, 2008; however, he advised he was very busy and would call back shortly with a response;
7. On January 31, 2008, TICO staff called the Applicant again to inquire about the status of the working capital injection. The Applicant's options were explained to him and he indicated he understood what was required. TICO staff requested a written response from the Applicant, indicating what was going to be done, and the Applicant agreed to provide a reply later on that day;
8. On January 31, 2008, TICO received fax correspondence from the Applicant indicating that he was addressing the working capital situation and hoped to have the problem rectified by February 11, 2008;

9. As of February 11, 2008, the Applicant had not corrected the working capital deficiency as of January 31, 2007, or appointed a new manager/supervisor approved by TICO.

On August 17, 2007, the Registrar issued a notice of proposal to Revoke the Registration of 02041061 Ontario Limited o/a Planet Earth Travel as a travel agent under the *Travel Industry Act 2002*. In the Registrar's opinion, 2041061 Ontario Limited o/a Planet Earth Travel was not entitled to registration under Section 8 of the Act on the following grounds:

- a) The Registrant is and has been carrying on activities that are in contravention of the Act and Regulations.

The Registrar is concerned that the Applicant may be operating a business without a qualified manager on site, and the Applicant may not be financially liable due to the large working capital deficiencies. Consequently, the Registrar proposed that the Registrant's Registration be revoked.

THE LAW

The registration of travel retailers and wholesalers is set out in section 8 of the Act as follows:

Registration

(1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless, (d) the applicant is a corporation and, (i) is incorporated without share capital, (ii) having regard to its financial position or the financial position of an interested person in respect of the corporation the applicant cannot reasonably be expected to be financially responsible in the conduct of its business, (iii) having regard to financial position 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 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 the corporation affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty, or (v) an officer or director of the corporation makes a false statement or provides a false statement in an application for registration or for renewal of registration; (e) the applicant or an interested person in respect of the applicant is carrying on activities that are, or will be if the applicant is registered, in contravention of this Act or the regulations, other than the code of ethics established under section 42; (f) the applicant is in breach of a condition of the registration; or (g) the applicant fails to comply with a request made by the registrar under subsection (1.1).

By virtue of section 10 of the Act, the grounds for refusal to register or renew registration are applicable to revocations.

Section 14 (1) of Regulation 26/05 of the Travel Industry Act, 2002 (herein after the "Regulation") states that this section ceases to apply on June 30, 2009.

Section 14 (2) of the Regulation states that the travel agent shall ensure that each office operated by the travel agent is managed and supervised during the hours of operation of the office by an individual who has, in the registrar's opinion, sufficient experience with and knowledge of the business of selling travel services to ensure that the office is managed in compliance with the Act and this Regulation.

Section 14 (3) of the Regulation states that an application for registration or renewal shall be accompanied by the name, address and a description of the experience and knowledge of the individual referred to in subsection (2).

Section 24 (1) of the Regulation states that this section applies on and after January 1, 2006.

Section 24 (2) of the Regulation states that the Registrant who had sales in Ontario during the previous fiscal year of an amount \$500,000 or less, shall maintain a minimum working capital of \$5,000.

Section 24 (3) of the Regulation states that Registrant's working capital shall be calculated in accordance with the generally accepted accounting principles and shall not include, a) the value of any security provided under section 25 (1) or b) capital belonging to any person who is an interested person in respect of the Registrant for the purposes of section 8 of the Act.

EVIDENCE

The following evidence was given at the hearing:

1. Exhibit # 3 – Respondent's Book of Documents
2. Testimony of James E. Rogers
3. Testimony of Ms. Archana Gupta. The Respondent's counsel also relied on the Book of Documents produced at this hearing

TESTIMONY OF JAMES E. ROGERS

The agent for Applicant testified that he has been the owner and manager of a travel agency for the past 15 years. He testified that he had financial problems and that he had a letter of credit for \$10,000 as a security with TICO. He had merged Planet Earth Travel with his other business, the Dive Shop. He identified his managers and stated that they had extensive experience in the industry. The Agent had numerous health issues during this period and had to undergo three heart surgeries. He dissolved the other corporation and sold its assets. The delay in filing a financial statement with the Registrar was due to the fact that the Agent had problems with his accountant. Unfortunately, the accountant shot himself and that further added to the Applicant's existing problems. He hired a new firm and sent financial statements to TICO. Assets

were also moved to his wife. The Agent was out of the country from February 1, 2008 to February 8, 2008. He had to terminate his managers, and he believes that these were the managers who called TICO and filed complains against him. He now manages the Company. He has sent in his resume to TICO, but he has not received any communication from TICO regarding his eligibility to function as a manager.

TESTIMONY OF MS. ARCHANA GUPTA

Ms. Gupta testified that she has 22 years of experience in the field of finance, and she is a financial analyst with TICO since the last two years. She testified further that the Applicant was registered May 12, 2006. In accordance with section 5 of the Act, there was a letter of credit in the amount of \$10,000 filed with TICO. The financial statements received by TICO were incomplete. The financial statement filed by the Applicant revealed a working capital of \$5,000. A working capital injection of \$75,478 is required. She referred to the Respondent's book of documents and testified that the financial statements received by TICO were incomplete and not prepared by a certified accountant. She also explained the principles of accounting that were applied to the Registrant's business. She referred to the minimum working capital and how it was calculated using generally accepted accounting principles. She noted that working capital did not include the value of any security provided or the capital belonging to any person who is an interested person in respect of the Registrant for the purposes of section 8 of the Act.

The following are the findings in this case:

FINANCIAL STATEMENTS

The Applicant failed to provide financial statements to the Registrar for each fiscal year. Section 22 (1) of the Regulation states that every registrant shall file with the Registrar financial statements for each fiscal year. Section 22 (2) of the Regulation states that a registrant, or who had sales in Ontario of less than \$10 million during the previous fiscal year shall file within three months after the end of the fiscal year: (a) annual financial statements with review engagement report by a public accountant licensed under the *Public Accountancy Act*, and (b) annual financial statements with an auditor's report from a licensed public accountant, if the registrant is required to obtain annual financial statements within auditor's report under the *Business Corporations Act*.

The Applicant submitted late financial statement for the year ended January 31, 2007 on July 20, 2007. This statement was due by April 30, 2007. However, the financial statement was not acceptable to the Registrar, as it had not been prepared by a licensed Public Accountant under a review engagement. The Applicant was requested to submit an appropriate financial statement no later than August 7, 2007. The Registrar did not receive the Applicant's financial statement for the year ended January 31, 2007 until January 11, 2008.

MINIMUM WORKING CAPITAL

The next main issue is that of the minimum working capital requirement under section 24 (2) of the Regulation, which states that a registrant, who had sales in Ontario during the previous fiscal of \$500,000, or less shall maintain a minimum working capital of at least \$5,000. Section 24 (3) of the Regulation states that a Registrant's working capital shall be calculated in accordance with the generally accepted accounting principals and shall not include: (a) the value of any security provided under section 25 (1) or (b) capital belonging to any person who is an interested person in respect of the Registrant for the purposes of section 8 of the Act.

The financial statement submitted by the Applicant for the year ended January 31, 2007, due on April 30, 2007, revealed a working capital deficiency of \$70, 478. Based on sales of \$386,973, the Registrant is required to maintain a minimum working capital of \$5,000. Thus, a working capital injection of \$75,478 is required. On January 14, 2008, TICO wrote to the Applicant indicating that he was required to provide evidence of working capital correction of \$75,478. The Applicant was requested to respond to TICO no later than January 28, 2008. The Applicant failed to provide TICO with any correction of the working capital deficiency.

SUPERVISION OF OFFICE

The third issue concerns the proper supervision of the office. Section 14 (2) of the Regulation states that a travel agent shall ensure that each office operated by the travel agent is managed and supervised during the hours of operation of the office by an individual who has, in the Registrar's opinion, sufficient experience with a knowledge of the business of selling travel services, to ensure that the office is managed in compliance with the Act and this Regulation. Section 14 (3) of the Regulation states that an application for registration or renewal shall be accompanied by the name, address, and a description of the experience and knowledge of the individual referred to in subsection (2). The Registrar is concerned that the Applicant may be operating the business without a qualified manager on site.

Based on the foregoing, the Registrar issued a Notice of Proposal to revoke the registration of the Applicant. In the Registrar's opinion, 2041061 Ontario Limited o/a Planet Earth Travel is not entitled to be registered under section 8 of the Act on the following grounds, quoting from the Notice given:

1. "The Registrant is and has been carrying on activities that are in contravention of the Act and Regulations. Section 10 of the Act provides that, subject to Section 11, the Registrar may revoke a registration where, in the Registrar's opinion, the Registrant is not entitled to registration under Section 8 of the Act; Section 11 of the Act provides that where the Registrar proposes to revoke a registration, he or she shall serve a notice of his or her proposal together with written reasons, and this notice of proposal was issued by the Registrar on August 17, 2007. Pursuant to Section 11 of the Act, the Registrar proposed the revocation of the registration of 2041061 Ontario Limited o/a Planet Earth Travel."

APPLICATION OF LAW TO THE FACTS

The provisions of the Act, are relevant to the issues in this case. The Registrar issued a Notice of Proposal to revoke the Registration of 2041061 Ontario Limited o/a Planet Earth as a travel agent under the Act. Under section 11 of the Act, the Registrar served Notice of his Proposal, together with written reasons, on the Registrant. In the Registrar's opinion, 2041061 Ontario Limited o/a Planet Earth Travel is not entitled to Registration under section 8 of the Act on the following grounds:

1. The Registrant has been carrying on activities that are in contravention of the Act and Regulation.
2. Under section 14 (2) of the Regulation, the Registrant has failed to ensure that each office is operated by the travel agent and is managed and supervised during the hours of operation of the office by an individual, who in the Registrar's opinion, has sufficient experience and knowledge of the business of selling travel services. The Registrant failed to comply with the Act and this Regulation.
3. In accordance with section 24 (2) of the Regulation, a Registrant, who had sales in Ontario during the previous fiscal year of an amount of \$500,000 or less, shall maintain a minimum working capital of at least \$5,000. The Registrant was not able to *remedy* the working capital deficiency as of January 31, 2007.

DECISION

During this hearing, there was ample evidence to conclude that the Applicant cannot be expected to be financially responsible in the conduct of its business. The Applicant's past conduct affords a reasonable belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty. The evidence is overwhelming that the Applicant has ignored the financial reporting obligations. An analysis of the Applicant's financial position shows a complete disregard for timely compliance with its disclosure obligation. The financial position indicates a massive working capital deficit, which the Applicant has failed to remedy.

The facts of this case are based on the statutory test for denial of registration. In accordance with the principles set out in *Brenner v. Ontario* (Registrar of Motor Vehicle Dealers and Salesman), [1983] O.J. No.1017, the Tribunal finds that having regard to its financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and his past conduct affords reasonable grounds for the belief that he will not comply with the legislation and will not carry on business in accordance with the law and with integrity and honesty.

ORDER

Pursuant to the authority granted to it under the Act, this Tribunal orders the Registrar to carry out the proposal, dated August 17, 2007, to revoke the Registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Raj Pannu, Vice-Chair

RELEASED: April 7, 2008

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